



Cassels

Indigenous Partnerships

**THE FUTURE OF RESOURCE
DEVELOPMENT**

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Kurtis Bond
Corinne Grigoriu

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Agenda

1. Introduction
2. Income Tax Exemptions
3. Business Structures
4. Structuring Considerations
5. Governance Considerations



Introduction: Trend Towards Equity Agreements

- Changing Landscape
 - Regulatory Uncertainty
 - Impact Benefit Agreements (“**IBAs**”)
 - Economic and Business Development
 - Employment
 - Environmental Protection
 - Financial



Introduction: Trend Towards Equity Agreements

- Indigenous communities are increasingly seeking long-term opportunities and benefits beyond the scope of IBAs
- Equity Participation
 - Meaningful ownership and participation
 - Indigenous co-ownership may expedite the regulatory process
 - Support for Equity Investment
 - *E.g.*, Alberta Indigenous Opportunities Corporation



Income Tax Exemptions: Indian Act Exemption

- Section 87, *Indian Act*, R.S.C. 1985, c. I-5

(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal Management Act*, the following property is exempt from taxation:

(a) the interest of an Indian or a band in reserve lands or surrendered lands; and

(b) the personal property of an Indian or a band situated on a reserve.

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property

- Subsection 81(1), *Income Tax Act* (Canada) (“**Tax Act**”)

- There shall not be included in computing the income of a taxpayer for a taxation year [...] (a) an amount that is declared to be exempt from income tax by any other enactment of Parliament [...] shall not be included in computing the income of a taxpayer for a taxation year.



Income Tax Exemptions: Indian Act Exemption

Definitions

- “Indian” a person who pursuant to the *Indian Act* is registered as an Indian or entitled to be registered as an Indian;
- “band” “a body of Indians;
 - (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
 - (b) for whose use and benefit in common, moneys are held by Her Majesty, or
 - (c) declared by the Governor in Council to be a band for the purposes of this Act;
- “Reserve” a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by her Majesty for the use and benefit of a band, and generally includes designated lands that have not been absolutely released or surrendered;
- Personal property includes income and taxable income.
 - *Nowegijick v. The Queen*, 1983 CarswellNat 123, [1983] 1 S.C.R. 29 (S.C.C.)



Income Tax Exemptions: Indian Act Exemption

Connecting Factors Test

- **Step 1:** identify potentially relevant factors connecting the income to a location:
 - the residence of the payor, payee, or business owner;
 - the place of payment;
 - the place where revenue-generating activity was conducted;
 - the location of a taxpayer's banking, office, books and records, management and administration, and board meetings;
 - where the relevant contracts were concluded; and
 - the relationship between a taxpayer and the reserves it serves.
- **Step 2:** determine the weight to be given to the relevant factors in light of the purpose of the Indian Act Exemption, the type of property in question and the nature of the taxation.



Income Tax Exemptions: *Income Tax Act*

- **Public Body Exemption – paragraph 149(1)(c)**
 - No tax is payable under Part I of the Tax Act on the taxable income of a person for a period when that person was a municipality in Canada, or a municipal or public body performing a function of government in Canada (a “**Public Body**”).
 - No geographical constraints
- Functions of Government
 - powers to govern granted by legislation;
 - ability to create by-laws that affect the members;
 - accountability to the community;
 - ability to levy property taxes; and
 - provision and administration of public services (e.g., education, healthcare, public works, social services and infrastructure).
- CRA 2016 Policy [Canada Revenue Agency, View 2016-0645031I7]
 - All bands created under the *Indian Act* meet the criteria to be considered a Public Body



Income Tax Exemptions: *Income Tax Act*

- **Municipal Corporation Exemption – paragraphs 149(1)(d.5) and (d.6)**
 - Ownership requirement – not less than 90% ownership by a Public Body.
 - Geographical limitations – no more than 10% of income from activities carried on outside the geographical boundaries of the Public Body.
 - Geographical boundary – area in respect of which Public Body has the power to impose taxes (s. 149(11)).



Income Tax Exemptions: *Income Tax Act*

Non-Profit Exemption – paragraph 149(1)(I)

- A club, society or association that is
 - (a) not a charity;
 - (b) organized and operated exclusively for social welfare, civic improvement, pleasure or for any other purpose except profit; and
 - (c) no part of the income of which may be payable to, or otherwise available for the personal benefit of, any proprietor, member or shareholder thereof.



Modern Treaties and Self-Government

- Historical approach: phase-out of section 87 of the *Indian Act* as a condition to entering into a modern treaty or self-government agreement
 - Disincentive to advancing self-government.
- Current federal policy:
 - Indigenous government choice to maintain existing exemption or adopt own taxation powers.



Business Structures: Sole Proprietorship

GENERALLY

- One owner
- Responsible for all downside, entitled to all upside

ADVANTAGES

- Easy and inexpensive to create and maintain
- Low regulatory load
- Direct decision-making

DISADVANTAGES

- Unlimited liability
- Liability against personal assets
- Income taxable at personal rate
- Can be difficult to raise capital
- No perpetual existence



Business Structures: Corporation

GENERALLY

- Distinct legal entity separate and apart from shareholders
- Can enter into and assume obligations on its own behalf
- Executives report to board of directors, board reports to shareholders
- Governed by specific legislation

ADVANTAGES

- Limited liability for shareholders
- More easily transferable
- Continuous existence
- Separate legal entity
- Easier to raise capital
- Exemptions for raising capital exist

DISADVANTAGES

- Regulatory load is higher – extensive record-keeping, filing and retention required
- Corporation is not taxed as an Indian or band and is not tax-exempt (but may fall under exemption)



Business Structures: Limited Partnership

GENERALLY

- Generally, combines liability for operating partner with limitation on liability for limited partners

ADVANTAGES

- Limited partners protected from liabilities of business
- Income is taxed at the individual partners' level
- Flexibility under the *Partnership Act* for obligations, operating structures of LP

DISADVANTAGES

- Structures can be complex (and costs increase) when multiple LPs are involved
- Limited partners may not take active role in business



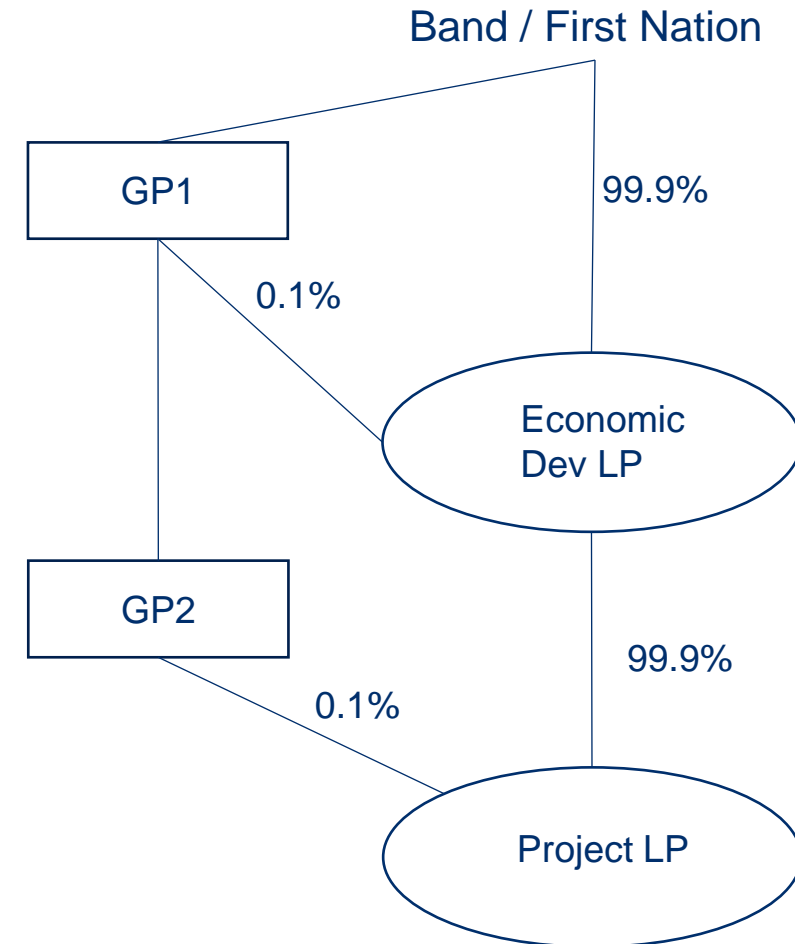
Limited Partnerships

- Calculation of Partnership Income
 - Net income computed at partnership level
 - Allocation of income and losses
 - Reasonable allocation: section 103
- Tax status of each partner determines taxation of partner's share of partnership income
 - *Indian Act* Exemption – geographical constraints
 - Public Body Exemption
- Other Considerations
 - Discretionary deductions, Investment Tax Credits
 - Sale to Tax-Exempt – section 100



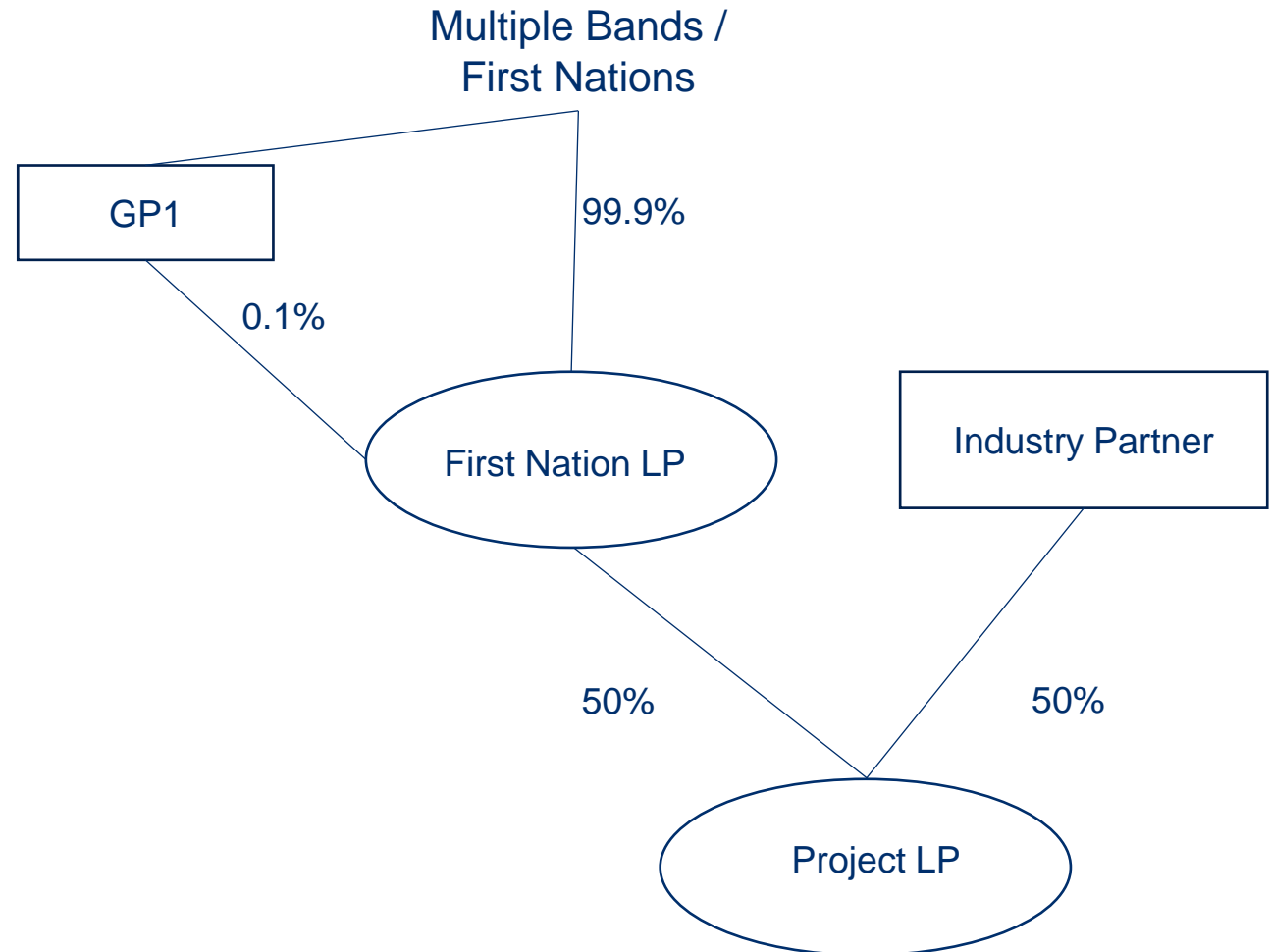
Limited Partnerships: Structuring Considerations

- Stacked Limited Partnerships
 - Indigenous limited partner maintains access to tax exemption (e.g., Public Body)
- Economic Development Limited Partnership
 - Special purpose limited partnership for each economic development activity



Limited Partnerships: Structuring Considerations

- Consortium of indigenous participants
 - Aggregator partnership for indigenous participants
 - Operating partnership
 - *E.g.*, Coastal GasLink



Limited Partnerships: Governance Considerations

- Maintaining Limited Liability
 - Participation of limited partner in control or management of the business of the partnership
 - Consider GP board composition
- Use of Trusts
 - Trust is taxed at the highest marginal rate
 - Access to applicable tax exemption
 - Business Income – income payable to tax-exempt beneficiary
 - Passive income – attribution rules in s. 75(2)
 - 21 year deemed disposition: s. 104(4))



Cassels

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THE FUTURE OF RESOURCE DEVELOPMENT

Suite 3200, Bay Adelaide Centre
North Tower, 40 Temperance Street
TORONTO, ON
M5H 0B4 Canada

t: 416 869 5300
f: 416 350 8877

Suite 2200, HSBC Building
885 West Georgia Street
VANCOUVER, BC
V6C 3E8 Canada

t: 604 691 6100
f: 604 691 6120

Suite 3810, Bankers Hall West
888 3rd Street SW
CALGARY, AB
T2P 5C5 Canada

t: 403 351 2920
f: 403 648 1151

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