

**UNDERSTANDING CHOICES OF LEGAL FORMS:
EMPIRICAL EVIDENCE FROM PRIVATE INDIGENOUS
BUSINESSES IN CANADA**

TRAVIS HUCKELL, FERNANDO ANGULO-RUIZ, ARLAN DELISLE,
MAX SKUDRA, AND JEAN-PAUL GLADU*

The present study takes up the challenge of the Truth and Reconciliation Commission Report Call to Action 27 to provide “appropriate cultural competency training” for lawyers dealing with Indigenous persons. Specifically, we look at how private Indigenous business owners take up private law forms of business organization, namely: sole proprietorship, partnership, and corporation. We use survey data from representative samples of Indigenous entrepreneurs in Canada in 2010 and 2015, and we also employ the report of the 2020 Ontario Aboriginal Business Survey developed by the Canadian Council for Aboriginal Business. Findings reveal that Indigenous entrepreneurs’ higher education levels, business training and experience, as well as the age and size of the business positively influence the selection of the corporation legal form of business. Business location on a reserve has a positive influence on the selection of sole proprietorship or partnership forms. These conclusions, based on empirical evidence, answer a need identified in the study of Indigenous business enterprises and allow legal practitioners to understand the reasons why private Indigenous entrepreneurs prefer one form of legal business organization over others.

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* Travis Huckell, LLB is an Associate Professor in the Department of International Business, Marketing, Strategy & Law at MacEwan University. Fernando Angulo-Ruiz, PhD is a Full Professor in the Department of International Business, Marketing, Strategy & Law at MacEwan University. Arlan Delisle, LLB, LLM is an Assistant Professor in the Department of International Business, Marketing, Strategy & Law at MacEwan University. Max Skudra, BA is a Partner at Mokwateh. Jean-Paul Gladu, BScF, MBA, ICDD is a Principal and Director at Mokwateh. We are very thankful to the Canadian Council for Aboriginal Business for sharing the 2010 and 2015 Aboriginal Business Survey data files to use in this study. We are grateful for the comments and suggestions received from attendees and reviewers of the 2019 Administrative Sciences Association of Canada Conference. MacEwan University School of Business and MacEwan University research office provided financial support to develop and disseminate this research. Professor Fernando Angulo-Ruiz is very thankful for the support provided by The Social Sciences and Humanities Research Council of Canada, Insight Grant 435-2022-0515.



I. INTRODUCTION

Call to Action 27 of the *Final Report of the Truth and Reconciliation Commission Canada* (TRC) asks “that lawyers receive appropriate cultural competency training.”¹ A similar statement is made for law student education in the Call to Action 28.² Call to Action 27 and 28, entitled together “Educating lawyers,”³ cite a number of public law issues,⁴ such as Constitutional, Aboriginal, and Treaty rights,⁵ Aboriginal-Crown relations, and other public and private law⁶ issues arising out of “the history and legacy of residential schools.”⁷ The *Final Report* of the TRC also mentions the *United Nations Declaration on the Rights of Indigenous Peoples*, including article 27 of *UNDRIP* which requires “giving due recognition to indigenous peoples’ laws.”⁸ Indigenous laws include both public and private law aspects.⁹ This article will focus on private law issues.

Private law concerns the legal issues between persons as opposed to public law issues between state(s) and nation(s) or legal relations between the state and nation to persons.¹⁰ Private law is often permissive or facilitative, consistent with the normative concept of qualified freedom of contract. For example, and in the context to be discussed where we seek to describe Indigenous entrepreneurs’ choices, private law allows persons to choose a form of business organization and its internal structure as opposed to public law, which imposes principally prescriptive rules such as divisions of powers between state actors, or the relation of state actors to persons.¹¹

¹ *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: TRC, 2015) at 168 [*Final Report*].

² *Ibid.*

³ *Ibid.*

⁴ “Public law” is used in this article as denoting law governing relations amongst nations, states, and between one or more of them and individuals, thus encompassing, for example, Treaty rights, Aboriginal-Crown relations, for the relations at a nation or state level and rights within the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11), for example, for the relation of the state to persons. “Private law” governs relations between persons. Although the distinction is not universally agreed and has become blurred in the twentieth century, “the distinction between private and public law as being equivalent to the distinction between rules of just conduct and rules of organization”: FA Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London: Routledge, 1982) at 132.

⁵ *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act*].

⁶ *Supra* note 4. “Public and private law” encompasses, for example, the overlap between public and private law, such as the public inquiry (TRC), public acknowledgement, and individual compensation processes arising out of residential schools in Canada. There is a similar overlap between criminal offences (public law) where the offence is to public order, but also concurrent civil delicts (private law) where an incident of intentional harm may be compensated through the civil courts as a “private law” action. Both public offence and private civil delict arise out of one incident of intentional harm by one individual to another.

⁷ *Final Report*, *supra* note 1 at 168.

⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, A Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/53, 1, as enacted in Canada: *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, art 27 [*UNDRIP*].

⁹ It must be admitted that a case can be made for the overlap if not the intersection of private and public law in certain contexts of Indigenous legal issues. For example, the “colonial assumptions” of corporate commercial law have consequences for injustice in settlor-Indigenous relations: Jeffery Hewitt & Shanthi E Sente, “Disrupting Business as Usual: Considering Teaching Methods in Business Law Classrooms” (2019) 42:2 Dal LJ 261 at 265–68 discussing *R v Stanley*, 2017 SKQB 367 where “valuation” and defence of property justifies injustice toward an Indigenous person.

¹⁰ *Supra* note 4. The law allows persons to choose a form of business organization as opposed to imposing prescriptive rules. In the context of corporate law, see below note 12.

¹¹ *McClurg v Canada*, [1990] 3 SCR 1020 at 1047, per Chief Justice Dickson: “The purpose of the governing statute, the [Saskatchewan *The Business Corporations Act*, RSS 1978, c B-10] is facilitative — that is, it allows parties, with certain explicit restrictions, to structure bodies corporate as they wish.”

Private law is also implied in the TRC Call to Action 50, which seeks the establishment of institutes for “understanding of Indigenous laws,”¹² as required by *UNDRIP*. It needs to be stated and restated that Indigenous legal systems pre-existed colonization, continue to exist, and are resurgent.¹³ Like the non-Indigenous legal system, Indigenous legal systems are concerned with both public ordering, such as prevention and punishment of criminal¹⁴ and anti-social behaviour,¹⁵ but also private ordering, such as Indigenous Peoples’¹⁶ laws and customs on possession and use of land¹⁷ and methods of trade among individuals.¹⁸

The TRC focused on the Residential School System and its effects on Indigenous Peoples, but the Calls to Action have much wider ramifications. Understanding Indigenous ethics and legal traditions, and how both apply, can have a positive effect on reconciliation with Treaty Peoples. This is evident in, for example, Call to Action 92, “Business and Reconciliation,” where the TRC called upon the corporate sector to adopt *UNDRIP* “as a reconciliation framework and to apply its principles, norms, and standards to [private law] corporate policy.”¹⁹ Substantive reconciliation will require change. The pace and extent of change will be a generational challenge. Lively debates are ongoing as to whether or not real reconciliation is even possible without big changes, fundamental structural changes, to such matters as how we are governed, how we define and deal with property, and how we balance conflicting stakeholder interests regarding land and resource development.²⁰

Taken together, these four TRC Calls to Action (27, 28, 50, and 92) are an explicit call for lawyers, law students, and others to engage in meaningful inclusion of public law issues such as Aboriginal Treaty Rights, but also private law matters, which is the focus of this article, specifically as it relates to private choices of legal forms of business organization for Indigenous economic development. This article presents evidence of Indigenous entrepreneurs’ choices of legal forms of business organization. We focus on three likely choices: sole proprietorship; partnership; and, corporation.²¹

¹² *Final Report*, *supra* note 1 at 207. The TRC, working with the Accessing Justice and Reconciliation (AJR) project, identified “six different legal traditions across the country: Coast Salish (Snuneymuxw First Nation, Tsleil-Waututh Nation); Tsilhqot’in (Tsilhqot’in National Government); Northern Secwepemc (T’excw Williams Lake Indian Band); Cree (Aseniwuche Winewak Nation); Chippewas of Nawash Unceded First Nation # 27); and Mi’kmaq (Mi’kmaq Legal Services Network, Eskasoni)”: *Final Report*, *ibid* at 206. The AJR report contended that both Indigenous and non-Indigenous people would benefit from recovering and revitalizing Indigenous laws. See also Hadley Friedland, *IBA Accessing Justice and Reconciliation Project: Final Report* (Victoria: University of Victoria Indigenous Law Research Unit, 2014).

¹³ Larry Chartrand, “Eagle Soaring on the Emergent Winds of Indigenous Legal Authority” (2013) 18:1 *Rev Const Stud* 49; Val Napoleon & Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions Through Stories” (2016) 61:4 *McGill LJ* 725.

¹⁴ Friedland, *supra* note 12 at 10.

¹⁵ John Borrows, *Law’s Indigenous Ethics* (Toronto: University of Toronto Press, 2019) at 176–215.

¹⁶ “Indigenous Peoples” is used in this article in a broad inclusive sense of the phrase to include Inuit, First Nations, and Métis people, without regard to their separate origins and identities. See *Constitution Act*, *supra* note 5, s 35(2).

¹⁷ *Final Report*, *supra* note 1 at 204.

¹⁸ Borrows, *supra* note 15 at 204.

¹⁹ *Final Report*, *supra* note 1 at 336.

²⁰ Sylvia McAdam, *Nationhood Interrupted: Revitalizing Nêhiyaw Legal Systems* (Saskatoon: Purich, 2015) at 77–85; Arthur Manuel, *The Reconciliation Manifesto: Recovering the Land, Rebuilding the Economy* (Toronto: James Lorimer & Company, 2017) at 200–10, 275–79.

²¹ There are other methods permitted in many if not most jurisdictions such as limited partnership, limited liability company, and statutory and specialized corporations, such as benefit corporations, many of which are known usually only to members of the legal profession and thus not easily canvassed in a survey instrument of lay persons, such as the Indigenous entrepreneurs canvassed in this study.

A sole proprietorship arises when one person carries on business with no other formally recognized separate legal organization or person participating in the business. The sole proprietor is the single equity investor entitled to receive the residual proceeds of the business, namely the net profits, if any, and the net proceeds on the liquidation of the business after satisfying creditors and claimants. The sole proprietor owns all assets, makes all relevant business decisions, and is therefore held in law to have assumed all risks of loss but is entitled to all benefits of profits of the enterprise. A sole proprietor also has unlimited personal liability, should the business fail, and claims against the business remain unsatisfied. The sole proprietorship is indistinguishable from the proprietor, and therefore ends with the demise of the proprietor.²²

A partnership involves more than one equity investor, referred to as a partner where, in a normal general partnership, each partner has an equal say in how the business can be run and each has unlimited personal liability for the partnership actions and decisions of all partners. The general partnership, like the sole proprietorship, is not treated in law as a separate legal entity. Instead, the partners are together liable for the obligations brought about by their partnership activity. Various jurisdictions allow departures from the above rules by express agreement, for issues such as degrees of partners' control and investment, or even limiting liability of one or more limited partners in the case of limited partnerships. A partnership, like a sole proprietorship, comes to an end on the death or bankruptcy of one of the partners, but may be reconstituted by agreement of the remaining partners.²³

A corporation has three significant features. First, it has a separate existence from its constituents such as shareholders, managers, and internal stakeholders, including employees.²⁴ Second, liabilities for claims are limited to the corporation's separately owned assets with, generally speaking, no liability flowing through automatically to its constituents,²⁵ along with concomitant asset partitioning between the corporation and its constituents.²⁶ Third, the corporation has perpetual existence, unlike individuals participating in sole proprietorships and partnerships where human mortality has effects on the continuance of the form of business organization.²⁷ The demise of a corporate shareholder or director has no effect on the continued existence of the corporation, unlike sole proprietorships and partnerships. Corporations are established through registration of state authorized and supervised processes, unlike proprietorships and partnerships, which have no or minimal registration processes. A corporation continues perpetually if it meets minimal annual reporting requirements.

Therefore, corporations appear, at first glance, to have advantages arising out of their legal form over the other types of business organization, including limited liability assured through

²² Robert Yalden et al, *Business Organizations: Principles, Policies and Emerging Challenges*, 2nd ed (Toronto: Emond Montgomery, 2018) at 8–11.

²³ *Ibid* at 11–14.

²⁴ *Ibid* at 15.

²⁵ An exception, for example, is the fraudulent or improper purpose of corporate directors or managers, whose illegal conduct would result in their personal liability. See e.g. *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1996), 28 OR (3d) 423 at 433–34. See generally Yalden et al, *supra* note 22 at 16–17, 176–77.

²⁶ Henry Hansmann & Reiner Kraakman, “The Essential Role of Organizational Law” (2000) 110:3 Yale LJ 387 at 394.

²⁷ Yalden et al, *supra* note 22 at 17–18.

separate existence, asset partitioning, and perpetual existence unaffected by the transitory nature of human mortality.²⁸ These features of corporation should seem to be attractive, if not superior, to sole proprietorships and partnerships. This article asks whether those attractions of legal form are borne out by the reviewable data drawn from the Indigenous business community. The article draws upon two databases of Indigenous businesspersons' preferences to see whether these seeming advantages of corporations over the other forms of business organizations are taken up in an Indigenous business context and if not, explores questions about why this is so.

We focus on a *descriptive* analysis of choices for legal forms of business organization made by Indigenous entrepreneurs and how those choices create ethics of truth drawn from experience. We describe, but have less interest in, the *prescriptive* aspects of positive law on the legal forms, described above.²⁹

Part II will describe Indigenous economic development generally at a community level so as to distinguish it from individual or small group and independent or private initiatives, which is the focus of this article.

Part III will describe that Indigenous law is derived from choices made from the bottom up as opposed to positivist *prescriptive* notions of law coming from top-down, *a priori* sources such as statutes and case precedent.³⁰

Part IV will describe empirical evidence of the choices that independent Indigenous entrepreneurs make and argue that those choices should be part of lawyer education as propounded in Calls to Action 27 and 28. This Part draws upon two datasets developed by the Canadian Council for Aboriginal Business (CCAB), with a representative sample of private Indigenous business owners in the 2010 and 2015 Aboriginal Business Surveys (ABS) in Canada.³¹ Whenever possible, we also include the latest publicly available findings at the Province of Ontario level from the Report of the 2020 Ontario Aboriginal Business Survey published by the CCAB.³²

Part V will discuss the implications of our empirical findings and Part VI concludes our study. Throughout this article we draw on sources identifying elements of Indigenous legal systems and economic relations. Many Indigenous systems emphasize ethics of humility, respect, sharing, and giving,³³ and we consider how these are expressed in the choices of legal form in contemporary business activity.

²⁸ There are other advantages of corporations such as favourable tax treatment, particularly for smaller businesses' greater ease in attracting investors because of limited investor liability, amongst many other advantages.

²⁹ *Final Report*, *supra* note 1 at 207, citing Friedland, *supra* note 12 at 18: "Legal traditions are not only prescriptive, they are descriptive. They ascribe meaning to human events, challenges and aspirations." Borrows, *supra* note 15 at 50–87.

³⁰ We are deeply thankful to CCAB for providing access to the datasets. We are also very thankful for the recommendation of the reviewers to update the data in this study by using the latest publicly available information. Canadian Council for Aboriginal Business, "Promise and Prosperity: The 2020 Ontario Aboriginal Business Survey" (2020), online: [perma.cc/8H2W-BB24] [CCAB 2020].

³¹ *Ibid.*

³² Borrows, *supra* note 15.

³³

II. INDIGENOUS ECONOMIC DEVELOPMENT

Indigenous Peoples have engaged in a wide variety of economic development in many forms,³⁴ and for hundreds of years.³⁵ That development may be community-owned and community-benefiting enterprises such as ownership by the band or the band's designate (such as the Chief or Councillor(s)) who holds interests in enterprises in trust for the benefit of the community. Collective Indigenous economic development is a significant contributor to community development.³⁶ Researchers have highlighted entrepreneurial activity as a key catalyst for facilitating socio-economic progress and emancipation of Indigenous communities.³⁷ Examples of sharing of the resulting wealth within Indigenous cultures along with its antipode of "fierce competition and the protection of individual wealth" are both found in many Indigenous communities.³⁸

Indigenous economic activity also encompasses smaller scale enterprises of one person carrying on economic activity or two or more persons forming groups undertaking private economic activity as a sub-group within or outside an Indigenous community.³⁹ There are about 55,000 self-employed Indigenous persons in Canada.⁴⁰ During the 2001 to 2007 period, the rate of growth of self-employed Indigenous persons was five times that of self-employed Canadians overall.⁴¹ For Indigenous entrepreneurs, "their goal is not economic development alone, but economic development as part of the larger agenda of rebuilding their communities and nations and reasserting their control over their traditional territories."⁴² From the above, we can see that Indigenous ethics may make it more likely that the benefits of private enterprises will be shared with the community compared to non-Indigenous enterprises.⁴³ Moreover, private Indigenous activity is a significant part of Indigenous

³⁴ See e.g. National Chief Dwight Dorey, "Development Unreserved: Aboriginal Economic Development for the 21st Century" in Dwight Dorey & Joseph Magnet, eds, *Legal Aspects of Aboriginal Business Development* (Markham, Ont: LexisNexis Butterworths, 2005) 9.

³⁵ Rick Colbourne, Ana Maria Peredo & Irene Henriques, "Indigenous Entrepreneurship? Setting the Record Straight" (2023) *Business History* 1; Emily Salmon, Juan Francisco Chavez R & Matthew Murphy, "New Perspectives and Critical Insights from Indigenous Peoples' Research: A Systematic Review of Indigenous Management and Organization Literature" (2023) 17:2 *Academy of Management Annals* 439.

³⁶ Dorey, *supra* note 34 at 16.

³⁷ Albena Pergelova, Fernando Angulo-Ruiz & Leo-Paul Dana, "The Entrepreneurial Quest for Emancipation: Trade-Offs, Practices, and Outcomes in an Indigenous Context" (2022) 180:2 *J Bus Ethics* 481; Annaleena Parhankangas & Rick Colbourne, "Indigenous Entrepreneurship and Venture Creation: A Typology of Indigenous Crowdfunding Campaigns" (2023) 47:5 *Entrepreneurship Theory & Practice* 1617; Joy Olabisi et al, "Stakeholder Transformation Process: The Journey of an Indigenous Community" (2019) 159 *J Bus Ethics* 1.

³⁸ Borrows, *supra* note 15 at 204. For example, Borrows describes the multiplicity of economic activities and ethics of sharing and protection of individual wealth under Anishinaabe law: Borrows, *ibid*. The same ethic of sharing of the fruits of economic activity is described in other Indigenous legal traditions such as in Mi'kmaq legal traditions. See e.g. Edith GJ Callaghan & Bernd Christmas, "Building a Native Community by Drawing on a Corporate Model" in Dorey & Magnet, *supra* note 34, 31 at 33.

³⁹ Callaghan & Christmas, *ibid* at 47.

⁴⁰ Statistics Canada, "Aboriginal Population Profile, 2016 Census" (18 July 2018), online: [perma.cc/MKR8-CAB9].

⁴¹ Canadian Council for Aboriginal Business, "Promise and Prosperity: The Aboriginal Business Survey" (2010) at 2, online (pdf): [perma.cc/CD8N-FRNT] [CCAB 2010]. Canadian Council for Aboriginal Business, "Promise and Prosperity: The 2016 Aboriginal Business Survey" (2016), online: [perma.cc/CGB7-UZQV] [CCAB 2015].

⁴² Ana María Peredo et al, "Towards a Theory of Indigenous Entrepreneurship" (2004) 1:1/2 *Intl J Entrepreneurship & Small Bus* 1 at 6.

⁴³ Callaghan & Christmas, *supra* note 38 at 33–34; Rick Colbourne, "Indigenous Entrepreneurship and Hybrid Ventures" in Andrew C Corbett & Jerome A Katz, eds, *Hybrid Ventures, Advances in Entrepreneurship, Firm Emergence and Growth*, vol 19 (Bingley: Emerald, 2018) 93.

economic activity along with band or collective activity. It is this private Indigenous economic activity that is the focus of this study.⁴⁴

III. INDIGENOUS NORMATIVE LAW TRADITIONS

Indigenous people have pursued purely private independent entrepreneurial activities from before contact to the present day.⁴⁵ Such independent entrepreneurial activity is part of Indigenous traditions.⁴⁶ Although the *Final Report* of the TRC and *Report of the Royal Commission on Aboriginal Peoples* focused on public law issues, both have references to Indigenous laws that have public and private law implications.⁴⁷ This article shows empirical evidence of the contemporary choices of private forms of legal business organization made by independent Indigenous entrepreneurs. Describing this empirical truth-forming experience of entrepreneurs' choices of business forms will contribute to addressing Calls to Action 27 and 28 regarding lawyer education contributing to "skills-based training in intercultural competency."⁴⁸ Amongst other beneficial effects, lawyers should know the descriptive aspects of Indigenous legal traditions in their jurisdiction in addition to the positivist *a priori* training of law schools.

Law schools have responded to Call to Action 28 by changing or adding to curricula, admissions policies, and approaches to teaching.⁴⁹ What is not obvious is how to do the same in private law subjects such as the practice of corporate commercial law.⁵⁰ Some have suggested that teaching private corporate commercial business law should include concepts of social justice so that law students have "expanded vocabulary, understanding and interconnectivity that challenged law's structured silos."⁵¹ That connection between private law and public social justice is consistent with the Calls to Action of the TRC discussed in this article. To be sure, there is much to be done in the public law sphere, as the TRC has detailed extensively.⁵² In this sense, the private law sphere is an area for reconciliation as much as are questions of public law, such as Constitutional, Aboriginal, and Treaty Rights.

As much as there is a need to prepare lawyers when they are law students for an enlightened approach to Indigenous legal issues, answering Call to Action 28, so too must lawyer practitioners be made aware of the same issues as demanded in Call to Action 27. There is a need for empirical evidence in private law commercial subjects to assist in this regard.⁵³ This will also serve to inform the "corporate sector" of various public and private

⁴⁴ Fernando Angulo-Ruiz, Albena Pergelova & Leo Paul Dana, "The Internationalization of Social Hybrid Firms" (2020) 113 J Bus Research 266; Fernando Angulo-Ruiz, *New Frontiers in the Internationalization of Businesses: Empirical Evidence from Indigenous Businesses in Canada* (New York: Routledge, 2020).

⁴⁵ Dorey, *supra* note 34 at 10; Coulbourne, Peredo & Henriques, *supra* note 35 at 8.

⁴⁶ Callaghan & Christmas, *supra* note 38 at 32–34.

⁴⁷ See e.g. *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Privy Council Office & RCAP, 1996) [RCAP].

⁴⁸ *Final Report*, *supra* note 1 at 168.

⁴⁹ Anna Lund et al, "Reconciliation in the Corporate Commercial Classroom" (2016) 2:1 Lakehead LJ 49.

⁵⁰ *Ibid* at 49.

⁵¹ Hewitt & Sente, *supra* note 9 at 269.

⁵² *Final Report*, *supra* note 1.

⁵³ Lund et al, *supra* note 49 at 52.

law Indigenous issues, as called for in Call to Action 92 of the TRC, that includes intercultural competency training for business-Indigenous relations.⁵⁴

IV. EVIDENCE OF INDIGENOUS ENTREPRENEURS

This article addresses the need for empirical evidence of Indigenous private economic activity by analyzing two data sets that survey the legal form of business organization selected by private Indigenous businesspersons. The need for *private* entrepreneurial Indigenous development, in the discussion that follows, as part of the mix with *public* Indigenous business development⁵⁵ was identified in 1996 by the *RCAP*.⁵⁶

For many lawyers, the obvious advantages of the corporate form of business, such as limited liability, along with the statutory separation of enterprise ownership from control lead to a nearly automatic preference for the corporate form of business organization, compared to the other forms of business organization, such as sole proprietorship and partnership, with their attendant liability risks. This article shows, for the empirical reasons demonstrated, the preferences of Indigenous persons amongst these legal forms of business engaged in private businesses. Those preferences should be enlightening for lawyers.⁵⁷

Public or collective Indigenous economic development is canvassed elsewhere,⁵⁸ and may form a large part of Indigenous communities' economic activity compared to private Indigenous activity. To be sure these Indigenous, collectively-owned enterprises may be a significant source of good news for Indigenous economic development especially given the problems of "limited capital for investment, distrust from banks . . . , absence of local business services and advisers, [and] tiny local markets,"⁵⁹ amongst many other problems. However, Indigenous economic development is not an "either-or" choice of *public* community development versus *private* Indigenous economic effort but must include both.

This article looks at private undertakings by either one individual, such as the sole proprietorship, or a small group of persons, such as a partnership, or by two or more persons in a "private" corporation, and need not be geographically limited to individual communities, such as First Nations reserves or Inuit or Métis communities. By "private" corporation we mean a closely-held, non-distributing corporation that sells its shares privately to a narrowly

⁵⁴ *Final Report*, *supra* note 1 at 306, Call to Action 92 [abridged for relevancy to private corporate law issues]:

We call upon the corporate sector in Canada to . . . [e]nsure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, . . . [p]rovide education for management and staff on the history of Aboriginal peoples, including . . . Indigenous law, . . . [and provide] skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

⁵⁵ Robert B Anderson, Leo Paul Dana & Teresa E Dana, "Indigenous Land Rights, Entrepreneurship, and Economic Development in Canada: 'Opting-in' to the Global Economy" (2006) 41:1 *J World Bus* 45 at 46.

⁵⁶ *RCAP*, *supra* note 47 at 7.

⁵⁷ We do not look at other forms of public or collective Indigenous economic development such as First Nation or band ownership of enterprises, or non-Indigenous ownership of enterprises serving Indigenous communities or undertakings, with or without participation of First Nations councils, band administrations, First Nations-owned enterprises, or the involvement of other levels of government, or some combination of these collective actions.

⁵⁸ See Dorey, *supra* note 34.

⁵⁹ Crown-Indigenous Relations and Northern Affairs Canada, "Highlights from the Report of the Royal Commission on Aboriginal Peoples" (15 September 2010), online: [perma.cc/ED5T-66RA].

defined class of persons and that does not trade those shares on a public stock exchange.⁶⁰ This definition of a “private corporation” certainly describes the Indigenous corporations discussed in this article.

It should be mentioned, for the benefit of the lay reader, that sometimes collective action undertakings between a band council and government or between a band council and a corporation are called “partnerships” when referring to community-wide development programs for Indigenous people,⁶¹ and may include non-Indigenous persons.⁶² The references to “partnerships” in this context are likely colloquial in intention and are therefore not partnerships in a legal sense of business organization law⁶³ because they lack the element of mutual agency that invokes the fiduciary duties of private partnership law⁶⁴ under the various provincial *Partnership Acts* in the common law provinces of Canada,⁶⁵ or similar legislation in the *Quebec Civil Code*.⁶⁶ In sum, we focus on the private forms of business organizations, namely sole proprietorships, partnerships, and corporations, as defined in this article and as disclosed by the empirical evidence described.⁶⁷

⁶⁰ There is no universally accepted definition of a “closely held” or “private” corporation but they usually have these attributes: (1) relatively few shareholders (often under 10); (2) most, if not all, of the shareholders participate in the management of the corporation; (3) there is no ready market for the shares of the corporation except to other constituents of the corporation; and (4) there is often a restriction on the sale of the shares, preventing sale to “outsiders”: Yalden et al, *supra* note 22 at 712. A private corporation is not a “reporting issuer” to use statutory language found in, for example, the *Securities Act*, RSA 2000, c S-4, s 1(ccc).

⁶¹ See e.g. *Building Authentic Partnerships: Aboriginal Participation in Major Resource Development Opportunities* (Ottawa: Public Policy Forum, 2012), online (pdf): [perma.cc/6KVH-YL3V].

⁶² “Partnerships” as indicators of community development are also used for non-Indigenous contexts. See the fuller discussion of this issue in Cameron Harvey & Darcy MacPherson, *Agency and Partnership Law Primer*, 5th ed (Toronto: Thomson Reuters, 2016) at 195–96.

⁶³ We recognize that the respondents to the survey discussed may have a colloquial sense of partnership in their minds when answering the survey. It may be that the respondents made their choices of forms of business without a technically correct understanding of the legal definitions of those forms but in the knowledge of their understanding of the forms. The colloquial definitions of partnerships as cooperation between governing authorities and other persons are not likely what the respondents in this study had in mind, since it was clear that they were engaged in private cooperation amongst individuals and not involving the public or semi-public “partnership” with band councils or governments. In this sense, their understanding of “partnership” amongst persons and not involving public authorities is in general accord with the technical definitions of private partnership law.

⁶⁴ The “partnership” between, for example, a band council and a service provider or between a tribal council and a government department or agency may be a *contractual arrangement* with potential liabilities in case of breach by one or both sides; however, such arrangements lack the *mutual agency* between partners necessary for the legal form of partnership with attendant fiduciary duties between the partners. See the fuller discussion of this issue in Harvey & MacPherson, *supra* note 62 at 195–96.

⁶⁵ *Partnership Act*, RSA 2000, c P-3, s 6; *Partnerships Act*, RSO 1990, c P.5, s 6.

⁶⁶ Arts 2186–66 CCO.

⁶⁷ We do not address non-profits whether organized under the *Canada Not-for-Profit Corporations Act*, SC 2009, c 23 or societies under provincial legislations such as the *Societies Act*, RSA 2000, c S-14 or the *Corporations Act*, RSO 1990, c C.38, nor do we address “Community Contribution Companies” or “Benefit Companies” under the *Business Corporations Act*, SBC 2002, c 57, ss 51.91–51.995 or “Community Interest Companies” under the *Community Interest Companies Act*, SNS 2012, c 38.

A. INDIGENOUS CHOICES FOR PRIVATE LEGAL FORMS OF BUSINESS

Indigenous businesses require understanding of context because the selection of legal forms of business is different from non-Indigenous business. For example, using survey data developed by the CCAB in 2010, 36 percent of Indigenous business owners select the corporation method of business organization, while 54 percent select sole proprietorship as their method of business organization.⁶⁸ However, the proportions are inverted for mainstream businesses as the law literature suggests.⁶⁹

In this study, an Indigenous business is 51 percent or more owned by First Nations, Inuit, or Métis persons. In Canada, there were almost 1.7 million individuals that had an Indigenous identity in 2016 (representing almost 5 percent of the total population in Canada).⁷⁰ Of all Indigenous people in Canada, 731,480 Indigenous individuals live in urban areas, which accounts for 44 percent of the total Indigenous population.⁷¹ Of Indigenous individuals living in urban areas, 51 percent are First Nations, 45 percent are Métis, and 1 percent are Inuit.⁷²

This study uses two datasets, both developed by the CCAB, to contribute to the understanding of the opportunities and challenges faced by privately-owned Indigenous businesses in Canada,⁷³ their aspirations, goals, and strategies, and the key factors that contribute to growth.⁷⁴ The ABS 2010 data includes a representative sample of 1,095 Indigenous business owners, and the ABS 2015 data provides a representative sample of 1,101 Indigenous business owners. We also include the latest publicly available findings for the Province of Ontario from the *Report of the 2020 Ontario Aboriginal Business Survey* published by the CCAB and compare them with the Province of Ontario data from the ABS 2010 and 2015 data sets.

In our article, we study the influence of several independent variables on the selection of a legal form of business. We specifically focus on the role of entrepreneurs' general education, entrepreneurs' business training, entrepreneurs' age, age of the business, size of the business, and business location on a reserve. These variables represent the institutional logics Indigenous entrepreneurs might follow when selecting a legal form of business organization. An institutional logic is the "socially constructed, historical pattern of cultural symbols and material practices, including assumptions, values, and beliefs, by which individuals and organizations provide meaning to their daily activity, organize time and space, and reproduce their lives and experiences."⁷⁵ These variables also help us analyze the

⁶⁸ CCAB 2010, *supra* note 41.

⁶⁹ Margaret M Blair, "The Four Functions of Corporate Personhood" (2012) Vanderbilt Public Law & Legal Theory Working Paper No 12-15.

⁷⁰ Statistics Canada, "2016 Census Topic: Aboriginal Peoples" (25 October 2017), online: [perma.cc/CTJ4-DGYD].

⁷¹ Statistics Canada, *Results from the 2016 Census: Housing, Income and Residential Dissimilarity among Indigenous People in Canadian Cities*, by Thomas Anderson (Ottawa: Statistics Canada, 2019), online (pdf): [perma.cc/7W44-GRDB].

⁷² *Ibid.*

⁷³ Privately-owned businesses are not owned by the community.

⁷⁴ CCAB 2010, *supra* note 41 at 1.

⁷⁵ Patricia H Thornton, William Ocasio & Michael Lounsbury, *The Institutional Logics Perspective: A New Approach to Culture, Structure, and Process* (Oxford: Oxford University Press, 2012) at 2.

influence of different levels in the selection of a legal form of business organization, namely individual entrepreneurs' characteristics (for example, education level), business characteristics (for example, age and size), and community variables (for example, location on reserve). To our knowledge, this is the first empirical attempt to understand the variables that affect the selection of legal forms of business organizations by Indigenous businesses in Canada. Appendix 1 provides details of the operationalization and measurement of dependent, independent, and control variables in our models.

B. ANALYTICAL TECHNIQUES

Our analytical approach includes empirical models on the determinants of legal forms of business organization. We run three binomial logistic regressions with robust standard errors, and the results are presented in Table 5. These regressions are used when the dependent variable is binary (with 0 and 1 values) and thus include two outcomes. In our study, we have three dependent variables. The first dependent variable compares the selection between sole proprietorship and incorporation; sole proprietorship is assigned the outcome value of zero (0) and incorporation is assigned the outcome value of one (1). The second dependent variable compares the selection between partnership and incorporation, where incorporation is assigned the outcome value of one (1) and partnership is assigned the outcome value of zero (0). The third dependent variable compares the selection between sole proprietorship and partnership, where partnership is assigned the outcome value of one (1) and sole proprietorship is assigned the outcome value of zero (0). We run each of these models using both the 2010 and 2015 ABS data.

C. EMPIRICAL RESULTS

1. DESCRIPTIVE STATISTICS

As detailed in Table 1, in 2010, approximately 54 percent of Indigenous entrepreneurs indicated their businesses were sole proprietorships, 10 percent indicated they were partnerships, and 36 percent indicated they were incorporated. In 2015, 45 percent of Indigenous entrepreneurs reported their businesses were sole proprietorships, 11 percent were partnerships, and 44 percent were incorporated. From this data, it is also suggestive that the number of Indigenous entrepreneurs with an incorporated business increased from 2010 to 2015. Table 2 presents a selection of legal forms of business by Indigenous entrepreneurs based in the Province of Ontario. In 2010, 67.32 percent of Indigenous entrepreneurs in Ontario reported their businesses were sole proprietorships; in 2020, that value reduced to 47 percent. In Ontario, partnerships as a form of business increased from 8.56 percent in 2010 to 22 percent in 2020. Data in Table 2 also suggests that incorporation as a legal form of business by Indigenous entrepreneurs in Ontario increased from 2010 (24.12 percent) to 2015 (34.17 percent), and slightly reduced in 2020 (31 percent) compared to 2015.

TABLE 1:
SELECTION OF LEGAL FORMS OF BUSINESS
BY INDIGENOUS ENTREPRENEURS IN CANADA⁷⁶

Legal Forms of Business	2010 Aboriginal Survey (Canada)	2015 Aboriginal Business Survey (Canada)
Sole Proprietorship	53.79%	45.13%
Partnership	10.20%	10.83%
Incorporation	36.01%	44.04%
Number of Responses	1,069	1,099

The questionnaire asks participants the following question: Is the business a ... (1) sole proprietorship; (2) partnership; or (3) corporation that is incorporated under a federal or provincial charter?

TABLE 2:
SELECTION OF LEGAL FORMS OF BUSINESS
BY INDIGENOUS ENTREPRENEURS IN ONTARIO⁷⁷

Legal Forms of Business	2010 Aboriginal Business Survey (Ontario)	2015 Aboriginal Business Survey (Ontario)	2020 Aboriginal Business Survey (Ontario)
Sole Proprietorship	67.32%	55.04%	47%
Partnership	8.56%	10.79%	22%
Incorporation	24.12%	34.17%	31%
Number of Responses	257	278	200

The questionnaire asks participants the following question: Is the business a ... (1) sole proprietorship; (2) partnership; or (3) corporation that is incorporated under a federal or provincial charter?

As detailed in Table 3, in 2010, 33.52 percent of Indigenous entrepreneurs had some level of university or postgraduate education. Approximately 36 percent of Indigenous entrepreneurs had business training. Thirty-seven percent of Indigenous businesses were female-owned. Indigenous entrepreneurs were on average 49 years old. The average age of the business was 11.45 years while the average size of the business was about seven employees. Almost 41 percent of Indigenous entrepreneurs had their business located on a reserve.

⁷⁶ CCAB 2010, *supra* note 41; CCAB 2015, *supra* note 41.

⁷⁷ CCAB 2010, *ibid*; CCAB 2015, *ibid*; CCAB 2020, *supra* note 31. The 2020 information comes from the report of the 2020 Ontario ABS published by the CCAB, which is based on survey data from “200 First Nations, Metis and Inuit businesses conducted from January 20 to February 14, 2020” (CCAB 2020, *ibid* at 12). The 2010 and 2015 ABS data are a sub-set of the national survey data collected by the CCAB in those years.

In 2015, as detailed in Table 3, approximately 36.5 percent of Indigenous entrepreneurs had some level of university or postgraduate education. Thirty-three point five percent of Indigenous businesses were owned by females. The average age of Indigenous entrepreneurs was 52 years, while the average age of their business was 14.38 years. Indigenous businesses had almost eight employees in total (this includes full-time, part-time, and casual or temporary employees). In 2015, 36.11 percent of Indigenous entrepreneurs reported that their businesses were located on a reserve.

Table 4 presents summary statistics of some characteristics of Indigenous businesses based in Ontario in 2010, 2015, and 2020. In Ontario, the percentage of more mature Indigenous businesses (over 15 years of age) has grown from 2010 (28 percent) to 2015 (37 percent) to 2020 (60 percent) in the province. The average number of employees has also grown from four full-time employees in 2010 and 2015 to 12 full-time employees in 2020. The percentage of Indigenous businesses located on a reserve in Ontario is also reported in Table 4.

**TABLE 3:
SOME CHARACTERISTICS OF
INDIGENOUS ENTREPRENEURS IN CANADA ⁷⁸**

Characteristics	2010 Aboriginal Business Survey (All Canada)	2015 Aboriginal Business Survey (All Canada)
Percentage of Indigenous Entrepreneurs with General Education		
Completed high school or less	30.46%	30.35%
Completed community college or vocational	36.02%	33.27%
Completed university or less	23.98%	24.59%
Postgraduate school	9.54%	11.79%
Number of responses	1,080	1,094
Percentage of Indigenous Entrepreneurs with Business Training	36%	Not asked
Number of responses	1,090	
Percentage of Female Indigenous Entrepreneurs	37%	33.51%
Number of responses	1,095	1,101
Average Age of Indigenous Entrepreneurs	49 years old	52.06 years old
Number of responses	1,049	1,062
Average Age of the Business	11.45 years	14.38 years
Number of responses	1,075	1,092
Average Size of the Business	7 employees	7.97 employees
Number of responses	1,077	1,101
Percentage of Indigenous Businesses Located on a Reserve	41%	36.11%
Number of responses	1,089	1,008

⁷⁸

CCAB 2010, *ibid*; CCAB 2015, *ibid*.

TABLE 4:
SOME CHARACTERISTICS OF
INDIGENOUS BUSINESSES IN ONTARIO⁷⁹

Characteristics	2010 Aboriginal Business Survey (Ontario)	2015 Aboriginal Business Survey (Ontario)	2020 Aboriginal Business Survey (Ontario)
Age of Business			
5 or less years	28.40%	22.74%	13%
6 to 15 years ago	43.58%	40.08%	26%
Over 15 years ago	28.02%	37.18%	60%
Number of responses	257	277	200
Average Number of Employees			
Full-Time	4.5	4	1,262,133
Part-Time Seasonal	2.6	2.7	
Casual or Temporary	1.9	1.4	
Number of responses	161, 160, 160	174, 173, 172	
Percentage of Indigenous Business Located on a Reserve	65%	47.64%	59%
Number of responses	260	275	200

Average number of employees is based on business which reported to have employees other than the owner.

In the following section, we analyze which of these characteristics of Indigenous entrepreneurs and their businesses are significantly related with the selection of private legal forms of business organization.

2. DETERMINANTS OF PRIVATE LEGAL FORMS OF BUSINESS ORGANIZATION

a. Selection of Sole Proprietorship Versus Incorporation

Binomial logistic regression results are reported in Table 5. As explained in section IV.B., binomial logistic regressions are used when the dependent variable under analysis includes two outcomes and those outcomes are assigned binary values (0 and 1). We first report the determinants of selecting the incorporation legal form (assigned the value of 1) when compared with the sole proprietorship (assigned the value of 0). A positive sign indicates that the determinant under analysis positively affects the selection of the incorporation legal form. A negative sign indicates that the determinant under analysis positively affects the selection of the sole proprietorship form of business. Using the 2010 ABS data, results reveal that Indigenous entrepreneurs' business training or education is positively associated with the selection of the incorporation legal form of business (0.6368, $p < 0.01$). Using the 2015 ABS data, findings show that Indigenous entrepreneurs' education is positively related with the selection of the incorporation legal form of business (0.2492, $p < 0.01$). In other words, both

⁷⁹ CCAB 2010, *ibid*; CCAB 2015, *ibid*; CCAB 2020, *supra* note 31. The 2020 information comes from the report of the 2020 Ontario ABS published by the CCAB, which is based on survey data from "200 First Nations, Metis and Inuit businesses conducted from January 20 to February 14, 2020" (CCAB 2020, *ibid* at 12). The 2010 and 2015 ABS data are a sub-set of the national survey data collected by the CCAB in those years.

survey data sources consistently indicate the positive and significant role of education as a determinant of the selection of the incorporation legal form of business among Indigenous entrepreneurs.

Size of the business is also a positive determinant of the selection of the incorporation legal form of business. In 2010, the larger the business (in terms of the number of employees), the more likely the selection of incorporation (0.0656, $p < 0.001$). Using the 2015 ABS data, we obtained similar results as in 2010, that the size of the business is positively associated with the selection of incorporation (0.0252, $p < 0.01$).

Indigenous business' location on a reserve has a positive influence on the selection of sole proprietorship. In 2010, business location on a reserve had a negative influence on the selection of the incorporation legal form of business (-1.9766, $p < 0.001$). In 2015, we also found that business location on a reserve had a negative association with the selection of the incorporation legal form of business (-1.1416, $p < 0.001$). In other words, Indigenous businesses located on reserves are less likely to select an incorporation legal form and more likely to select a sole proprietorship form of business.

b. Selection of Partnership Versus Incorporation

Results in Table 5 also offer insights about the determinants for the selection of incorporation when compared to the partnership legal form of business. In 2010, Indigenous entrepreneurs' business training or education positively influenced the selection of incorporation (0.7304, $p < 0.05$). In 2015, Indigenous entrepreneurs' education was positively associated with the selection of incorporation (0.3682, $p < 0.01$). Indigenous entrepreneurs' education also matters for the selection of incorporation when it is compared with the partnership legal form of business.

In 2010, age of the business was positively related to the selection of incorporation (0.0422, $p < 0.10$). In 2015, it was the age of Indigenous entrepreneurs that was positively associated with the selection of incorporation legal form (0.0304, $p < 0.05$). Experience of the Indigenous entrepreneur and the age of the business determine the selection of incorporation when compared to the partnership legal form of business.

TABLE 5:
DETERMINANTS OF THE SELECTION OF PRIVATE LEGAL FORMS
OF BUSINESS BY INDIGENOUS ENTREPRENEURS IN CANADA⁸⁰

Characteristics	Dependent Variable: Sole Proprietorship (0) versus Incorporation (1)		Dependent Variable: Partnership (0) versus Incorporation (1)	
	2010 Aboriginal Business Survey Coefficients (p-value)	2015 Aboriginal Business Survey Coefficients (p-value)	2010 Aboriginal Business Survey Coefficients (p-value)	2015 Aboriginal Business Survey Coefficients (p-value)
General Education	0.0893 (0.351)	0.2492 (0.005)	0.1487 (0.353)	0.3682 (0.008)
Business Training	0.6368 (0.001)		0.7304 (0.023)	
Female Indigenous Entrepreneurs	-0.4758 (0.011)	-0.117 (0.502)	-0.5351 (0.08)	-0.3908 (0.146)
Age of Indigenous Entrepreneurs	0.0035 (0.691)	-0.003 (0.716)	-0.0121 (0.408)	0.0304 (0.031)
Age of the Business	-0.008 (0.478)	-0.0069 (0.423)	0.0422 (0.071)	0.0249 (0.124)
Size of the Business	0.0656 (0.000)	0.0252 (0.004)	0.0255 (0.139)	0.0086 (0.534)
Businesses Located on a Reserve	-1.9766 (0.000)	-1.1416 (0.000)	-1.5793 (0.000)	-0.8516 (0.003)
Industry	Included as control variable	Included as control variable	Included as control variable	Included as control variable
Province/Territory of Location	Included as control variable	Included as control variable	Included as control variable	Included as control variable
Constant	-0.0738 (0.918)	0.2469 (0.748)	1.321913 (0.237)	0.2487 (0.871)
Pseudo R-square	0.2565 (0.000)	0.1744 (0.000)	0.2184 (0.000)	0.1529 (0.0013)
Wald Chi-square	183.28	167.11	83.06	62.92
Number of Observations	878	857	407	512

P-values are listed above in parentheses. Industries include Manufacturing; Agriculture, Forestry, Fishing, and Hunting; Mining and Oil and Gas Extraction; Utilities; Construction; Wholesale Trade; Retail Trade; Transportation and Warehousing; Information and Cultural Industries (for example, publishing, broadcasting, Internet); Finance and Insurance; Real Estate and Rental and Leasing; Professional, Scientific, and Technical Services (for example, legal, accounting, advertising); Management of Companies and Enterprises; Administrative and Support, Waste Management and Remediation Services; Educational Services; Health Care and Social Assistance; Arts, Entertainment, and Recreation; Accommodation and Food Services; and Other Services. All provinces and territories in Canada are included as control variables.

Business location on a reserve also plays a role in the selection of legal forms of business. Using the 2010 ABS data, results indicate that if an Indigenous business is located on a reserve, this will positively influence the selection of a partnership form and negatively influence the selection of incorporation legal form of business (-1.5793, $p < 0.001$). The 2015 ABS data corroborates this result and shows that the relationship between business location on a reserve and incorporation legal form is negative (-0.8516, $p < 0.01$).

The r-square of all models included in Table 3 are statistically significant. Models of determinants between sole proprietorship and partnership legal forms are not included in Table 3 as there are no statistical differences in the selection of these two forms.

⁸⁰ CCAB 2010, *ibid*; CCAB 2015, *ibid*.

3. CONDITIONS FOR INDIGENOUS BUSINESSES LOCATED ON A RESERVE TO POTENTIALLY SELECT INCORPORATION

We conducted moderation analyses between business location on a reserve and each of the other independent variables included in Table 5, namely, entrepreneur's education level, entrepreneur's gender, entrepreneur's age, age of the business, and size of the business. We first mean-centred all these variables and then calculated five interaction terms.⁸¹

Using the 2010 ABS data, our results indicate that the only interaction term that is marginally statistically significant is the interaction between business location on a reserve and the size of the business. This interaction term is marginally and significantly associated with the selection of incorporation when compared to the sole proprietorship legal form of business ($-.0378, p < 0.10$, one-tailed test). While Indigenous businesses located on a reserve are in general less likely to select incorporation as a legal form of business organization, it appears that larger Indigenous businesses (in terms of number of employees) located on a reserve might be more likely to select the incorporation legal form of business than smaller businesses.

Using the 2015 ABS data, we find that the only interaction term that is marginally statistically significant is the interaction between business location on a reserve and the entrepreneur's gender. This interaction term significantly influences the selection of incorporation when compared to sole proprietorship legal form of business ($0.068, p < 0.10$). To further understand the significance of this coefficient, we ran two separate binomial logistic regressions — one for the Indigenous male entrepreneurs' sub-sample and the other for the Indigenous female entrepreneurs' sub-sample. We find that in the Indigenous male entrepreneurs' group, business location on a reserve has a negative influence on the selection of incorporation when compared to sole proprietorship ($-1.4141, p < 0.001$). In the Indigenous female entrepreneurs' group, we also find that business location on a reserve has a negative influence on the selection of incorporation ($-0.8347, p < 0.05$). However, the influence in the female group (-0.8347) is significantly less negative than in the male group (-1.4141). In other words, in general Indigenous female entrepreneurs with businesses located on a reserve are less likely to select the incorporation legal form of business compared to the sole proprietorship legal form. However, when compared to their male counterparts, female entrepreneurs appear to be less likely to select sole proprietorship legal forms in these settings. We repeated this analysis for the selection of incorporation when compared to the partnership legal form of business and found similar results, although less statistically significant.

⁸¹

For example, we multiplied the mean-centred values of the variable business location on a reserve with the mean-centred values of the variable size of the business; we also multiplied the mean-centred values of the variable business location on a reserve with the mean-centred values of the variable age of the business, and so on.

V. DISCUSSION AND IMPLICATIONS

This research sets out to offer an empirical account of the determinants of legal forms of business organization for private Indigenous entrepreneurs. Our findings contribute to a more complete and systematic understanding of the antecedents of private legal forms of business organization permitted by law. Our results, in the Indigenous context in Canada, imply that entrepreneurs' education and experience, size of the business, and business location on a reserve significantly influence the selection of legal forms of business organization. In particular, our findings indicate that Indigenous entrepreneurs with higher levels of education, business training, and experience and owners of more mature businesses tend to choose incorporation as opposed to the sole proprietorship or partnership legal forms of business organizations.

Our research also contributes to a better understanding of the impact of business location on a reserve on the selection of legal forms of business organization. More concretely, our findings indicate that Indigenous businesses located on reserve are more likely to select sole proprietorship or partnership legal forms of business organization as opposed to incorporation — most likely because of the effects of the *Indian Act*.⁸²

In Canada, under section 89 of the federal *Indian Act*:

[T]he real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.⁸³

On its face, section 89 appears to protect Indigenous Peoples in Canada by prohibiting the execution or seizure of on-reserve real and personal property by non-Indigenous creditors.⁸⁴ Section 89 of the *Indian Act* reflects the idea that Indigenous Peoples collectively own property on reserves; this recognition of collective title, and a cultural relationship to reserve property, can help to protect against assimilation and the erosion of community values.

However, some see section 89 not as protective, but as discriminatory, and as an example of the paternalistic approach that appears throughout the *Indian Act*.⁸⁵ In practice, section 89 of the *Indian Act*, and its antecedents, have limited the ability of Indigenous Peoples to participate fully in the economy, in particular by restricting the ability to obtain financing.⁸⁶ Lenders may demand a risk premium in the form of higher interest rates to compensate for the lack of security, should default on payment occur.⁸⁷

Therefore, while section 89 of the *Indian Act* grants protection to property on reserve, the property of Indigenous-owned corporations is not protected even if located on a reserve,

⁸² RSC, 1985, c I-5.

⁸³ *Ibid*, s 89.

⁸⁴ *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 114–15.

⁸⁵ Anita G Wandzura, “The Enforcement of Security Interests Against the Personal Property of First Nations Persons on a Reserve” (2007) 39:1 Ottawa L Rev 1.

⁸⁶ Adrian Pel, “Reforming Section 89 of the *Indian Act*: Tinker, Waiver, Soldier (On), Sigh?” (2020) 4:1 Lakehead LJ 65.

⁸⁷ *Ibid* at 67–68.

since corporations are separate legal persons and not “Indians” under the *Indian Act*,⁸⁸ consistent with the separate legal personality of a corporation from its constituents. In other words, if an Indigenous-owned business incorporates on a reserve (for example, larger businesses or female-owned businesses, as our results indicate), then the corporation is subject to the same collection processes as any corporation and its assets may be seized by any creditor. This creates an incentive to *not* incorporate and to select partnerships and sole proprietorships instead as the property of Indigenous partnerships and sole proprietorships located on reserves is not subject to seizure by non-Indigenous persons because of section 89 of the *Indian Act*.

To be sure, the intention of section 89 is to prevent “exploitation” of the property owned by Indigenous persons and bands,⁸⁹ but the limitations on Indigenous persons’ access to credit and therefore economic development are real and create dilemmas for borrowers and lenders alike.⁹⁰ Insertion of the corporate entity does not necessarily solve this dilemma. Other solutions to restricted credit have been proposed such as leasehold mortgages that require “designation” under the *Indian Act*,⁹¹ conditional sale of personal property,⁹² or where real property is permanently removed from the reserve by surrender and conversion to a fee simple with subsequent issuance of a land title to an individual (whether Indigenous or not) or to another legal person such as a corporation.⁹³ And, of course, there is no limitation on creditor remedies where the creditor is an Indian person or Indian band,⁹⁴ but all of these are of “limited utility,”⁹⁵ likely because of the onerous nature of the processes in some of them or as being unattractive to lenders and borrowers.⁹⁶ Reforms to the law could encompass repeal or reform of section 89, including permitting waiver of protections under section 89.⁹⁷ Clearly, such discussions around reform of the law or assessing whether mechanisms presently allow amelioration of some of the disadvantages arising from section 89 are beyond the scope of this article since we are primarily concerned with descriptive analyses of the issues we raise.

Section 87 of the *Indian Act* provides that Indigenous persons in Canada are not taxed on income that is earned on reserve,⁹⁸ however, this should always be followed with a restatement that income earned off-reserve is taxed the same as it is for non-Indigenous taxpayers. Indigenous-owned corporations, even on reserve, pay tax as well (unless the corporation is a wholly owned corporation of a band that is a “public body performing a function of government”).⁹⁹

⁸⁸ Yalden et al, *supra* note 22 at 247; *Reference Re Stony Plain Indian Reserve No 135* (1981), 130 DLR (3d) 636 at 654–55 [*Stony Plain*].

⁸⁹ *McDiarmid Lumber Ltd v God’s Lake First Nation*, 2006 SCC 58 at paras 50–66.

⁹⁰ Pel, *supra* note 86 at 67–68.

⁹¹ *Ibid* at 66, citing Scott Hitchings, “Real Property Security Interests on First Nations Reserved Lands” (2017) 80:1 Sask L Rev 125 at 126–27.

⁹² Pel, *ibid* at 67.

⁹³ Discussed in *Stony Plain*, *supra* note 85 at 653.

⁹⁴ *Ibid*.

⁹⁵ Pel, *supra* note 86 at 67.

⁹⁶ *Ibid* at 67.

⁹⁷ *Ibid* at 71–74.

⁹⁸ *Indian Act*, *supra* note 82, s 87; Yalden et al, *supra* note 22 at 246–47.

⁹⁹ Yalden et al, *supra* note 22 at 248, 247–49 regarding the *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 149 and Canada Revenue Agency, Internal Technical Interpretation 2016-064503117 (27 July 2016). Note the reserve limitation for this exemption in this discussion for certain modern First Nations Self-Government Agreements (Yalden et al, *ibid* at 250–51).

In sum, private Indigenous entrepreneurs located on a reserve and who are subject to sections 87 and 89 of the *Indian Act* and related case law appear, in the data, to prefer to choose unincorporated methods of business organization such as sole proprietorships or partnerships. That would be consistent with preserving the statutory protection from non-Indigenous creditors, and the limited tax advantage, found in the *Indian Act*.

The historical and ongoing effects of the *Indian Act* are beyond what we can address in this article, but there is a growing body of writing that helps broaden our understanding of the many effects of that legislation. Carol Hilton in *Indigenomics: Taking a Seat at the Economic Table* describes the “Indian Act Economics” as creating the perfect conditions for potential market failure.¹⁰⁰ In the 2023 book, *Upholding Indigenous Economic Relationships: Nehiyawak Narratives*, Shaleen Jobin refers to the “Colonial Dissonance” resulting from the implementation of the *Indian Act*.¹⁰¹ The concept of wâhkohtôwin (“the laws governing relationships within a Cree world view”¹⁰²) is disrupted not only for Cree people, but also “non-Cree people, other living beings, and spirit beings on this territory.”¹⁰³ These writings provide us with many examples of just how damaging the *Indian Act* is, but they also provide hope that we can “create new relations and fix the broken ones.”¹⁰⁴

A. PRACTICAL IMPLICATIONS

Our findings have implications for private entrepreneurs and law practitioners thinking about which legal form of business organization to select. Our study provides a snapshot of the determinants of three legal forms of business organization: (1) sole proprietorship; (2) partnership; and (3) incorporation. Based on unique representative samples of Indigenous businesses in Canada in 2010 and 2015, our results indicate that entrepreneurs with higher education levels and business training and experience, and owners of more mature and larger businesses tend to select incorporation. In general, Indigenous businesses located on a reserve tend to select sole proprietorship or partnership legal forms. However, our study also indicates that larger Indigenous businesses located on reserve might be more likely to select incorporation than smaller businesses; and that Indigenous female entrepreneurs might be more likely to incorporate than their male counterparts when located on a reserve.

For law practitioners, our study provides behavioural information about what legal forms of business organization Indigenous entrepreneurs are selecting. We know that lawyers usually recommend the selection of the corporate legal form of business organization, given liability protections of that form. However, our study shows that Indigenous entrepreneurs select other legal forms of business organization in addition to the corporation such as sole proprietorship and partnership. Lawyers should consider the reasons that Indigenous persons select a particular form of business organization, as discussed in this article.

¹⁰⁰ Carol Anne Hilton, “Indian Act Economics” in *Indigenomics: Taking a Seat at the Economic Table* (Gabriola Island: New Society, 2021) 95.

¹⁰¹ Shaleen Wuttunee Jobin, “Colonial Dissonance” in *Upholding Indigenous Economic Relationships: Nehiyawak Narratives* (Vancouver: UBC Press, 2023) 94.

¹⁰² *Ibid* at 110, citing Cardinal Harold Cardinal, “Nation-Building as Process: Reflections of a Nehiyow (Cree)” in *Natives’ and Settlers’ Now’ and Ten’: Historical Issues’ and Current Perspectives on Treaties and Land Claims in Canada*, Paul W DePasquale, ed (Edmonton: University of Alberta Press, 2007) 65 at 74–75.

¹⁰³ *Ibid* at 108–35, 136.

¹⁰⁴ *Ibid* at 210.

B. LIMITATIONS AND FUTURE RESEARCH DIRECTIONS

Our research provides systematic results on the determinants of private legal forms of business organization permitted by law. However, there are avenues to further improve the existing body of research in this field. An aspect we recommend for future research is to understand how private Indigenous entrepreneurs interpret and apply normative positive law. Our research indicates that there is social construction in the selection of a legal form of business organization beyond what the law dictates. In this study, we have shown that Indigenous entrepreneurs' education, entrepreneurs' age, age of the business, size of the business, and business location on a reserve affect the selection of a legal form of business organization. Future research should explore what else is missing, especially, interpretative qualitative studies can point to interesting new research directions for the selection of legal forms of business organization. As the focus of our study is on private Indigenous businesses, future research should also provide empirical evidence on the process of selection of legal forms by public Indigenous economic development organizations based on representative samples.

VI. CONCLUSION

This article is a contribution to the work of reconciliation called for by the TRC Final Report as applied to four TRC Calls to Action (27, 28, 50, and 92) applicable to private law matters of choice of form of business for Indigenous entrepreneurs. This article shows empirical evidence of the factors of social construction as to the choices of Indigenous entrepreneurs. Lawyers and law students (TRC Calls to Action 27 and 28) that are mindful of the social constructions presented in this article will have greater cultural awareness of the issues and choices faced by Indigenous entrepreneurs. This mindfulness will also add to the discussion relating to the Call to Action for enlightened corporate policy (TRC Call to Action 92) and contribute to understanding the normative foundations of Indigenous laws (TRC Call to Action 50). Lawyers are encouraged to seek a better understanding of the legal, social, environmental, and economic practices of the Indigenous Peoples in the jurisdiction they practice. There are likely common themes but also differences. It is our hope that this article will help to inform that understanding and contribute to the building of respectful relationships.¹⁰⁵

¹⁰⁵ *Final Report, supra* note 1 at 306.

**APPENDIX I:
OPERATIONALIZATION OF VARIABLES**

Variable	Operationalization	Measurement
<i>Dependent:</i> Legal forms of business	(0) sole proprietorship, (1) partnership, (2) corporation that is incorporated under a federal or provincial charter.	In the empirical analyses, legal forms of business organization were reconstructed as three binary variables: (0) sole proprietorship, (1) partnership; (0) sole proprietorship, (1) corporation; and (0) partnership and (1) corporation.
<i>Independent:</i>		
Indigenous entrepreneur's general education	We collapsed the original nine categories included in the ABS question "what is the highest level of education that you have reached?" into four.	(1) completed high school or less, (2) completed community college or vocational, (3) completed university or less, and (4) postgraduate school.
Indigenous entrepreneur's business training	We used the ABS question "did you take any business training courses at the college or university level?"	(0) no and (1) yes.
Indigenous entrepreneur's gender	Respondent's sex.	(0) male and (1) female.
Indigenous entrepreneur's age	Experience of the entrepreneur in years.	Number of years.
Age of the business	We used the ABS question "in what year did you establish or acquire this business?" and subtracted the answer from 2010 (the year when the survey data was collected).	Firm age represents years since inception.
Size of the business	We merged two ABS questions to obtain the total number of current employees: "Excluding yourself, how many employees does your business currently have?"; and, "do you have any employees other than yourself?"	The scale goes from 0 to 98 in the 2010 ABS dataset, and from 0 to 165 in the 2015 ABS dataset.
Business location on a reserve	We used the ABS question "is this business located on a reserve or not?" It is crucial to include this variable since the entrepreneurial activities of Indigenous individuals in their Indigenous setting are situated in communities of Indigenous people with shared social, economic, and cultural patterns. The characteristics of entrepreneurship among Indigenous persons who migrate individually or in relatively small groups, especially to urban areas, may well be different and it has been suggested that they may more closely resemble that of ethnic enclaves.	(0) no and (1) yes.
<i>Control variables:</i>		
Industry	We used industry dummies using manufacturing as the base category in the regression analyses.	Manufacturing; agriculture, forestry, fishing, and hunting; mining and oil and gas extraction; utilities; construction; wholesale trade; retail trade; transportation and warehousing; information and cultural industries; finance and insurance; real estate and rental and leasing; professional, scientific, and technical; management of companies and enterprises; administrative and support, waste management; educational services; health care and social assistance; arts, entertainment, and recreation; accommodation and food services; and, other services.

Variable	Operationalization	Measurement
Province	We employed dummies of provinces and territories in Canada and used Newfoundland and Labrador as the base category. The geographic community in which the entrepreneur is embedded influences networks ¹⁰⁶ and what social expectations an entrepreneur should meet. ¹⁰⁷	Newfoundland and Labrador; Prince Edward Island; Nova Scotia; New Brunswick; Québec; Ontario; Manitoba; Saskatchewan; Alberta; British Columbia; Yukon; Northwest Territories; and, Nunavut.

¹⁰⁶ Christopher Marquis & Julie Battilana, “Acting Globally but Thinking Locally? The Enduring Influence of Local Communities on Organizations” (2009) 29 *Research in Organizational Behavior* 283.

¹⁰⁷ Christopher Marquis, “The Pressure of the Past: Network Imprinting in Intercorporate Communities” (2003) 48:4 *Administrative Science Q* 655.

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