

**BAND COUNCILS AND CORPORATE GOVERNANCE:
CHOOSING THE RIGHT FORM**

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I. Introduction

Many reasons motivate Bands¹ to create other business entities, such as corporations, and the reasons are usually unrelated to tax. The entity can be meant to put certain operations at arm's length from the political process and the Band Council, to take advantage of certain programs and subsidies, or to satisfy a business partner's needs.

However if the operation is a business which is likely to generate profits, the tax implications are crucial. No business wants to pay more tax than it is required to by law and a number of exemptions, especially section 87 of the *Indian Act*, can make it possible to avoid most or all tax. In addition, section 89 protects a Band's assets from seizure if their principal location is on reserve. These exemptions can be used even while working with other parties by using structures such as partnerships.

On the other hand, if the tax exemption under the *Indian Act* cannot apply, incorporation should be considered based on its other advantages. However the corporate structure still needs to be carefully designed to serve the community's best interests. In addition, the corporation's business arrangements can be structured to minimize tax and protect its assets.

II. What is a Band?

A. Under the *Indian Act*

Most statutes refer to the rights of individuals or of persons, which includes both individuals and corporations as legal persons.

However a Band under the *Indian Act* is neither an individual nor a corporation, nor even an unincorporated association: *Williams v. Lake Babine Indian Band*, [2000] 1 C.N.L.R. 233 (B.C.S.C.); *Montana Band v. Canada*, [1998] 2 F.C. 3 (T.D.).

Nevertheless the courts have held that a Band acting through its council has many of the powers of a person, including the power to enter into contracts and to own property, because those powers are necessary to carry out the *Indian Act*: ; *Public Service Alliance of Canada v. St. Regis Indian Band Council*, [1982] 4 C.N.L.R. 94 (S.C.C.); *R. v. Peter Ballantyne Band*, [1987] 1 C.N.L.R. 67 (Sask. Q.B.); *Telecom Leasing v. Enoch Indian Band*, [1994] 1 C.N.L.R. 206 (Alta. Q.B.).

But if carrying out those powers includes certain obligations which a statute defines as belonging to a person, those obligations will also be imposed on a Band. For instance, Bands must pay employment insurance premiums for their employees like any person who is an employer:

¹I have used the term "Band" rather than "First Nation" because I am referring to the entities recognized under the *Indian Act* whereas for many Aboriginal peoples, their Nation is something different.

Minister of National Revenue v. Iroquois of Caughnawaga, [1977] 2 F.C. 269 (C.A.), 9 C.N.L.C. 192.

B. Under land claims and self-government agreements

The rules are often different where a land claims or self-government agreement is in force.

For instance, as a result of special legislation passed after the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement, the Cree and Naskapi Bands are corporations and they have the powers of a natural person (or individual): *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c. 18, ss. 12, 14, 22(1).

Each of the Yukon First Nations with a self-government agreement in place is defined as a “legal entity having the capacity, rights, powers and privileges of a natural person”: *Yukon First Nations Self-Government Act*, S.C. 1994, c.35, s.7.

Similarly, the Westbank First Nation Self-Government Agreement signed in 2003, provides (at s.19) that Westbank “is a legal entity with the rights, powers and privileges of a natural person” and specifically recognizes its power to enter into contracts, buy and sell property and deal with trusts: *Westbank First Nation Self-Government Act*, S.C. 2004, c. 17, in force as of April 1, 2005 by virtue of SI/2005.

C. Consequences

As discussed below, the exemption from taxation and seizure on reserve only applies to Indians or their Bands acting through their Councils.

These are very significant protections: if a Band with a profit-making business on reserve ensures it remains tax-exempt, it will also be able to keep more of the profits for other community purposes. If a Band-owned business with expensive equipment can keep that equipment in the Band’s name and located principally on reserve, it can protect that equipment from seizure by an unhappy creditor.

At the same time, however, certain activities cannot be carried out by Bands directly or through their councils if they are legally required to be carried out by “persons”.

An important example concerns reserve lands governed by the *Indian Oil and Gas Act*, R.S.C. 1985, c.I-7: a Band or a Band Council cannot undertake oil and gas development directly because under s.2 of the *Indian Oil and Gas Regulations, 1995*, SOR/94-753, an operator “engaged in an activity related to the exploitation of oil or gas on Indian lands” must be a corporation or an individual.

The practice of Indian Oil and Gas Canada is therefore to require a First Nation which wishes to carry on oil and gas operations on its reserve to do so through a Band-owned corporation: Brown

and Strother, *The Taxation and Financing of Aboriginal Businesses in Canada* (Toronto: Carswell, 1998) at § 22.5.

Similarly, in Quebec the Cree and Naskapi Bands only have the right to engage in commercial activity where it is related to the management or administration of their Category IA lands or to providing public services to residents of Category IA lands. In order to carry on other commercial activities, they must generally set up other corporations in which they own shares: *Cree-Naskapi (of Quebec) Act*, s. 22(2) and (3).

III. Exemptions from taxation and seizure under the *Indian Act*

A. Introduction

Under section 87 of the *Indian Act* “the personal property of an Indian or a band situated on a reserve” as well as any interest of an Indian or a band in reserve lands are exempt from taxation; the exemption applies whether the taxes are federal, provincial or municipal.

Under section 89, no-one other than another Indian or a Band may seize the property of an Indian or a Band “situated on a reserve.”

(Similar exemptions apply under ss.188 and 189 of the *Cree-Naskapi (of Quebec) Act*.)

As stated above, these exemptions can offer important protection to Band-owned businesses.

The key issues in determining how far the exemptions apply are:

- what is the personal property of a Band or an Indian?
- what is a tax?
- when is it situated on reserve?

B. Not available to corporations

A corporation is a legal person which is distinct from its owner. As a result, it cannot benefit from the tax exemption under s.87 of the *Indian Act*, whether it is owned by the Band or a member: *R. v. Kinookimaw Beach Association*, [1979] 4 C.N.L.R. 101 (Sask. C.A.).

Similarly, a corporation’s property is not exempt from seizure under s.89 of the *Indian Act*: *First Nations Farm Credit (Manitoba) Corp. v. McKay*, [2001] 3 C.N.L.R. 114 (Man. Master).

C. What is personal property?

The personal property exempted from taxation includes not just physical objects but also services, as well as income such as wages and income replacement such as employment insurance. In a well-known case, the court decided that electricity delivered on a reserve was tax-free “personal property”, even though it cannot be seen or felt: *Brown v. The Queen* (1979) 107 D.L.R. (3d) 705 (B.C.C.A.).

As a result, an unincorporated Band-owned business on reserve can acquire most of its goods and services free of sales tax and its status Indian employees can earn their wages free of income tax.

However the tax exemption does not apply to every form of property controlled by an Indian on reserve. Despite the *Indian Act* tax exemption, on-reserve businesses must collect sales tax from non-Indian customers: *Johnson v. Nova Scotia (Attorney General)*, 170 D.L.R. (4th) 167 (N.S.C.A.). Like other businesses, they can claim input tax credits for the Goods and Services Tax (GST) paid on purchases they made in carrying out their business and must remit the balance to the government.

Retailers on reserve must also pre-pay sales tax on certain products such as gasoline and tobacco, even if they are selling on reserve. If the retailer’s customer is an Indian, the transaction should be tax-free and the retailer will receive a refund; if the customer is not an Indian, the sales tax must be paid even on reserve. The courts have held that in either case, the retailer does not actually pay the tax, but instead acts as an agent of the government to collect the tax: *Union of Nova Scotia Indians v. Nova Scotia (A.-G.)* (1988), 54 D.L.R. (4th) 639 (N.S.S.C.); *Bomberry v. Ontario (Minister of Revenue)* (1989), 63 D.L.R. (4th) 526 (Div. Ct.).

D. What is a tax?

It is clear that section 87 of the *Indian Act* applies to income tax and to sales taxes such as the GST.

However not every amount collected by the government is a tax and some amounts will therefore be payable by Indians or Bands even for property situated on reserve. For instance, Indians are not exempt from paying duty on imported goods because the Supreme Court of Canada held in *Francis v. The Queen* [1956] S.C.R. 61, 5 C.N.L.C. 170, that “customs duties are not taxes imposed upon the personal property of an Indian situated on a Reserve but are imposed upon the importation of goods into Canada.” (Currently, Indians must also pay GST on imported goods, which is collected by Canada Customs.)

Businesses owned by Indians must register as vendors in order to collect the GST from the customers, like all other businesses, provided their sales are more than \$30,000 per year: *GST/HST Technical Information Bulletin*, B-039R, 25 November 1993, “GST Administrative

Policy: Application of GST to Indians”. This requirement applies whether the business is a corporation, a partnership or a sole proprietorship.

In addition, fees such as business licenses fees are generally not considered to be taxes and must usually be paid by on-reserve businesses. The courts have also held that Employment Insurance and worker’s compensation premiums are not taxes, even if all employers must pay them. Instead they are premiums owed under a mandatory and universal insurance scheme and Band Councils are obliged to pay them like all other employers: *Minister of National Revenue v. Iroquois of Caughnawaga*, [1977] 2 F.C. 269 (C.A.), 9 C.N.L.C. 192; *Commission de la santé et de la sécurité du travail c. Nation Crie de Chisasibi*, [2000] 1 C.N.L.R. 91 (Que. S.C.).

An amount levied by government is a tax, rather than a fee, if no connection exists between the amount charged and the cost of the service provided.

For instance, the provincial governments in Newfoundland, Quebec, Ontario and Manitoba charge employers a tax based on total payroll in order to pay for health care. This amount is not a fee because it bears no relationship to the health services provided to the employees. Since it is a payroll tax – not a health insurance premium – it does not apply to Indian employers on reserve. This has been recognized by the Quebec government in *Interpretation Bulletin*, RAMQ.34-5/R1, “Contribution to the Health Services Fund by Certain Indian Organizations”.

E. When is property “situated on a reserve”?

1. Sales taxes

When a sales transaction takes place on reserve, it is tax exempt no matter where the property is later used. Sales tax therefore does not apply to automobiles sold on reserve, for instance, even if they are driven elsewhere: *Danes v. The Queen in right of British Columbia*, [1985] 2 C.N.L.R. 18 (B.C.C.A.).

The exemption can depend upon the moment when the goods become the property of a Band. If this occurs outside the reserve, the transaction is normally subject to sales tax. On the other hand, if the goods will not become the Band’s property till they are delivered on the reserve (for instance, “C.O.D.” or cash on delivery), the transaction is tax exempt: *Kamloops Indian Band v. British Columbia*, [1988] B.C.J. No. 645 (QL) (B.C.S.C.).

In addition, property paid for off-reserve but delivered to the reserve by the seller will be exempted from the goods and services tax (GST) under a policy adopted by the Canada Customs and Revenue Agency (CCRA). If the Indian purchaser uses his or her own vehicle to transport the property to the reserve, the acquisition will be subject to the GST.

The requirement of delivery to reserve is also waived for certain retailers who are not located on a reserve but make a significant portion of their sales to Indians, especially businesses in remote locations.

Finally, GST is charged when individuals pay for services such as lawyers or accountants that are not performed entirely on reserve (unless the services are related to on-reserve lands). However when a Band or band-empowered entity pays for services in support of Band management activities, the GST is also waived.

This federal policy was stated in *GST/HST Technical Information Bulletin*, B-039R, 25 November 1993, “GST Administrative Policy: Application of GST to Indians”, which has been consistently applied since that time. In addition, in New Brunswick, Newfoundland, Nova Scotia and Quebec, provincial sales tax is harmonized with the federal government’s GST, so the same policy is applied. See: Revenue Quebec’s *Interpretation Bulletin: Consumption Taxes*, TVQ.16-17/R2, 28 April 2000, “Rules relating to Indians”.

It is important to note that some parts of the GST Administrative Policy go further than the *Indian Act* itself and waive GST on transactions which would not necessarily be exempt under section 87. Since a policy is not law, it can be changed at any time.

2. **Income taxes**

It will often be difficult to determine the location of property which is not a physical object, such as income from business or employment. For income in particular, the courts have devised the “connecting factors” test to decide whether it should be characterized as situated on a reserve.

The issue can be just as complex for business and employment income whenever the Indian owner or employee spends a significant amount of time off reserve. Generally, the further the work performed or service offered is from the reserve, the more reluctant the courts have been to apply the exemption.

The court held that an Indian whose business consisted of providing logging services to a single client and who did all of the logging off reserve did not earn his income on reserve, even if he did some administrative work connected to the business at home on reserve and kept his tools there: *Southwind v. The Queen*, [1998] 2 C.N.L.R. 233 (F.C.A.).

Investment income is not necessarily tax exempt even if it is invested through a financial institution located on reserve. The courts have decided, for instance, that interest earned by an individual on term deposits originate in the commercial mainstream off-reserve because they represented payments made by the bank’s borrowers across Canada: *Recalma v. Canada*, [1998] 3 C.N.L.R. 279 (F.C.A.).

Where the issue is whether employees are entitled to the tax exemption, the determination must be made by the Canada Revenue Agency and the employer is not entitled to decide alone whether its employees are tax-exempt under the *Indian Act*. Section 153 of the *Income Tax Act* obliges anyone paying wages to make deductions at source unless the Minister of National Revenue has authorized another procedure: *Grand Council of the Crees (of Quebec) v. M.N.R.*, 90 DTC 1653 (T.C.C.).

3. Seizure of property

Currently, the *Indian Act* allows an Indian or a Band to locate an asset “on any reserve in Canada, even if he has no connection whatever with it or its residents, and so exempt the asset from seizure”: *Alberta (Worker's Compensation Board) v. Enoch Band*, [1994] 2 C.N.L.R. 3 (Alta. C.A.).

For instance, a Band's or an Indian's bank account is exempt from seizure if the account is in a bank or credit union on any reserve: *Canadian Imperial Bank of Commerce v. E. & S. Liquidators Ltd.*, [1995] 1 C.N.L.R. 23 (B.C.S.C.); *Compagnie d'accoustique et de partitions unies Inc. c. Mohawk Council of Kanesatake*, 2005 IIJCan 17122 (C.Q.)

The issue is slightly more complex if the asset regularly leaves the reserve. The Supreme Court of Canada has held it is “the pattern of use and safekeeping of the property” which will determine whether its “paramount location” is on the reserve: *Mitchell v. Peguis Indian Band*, [1990] 3 C.N.L.R. 46 (S.C.C.).

For instance, school buses used by Bands to transport children from the reserve to schools located elsewhere have been held exempt from seizure even when they are temporarily parked off reserve: *Wahpeton Dakota First Nation v. Lajeunesse*, [2002] 3 C.N.L.R. 285 (Sask. C.A.); *Kingsclear Indian Band v. J.E. Brooks & Associates Ltd.*, [1992] 2 C.N.L.R. 46 (N.B.C.A.).

4. The deeming provision for treaty moneys

Property can sometimes be “deemed” to be on reserve and exempt from taxation and seizure even if it is held elsewhere. Section 90 of the *Indian Act* provides that personal property that was “given to Indians or to a band under a treaty or agreement between a band and Her Majesty shall be deemed always to be situated on a reserve.”

However this addition to the exemption has been very narrowly applied by the courts. The money or property must be from the federal government, not from the province: *Mitchell v. Peguis Indian Band*, [1990] 3 C.N.L.R. 46 (S.C.C.).

In addition, the money or property must be paid under a treaty or an agreement attached to a treaty. It is not enough, for instance, for a Band to receive money under a comprehensive funding arrangement (CFA) – there must be an explicit connection with the Band's treaty rights and the funding arrangements must arise out of Canada's treaty obligations: *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2005] M.J. No. 29 (QL) (C.A.); *Kakfwi v. Canada*, [2000] 1 C.N.L.R. 140 (F.C.A.).

In practice, therefore, section 90 will rarely apply so as to make off-reserve property exempt from taxation or seizure.

5. Can a Band ever be a taxpayer?

The basic rule under s.2 of the *Income Tax Act* are that income tax shall be paid on the taxable income “of every person resident in Canada” and on any “person's taxable income earned in Canada” who is not a resident. But a “taxpayer” is generally defined as a “person” under s.248(1) of the *Income Tax Act*.

Unless organizations such as partnerships, unincorporated associations or trusts are specifically designated liable for tax under the *Income Tax Act*, they cannot be taxpayers because they are neither natural persons (individuals) nor legal persons (corporations). This was the basis on which the Tax Court of Canada held that a partnership resident France could not be a non-resident person liable for tax: *Gillette Canada Inc. v. Canada*, [2001] 4 C.T.C. 2884, [2001] T.C.J. No. 699 (QL) (T.C.C.), affirmed on other grounds [2003] 3 C.T.C. 27, [2003] F.C.J. No. 61 (QL) (F.C.A.).

It is therefore an open question whether a Band would ever be liable for tax even for income earned off-reserve, since under the *Indian Act* it is not a legal person and does not meet the definition of taxpayer in the *Income Tax Act*.

On the other hand, testing this issue would be a risky undertaking for a Band which earned significant profits. The Supreme Court of Canada has insisted on “assessment of taxpayers’ transactions with an eye to commercial and economic realities, rather than juristic classification of form”: *Bronfman Trust v. The Queen*, [1987] 1 S.C.R. 32. The Supreme Court has also held that a Band is bound by statutes which refer only to persons, if that statute regulates powers a Band must exercise to carry out its duties. As a result, a Band’s power to hire employees included the obligation to allow them to be unionized: *Public Service Alliance of Canada v. St. Regis Indian Band Council*, [1982] 4 C.N.L.R. 94 (S.C.C.).

IV. Other tax exemptions

A. The income tax exemption for certain Band-owned corporations

1. Treated like a municipality

Corporations which are at least 90 per cent owned by municipalities are tax-exempt under the *Income Tax Act*, s.149(d.5).

The Tax Court of Canada decided in 1994 that Indians Bands are included within the definition of municipality for tax purposes: *Otineka Development Corporation v. Canada*, [1994] 2 C.N.L.R. 83. Since then, the Canada Revenue Agency has given the same tax treatment to Band-owned corporations as to municipally-owned corporations. (However this has not changed the fact that Indian Bands are a distinct form of government and are not municipalities.)

Unlike the definition of "band-empowered entity" under the GST policy, a Band-owned corporation treated as municipally-owned can be exempt from income tax even if it is engaged in commercial activities, provided it meets the other criteria.

2. **Restricted to within reserve boundaries or certain joint ventures**

The tax exemption for municipally-owned corporations has been narrowed since the *Otineka* case was decided. Now the corporation may not ordinarily earn more than 10 per cent of its income outside the municipal boundaries (or the reserve for a Band-owned corporation) or else the exemption will not apply.

However certain joint ventures will benefit from the exemption under s.149(1.2) even if their operations are carried on outside a municipality's boundaries or outside the Band's reserve and are carried on:

- with another municipally- or Band-owned corporation and within that municipality's boundaries or the other Band's reserve;
- with the federal government or its Crown corporations, for operations carried anywhere in Canada;
- with a provincial government or its Crown corporations, for operations anywhere within that province.

In addition, a municipally- or Band-owned corporation will be exempt from tax for income it earns anywhere in Canada as a producer of electrical energy or natural gas, or as a distributor of electrical energy, heat, natural gas or water, provided that the operations are provincially-regulated.

3. **Not applicable to provincial income tax in Quebec at present**

The Quebec government has refused to apply the *Otineka* decision under identical provisions of the provincial income tax statute. The Quebec Court of Appeal upheld this restrictive interpretation and held that the *Taxation Act's* definition of municipality cannot be read as if it included a Band: *Tawich Development Corporation v. Quebec (Deputy Minister of Revenue)*, [2000] 3 C.N.L.R. 383 (Que. C.A.).

The current legal situation in Quebec is therefore that a Band-owned corporation will be exempt from federal income tax if it operates predominantly on reserve or is involved in a joint venture as described above, but the same company remains taxable at the provincial level.

As a result of the *Tawich* decision, the federal government has proposed amending s.149(1)(d.5) of the *Income Tax Act* to refer to any "municipal or public body performing a function of government in Canada," a definition meant to include Band councils: Department of Finance

Canada, *Explanatory Notes to the Legislative Proposals and Draft Regulations Relating to Income Tax*, February 2004. It is likely that once this occurs, Quebec will amend the provincial tax statute to bring it into line with the amended federal rules.

B. The income tax exemption for non-profit organizations

A non-profit organization is exempt from tax under the *Income Tax Act*, s.149(1)(l), provided that is organized and operated exclusively “for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit” and provided that its income is not available for the personal benefit of its members. In addition, registered charities are tax-exempt under s.149(1)(f).

The fact that a corporation operates a business and even generates a surplus from its operations will not disqualify it from treatment as a non-profit depending on the purpose for which the corporation is operated.

A Band in northern Ontario set up a non-profit corporation whose purposes included:

To promote the economic and social welfare of persons of native origin who are members of the Gull Bay Indian Reserve (No.55) and to provide support for recognized benevolent and charitable enterprises, federations, agencies and societies engaged in assisting the development, both economic and social, of native people who are members of the Gull Bay Indian Reserve (No.55).

In order to serve that purpose, the Gull Bay Development Corporation established a viable commercial logging operation to provide employment and training for members of the community but more than half of their time was spent on community activities such as cleaning up the reserve or cutting wood for elderly residents. The company made profits which provided funding for on-reserve programs established to give food, clothing and other necessities to needy Band members and for educational excursions that for school children.

The Federal Court ruled that it was a tax-exempt non-profit organization: *Gull Bay Development Corporation v. The Queen*, [1984] 1 C.N.L.R. 74 (F.C.T.D.).

On the other hand, if a business generates significant and regular income, it will face certain challenges if set up as a non-profit corporation. A non-profit organization must always be able to satisfy the Canada Revenue Agency that it is fulfilling its purpose and that it does not confer any direct benefits on its members. As a result, a successful business set up as a non-profit would have to put considerable energy into giving away its retained earnings because it is not allowed simply pass them on to members in the same way that a for-profit corporation pays dividends.

C. The GST exemption for Band-empowered entities

As discussed above, the tax exemption under section 87 of the *Indian Act* belongs only to individual Indians and to Bands: corporations have no right to the exemption, even if they are the property of Indians.

Nevertheless certain "band-empowered entities" will be exempted from the GST when purchasing goods or services for "band management activities", under the policy stated in *GST/HST Technical Information Bulletin*, B-039R, 25 November 1993, "GST Administrative Policy: Application of GST to Indians." The same policy applies to provincial sales tax in New Brunswick, Newfoundland, Nova Scotia and Quebec which are harmonized with the GST.

For a corporation to be treated as a "band-empowered entity", it must be owned or controlled by a band, a tribal council, or a group of bands other than a tribal council. In addition, to be treated as "band management activities", the activities or programs it undertakes must be non-commercial.

In practice, therefore, only non-profit corporations owned by a Bands will be exempt from paying the GST. As discussed above, this policy is not law and can be changed at any time.

V. Choosing the right business structure

A. Introduction

As discussed above, a corporation is a legal person which is distinct from its owner. Therefore a corporation cannot benefit from the tax exemption under s.87 of the *Indian Act*, nor the exemption from seizure under s.89, whether or not it is owned by a Band.

On the other hand, also as discussed above, an *Indian Act* Band is neither an individual nor a corporation and therefore cannot always carry out the functions reserved by law to natural persons (individuals) or legal persons (corporations).

B. The Band's sole proprietorship

Any individual carrying on business alone and in his or her own name is automatically operating as a sole proprietor. The same principle would apply to a Band acting on its own or through its council.

No legal formalities are involved in this structure. For tax purposes, the sole proprietorship is by far the simplest means of taking advantage of the *Indian Act* exemption because the business is not distinguished from the Band itself. To the extent that the income earned from the business can be defined as "situated on reserve", it will be tax exempt.

A sole proprietorship which carries on business under a trade name other than its owner's – but without incorporating – must usually register that name with a provincial registry of business names. Such registration has no effect on *Indian Act* exemptions because the business remains a sole proprietorship: it merely acquires the legal right to do business under a name other than that of the individual or Band which operates it.

For most people, the disadvantage of a sole proprietorship is that it leaves the individual fully responsible for all the debts and obligations of his business. While the creditors of an incorporated business can usually seize only the corporation's assets in payment of a business debt, the creditors of a sole proprietorship could also seize the individual's personal possessions, such as his home.

However this issue is less of a concern for a Band or an Indian on reserve because under s.89 of the *Indian Act*, their personal property on a reserve is not subject to seizure by creditors other than another Indian or Band.

C. Partnerships

1. Definition

A partnership is a business formed when two or more persons agree to combine their resources in a business. A partnership can be created by verbal agreement although it is preferable to use a written contract to settle issues such as who will manage the business, how control will be shared and how profits will be divided and debts paid.

The partners can be individuals, corporations or a Band, or any combination of these. For instance, a Band could form a partnership with a corporation or an individual; a partnership could even be formed between a Band-owned corporation and another company. In addition, several Indians could set up an on-reserve business together through a partnership rather than founding a company.

Partnerships take two forms. The first is a general partnership, in which all members share the management of the business and each is personally liable for all the debts and obligations of the business.

The second form is a limited partnership, in which those referred to as "general partners" control and manage the business, while those referred to as "limited partners" contribute only capital, take no part in control or management and are liable for debts only to a specified extent. A limited partnership cannot be created without a written agreement.

2. Tax treatment

For income tax purposes, each partner's share of partnership income or losses is reported separately after calculating the total. This makes the partnership an attractive alternative to corporations where Bands or Indians on reserve wish to undertake business ventures together or with outside interests.

The profits from a partnership which were owed to the Indian partner would be tax exempt – provided that the profits were earned on reserve – and even though a non-Indian partner would owe income tax on the same amounts.

As a result, they could – within reasonable limits – arrange their affairs to allocate more of the profits to the tax-exempt Band-owned corporation and more of the deductible losses to the taxable outside company: Brown and Strother, *The Taxation and Financing of Aboriginal Businesses in Canada* at § 14.2, 16.2.

3. Exemption from seizure for assets

As discussed above, the property of a Band or an Indian which is principally located on reserve is exempt from seizure but a corporation's or a non-Indian's is not.

Where, for instance, a Band entered into a partnership for an on-reserve business which involved expensive equipment, placing that equipment in the Band's name would probably protect it from seizure by creditors. So far only one decision by the courts has addressed how the *Indian Act's* exemption from seizure would apply to property of a partnership owned by both Indians and non-Indians.²

If all the partners were Indians and the property was situated on reserve, the exemption of the partnership's assets from seizure by creditors would clearly apply.

On the other hand, the exemption from seizure can also limit the availability of financing since lenders prefer that a borrower put up his property as security for loans. In addition, the most likely tax-deductible losses for the non-Indian partner to claim will usually be the capital cost allowance on equipment, which the non-Indian partner would therefore want in its name.

²The Court of Quebec upheld a seizure on the grounds that the bank account of a partnership made up of both Indians and non-Indians belongs to the partnership and not to an Indian: *9060-1766 Québec inc. (Loutec) c. Cleary, faisant affaire sous la raison sociale Forestiers C.C.M.*, [2003] J.Q. No. 13523 (QL) (C.Q.). However this decision is impossible to reconcile with another case which held that a joint account can only be garnished to the extent of the judgment debtor's contribution: *Poulin c. Bouchard*, J.E. 2001-262 (C.Q.). In any case, the general rule in the common law provinces is that the property of a partnership cannot be seized by creditor who has obtained judgment against only one of partners: *Hoon v. Maloff Const. & Builders Supplies Ltd.*, (1964) 42 D.L.R. (2d) 770 (B.C.S.C.).

D. Corporations

1. Definition

A corporation can be formed by one or more people who become its shareholders (if it is for profit) or its members (if it is not-for-profit) and who choose the directors.

A share corporation distributes its profits to the shareholders through dividends but a not-for-profit corporation must be run without financial benefit to its members.

A corporation is a legal entity that is separate from its owners, the members or shareholders. No shareholder or member of a corporation is personally liable for the debts simply because he owns shares or is a member.

Since it is a separate legal entity, a corporation cannot benefit from the Indian status of its members or shareholders. The courts have repeatedly held they will not “lift the corporate veil” to see who is behind it; this rule applies whether the corporation is owned by an individual Indian or the Band.

2. Income tax issues for a Band-owned corporation

As stated above, since a corporation is a legal person distinct from its owners, a Band-owned corporation will not be entitled to the tax exemption under s.87 of the *Indian Act*.

A number of other measures to reduce or eliminate income tax liability for a Band-owned corporation are possible, which are set out in more detail in the discussion of “Other tax exemptions” above.

Briefly:

- a non-profit corporation’s income would not be taxable but making profits could not be its primary purpose and those profits could not be distributed directly to members;
- a Band-controlled non-profit corporation situated on reserve would be exempt from GST on its supplies, even purchased off-reserve;
- a for-profit corporation owned by the Band would not have to pay tax provided that its income from activities outside the boundaries of the reserve did not exceed 10 per cent of the annual total;
- even operating off-reserve, a for-profit corporation would not have to pay tax if its income was earned with another municipally- or Band-owned corporation and within their municipal or reserve boundaries, with the federal government or its Crown corporations anywhere in Canada, with a provincial government or its Crown

corporations anywhere in that province, or as a regulated producer of electrical energy or natural gas or distributor of energy or water anywhere in Canada

In addition, the small business deduction (SBD) applies to any corporation which is Canadian-controlled, not traded on the stock market and has less than \$15 million in assets (or taxable capital). This deduction lowers the basic federal tax rate on the first \$275,000 of active business income to 12 per cent.

Finally, the tax status of profits distributed to a Band as the shareholder of a for-profit corporation is not clear. As described above, it is an open question whether a Band is liable for tax on income earned off-reserve, since it is not a legal person and does not meet the definition of taxpayer in the *Income Tax Act*.

It is also possible to shield some profits from tax by remitting them to the Band in a form which would be tax-deductible, such as management fees or equipment rental, but only to the extent that the amounts were reasonable.

3. Protecting the assets of Band-owned corporations

As stated above, since a corporation is a legal person distinct from its owners, a Band-owned corporation does not benefit from protection under s.89 of the *Indian Act* which prevents the seizure of Band-owned property situated on reserve.

The assets of a Band-owned corporation could therefore be seized by its creditors, even if they were kept on the reserve. On the other hand, this fact would also make it easier to obtain financing because lenders are reluctant to finance the purchase of assets which they cannot take as security for payment of the loan.

In addition, the assets could be protected from seizure provided their principal or “paramount” location was on reserve and were either leased to the corporation or provided through a conditional sales agreement so that they remained Band property.

4. Employment issues

If a Band chooses to operate a business through a corporation, it is important to treat company employees as being answerable only to the corporation’s directors or management. A Band council which does not respect the distinction between its direct authority over its own employees and its rights as the corporation’s shareholder can create problems for itself.

In one case, the Band Council rather than the company’s board of directors decided to fire the senior employee of a Band-owned corporation. As a result, the court held that the Council was held jointly liable with the corporation for damages owed to the former employee for wrongful dismissal: *Lespérance v. Waswanipi Dev. Corp.*, [1998] J.Q. No. 4011 (QL) (C.A.).

Another reason to respect the boundary is to remain clear about the applicable law. A Band or Band council is a federally-regulated enterprise subject to the *Canada Labour Code*. For any corporation, however, jurisdiction will depend on the nature of its business and not the identity of its owner. Since the majority of businesses are under provincial jurisdiction (with a few exceptions such as aviation, broadcasting or interprovincial transport), the employment relations of Band-owned corporations will usually be subject to provincial law.

If lines of authority are not made clear, confusion can arise not just over whose employee a person is – the Band's or the corporation's? – but over the law which applies to his employment. A Band which preferred to retain more authority could hire employees directly and lease their services to its corporation, but such arrangements should be made in writing and deal with liability.

5. Governance issues

Not only is a corporation a legal person distinct from its owners, but it is answerable only to its shareholders or members. In particular, there is a difference between a corporation which is meant to operate for the benefit of a Band and a corporation which is owned or controlled by the Band.

If the intention is for the corporation to be directly controlled by the Band, it is preferable for its shares to be owned by the Band as represented by its council or, if the corporation is not-for-profit, that the members be the councillors of the Band as elected from time to time by the members of the Band. This method ensures that the council elected by the Band also controls the corporation.

Some communities wish to put control of the corporation at arm's length from the elected politicians. With this approach, however, there is always a risk that legal control will simply end up in the hands of a different group and which is not any more and can even be less accountable to community members.

An example about the confusion which can arise as to who controls a corporation established by a Band is found in a dispute which went all the way to the Ontario Court of Appeal. The Wasauksing First Nation had leased part of its reserve as cottage lots and created as a separate corporation to hold the head-lease, carry out the leasing and manage the rental income. For several decades, the Band councillors acted as the corporation's directors but in fact, legally the corporation's only members were the founders. After financial problems arose, the council decided that the corporation's affairs should be separated from those of the Band, though the chief at the time and some other individuals were added as members of the corporation. After an election and further financial problems, the new Band council sought to take control of the corporation and use its income for Band purposes but the corporation's members and directors, led by the immediate past chief, refused.

The Wasauksing First Nation was unsuccessful in its arguments that all Band members were also members of the of the Wasausink Lands corporation and they were also unsuccessful in arguing that the chief and council were the rightful directors of the corporation. The court held that whatever the practice had been, legally the members and directors were determined by the company's letters patent issued under the *Corporations Act* of Ontario and by the corporate by-laws: *Wasauksing First Nation v. Wasausink Lands Inc.*, [2004] 2 C.N.L.R. 355 (Ont. C.A.), affirming [2002] 3 C.N.L.R. 287 (Ont. S.C.J.). This left the former chief and a small number of other individuals in control of the corporation because they were the only people who had ever legally become members.

In other words, Wasausink Lands Inc. was a corporation founded (in the words of its letters patent) “to foster and advance the interests of the Ojibways of Parry Island Band” but it was not a corporation controlled by the Wasauksing First Nation.

As discussed above, incorporated Band-empowered entities which carry out non-commercial Band management activities are exempt from paying the GST purchase on or delivered to reserve under the Canada Revenue Agency's administrative policy found in *GST/HST Technical Information Bulletin B-039R*.

The policy states that:

An entity is considered to be controlled by the band, tribal council or group or bands if:

- the band, tribal council, group of bands or individual members of the band, tribal council or group of bands, appoint or elect a majority of the members of the governing body of the entity (e.g., directors); and
- the entity is required by legislation, by-laws, or an operating agreement, to submit to the band, tribal council or group of bands, its operating budget and where applicable, its capital budget for review and approval.

These rules also provide useful an example of how to ensure that any corporation – whether or non-profit or for-profit and whether on- or off-reserve – remains accountable to the Band.

VI. Conclusion

When Bands go into business, the form of entity they use will be dictated first by the tax issues: can the profits be shielded from tax, especially by the exemption available to Bands and Indians on reserve in section 87 of the *Indian Act*.

However, for the *Indian Act* exemption to apply, the business cannot take the form of a corporation because a corporation is a legal person separate from its owners. In addition, section 89 of the *Indian Act* protects a Band's assets from seizure if their principal location is on reserve but this too cannot apply to a corporation, even if its owners are a Band or an Indian

At the same time, a corporate structure can be useful or necessary, for instance, to take advantage of certain programs and subsidies, meet legal requirements for certain regulated activities, or satisfy a business partner's needs. As well, certain corporations – non-profits, Band-owned corporations operating under certain conditions but principally on reserve – are also exempt from tax.

In addition, the use of a corporation for some purposes does not put the *Indian Act* exemptions out of reach for all purposes: the use of partnerships or leasing agreements, for instance, can protect some income from tax and some assets from seizure.

Finally, it remains important not just to address the financial issues but also to ensure accountability. If a corporate structure is chosen, the definition of the members and directors is important because not only is a corporation a legal person distinct from its owners, but it is answerable only to its shareholders or members. Band members must have the power to choose who will hold the shares of a for-profit corporation or be considered members of a non-profit corporation with, in turn, the power to choose its directors if the corporation is to be controlled by the Band.