



Economic Development and the Indian Act: Challenges & Opportunities

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Overview

Areas of challenge and opportunity:

1. Taxation
2. Property and Financing
 - a) Land
 - b) Personal Property
 - c) Financing





Part 1: Taxation

- Indian Act Exemption: Section 87
- Income Tax Act Exemptions:
 - Public body
 - Municipal Corporation
 - Charity
 - Non-Profit



Taxation

- Section 87 of Indian Act:
No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of an interest in reserve lands or surrendered lands or personal property situated on a reserve.



Taxation: Section 87

- Is income located on reserve?
- Identify “connecting factors”, then determine their weight, having regard to:
 - Purpose of exemption: “integral to the life of the reserve or “in the commercial mainstream”
 - Type of property
 - Nature of taxation
- Case law vs. CRA policy



Taxation: Section 87

- Employment Income:
 - Nature, location and surrounding circumstances of work:
 - most important factor for determining whether “commercial mainstream”
 - Location/residence of employer
 - Residence of employee
 - Place where employee is paid



Taxation: Section 87

- CRA Guidelines: Usually exempt if:
 - Min. 90% of duties performed on reserve; If less than 90%, and no other guideline, then pro-rate
 - Employer and employee both resident on reserve
 - Min. 50% of employment duties on reserve, and employer or employee resident on reserve
 - Employer resident on reserve, employer meets certain criteria, and duties are in connection with non-commercial activities



Taxation: Section 87

- Business Income:
 - Key factors:
 - location where business carries on revenue-generating activities (most significant)
 - location of your customers
 - Objective is to determine whether on reserve or in the “commercial mainstream”



Taxation: Section 87

- Business Income: case law:
 - Logging:
 - If logging off reserve, not sufficient if administration and equipment on reserve (Southwind/Pelletier)
 - Crown land not reserve, even if history of use (Giguere)



Taxation: Section 87

- Business Income: case law:
 - Commercial Fishing:
 - Actual fishing must generally take place on reserve
 - Waters adjacent to reserve not reserve (Ballantyne)
 - Unceded territory not reserve (Dumont)
 - If processing on reserve, may be able to pro-rate income (CRA)



Taxation: Section 87

- Business Income (cont'd)
 - Participation in food fishery not enough (Bell)
 - Commercial fishing not part of traditional way of life (Ballantyne): fact-dependent



Taxation: Section 87

- Investment Income
 - E.g. interest, dividends, rental income, royalties,
 - Critical factor: nature and location of investment:
 - On reserve or in “commercial mainstream”
 - Not sufficient that branch or institution on reserve if majority of money invested off reserve



Taxation: Section 87

- Investment Income
 - Dividends: exempt if corporation operates on reserve
 - Rental income: exempt if property located on reserve
 - Royalties: exempt if right exploited or enforced on reserve



Taxation: Section 87

- Opportunity: unincorporated businesses operated by band or status Indian on reserve can earn money tax exempt
- Challenge: does not apply to business operations off reserve or in “commercial mainstream”



Taxation: Section 87

- Challenge: section 87 exemption does not apply to corporations, even if 100% owned by bands or status Indians: will have to pay corporations tax on profits
- Opportunity: other ways for bands and individuals to get money out of corporation tax exempt



Taxation: Income Tax Act

- Public body performing function of government in Canada (Section 149(1)(c))
 - Opportunity: tax exempt and can issue tax receipts for donations
 - Challenge: to be public body, CRA position is First Nation must have passed by-laws under s. 81 and 83
 - Opportunity: not limited to reserve



Taxation: Income Tax Act

- Corporation owned by a municipality (Section 149(1)(c)):
 - Opportunity: tax exempt
 - Challenge: No longer available to First Nations
 - Opportunity: section to be amended to include public bodies, so it would include band-owned businesses
 - However, 90% of income will have to come from reserve



Taxation: Income Tax Act

- Registered Charities (Section 149(1)(f)):
 - Opportunity: tax exempt, and can issue tax receipts for donations
 - Challenge: long process to register, and charitable purposes restrictive
 - Opportunity: Charity can carry on business if promotes charitable purpose





Taxation: Income Tax Act

- Registered charities
 - Opportunity:
 - band-owned corporation could donate all profit to charity that works in community:
 - can be used for limited social and community economic development purposes (e.g. relief of poverty, housing for elderly, etc.)



Taxation: Income Tax Act

- Section 149(1)(l): Non-Profit Corporations:
 - Often tribal councils and other government entities fall in this category
 - Challenge: business activities ancillary to main purpose
 - Challenge: Must spend profits in corporation and not distribute
 - Opportunity: not limited to reserve





End of Part 1

- Questions?
- Time for a Break!





Part 2: Property & Financing

- Two types of property:
 - Real Property (i.e. Land)
 - Personal Property (e.g. equipment, etc.)
- Critical to economic development because need property for use by business, and for use as collateral for financing





Land

- Opportunity: reserve lands offer land base for economic development, and potential security for business financing
- Challenge: land is limited, and use is restricted
 - S. 28: document which gives person other than band member right to use reserve land is void
 - S. 29: reserve lands not subject to seizure
 - S. 89: real or personal property on reserve cannot be charged, mortgaged, seized,





Land

- Certificates of possession:
 - Opportunity: gives band member individual possession: can be used for business
 - Can be sold or transferred to other band members or First Nation (s. 24)
 - Opportunity: section 58(3): CP holder can apply to Minister to lease land without designation
 - Risk of losing control of land base, but subject to land use bylaws





Land

- Indian Act Permits: (section 28(2))
 - Minister can grant permit to any person allowing permittee to use and occupy reserve land
 - Fee usually negotiated with First Nation
 - Over one year term requires consent of council
 - Non-exclusive possession (e.g. easement to utility)
 - INAC has standard terms and conditions





Land

- Conditional Surrender (Designation): section 38(2)
 - First Nation may choose to designate portion of reserve for leasing purposes
 - Requires approval of majority of band members, as well as Minister and cabinet (s. 37 and 39): band members can set purpose of designation
 - INAC has standard terms for lease
 - Leasehold interest can be assigned



Personal Property

- Exempt from seizure if on reserve: s. 89
 - Paramount location: may still be protected if temporarily moved off reserve
 - Property may not be exempt if used in commercial mainstream instead of personal use
 - Assets could be seized from trust company with on reserve head office if located at branch off reserve



Financing

- Section 29: reserve land not subject to seizure
- Section 89(1): real or personal property of Indian or band situated on reserve not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution at instance of any person other than Indian or band





Financing

- Opportunity: restrictions on seizure and charging provide creditor protection
- Challenge: restrictions on seizure and charging make it difficult to obtain mortgage or other financing for on-reserve businesses (whether band-owned or individually owned)





Financing

- Opportunities:
 - Possible to obtain financing from other bands or Indians
 - corporation not an Indian, so can pledge on-reserve personal property



Financing

- Opportunities: Section 89(1.1)
 - can pledge, mortgage, attach, levy, seize, distress or execute leasehold interest
 - so possible for tenant in designated land lease or CP lease to mortgage or pledge their interest
 - Band or CP holder could lease to band-owned or individually owned business who could then borrow to finance construction, etc.



Financing

- Opportunities: Section 89(2)
 - person selling chattel (e.g. equipment) where right of possession or property remains with seller can exercise rights
 - This allows for conditional sales contract/lease-purchase



Questions?

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