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Aboriginal Law Group

Business First

"A newsletter for Aboriginal-owned businesses and their partners."

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Many myths and misconceptions stop non-Aboriginal businesses from partnering with Aboriginal communities and businesses. However, as businesses in industries as diverse as renewable energy, retailing, health care, hospitality and many others are learning, there are many benefits to working with Aboriginal business partners.

Land Use

Doing business on Aboriginal lands may provide benefits such as more flexible land use planning and below market rental rates. There is a myth that there are no private interests on reserve, and that non-Indians can not use or access reserve land. As such, many believe it is impossible to set up any type of buildings or other capital (such as wind turbines) or to finance on-reserve interests. This is not the case. There are options in terms of both short term and long term licenses and leases that allow both Aboriginal and non-Aboriginal businesses to use reserve lands. Most major financial institutions are now prepared to finance both Aboriginal and non-Aboriginal interests in reserve lands, and to provide insurance as well.

Many First Nations issue certificates of possession to their members, which allow them to use and occupy that land, including for business purposes. The CP holder can also lease their land to third parties, including non-Aboriginals.

Many First Nations have designated portions of their reserve land as available for leasing. It is possible to get long term leases over these lands, for periods long enough to construct and operate everything from rental housing to movie theatres. Indian and Northern Affairs

(INAC) has standard terms for these leases although there is some flexibility to negotiate. Other First Nations have adopted land codes under legislation or under powers of self-government that allow them to enter into leases directly.

Where any non-exclusive use (such as for power lines) is required, non-Aboriginals may be able to get a permit to use and occupy reserve land. Any permit over a period of one year will require approval of the First Nation. Again, INAC has standard terms and conditions for these permits. They are commonly used by power companies and others that need access to reserve land on a non-exclusive basis.

Tax Advantages

There may be tax advantages to partnering with Aboriginal businesses. It is a commonly held myth that "Indians do not pay taxes". The truth is that the tax exemption only applies in limited circumstances. However, there are structures and strategies which can help to maximize the use of those exemptions and minimize taxes paid by Aboriginal businesses and their partners.

The Indian Act tax exemption is generally limited to status Indians and bands, and limited to income which is on reserve. Employment income, business income and investment income will all qualify if earned on reserve. However, First Nations may also qualify under the Income Tax Act for exemptions which may enable them to earn tax-exempt business income off reserve.

A corporation owned by an Indian band or status Indians will pay corporate taxes, even if operating on reserve. However, it is possible to reduce profit and therefore taxes by paying reasonable amounts for



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salaries, interest, management fees, royalties, etc. to the band and to on reserve Indians and entities, who can receive these income streams tax exempt. Reducing the taxes paid by the Aboriginal partner leaves more profit left for everyone to share.

A limited partnership is another popular model. In that case the general partner, usually a corporation that all parties own shares in, performs the day to day management of the business and bears the risk of business liability. The limited partners are “silent partners” who invest capital, are not involved in the day to day business operations and have limited liability. Income can then be divided out to the limited partners. A First Nation who is a limited partner will not have to pay tax if the income was earned on reserve, but they still enjoy the benefit of limited liability.

Joint ventures are often used for non-Aboriginal businesses and their Aboriginal partners. This can be a contractual arrangement between two parties or a separate business structure such as a partnership or corporation. It is often between a First Nation (or an on-reserve corporation) and a non-Aboriginal business. Under this structure, there are mutual benefits because tax credits and any tax losses can be attributed to the taxable entity (the non-Aboriginal business) while tax-free income can be paid to a First Nation. This reduces the amount of taxes that both partners pay.

Bands also have the ability to levy property taxes, sale taxes and other taxes on reserve. In some provinces, they have agreements with the provincial government to get their share of sales, excise and other taxes. They may be able to provide tax breaks to their Aboriginal business partners doing business on-reserve.

Access to Capital

Another myth is that Indians are unable to borrow money. While financing on-reserve interests presents some challenges, it is certainly possible, as discussed

above. Further, Aboriginal businesses may have access to capital that is not available to non-Aboriginal businesses. There are various government and business programs, grants and loans that are available to Aboriginal owned businesses. In order to secure these, it is often necessary for the Aboriginal business partner to take a majority stake in any joint venture, partnership or corporation. However, through the use of a Shareholders Agreement, Partnership Agreement or Joint Venture Agreement it is possible to protect the interests of both parties.

In closing, many of the reasons why non-Aboriginal businesses do not do business with Aboriginal businesses can be shown to be myths, and there are many advantages for non-Aboriginal businesses doing business with Aboriginal businesses, including flexibility in land use, tax advantages, and access to capital, among many others.

The contents of this newsletter are intended to provide a general guide to the subject matter and are for information purposes only. Specialist advice should be sought about your specific circumstances.