THOMPSON DORFMAN SWEATMAN

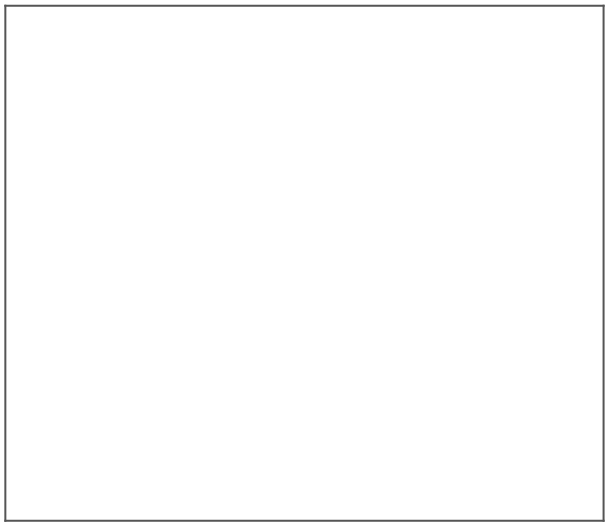
Doing Business With First Nations

Authors: Bob Adkins, K.C., **Michael Sinclair, K.C.**, **Sacha R. Paul**

published 03/01/2010

Challenges and Opportunities

INTRODUCTION



Recently, the former Grand Chief of the Assembly of First Nations, Phil Fontaine, was appointed a Special Advisor to the Royal Bank of Canada. One of Mr. Fontaine's roles with RBC will be to increase economic opportunities for First Nations people. The fact that a major Canadian bank has emphasized First Nation (1) economic opportunities is not surprising. Increasingly, First Nations are seeking a greater share of the benefits and opportunities that come with participating in the larger Canadian economy. At the same time, resource developers and other businesses and industries are seeking commercial arrangements, including partnerships and joint ventures, with First Nations to facilitate access to natural resources, to expand their labour pools in remote areas, to promote the provision of goods and services by local businesses and to increase their customer base.

This trend is likely to accelerate. Canada has a huge storehouse of untapped natural resources mostly in Northern and remote areas where the First Nations populations are large and where traditional and constitutionally recognized pursuits, such as hunting, trapping, fishing and gathering are still a significant way of life. First Nations people are demographically one of, if not the fastest, growing segments of Canadian society and, comparatively, they are young and underemployed. First Nations want economic opportunities for the benefit of their youth and for the future of their communities and will support, partner in and lead development provided it is sustainable, environmentally

sensitive and respectful of their culture, language and traditions.

In addition, in recent years the federal and provincial governments have prioritized the need to redress past grievances and reconcile the rights and aspirations of Canada's Aboriginal people, including First Nations people, with those of the larger Canadian society. These initiatives of government are due in part to court decisions requiring governments to uphold the honour of the Crown and to respect and accommodate the rights of Aboriginal people in Crown actions and decision making. However, it is not just court decisions that are driving this governmental agenda, but the recognition that Canada's reputation, its strength as a nation and its long-term economic well-being will be adversely affected if these fundamental inequities are not addressed.

In this social and political context, forward thinking companies wanting to do business or access resources in traditional territories of First Nations are trying to find ways to work with those First Nations. They are consulting with First Nation governments, taking steps to minimize impacts arising from development and finding ways to benefit local First Nations and their members. In most instances the benefits arise from business and employment opportunities and often involve detailed commercial and contractual arrangements. Entering into such arrangements with First Nations raises some unique legal issues. The purpose of this article is to identify and discuss some of those issues.

(1). First Nation is another name for bands or tribes and First Nation members are Indians who belong to a First Nation. This paper is restricted in scope to a consideration of issues related to First Nations and does not address the other Aboriginal people of Canada, namely the Métis and the Inuit.

THE LEGAL STATUS OF FIRST NATIONS OR BANDS

One of the first issues that lawyers consider in crafting legal agreements is the capacity and legal status of the entities involved. Over hundreds of years the common law and statutes have brought a significant level of certainty to these questions in the normal business setting. The legal capacity of individuals, corporations, partnerships, joint ventures and governments are well established, as are the processes required to ensure that the commitments they make are legally binding and enforceable.

The law in relation to the legal status and powers of First Nations is not as well established. The *Indian Act* does not provide that a band is a legal entity, or that it has the powers of a natural person, or that it may be bound by the signatures of its proper officers. The absence of these provisions likely stems, in part, from the *Royal Proclamation* of 1763 in which the Crown, primarily to protect Britain's interests in unsettled territories, prohibited anyone from

purchasing lands from the “Nations or Tribes” except through the Crown. A justification for the *Proclamation* was that Indian nations could not make informed decisions in their own best interests, that they lacked legal capacity and required Crown protection. That paternalistic approach, which is the cause of much resentment, is reflected throughout the *Indian Act* and is one of the factors fuelling the drive to self-government.

Regardless of the cause, in the absence of such statutory provisions, the courts have been reluctant to pronounce that bands are “legal persons". They have struggled with the authority of Bands to sue and be sued in their own names. They have varied in their view about how bands exercise their authorities and when and how a Chief and Council can bind the band.

What is clear is that a band is not a corporation and cannot hold land in its own name. In the context of the Nova Scotia *Quieting Titles Act* and the meaning of “person,” Jones J. in *Afton Band of Indians v. A.G.N.S*. wrote at p. 309, “As a band does not have corporate status it cannot acquire or hold real property. Parliament could confer that power on bands as unincorporated associations but has chosen not to do so under the *Indian Act*."

In the context of court proceedings, there is a wealth of case law holding that bands are analogous to, or a unique type of, unincorporated associations. This case law emerged after the requirement in the *Indian Act* that anyone soliciting funds for Indian legal claims first obtain a licence from the superintendent general was repealed in 1951, and bands began filing law suits in their own names. Court rules allow unincorporated associations to sue and be sued; and by recognizing that bands could be treated as unincorporated associations the courts were able to hear and decide these claims.

The courts have also held that bands can be beneficiaries of a trust. In *Keewatin Tribal Council v. Thompson (City)*, a corporation was created to hold title to buildings as a trustee under a trust indenture in which a number of bands were designated as beneficiaries. The corporation claimed that it was exempt from municipal taxation because the buildings were held in trust for the bands. In response, the taxing authorities alleged, amongst other things, that the bands were only unincorporated associations, not legal entities, and could not qualify as beneficiaries.

The court found that “Indian bands are unincorporated associations, but, with rather special features. They are not like an ordinary club or association, existing by consent of its members, but are creatures of statute, namely the *Indian Act*” and have standing to sue, in their own names, as an unincorporated association. The fact that the band could sue was crucial. The validity of the trust depended on there being a beneficiary with legal standing to enforce the trust should it be required. Since bands could sue, they could be beneficiaries.

The ability of a band to hold shares in a corporation has also been questioned and may

depend on the specific corporations legislation. Under the British Columbia *Business Corporations Act* only "persons" are allowed to hold shares and the term "person" under the BC *Interpretation Act* does not include an unincorporated association. The term "person" under the Ontario *Business Corporations Act*, includes "unincorporated associations" and under the federal *Canada Business Corporations Act*, includes "associations". Since bands or First Nations have been considered as unincorporated associations for purposes of litigation, it is reasonable that they can hold shares in a corporation in any jurisdictions where such associations can hold shares. However, that view is not universally accepted and despite the complexity, it is fairly common practice for shares to be placed in the names of band councillors, or other legal entities, to hold in trust for the band. In some instances this is the result of tax planning, but the lack of certainty about capacity is also a factor.

Similarly, in relation to partnerships, the relevant partnership act must be reviewed to determine who has the legal status to be a partner. Under *The Partnership Act* in Manitoba, the term "person" expressly includes unincorporated associations, and therefore reasonably would permit bands to form legal partnerships, but that is not the case under the Alberta *Partnership Act* and *Interpretation Act*.

There is no definitive answer to this issue of legal status and capacity, but the law, both common and statute, seems to be evolving in a way that would facilitate First Nations participating more fully, and with less impediments, in the mainstream economy. However, until there is certainty about the legal status of bands, the issue will need to be carefully considered in any commercial contracts.

This is also a very sensitive issue with many First Nations. They may accept that under the *Indian Act,* reserve land is held by the Federal Crown for their use and benefit, but they resist the notion that they do not have full legal capacity. Regardless of the *Indian Act*, First Nations point out that prior to European contact they existed as autonomous self-governing Nations, that they had capacity as governments to hold land and to sign treaties disposing of their interests in their land and that they have never relinquished those powers.

CREATING BINDING CONTRACTS WITH BANDS

Although the *Indian Act* provides no express power for a band to enter into a contract, the courts have found such a power is necessarily incidental to the exercise of the powers given under that Act. In the case of *Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Stony Plain Indian Reserve No. 135*, the Band Council, on behalf of the Band, gave a guarantee. The court held at paragraph 8, that "Although the band council is clearly a creature of statute, deriving its authority solely from the *Indian Act* …, it by necessity must have powers in addition to those expressly set out in the statute."

However, with bands there is no indoor management rule and the power of chief and council to enter into contracts on behalf of the band is subject to compliance with section 2(3) of the *Indian Act*, which provides that, “unless the context otherwise requires or this Act otherwise provides … a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened". The consent of chief and council is often evidenced by a “Band Council Resolution” (BCR), but such a document is not conclusive evidence of compliance.

Strict compliance with this provision has generally been held as an essential prerequisite to the creation of a contract. As such, where there was no consent given by the councillors at a duly called meeting, there was no contract. The law in some more recent cases may be moving to a more flexible position where the courts could recognize and enforce equitable rights when the legal requirement has not been met. For example in *Maloney* v. *Eskasoni Indian Band*, the court did not require formal council approval of an employment contract where the Chief was authorized by the council to negotiate and conclude a contract on behalf of the Band and further found that bands could be bound by the actions of the Chief acting with ostensible authority. In reaching its decision the court, relying on the *McDiarmid Lumber* case, at paragraph 259, stated “it is not for the courts to expand on provisions in the *Indian Act* that make First Nations people, or their governments, exceptional figures in the marketplace”. However, this case does represent a major shift and is only a trial court decision.

From a commercial perspective, where certainty is important, obtaining a BCR evidencing consent to a contract is recommended. That BCR should recite that the decision it purports to document was in fact made by the majority of the council at a duly convened meeting and should be signed by the majority of the councillors. Even with this level of documentation, the validity of the decision can be put in question because there are no specific requirements in the Act relating to the calling of a meeting. As a consequence, BCRs and decisions have been questioned on the basis that the meeting was not duly called, or that one or more of the councillors was improperly excluded, or that there was no meeting and the BCR was simply circulated for signing.

This can also be a very sensitive issue with First Nations. Most accept the requirements of the *Indian Act* in relation to how they must consent, but some First Nations refuse to provide a BCR since that is not required under the Act. In some cases First Nations demand that their traditional decision making processes or their powers of self-determination be accepted. In some situations these concerns can be addressed through formal signing ceremonies where the members of Chief and Council attend the ceremony and sign the document as it is being signed by the other parties.

DOING BUSINESS ON RESERVES

Where the business opportunity being pursued requires occupying or building upon reserve land, it is important to be aware that the *Indian Act* provides that, except where a permit has been issued by the Minister, an agreement of any kind, which purports to permit a person, other than a member of that band, to occupy or use a reserve, is void. There are other provisions which allow reserve land to be surrendered to the Crown and then disposed of by the Crown to non-Indians, but except under ministerial permits, there is no way under the *Indian Act* for a non-Indian to acquire an interest in reserve lands.

There are some First Nations that are proceeding to self-government status under negotiated agreements with the Federal Crown and their reserves may fall under the provisions of the *First Nations Land Management Act*, but this legislation, which expressly gives the First Nations more control over its lands, currently applies only to a small group of bands.

In addition, it is important to be aware that Indian reserve lands generally fall under the jurisdiction of the federal government and only provincial laws of general application that are not inconsistent with the *Indian Act* and other applicable federal legislation, including regulations or by-laws in force under such federal legislation, are applicable on reserve. Considerable care must be taken when doing business on reserves that you are applying or conforming to the applicable legal requirements.
Doing business on reserve can have some positive tax benefits, because under section 87 of the *Indian Act* property of an Indian or a band on reserve, which includes income earned on a reserve by an Indian or a band, is not taxable. Although this exemption is not available to non-Indians, it is a factor that should be carefully considered when structuring agreements.

Finally, under section 81 of the *Indian Act* businesses on reserves may be subject to by-laws and regulations of the Band Councils and under section 83 subject to Band Council licensing and taxation powers. These powers of the Band Councils under the *Indian Act* are subject to ministerial or governmental approvals.

ENFORCEMENT OF MONETARY REMEDIES

When drafting a business contract, the prudent lawyer invariably asks what happens if one side or the other fails to meet its obligations. If the remedy for non-performance is monetary compensation and a party to the contract is an Indian or a Band, then consideration must be given to enforcement and collection. Under section 89 of the *Indian Act*, a creditor, other than an Indian or band, cannot charge, attach, seize or otherwise execute against the assets of an Indian or band that are “situated on a reserve”.

The “paramount location” test, commonly used in determining *situs* of property for the purposes of tax exemption, also applies to section 89 per *Mitchell v. Peguis Indian Band*. Determining the *situs* of an asset involves an examination of the pattern of use and the safekeeping of the property, meaning that it is possible for property to be situated on reserve within the meaning of section 89 even if not physically located on the reserve. The Supreme Court also identified, in *Williams v. Canada*, the importance of identifying and weighing the “connecting factors” between property and a reserve for the purposes of determining the *situs* of the property.

The practical reality is such that generally, property located on-reserve is exempt from seizure and property located off reserve can be seized or attached.

In addition to section 89 protections based on *situs* of property, there is also a deeming provision at section 90 of the *Indian Act* which protects personal property purchased by Her Majesty with Indian money or money appropriated by Parliament for the use and benefit of Indians or bands, as well as personal property given to Indians or to a band under a treaty or agreement between a band and Her Majesty. Such property is always deemed to be situated on reserve.

Where funds in a bank account are concerned, a survey of the existing case law suggests the location of the bank branch where the account is located is determinative. In *Joyes v. Louis Bull Tribe #439*, a Band held accounts with Peace Hills Trust in Hobbema (on-reserve) and Edmonton (off reserve). The Band argued that their intention was that all banking occurs at the Hobbema branch and the account at Edmonton was opened for the purpose of clearing “high volume cheque transactions”. The court found the intentions of the Band Council were not relevant; what was relevant was whether the account was in fact located on reserve. As a result, the Edmonton account was not exempted from garnishment proceedings.

In *Borden & Elliot v. Temagami First Nation*, funds were received and held by a general partner and subsequently distributed to the Band, among other limited partners. The creditor argued the funds were not the property of the Band until distribution and that, as the general partner is not an Indian or a Band, any monies held by it are not exempt from garnishment. The creditor also argued that the revenue generated from a commercial activity (casino), was not the kind of revenue that ought to be protected by the *Indian Act*. The court held “there is no criterion concerning the source or nature of the funds to be exempted from seizure like, for example, funds generated in the commercial mainstream” and further held the Band’s share in the funds represented an intangible asset considered to be property under section 89. In the result, the funds were exempt from garnishment under section 89 because the funds were located on reserve and held for the benefit of the First Nation.

While the protections of section 89 are broad, there are certain exemptions from protection which can assist in obtaining security for a creditor. First, if the creditor is an Indian or band,

the protections of section 89 do not apply and the real or personal property of an Indian or band is subject to charge, attachment or seizure. This does not mean that a claim on the debt could be assigned to a status Indian or band in order to bypass section 89 and seize property. Secondly, under section 89(1.1), a leasehold interest in "designated lands" under the *Indian Act* is not protected from seizure, execution or enforcement under section 89. Similarly, under section 89(2), personal property sold under a conditional sales agreement is not protected by section 89.

It is also possible for the protection from seizure to be waived. In *Tribal Wi-Chi-Way-Win Capital Corp. v. Stevenson*, Stevenson signed an authorization and consent waiving his section 89 rights. The court held that an Indian can effectively waive the protection of section 89 with respect to commercial transactions on reserve. In doing so, the court relied on *McDiarmid Lumber Ltd. v. God's Lake First Nation*, and the finding that provincial credit regimes are designed to apply universally and, unless expressly excluded by the *Indian Act*, apply to Indian property.

The rationale in the *McDiarmid Lumber* case reflects the apparent direction of the courts and the law in Canada.

CONCLUSION

Additional legal challenges will arise when doing business with First Nations; however, these challenges are by no means insurmountable in developing positive economic relationships between industry and First Nations. In fact, such challenges create opportunity - recognizing the partnerships which existed in the creation of a Canadian economy and re-connecting in a manner which brings those historic partnerships full circle to a point of positive impact, benefits and interaction between First Nations and Canadian society as a whole.

This article was written by TDS lawyers Bob Adkins, Q.C., Michael Sinclair, Q.C., and Sacha R. Paul, and appeared on Page 83 of The 2010 Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada and is reproduced with permission.

---

constitute legal advice or solicitation and does not create a solicitor client relationship. The views expressed are solely the authors' and should not be attributed to any other party, including Thompson Dorfman Sweatman LLP (TDS), its affiliate companies or its clients. The authors make no guarantees regarding the accuracy or adequacy of the information contained herein or linked to via this article. The authors are not able to provide free legal advice. If you are seeking advice on specific matters, please contact Keith LaBossiere, CEO & Managing Partner at kdl@tdslaw.com, or 204.934.2587. Please be aware that any unsolicited information sent to the author(s) cannot be considered to be solicitor-client privileged.

While care is taken to ensure the accuracy for the purposes stated, before relying upon these articles, you should seek and be guided by legal advice based on your specific circumstances. We would be pleased to provide you with our assistance on any of the issues raised in these articles.