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**NOVA SCOTIA UTILITY AND REVIEW BOARD
IN THE MATTER OF THE ELECTRICITY ACT**

- And -

IN THE MATTER OF a hearing to determine Renewable Energy
Community Based Feed-in
Tariffs

Summary of Exhibits as submitted by the
Kwilmu'kw Maw-klusuaqn Negotiation Office (KMKNO)
On behalf of the
Assembly of Nova Scotia Mi'kmaq Chiefs (ANSMC)

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1.0 Introduction

The KMKNO is mandated by the ANSMC to engage project proponents (in both federal and provincial regulatory jurisdictions) in meaningful negotiation and consultations in the province of Nova Scotia. The ANSMC have ratified a tripartite agreement with the federal and provincial governments on a Terms of Reference (TOR) in respect to all matters of consultation with project proponents and federal and provincial governments and their respective regulatory agencies and processes.

The ANSMC have instructed the KMKNO to formally participate in the Nova Scotia Utility and Review Board's hearings on community feed in tariffs as formal interveners on their behalf. The KMKNO has participated in all of the UARB's preliminary sessions (as chaired by Synapse Energy Economics) and submitted all required documentation as per the schedule set out by the UARB.

The KMKNO feels that the UARB consultant (Synapse) has made several assumptions concerning the economic and social variables to the feed in tariffs rates that contravene the socio economic and political realities within the Mi'kmaq community.

The KMKNO are submitting several exhibits to support the position of the KMKNO (on behalf of the ANSMC) that the feed in tariffs as proposed by Synapse will be counterproductive to the objectives of the ANSMC and their respective communities to meaningfully participate in the Nova Scotia renewable energy sector.

1.2 The position of KMKNO with respect to the socio-economic and political assumptions that Synapse has utilized to develop the draft feed in tariffs for large wind is as follows;

- a. That Synapse has erred in assuming that the Mi'kmaq First Nation is economically and financially level with other community groups that will participate in the community feed in tariff program.
- b. That Synapse has not properly undertaking the appropriate research that underlies the severity of financial and political restrictions that the Mi'kmaq face; specifically Section 89 of the Indian Act.
- c. That the Synapse debt/equity assumptions for all technologies identified in the COMFIT process (but specifically large wind) is unrealistic given the provisions of the Indian Act and the general state of finances within the Mi'kmaq governments.
- d. That Synapse has not considered the Ontario model including a two tiered comfit pricing model is essential for Mi'kmaq participation.
- e. The options for the Mi'kmaq to develop a financial institution or CEDIF are restrictive.
- f. The DSCR for the Mi'kmaq resulting from the aforementioned issues will certainly result in a severe lack of project capital for the Mi'kmaq to go forward in the renewable energy sector.

g. The necessity for Mi'kmaq renewable project integration is paramount given the current state of on reserve utility usage rates as a result of sub-standard housing and over population issues.

2.0 Comparative analysis on the differentiation between the Mi'kmaq and other communities participating in the COMFIT program.

2.1 For purposes of this discussion point we are referring to Section 1.2 (a) noted above. The KMKNO believes that Synapse erred in included the Mi'kmaq bands into their definition of community. Although it is recognized that all community groups in the Synapse definition of "Community" will have challenges in raising project equity and financing, municipalities, counties, townships will have access to raise capital far beyond the capacities of the Mi'kmaq community. Non-Mi'kmaq communities will have bond issues, credit unions and CEDIF's at their disposal. As well they may have community owned credit unions to further support projects. As evidenced in exhibit 1 (electronically attached as exhibit 001) the Indian Act (Section 89 and Section 90) the Act specifically outlines how the Crown views Indian Lands and the constraints that this definition will place on commercial lenders.

2.2. To further the point KMKNO has also included an exhibit (electronically attached as exhibit 002) "Creditors Remedies under the Indian Act" This exhibit lays out case study and detail that supports the KMKNO position that Section 89 is restrictive and therefore is a hindrance to the Mi'kmaq in terms of developing medium to large scale renewable energy projects. See page 4 which analyzes the restrictive nature of Section 89 and page 5 where income earned by a project may be considered "personal property" and therefore subject to Section 89 protection. Any commercial lender facing these obstacles to seizure will in all likelihood reject the finance request.

2.3. Municipalities, counties and townships are not faced with this constraint and therefore the KMKNO assert that the Mi'kmaq needs to be excluded from the general Synapse definition of COMFIT community participant.

3.0 Understanding the Indian Act

3.1 For purposes of this discussion point we are referring to 1.2 (b). In review of the evidence as submitted by Synapse (dated March 2, 2011) it is noted that there are references to the First Nations in terms of raising capital and debt/equity issues. However, the primary research needed to understand these issues is the Indian Act and corresponding case law, specific to Section 89 and Section 90. It was noted by KMKNO that these reports were not present in the Synapse submission.

3.2 The Indian Act dominates all social, political and economic issues respective to the First Nations in Canada, including the Mi'kmaq of Nova Scotia. To fully understand the scope of the challenges before the Mi'kmaq in respect to our participation, a complete review of the Indian Act is necessary before any consultant can draw conclusions.

3.3 Further to this issue it is also noted by KMKNO that the attached resumes indicate that the consultants (while strong in their field of expertise as energy consultants) lacked any experience in working with First Nations or U.S Tribal groups. This expertise would have been fundamental to understanding the socio-economic and political issues of the Mi'kmaq in respect to renewable energy.

4.0. Debt/Equity

4.1. For purposes of this discussion we are referring to 1.2 (c). (Electronically submitted as exhibit 003) Stantec Consultants Group (a leader in renewable energy technology consultation) and Gardner Pinfold (a leading economics consulting group in Nova Scotia) concur that the Mi'kmaq will be challenged to secure the required equity that Synapse is proposing. (See 1.0, 1.1.1 and 1.1.2 of exhibit 003). In essence these renowned consulting groups reaffirm the position held by KMKNO that constraints from the Indian Act and the general state of relative poverty within the Mi'kmaq community makes it near impossible to acquire the financial equity as laid out by the Synapse model for all technologies (except Tidal).

4.2. Grant Thornton, an international leader in accounting and audit services and a primary auditor for many Mi'kmaq communities in Nova Scotia, further reaffirms the position that the Synapse model lacks the economic reality that challenges the Mi'kmaq of Nova Scotia. In the attached exhibit (electronically submitted as exhibit 004) Grant Thornton confirms the challenge of raising equity. Although the Synapse evidence as submitted on March 2, 2011 highlights discussions with aboriginal groups, one must take into account the testimony of a qualified auditor in matters relating to finance.

5.0 Two Tier Pricing Model

5.1. For purposes of this discussion we are referring to 1.2 (d). The COMFIT price setting process and subsequent programs in Ontario recognized the necessity for a multi-tiered approach to ensure that the Ontario First Nations can participate in the OPA COMFIT program. A two-tier price model that includes (among other things) a 1.5 cent per kWh above the set COMFIT for large wind was deemed essential by the OPA. As well a supporting Government of Ontario aboriginal loan guarantee program (\$ 250 million) and an OPA Energy Partnership Program were all developed to offset the challenges that the Ontario First Nations face with regards to their participation in renewable energy. These Ontario First Nations are under the same government jurisdictions (including the Indian Act) as are the Mi'kmaq of Nova Scotia.

5.2. In previous submissions and pre-COMFIT hearings the KMKNO highlighted these initiatives and the necessity to have such programs here in Nova Scotia. The response by Synapse was that a COMFIT price for large wind would be targeted at 13.9 cents per kWh. (A full .004 cents above the base large wind rate in Ontario). The KMKNO are perplexed to see how the additional .004 cents will "change the game" for the Mi'kmaq in Nova Scotia.

5.3 In exhibit 003 the consultants highlight that a two tiered price model is essential for Mi'kmaq participation. (See 1.1.3 of the exhibit).

5.4. A Mi'kmaq price adder may not be enough to facilitate the participation of the Mi'kmaq in large scale COMFIT projects. Further constraining the Mi'kmaq is the regulatory obstruction that prevents Nova Scotia Power to partner with the Mi'kmaq (or any other community group) in COMFIT projects. However, a realistic Mi'kmaq price adder may attract the partnerships that the Synapse report (March 2, 2011) even admits will be problematic.

6.0 Aboriginal Financial Institutions and CEDIF.

6.1. For purposes of this discussion we are referring to 1.2 (e). A report, generated by Memorial University and examining the potential for the development of an aboriginal financial institution (electronically submitted as exhibit 005) looks at the barriers to the Atlantic First Nations to create a financial institution of their own. The report looks at the impact of the Indian Act (see pages 71, 72) on the abilities of the Atlantic First Nations to raise capital on reserves.

6.2. The report also looks at the options available to the First Nations and concludes that a "credit union" model may be the best fit in terms of community ownership. However the report states that the economies of scale needed to sustain an aboriginal financial institution are immense in terms of trans-provincial regulation and the issues of deposit guarantees. (See pages 77, 78).

6.3. The conclusion to be drawn here is that the Mi'kmaq will not have the option of developing aboriginal financial institutions to fund renewable energy.

6.4. The Synapses report (March 2, 2011) also speaks to the issue of CEDIF's as a financing option. Again we analyze the Indian Act (Section 90) which provides income tax exemptions for aboriginals in Canada.

6.5. While beneficial on certain levels, the income tax exempt status seriously impairs the ability of the Mi'kmaq to develop CEDIF's as their primary selling feature is a limiting of income tax exposure to CEDIF shareholders.

7.0. Debt Service Coverage Ratio

7.1. This discussion pertains to 1.2 (f). From the beginning the Synapse model for large wind highlights the minimum requirement of a DSCR of 1.5. Given the relative nature of renewable energy and its corresponding new technologies, this ratio appears to be realistic. No financial institution would be willing to secure a loan under a 1.5 DSCR. We agree.

7.2. In readjusting the Synapse model in which we reflect the advantages and disadvantages facing the Mi'kmaq we find that the DSCR ratio for the Mi'kmaq falls well below the 1.5 DSCR standard. Utilizing the Synapse model (and electronically submitted as exhibit 006) we find that the average DSCR falls to an average of 1.25.

7.3. To arrive at the 1.25 ratio the followings adjustments were made to the Synapse model. Debt to equity ratio is 85/15. All federal and provincial income taxes are removed from the models assumptions. Finally we have removed the annual land lease payment as First Nations

lands (or Crown lands may be available for large wind development with no land lease payment).

7.4. To achieve the standard 1.5 DSCR (which is already a major element to First Nations financing) the UARB would have to apply a Mi'kmaq adder of \$ 24/MWH. (Or 2.4 cents per kWh). (See electronically submitted exhibit 007).

8.0. On Reserve Utility Usage Issues.

8.1. For purposes of this discussion we are referring to 1.2 (g). The UARB hearings will have participants who are on both sides of the issue. Many will seek a COMFIT rate that will develop their renewable technology of choice while others will want the rates to be low so as to minimize the impact on the Nova Scotia utility consumer.

8.2. The Mi'kmaq are unique in that we are in agreement on both sides of the issue. While we have made our position known with regards to the issues of debt/equity, community differentiation, Mi'kmaq price adders and impacts on DSCR, we are also facing a crisis within our Mi'kmaq communities with regards to the rising costs of energy.

8.3. In our submitted exhibit (003) we see where the electricity usage for the Mi'kmaq are out of synch with the rest of Nova Scotia. The exhibit clearly shows that for the years 2009-2010 the Mi'kmaq on average are using 1.6 to 2.3 times the electricity usage rates of Nova Scotians. (See 1.2 in exhibit 003) This is of critical concern as most band councils have to underwrite this cost as their residents do not have the financial means to cover the costs.

8.4 Within exhibit 003 the reasons for this disparity in usage can be found in issues of sub-standard housing condition and far larger than average family units. (See sections 1.2.1 and 1.2.2 of exhibit 003). Substantial increases in utility rates seriously impact the bands finances. Utilizing renewable electricity (and benefiting from its revenues will not only offset the problem of rising energy costs to a point where the net impact of rising price will be offset by even higher returns on investment.

List of Exhibits

Exhibit 001

Section 89 (1)

(Restriction on Mortgage, Seizure, etc. of Property on Reserve)

Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

Note 1: See also section 29.

Note 2: For a discussion of the purposes and scope of this immunity, see *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85.

Note 3: See section 90 for property deemed always situated on reserve.

Section 89 (1.1)

(Exception in respect of Leaseholds in Designated Lands)

Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

Section 89 (2)

(Exception in respect of Conditional Sales)

A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

Section 90 (1)

(Certain Property Deemed Always Situated on Reserve)

For the purposes of sections 87 and 89, personal property that was

(a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

**(b) 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.**

Section 90 (2)

(Restriction on Transfer of Property Deemed Situated on Reserve)

Every transaction purporting to pass title to any property that is by this section deemed to be situated on a reserve, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.

Section 90 (3)

(Offences under this Section)

Every person who enters into any transaction that is void by virtue of subsection (2) is guilty of an offence, and every person who, without the written consent of the Minister, destroys personal property that is by this section deemed to be situated on a reserve is guilty of an offence.

Note: The goods or chattels may also be seized under s. 103.

Exhibit 002

ABORIGINAL PRACTICE POINTS

Creditors' remedies under the Indian Act

Key Points

- The federal government has exclusive jurisdiction over the property and civil rights of Indians under the *Constitution Act, 1867*.
- Under section 89 of the *Indian Act*, a creditor, other than an Indian or band, cannot charge, attach, seize or otherwise execute against assets of an Indian or band that are “situated on reserve”.
- Whether tangible assets are “situated on reserve” may be determined by “paramount location”, which depends on the pattern of use and safekeeping. Courts may also look at various factors connecting property to a reserve in order to determine whether the protection against charge, attachment or seizure, etc., applies.
- An Indian’s salary is personal property and may be protected. Reserve land held by Indians is also protected. Off-reserve land held by Indians is not protected.
- If the creditor is an Indian or band, the protection does not apply and the real or personal property of an Indian or band is subject to charge, attachment or seizure.
- Leasehold interests in designated lands are also subject to charge, attachment or seizure as these interests are specifically excluded from protection under the *Indian Act*.
- A conditional sales agreement can be used to protect the interests of an unpaid, non-Indian vendor of personal property.

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I. Introduction

The *Indian Act*, R.S.C. 1985, c. I-5 (the “Act”) creates a special legal regime for Indians on reserve. The word “Indian” is defined in s. 2(1) of the Act as a person who is registered, or is entitled to be registered, as an Indian under the Act.

Under the heading of “Property and Civil Rights”, s. 92 of the *Constitution Act, 1867* gives the provinces exclusive jurisdiction over property issues. However, s. 91(24) of the *Constitution Act, 1867* gives the federal government exclusive jurisdiction over “Indians and Lands reserved for the Indians”. The Supreme Court of Canada has determined that s. 91(24) gives the federal government exclusive jurisdiction over the property and civil rights of Indians (*Canard v. Canada (Attorney General)*, [1976] 1 S.C.R. 170).

Although the federal government is not constitutionally restricted from imposing its jurisdiction over the property rights of Indians on off-reserve lands, it has generally limited its authority to the property of Indians on reserve lands and ceded to the provinces the jurisdiction over Indian property that is off reserve.

II. Protection from seizure and execution

The most important principle to remember when enforcing debts is that under s. 89(1) of the *Indian Act* the on-reserve property of an Indian or an Indian band is not subject to charge, pledge, mortgage, or attachment and is protected from seizure and execution. Section 89(1) states:

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

Section 89(1) essentially sets aside reserve lands as places of refuge for an Indian or a band wanting to protect property from execution and seizure by non-native creditors. Nothing in the *Indian Act* prevents a suit against an Indian by a non-Indian. A judgment may be obtained, but, with respect to execution, it can only be used by a non-Indian against the off-reserve property of an Indian. A creditor, other than an Indian or a band, cannot go onto a reserve and seize an Indian’s or band’s assets in order to satisfy a judgment.

The key to determining whether or not the personal property of an Indian or band is protected by s. 89(1) is the situs of the property. Whether the property of an Indian or band is situated on or off reserve, and whether activities with respect to the property are deemed to have taken place on or off reserve, are issues that have never been definitively resolved by the courts. Most recent cases concerning the situs of Indian property are taxation cases. Section 87 of the *Indian Act*, which provides tax exemption for Indians and bands, also deals with the personal property of an Indian or a band situated on reserve:

87. (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 and Statistical 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.

Section 90 of the Act expands the s. 87 and s. 89 deeming principles:

90. (1) For the purposes of sections 87 and 89, personal property that was

- (a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(b) 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.

In *Leighton v. British Columbia* (1989), 35 B.C.L.R. (2d) 216 (C.A.), the court determined that the situs of property for the purposes of the s. 87 tax exemption was determined by the “paramount location” test. This involved examining the pattern of use and safekeeping of the property in question. The court confirmed that property may be situated on a reserve within the meaning of s. 87 of the Act even if it is not physically located on the reserve. In *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, the Supreme Court of Canada noted that ss. 87 and 89 were part of the same legislative package, and approved of the “paramount location” test applied in *Leighton*. In *Williams v. Canada*, [1992] 1 S.C.R. 877, the Supreme Court of Canada stated that it had to identify and weigh the “connecting factors” that connect property to a reserve in order to determine the situs of the property for the purpose of ss. 87 and 89.

It may not always be enough to determine if an Indian’s property can be seized by relying strictly on its de facto location off reserve. For example, in *Wahpeton Dakota First Nation v. Lajeunesse*, 2001 SKQB 146, affirmed 2002 SKCA 27, leave to appeal refused [2002] S.C.C.A. No. 131 (QL), one band-owned school bus was seized off reserve and one band-owned school bus was seized on reserve. The court held that even though one of the buses was seized off reserve, both buses were situated on a reserve due to their use on reserve and storage on reserve land. Thus, neither bus could be seized.

In spite of the “paramount location” test in *Leighton* and the subsequent “connecting factors” analysis set out in *Williams*, s. 89 decisions have generally found that property located on reserve is exempt from seizure, and property located off reserve can be seized or attached.

On the question of whether Indian- or band-owned funds in a bank account can be seized or attached by creditors, Martha O’Brien, in her article “Income Tax, Investment Income and the *Indian Act*”, (2002) 50 *Canadian Tax Journal* 1570, notes that the courts’ answer appears to turn on the location of the bank branch where the account is located.

The common law rule, established in *R. v. Lovitt*, [1912] A.C. 212 (P.C.), reversing (1910) 43 S.C.R. 106, is that a bank account is situated for legal purposes where it is payable, and it is payable where, in the ordinary course of business, it would be paid and the holder would seek payment—that is, the bank branch that houses the account holder’s funds. The Ontario Court of Appeal applied this principle in *Avery v. Cayuga* (1913), 13 D.L.R. 275 (Ont. S.C. App. Div.), and held that Indian-owned funds in an off-reserve bank account could be attached by a non-Indian.

In *Houston v. Standingready*, [1991] 2 C.N.L.R. 65 (Sask. C.A.), a case predating *Williams*, Indian-owned bank accounts were maintained at off-reserve branches of two banks and a credit union. The court applied the “paramount location” test prescribed in *Mitchell* but found no discernible connection between the bank accounts and the reserve where the Indians lived. The court held that the accounts were therefore situated off reserve, and the funds contained within them could be attached by non-Indian creditors.

In *Weibtech Controls Inc. v. Cross Lake Band of Indians*, [1991] 3 C.N.L.R. 182 (Man. Q.B. Master), bank funds belonging to a band were held in an account at the Winnipeg branch of the Peace Hills Trust Company, which was owned by, and had its head office on, the Samson Indian Reserve in Hobbema, Alberta. The court considered the situs of the funds to be off reserve, rather than at the on-reserve head office of the trust company. However, the funds had been paid to the band to compensate its members for impairment of their rights under a treaty or ancillary agreement. They were therefore deemed by s. 90(1)(b) of the *Indian Act* to be always situated on a reserve and were exempt from seizure.

In a case subsequent to the *Williams* decision, *Canadian Imperial Bank of Commerce v. E. & S. Liquidators Ltd.*, [1995] 1 C.N.L.R. 23 (B.C.S.C.), the court affirmed that funds placed by an Indian or a band into a financial institution located on reserve cannot be attached by creditors. Warren J. held that it was the intention of s. 89 to exempt from garnishment the personal property of Indians on “designated lands”. In s. 2 of the *Indian Act*, “designated lands” are defined as lands conditionally surrendered by the band to Her Majesty (usually for lease for the benefit of the band), and “reserve” is defined to include designated lands for the purposes of, *inter alia*, ss. 87, 89, and 90. Since the bank branch that housed the account at issue was located on designated lands, the court found that the funds were therefore situated on reserve and not subject to seizure.

In *Maracle v. Ontario (Minister of Revenue)*, [1993] O.J. No. 1173 (Q.L.) (Gen. Div.), the court held that funds held in a safety deposit box at a bank that is not on reserve cannot be protected from seizure under s. 89, saying they constitute physical objects for which the situs is self-evident.

In *Alberta (Workers’ Compensation Board) v. Enoch Band*, [1994] 2 C.N.L.R. 3 (Alta. C.A.), the court found that an agreement between Peace Hills Trust Company and the band, by which the monies in the account were deemed to be held at the head office of Peace Hills Trust Company on the Samson Indian Reserve, was not effective as against third-party creditors because the band’s actual practice was to deal with the account solely at the Edmonton branch of the trust company. Thus, the court allowed the seizure of band funds held in the deposit account at the Edmonton branch of the trust company.

It should be noted, however, that both s. 461 of the federal *Bank Act* (S.C. 1991, c. 46) and s. 447 of the federal *Trust and Loan Companies Act* (S.C. 1991, c. 45) state:

For the purposes of this Act, the branch of account with respect to a deposit account is

(a) the branch the address or name of which appears on the specimen signature card or other signing authority signed by a depositor with respect to the deposit account *or that is designated by agreement between the bank and the depositor at the time of opening of the deposit account*, (emphasis added)

Thus, it appears that a properly drafted agreement between a band and a bank or trust company designating a branch on reserve as the “branch of account” might be effective, even if the funds were usually dealt with by the band at another branch. O’Brien states on p. 1586:

While there is little or no discussion of the principles in *Mitchell*, the connecting factors test in *Williams* or the *Bank Act* or *TLCA* [*Trust and Loan Companies Act*] provisions, the courts seem to accept that the Indian or band can choose to deposit funds at an on-reserve or off-reserve branch, and that that choice is determinative for purposes of section 89. In short, the courts apply the test of where the branch of account is situated.

Also exempt from seizure under s. 89 are insurance proceeds relating to property situated on reserve (*National Insurance Co. v. Sark*, [1999] 1 C.N.L.R. 128 (N.B.Q.B.)). An individual’s salary is considered to be personal property and may be protected by s. 89(1) from garnishment by a non-Indian if situated on reserve. A non-Indian can only commence garnishment proceedings against an Indian or a band’s personal property if it is situated off reserve.

The refuge that s. 89 provides for the personal property of Indians and bands also applies to their landholdings. This protection is also set out in s. 29 of the *Indian Act*, which provides that reserve lands are not subject to seizure under legal process. The Supreme Court of Canada, in *Canada (Attorney General) v. Giroux* (1916), 53 S.C.R. 172, held that the off-reserve fee simple holdings of an Indian are not protected by s. 89.

Funds paid to an Indian band pursuant to an agreement that is not ancillary to a treaty, and held to the benefit of the band at a commercial bank not located on reserve lands, may be attached by a garnishing order (*Ramsay Painting Ltd. v. St. Mary’s Indian Band*, 2006 BCSC 976; *McDiarmid Lumber Ltd. v. God’s Lake First Nation*, 2006 SCC 58).

III. Exemptions from protection

A corporation cannot be considered to be an Indian or band within the meaning of the *Constitution Act, 1867* or the *Indian Act*, even if a corporation has its registered office on reserve and all shareholders are registered Indians and band members residing on reserve.

In *R. v. Bernard*, [1992] 3 C.N.L.R. 33 (N.B.Q.B.), the court held that a limited company on reserve is not entitled to protection from seizure under s. 89 of the Act; in *Kostyshyn (Johnson) v. West Region Tribal Council Inc.*, [1994] 1 C.N.L.R. 94 (F.C.C.T.D.), the court held that s. 89 did not protect an incorporated tribal council's credit union account from garnishment. Also, in *Tsilhqot'in Economic Development Corp. v. Johnny*, [1995] B.C.J. No. 2896 (QL) (Prov. Ct.), the court held that an Indian development corporation is not an Indian and cannot garnish the wages owed by a band to an Indian. Therefore, corporations situated on reserve are not protected by s. 89 of the Act even when they are 100 per cent Indian-owned and Indian-operated.

Under s. 89(1), the real and personal property of an Indian or a band situated on a reserve is subject to charge, pledge, mortgage, attachment, levy, seizure, or execution in favour or at the instance of an Indian or a band. Accordingly, a band can enforce a debt or seize the on-reserve property of an Indian, including the on-reserve property of its own members, and an Indian may enforce a debt, commence garnishment proceedings, obtain execution against assets, or seize the on-reserve property of another Indian. The Indian creditor must be a status or registered Indian, but does not have to be a member of the same band or tribal affiliation as the Indian debtor.

However, there are some limitations on the ability of an Indian to enforce a debt against on-reserve property. In *Ferguson v. Lax Kw'Alaams Indian Band*, 2000 BCSC 273, leave to appeal granted 2000 BCCA 280, funds belonging to the defendant band were held in an account at the Duncan branch of the Toronto-Dominion Bank, which was located on a reserve. The plaintiff creditor was a law firm seeking to attach the band's funds in the account. As the firm was neither an Indian nor a band, it assigned its claim to a status Indian in order to try to bypass s. 89 and allow seizure of the band's property.

The band argued that assignment of the claim to an Indian should not allow the creditor to achieve indirectly what it could not achieve through direct means. In support of their submission, they cited the "fundamental principle of assignments" that an assignee takes an assignment subject to the equities that exist between the assignor and the debtor.

The court agreed with the band and held that s. 89 limited the ability of the plaintiff creditor to enforce the judgment. That limitation, the court pointed out, was an "equity" to which the assignment was subject, and the assignee could not rely upon his own status as an Indian to acquire a better right than the assignor law firm had.

The exemption from seizure under s. 89 does not prevent seizure of evidence as part of a criminal process (*Douglas v. R.*, [1984] 3 C.N.L.R. 65 (B.C. Co. Ct.)).

Section 89(1.1) states that a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress, and execution. "Designated lands" are defined in the *Indian Act* as being reserve lands to which a band has, for a limited time, released or surrendered its rights and interests. Accordingly, a leasehold interest in designated lands is not protected from seizure, execution, or enforcement under s. 89(1). Provincial laws of general application, including real property legislation pertaining to family relations, apply to leasehold interests in designated lands. As laws of general application, these would be available to married spouses regardless of Indian status or band membership. Their applicability to common-law relationships would depend on the specific provisions of each provincial and territorial statute or the results obtained in *Charter* litigation in each jurisdiction.

As for enforcement of court-ordered compensation or equalization payments in the division of matrimonial property, non-Indian spouses are at a disadvantage in terms of their ability to execute judgments against a former spouse residing on reserve. This arises because of the s. 89 exemption. To the extent that court orders may be extended by litigation or future legislative amendments to spouses in Aboriginal customary marriages or common-law partners, s. 89 would present similar barriers to enforcement of court orders.

Section 89(2) protects the interests of unpaid, non-Indian vendors of personal property to Indians and bands: 89. (2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

Thus, if a vendor keeps a right of possession in personal property that is sold under a conditional sales agreement, that property is not protected by s. 89 against seizure, execution, or enforcement. If there is a default of payment and a court order is granted for recovery of the property, a sheriff is entitled to go onto reserve land and execute the order.

Exhibit 003 (Extracted from Mi'kmaq Renewable Energy Strategy)

1.1 ACCESSING CAPITAL

Financial capital is required to cover expenses from site evaluation through feasibility analysis, consultations, permitting, equipment purchase, installation, and operations. The capital costs must be addressed through a combination of cash equity from Mi'kmaq communities and partners in the development, government loans or funding, fundraising through private or public offering of shares, and financing from lending institutions. This section examines financing options that are available to support the development of renewable energy projects for Mi'kmaq communities. Access to capital is particularly challenging for Mi'kmaq communities, as land is not owned in a conventional sense and cannot act as equity to secure financing.

1.1.1 Options for Mi'kmaq communities

Financing can be obtained for renewable energy projects with sound business plans and some track record of successful business management in Nova Scotia. Involvement of a lending institution is almost certain; therefore a down payment representing 40% of the required financing is the main hurdle. For example, a \$10 million project involving three 2 MW turbines, would require a \$4 million down payment. Mi'kmaq communities must assess the level of resources they can consolidate on their own and determine what share this represents of the down payment.

If programs emerge in Nova Scotia that are comparable to those in Ontario, Mi'kmaq contributions to a down-payment might be matched or better by provincial programs, and then \$1 million becomes the \$2 million required for a 50% stake in a \$10 million project. If more or less capital is available then a wind or biomass project could be scaled to the desired size. Partners such as NSPI, another renewable energy company, or a municipality must participate for the remaining share. Other scenarios for raising capital appear to be less likely including the prospect of venture capital that is explored briefly in the next section.

1.1.2 Lending institutions

Renewable wind energy companies with interests in Nova Scotia have indicated that almost all projects involve banks or other lending institutions for financing. Very few companies have the ability to fund medium to large-scale projects “from their balance sheet”, meaning they do not have sufficient cash flow to support the project alone. Like any other, a Mi’kmaq company, non-profit organization, or corporate body would have to qualify for financing from the lending institution.

Two of the major banks, BMO and RBC provided similar explanations of their criteria for supporting renewable energy development projects. They require a sound business plan, a purchase power agreement (PPA) in the case of renewable energy for electricity, and sufficient assets to secure the loan. Banks also look for a government guarantee on Aboriginal loans, the ability to enforce a contract, and agreement to repay the loan before the end of the PPA term. Renewable energy development is considered relatively new to banks so there is no set process or criteria for financing, each proposal is reviewed on a case by case basis. If all the criteria can be met, banks will require a 40% down payment from project proponents. For multi-million dollar projects, this poses a formidable challenge.

1.1.3 Two Tier System

With regard to the unique economic circumstances facing the Mi’kmaq, the Renewable Energy Regulations have implications that must be recognized and addressed so that the Mi’kmaq are neither unduly impacted nor constrained from participating in the opportunities associated with developing a sustainable energy future. In particular, without conventional ownership of land or other hard asset equity from a lenders’ perspective, Mi’kmaq communities and entrepreneurs must be able to project greater financial returns to compensate for the lack of tangible investment assets. The Assembly therefore concludes that the new energy regime should incorporate a two-tier system including a Community Feed-in-Tariff (ComFIT) system exclusive to the Mi’kmaq of Nova Scotia in tandem with a special purchase agreement formula that will enable the Mi’kmaq to effectively pursue capital markets for project financing. By accommodating the special conditions of the Mi’kmaq community, the Province can help to level the investment opportunities, enabling viable Mi’kmaq participation in the development of the renewable energy industry.

1.2 MI’KMAQ ELECTRICAL ENERGY USE

For the purposes of the MRES, First Nations residential, commercial and industrial electrical energy use are discussed. The information presented does not reflect a full community energy profile, as it only depicts electricity use and not other sources of energy. Therefore, this electrical energy profile provides only an initial glimpse into energy use within Nova Scotia First Nation communities. Individual communities should be further engaged to understand fully how energy is being used.

To provide an initial understanding of how electricity is being used in First Nation communities, electricity use data was obtained from NSPI for the years 2009 and 2010. This data was obtained by identifying postal codes for each reserve community, from which NSPI was able to

provide electrical energy consumption by service location. This information was then combined and arranged by rate class, and subsequently divided by the number of service locations to provide an electrical energy consumption average by Band for residential, commercial and industrial uses.

The electricity energy use profile developed for each Band should therefore be treated as general information providing an estimation of electrical consumption trends as opposed to an accurate depiction of electricity use by Band. A full outline of the methodology, detailed data and limitations of the data is provided in Appendix A. Another key limitation of the energy use data provided in this study is that it only reflects electricity use; other energy consumption data was not readily available or easily accessible to develop a representative sample of different types of energy use (e.g., electrical, home heating oil, biomass, propane, etc).

Once electrical usage data was compiled, this data was then compared to an estimated Nova Scotia average for electrical consumption. It is important to note that this average was derived using three different data sets, which is outlined in Appendix A. This number should also be considered an estimation of general Nova Scotia electrical consumption trends based on available data and should be treated as general information generated for the purposes of comparison.

The electricity use data provided a number of key findings:

- That the analysis indicates residential electrical energy use is significantly higher in First Nation communities than it is in a typical Nova Scotian household.
- Based on available electricity consumption data provided by NSPI, residential electrical energy use ranges from 1.6 to 2.3 times higher in First Nation communities versus the average Nova Scotian home.
- Average overall use of electricity on all First Nation communities combined is 1.9 times more than the average Nova Scotian home.
- Commercial Electrical energy use is below the NS average with the exception of Glooscap in 2009 which was 1.4 times higher and Membertou in 2010 which had energy use 1.5 times higher.
- Industrial electrical energy use falls below the NS Average.

1.2.1 Mi'kmaq Housing Conditions

Issues pertaining to First Nation housing are widespread. Serious problems include: shortages leading to overcrowding; lack of plumbing; no electricity; poor insulation; mould; substandard construction; and an accumulation of units in need of major repair. (First Nation Housing Action Plan, 2005) Core housing needs among First Nations communities in Nova Scotia is higher than the rest of the Province. Overcrowding is another well documented challenge that may also be accelerating the rate of deterioration in the housing stock. It is estimated that the number of persons per room in Canada is 50 per cent higher in First Nation communities than in their non-First Nation counterparts (CMHC, 2010). In Nova Scotia 11% of Aboriginal people living on-reserve are considered to live in crowded conditions and 15% of Aboriginal people living on-

reserve live in houses in need of major repair (NS Government, 2010). Issues relating to the building envelope such as poor ventilation, mould and issues with structural integrity need to be addressed prior to or at the same time as developing solutions for energy efficiency, otherwise energy efficiency measures may actually add to health and safety concerns. For example, if a house has poor ventilation or issues with mould, the ventilation system must be repaired before the energy efficiency improvement can be undertaken, otherwise methods for insulating and sealing the home can worsen ventilation and mould issues.

1.2.2 Mi'kmaq Housing Ownership

According to 2006 Census data, home ownership rates in First Nation communities were 31% compared to the National average of 69%. Multiple socioeconomic and legal factors contribute to lower rate of home ownership including generally lower household income. For those that can afford to purchase a home, there are challenges accessing financial services and credit opportunities on reserve that are widely available off reserve. Housing loans are difficult to secure due to the legal status of reserve land under the *Indian Act*; these lands reserved for the use of First Nations cannot be alienated, thus hindering a lender's ability to seize a property should a borrower default. Consequently, alternative means of securing housing loans are required (CHMC, 2009). As a result of lack of home ownership, there is reduced incentive for occupants to maintain and renovate their homes. In Nova Scotia, First Nation houses are either Band owned, privately owned or rented. Private ownership generally means that a band member has a certificate of possession (CP) which gives the occupant title over the property. A Section 10 home is where the occupant has a CP and has secured a loan guarantee through INAC and CMHC to purchase or build a home. It is up to each individual Band to determine whether or not to issue CPs and this practice varies widely among First Nation Communities. Lack of ownership is an impediment to energy efficiency programs which tend to be targeted towards the individual homeowner. Further inability to borrow and raise funds to improve housing conditions will limit opportunities for building-scale retrofits, which ultimately may produce the greatest saving in energy efficiency. Finally, if residents are not responsible for their energy bill payments this may also be an impediment to even simple energy conservation reduction measures.

Exhibit 004



Mr. Eric Christmas
Mi'kmaq Encana Liaison Officer
Kwilmu'kw Maw-klusuaqn (KMKNO)
851 Willow Street
Truro, NS B2N 6N8
March 17, 2011

Dear Mr. Christmas:

We understand that you are making a submission to the Nova Scotia Utility and Review Board (UARB) on behalf of the Assembly of Nova Scotia Mi'kmaq Chiefs in relation to the hearing to determine Renewable Energy Community Based Feed-in Tariffs (COMFIT) under the Electricity Act. You have provided us with a copy of the Direct Testimony and Exhibits of Mr. Bruce Biewald, Mr. Wilson Rickerson, Mr. Geoff Keith, and Ms. Susan Shaw, P. Eng., (collectively "the consultants") to the UARB dated March 2, 2011.

You have asked us to provide some general comments regarding the proposed Capital structure for >50 kW and <50Kw Wind projects contained in Exhibit C of the evidence provided by the consultants. The consultants' assumptions about Capital structure and costs in the tariff modeling work they have completed indicate a target Capital Structure for Debt to Equity of 50%:50%. You have asked us to comment on whether this is a reasonable Debt to Equity ratio expectation for investments in Wind projects located on Reserve lands throughout Mi'kmaq communities in Nova Scotia.

To assist in developing a response, you have also provided us with information contained in the "Indian Act, R.S.C 1985" of Canada which established regulations for the protection of on-reserve property of a First Nation band, a critical element impacting the ability to secure indebtedness on projects located on First Nation lands.

Section 89 states:

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

Based on this, it is our view that it would be difficult, if not impossible, to pledge any assets situated on Reserve lands as security for debt financing in a normal financing arrangement with entities such as a Chartered Bank, for example. In infrastructure projects the type of which are proposed in the energy sector, securing the borrowings with the respective capital assets is normal course. Based on the application of Section 89. (1) alone, we believe it would be

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difficult, if not impossible, for any Mi'kmaq communities to arrange debt financing for an energy project located on Reserve lands.

With or without debt financing in place, we would expect that the ability to raise equity for these projects at the levels proposed by the consultants would be extremely challenging. The potential that the percentage of capital required from equity sources could increase even higher (due to ability to obtain perhaps even smaller amounts of debt financing), would almost certainly be unattainable. We believe therefore that a target Debt to Equity ratio of 50%:50% for Wind assets to be located on Reserve lands in Nova Scotia would not be practical.

If you wish to discuss this further, please do not hesitate to contact me.

Yours very truly,

Grant Thornton LLP

John E. L. Carruthers, CA•CBV, CMC

Partner, Advisory Services

Exhibit 005

**ABORIGINAL FINANCE AND REGULATION – WHAT ARE THE
REGULATORY IMPEDIMENTS TO ESTABLISHING AN ATLANTIC
CANADIAN ABORIGINAL FINANCIAL INSTITUTION?**

Tom Cooper
Alex Faseruk
Patrick Phillips

Memorial University

We explore the regulatory and legislative barriers to address accessibility of capital for First Nations businesses and communities in Atlantic Canada. Specifically, we examine the legal and regulatory impediments that may have a bearing on the ability of Atlantic First Nations to establish an Aboriginal-owned financial institution.

Introduction

Financing is a necessary component to most businesses regardless of size. In theory and practice, it is uncommon for a business to have sufficient capital to satisfy all needs that arise from asset ownership. Capital can be used for a wide variety of activities during the start-up phase of a company, including equipment and inventory purchases, as well as general marketing purposes. A properly financed business, in many instances, becomes more profitable than the business trying to operate without an adequate capital base.

In the First Nations business community, the need for financing and the accessibility of capital has been recognized. This issue was publicly debated during 2007 proceedings of the Standing Senate Committee on Aboriginals People (Standing Senate Committee on Aboriginals People, 2007). Collateral and capital, as Chiste (1996) outlines, continue to be the components that negatively impact the gap between access to capital and the need for financing (Chiste, 1996 p. 122). There also exist additional factors which led to this gap such as corporate experience and the education of entrepreneurs (Anderson et al., 1995).

In this paper, we examine access to capital for Aboriginal peoples as well as the means to address financing through establishing an Aboriginal-owned and operated financial institution. We explore the specific legislative and regulatory impediments that limit access to capital for First Nations communities and businesses. Specifically,

we examine the legal or regulatory impediments that may have a bearing on the ability of the Atlantic First Nations to establish an Aboriginal-owned financial institution within Atlantic Canada.

Background

Regardless of the evolution of a company, capital is required to maintain its operations. Funds may be required at the start-up phase for purchases of equipment and inventory, product development, as well as staffing costs. Capital will also be required for leasehold improvements and the funding of inventory and accounts receivable as the business grows. Capital is accessed through two sources: debt financing or equity financing.

Debt financing is required for two purposes: financing of short term (current) assets and the financing of long term (fixed/capital) assets. Financing short- and long-term assets becomes difficult for Aboriginal peoples to obtain owing to the issue of financial institutions securing on-reserve assets (Government of Canada, 2009). This impacts the growth of First Nation businesses and communities which are unable to finance their operations through internally generated cash flow.

A 2004 study by Statistics Canada found that 80% of Aboriginal business owners indicated that they need less than \$50,000 to start their businesses. The study also found that this proportion increases to 90% for technical and professional companies (Statistics Canada, 2004). Debt and equity financing needs are similar for both Aboriginals and other Canadian businesses. Statistics Canada reported 89% of Aboriginal businesses use debt financing (90% for Canadians) and 77% use equity financing (74% for Canadians) (Statistics Canada, 2004). Heidrick and Nicol (2002) found that Aboriginal entrepreneurs used the following debt sources:

- ☐ 48% Personal loans from family and friends (interest bearing loans)
- ☐ 30% Supplier credit
- ☐ 22% Loans from Aboriginal lending institutions
- ☐ 20% Commercial bank loans (non-guaranteed)
- ☐ 15% Government guaranteed bank loans
- ☐ 11% Conditional sales contracts.

In the same study, equity was accessed through:

- ☐ 88% Personal investment
- ☐ 31% Retained earnings
- ☐ 21% Family and friends
- ☐ 7% Community investment funds
- ☐ 5% Venture capital.

Caldwell and Hunt (2002) showed that 56% of Aboriginal entrepreneurs studied had inadequate access to debt for the following reasons: lack of collateral (40%); inability

to use on reserve assets as collateral (30%); no local financial institutions (27%); and lack of profitability (22%). Reasons for inadequate access to equity included: lack of personal resources (58%); unavailability of venture capital (36%); inadequate retained earnings (32%); absence of community investment funds (31%); and inability of family/friends to invest (16%) (Caldwell and Hunt, 2002 p.17).

The context of the equity capital sources available, as outlined by Heidrick and Nicol's (2002) study is worthy of further comparisons. Anderson et al. (2005) contend that Aboriginal people want to do business on "their own terms;" hence, the 5% rate from venture capitalists is not surprising. Typically, venture capitalists control about one-third of the seats on a start-up's board of directors and often represent the single largest voting block on the board (Berk et al., 2010). The need for ownership by Aboriginals and the subsequent emerging conflict with venture capitalists' need for control presents challenges.

The motivation for establishing a business is also a determinant for the amount of capital required. When deciding to venture into a new business, many motives exist for the owner whether it is internally, i.e. personal drive or externally focused, i.e. profit driven, (Jaffe et al., 2005). Aboriginal business people are no different in their motivations, but the belief is that their fundamental motive is to satisfy the socioeconomics of their communities.

Anderson et al. (2005) state that economic development is seen as part of the larger agenda of rebuilding indigenous peoples' communities and nations and reasserting indigenous control over their traditional territories. Anderson (1999, p. 14) further suggests that Aboriginals are creating businesses to compete in the global economy for wealth generation which in turn would help support self-government and socio-economic conditions.

Aboriginals also bring a community-oriented view to economic development. They see the economy and social life as being intricately tied together (Standing Senate Committee on Aboriginals People, 2007, p. 4). The community view is reiterated by Aboriginal owners surveyed in the 1996 Aboriginal Business Survey. Over 50% stated that service to the community was the primary goal (Statistics Canada, 1999, p. 3). Culture is also seen as a vital component to their development.

Moreover, Aboriginals are not willing to compromise their identity for economic success. The Dogrib Treaty 11 Council told the Standing Senate Committee on Aboriginal Peoples, that they are not prepared "to give up who we are in order to gain from economic development." They added that "we do not want to lose our traditions, culture, language or religion" (Standing Senate Committee on Aboriginals People, 2007, p. 5).

Ownership of financial institution to assist in economic development is a key point for Aboriginal peoples. During the Standing Senate Committee on Aboriginals People

proceedings, Allan Luby established the importance of culture as a part of ownership.

He stated: Over this last 20 years, I have watched our youth take over the majority of our people. When I look into the eyes of our young people nowadays, I see a passion. They want to move ahead, but they are also becoming very impatient with things. They want to see these social and economic drivers there for the communities, to raise the level of the communities to that of the rest of Canada. (Standing Senate Committee on Aboriginals People 2007, p. 6)

While ownership is a key element, the structure of an Aboriginal financial institution to achieve social and economic development is also critical. In Canada, federally regulated financial institutions include banks, trust and loan companies, insurance companies and brokerages.

Structure is usually dictated by adherence to enabling legislation, i.e., The Bank Act; The Trust and Loan Companies Act; The Insurance Act; and The Brokerages Act. The legislation creates different financial services structures. Financial services institutions are also responsible to adhere to the requirements of several other pieces of legislation and regulations. This requires regulatory compliance where failure to do so would impede the institutions' ability to operate effectively and negatively affect its reputation.

Ultimately the question of whether an Aboriginal-owned financial institution is achievable rests on whether it is regulatory or legislatively possible. In order to address this question, a participatory research project, consistent with Reason and Rowan (1981) and Reason and Bradbury (2001), was conducted with an Aboriginal group in Atlantic Canada. The research question was to determine whether an Aboriginal-owned financial institution could be established and what form it would take.

Methodology

The United Nations Economic and Social Council (2010) states that defending the research practices and outcomes of Indigenous peoples is a highly contested area in academia, where Indigenous peoples struggle to have their traditional knowledge and world views recognized.¹ Complications emerge when researching Indigenous people, because it is a question of viewing Indigenous rights and business from a detached, analytical (some would say Western) framework while simultaneously incorporating the participative element into any research undertaken with Indigenous people.

There is little debate that Indigenous groups do indeed face systematic challenges in terms of addressing poverty, overcoming economic developmental challenges, and increasing the standard of living within Aboriginal communities. As described by the Secretariat of the Permanent Forum on Indigenous Issues in a 2004 workshop on data collection and disaggregation for Indigenous peoples by the United Nations, considerable thinking and debate have been devoted to the question of defining

'Indigenous peoples,' but no such definition has ever been adopted by any United Nations system body.²

One of the most cited descriptions of the concept of the Indigenous was given by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his Study on the Problem of Discrimination against Indigenous Populations³. In this study, he offered a working definition which stated:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.⁴

It is important to contrast 'Indigenous peoples' with 'Aboriginal peoples'. 'Aboriginal Peoples' is a collective name for the original peoples of North America and their descendants. For the purposes of this paper, we will use the title interchangeably although the data presented in the participatory research study primarily refers to Aboriginal groups in Canada.

¹ Indigenous Peoples: Development with Culture and Identity: Articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples. Report on the international expert group meeting. United Nations Economic and Social Council 2010 E/C.19/2010/1. P.6

² <http://whc.unesco.org/uploads/activities/documents/activity-496-6.pdf>

³ UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4.

⁴ UN Doc. E/CN.4/Sub.2/1986/7 paragraphs 379-382.

Indigenous peoples are also interesting (and difficult to study) from an academic perspective, because they are not a homogenous group. For example, the Canadian constitution recognizes three groups of Aboriginal people: Indians (commonly referred to as First Nations), Métis and Inuit. These are three distinct peoples with unique histories, languages, cultural practices and spiritual beliefs. More than one million people in Canada identify themselves as an Aboriginal person, according to the 2006 Census.⁵

In Canada and elsewhere, Aboriginal communities are located in urban, rural and remote locations. In Canada they include:

- ☐ First Nations or Indian Bands, generally located on lands called reserves;
- ☐ Inuit communities located in Nunavut, NWT, Northern Quebec (Nunavik) and Labrador;
- ☐ Métis communities; and
- ☐ Communities of Aboriginal people (including Métis, Non-Status Indians, Inuit and First Nation individuals) in cities or towns which are not part of reserves or traditional territories.

While the focus of this paper was on the regulatory structural requirements in establishing an Aboriginal-owned financial institution, the data came from a much wider survey that was conducted as a piece of participatory research during 2007-2010 with Unlooweg Development Group, an Aboriginal-owned financial institution where the focus of the participatory research was on the First Nations within Atlantic Canada.

There are 33 First Nation communities in Atlantic Canada distributed throughout four provinces. Each First Nation is autonomous and governed by an elected Chief and Council. The elected Chiefs and Band Councils of individual First Nation Bands are the basis of the political structure in Atlantic Canada.

All the First Nation communities in Atlantic Canada belong to the Atlantic Policy Congress of First Nations Chiefs (APC). The APC Secretariat is a Policy Research and Advocacy Secretariat for 33 Mi'kmaq and Maliseet and Passamaquoddy Chiefs, Nations, and Communities in Eastern Canada.

The First Nations in Atlantic Canada are an interesting group to study, because their structure and peoples are indicative of the wider Aboriginal community in Canada. In Atlantic Canada, there are communities which have self-government agreements, land claim settlements, tribal councils, landless bands etc. Business enterprises range from those owned by governments with millions of dollars in assets to small entrepreneur operations with one employee.

Communities exist within urban boundaries, in proximity to large urban centers and in remote coastal and inland communities. Consumers belong to many different Aboriginal groups and have widely varying forms of employment, education and housing. The wider participatory research project germinated from an idea in 2004 of establishing an Aboriginal Financial Services Holding Company.

The idea was originated by the partner in the participatory research, Unlooweg Development Group (UDG), as a means to explore potential Aboriginal involvement in the financial services sector. Unlooweg has been providing loans and business services to Aboriginal entrepreneurs in Atlantic Canada since 1986. With representatives in New Brunswick, Newfoundland & Labrador and Nova Scotia, its stated mission is to offer convenient, personalized service to its clients to help them succeed. Unlooweg's lending services bring financial support for First Nations businesses which may not be eligible for loans through other lending institutions. It aims to fill the needs that Aboriginal business owners have in accessing business loans and services in Atlantic Canada (Unlooweg, 2008).

In 2006, a Market Demand Study (MDS) proposal to study the feasibility of an Aboriginal financial services institution in Atlantic Canada was prepared by UDG. In December 2006, the Minister of Indian and Northern Affairs Canada announced funding for the study. As outlined in the MDS document, the study's objectives were:

- Conduct an assessment of the financial services needs of the Aboriginal

community in Atlantic Canada;

- Examine the experience of other Aboriginal groups and institutions who have been involved in similar undertakings;
- Analyze the requirements of capital markets and regulatory institutions; and
- Conduct an assessment of potential ownership and operational models of various financial institutions including legislative and operational requirements.

One of the authors of this study then became involved as researcher in the project working with Ulnooweg to ensure that conclusions on the demand for financial services were appropriate. Moreover, this author (researcher) took a participatory research approach (cf. Reason and Rowan, 1981; Reason and Bradbury, 2001) where the focus was to understand the context that Aboriginal communities and businesses are facing in respect to economic and business development.

There was also a legislative and regulatory review which forms the critical elements that need to be considered in the development and structure of any Aboriginal financial institution.

Discussion and Findings

The first legislative issue to address in obtaining capital and establishing a financial institution for Aboriginal people is the Indian Act.

The Indian Act

First enacted in 1876, the Indian Act is a federal statute that regulates Aboriginal people, their lands and their economy in Canada (The Native Investment and Trade Association, 1996, p. 23). Unfortunately, the law that was meant to protect First Nations people has resulted in an obstacle to economic development. A large part of the Indian Act's purpose is to protect reserve lands. Section 29 states "Reserve lands are not subject to seizure under legal process." (Government of Canada, 2009, p. 20).

Section 37 states:

(1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.

(2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been surrendered to Her Majesty pursuant to subsection 38(2) by the band for whose use and benefit in common the reserve was set apart. (Government of Canada, 2009, p. 23)

Section 89 has been deemed as the part of the Indian Act that has limited First Nations to borrow and financial institutions to lend. It states:

(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favor or at the instance of any person other than an Indian or a band. (Government of Canada, 2009, p. 54)

Suppliers of goods, services and capital are hesitant to provide consumer credit and credit for developments on reserve, strictly because of the restrictions found in the Indian Act (The Native Investment and Trade Association, 1996, p. 23).

Amendments have been made to section 89 that have eased restrictions on seizure of assets:

(1.1) Notwithstanding subsection (1), a leasehold-interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and

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execution. (2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

(Government of Canada, 2009, p. 54)

As Chief Palmantier of Lake Babine First Nation said “People cannot access capital locked in their homes to help finance their businesses” (Standing Senate Committee on Aboriginals People, 2007, p. 32). This directly relates to the continued restrictions that the Indian Act imposes on the First Nations people and its presence as a factor to developing an Aboriginal owned and controlled financial institution across Atlantic Canada.

Other impediments also exist owing to the Indian Act. A prime example is taxation. For non-Aboriginal businesses in Canada, there is great benefit to becoming incorporated mainly due to lower taxation. For First Nation businesses, it is often more beneficial to be unincorporated, since individuals on reserve are exempt from income taxes under section 87 of the Indian Act. Corporations are not considered to be Indians, despite the fact that the shares are owned by on-reserve Aboriginal people and are therefore subject to tax.

It is also important to note that businesses located off reserve, whether they are sole proprietorships or non-band owned incorporated companies, are subject to income taxes (Chiste, 1996).

Legislation for Financial Institutions in Canada

There are also several pieces of legislation that are specific to the financial services industry that have to be considered in developing the structure of an Aboriginal financial services institution. The primary federally regulated financial institutions commonly used by Aboriginal groups are banks and trust companies. Banks are federally incorporated under The Bank Act and must adhere to all the legislative requirements of that Act and the regulations passed pursuant to that Act.

Similarly, trust companies that operate extra provincially are incorporated under the Trust and Loan Companies Act, as well as the regulations passed pursuant to that Act. Other legislation that impact on both of these institutions includes:

- (a) Personal Information Protection and Electronic Documents Act;
- (b) Financial Consumer Agency of Canada Act;
- (c) 1. Proceeds of Crime (money laundering) and Terrorist Financing Act and Regulations;
- 2. Suspicious Transactions Regulations under this Act;

3. United Nations Suppression of Terrorism Regulations;

4. Criminal Code of Canada s.83.08 to 85.11

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5. OSFI Guideline B8: Detering and Detecting Money Laundering;

(d) The Competition Act;

(e) The Pension Benefits Standards Act;

(f) The Income Tax Act – RRSP;

(g) The Trustee's Act of Various Jurisdictions in the case of Trust Companies; and

(h) Provincial Regulations and Licensing Bodies / Employment Standards.

Regulatory compliance is also a key issue. Compliance regulations that have to be addressed by banks and trust companies include:

(a) Both institutions must adhere to the Bylaws of the Canada Deposit Insurance Corporation;

(b) CICA Handbook:

3025 impaired loans

3860 financial instruments

well being reporting requirement

(c) Statistics Canada;

(d) Canadian Payments Association; and

(e) Interac Security Compliance.

All these various requirements of the legislation and contractual compliance are enforced through the Office of the Superintendent of Financial Institutions (OSFI). Institutions are required to file compliance reports on each of these areas on an ongoing and regular basis. In addition to its regulatory role, OSFI must approve the initial business plan of the institution including its lending policies. These are monitored on an ongoing basis and OSFI has the power to alter the capital reserve requirements and liquidity levels, if they are not satisfied with any aspect of the performance of the institution.

Generally, there are no set minimum capital requirements for banks or trust companies in the Acts. But, they are required to maintain adequate capital and appropriate forms of liquidity. Guidelines set by OSFI for capital adequacy are taken from the BASEL II Framework for Regulatory Capital, which is an internationally agreed upon standard for regulatory capital and risk management. Minimums are set to protect creditors, depositors and stakeholders in case of liquidation.

Federally regulated financial institutions are very complex, may be costly to start up and maintain, as well require highly technically skilled individuals to manage. From our review, it is clear that there are no legislative impediments that would prevent the Atlantic First Nations from starting a bank or a trust company. The question would be the operational risk elements that would have to be addressed, as well as where to access the necessary funding to meet the capitalization requirements under the Banking Act.

While the specific types of operational risk are outside the scope of this paper, other organizational forms may pose less risk and be more conducive to

establishing an Aboriginal-owned and controlled financial institution, as well as meeting capital requirements.

Credit Unions

In our review of Aboriginal banking institutions, it was quite apparent that the normal form of the Aboriginal financial institution was a credit union (cf. UDG 2008). However, as credit unions are provincially regulated, questions emerged as to whether it could be done on a cross-provincial basis, which would be consistent with the demographics of Aboriginal peoples. A review of the legislation that govern credit unions in each of the four Atlantic Provinces was completed in an effort to determine whether a single credit union incorporated in any one of the four provinces could provide services to bands that reside outside the province of incorporation. The primary purpose of a Credit Union is mutual self help, although in reality their activities are to provide banking services. The philosophy of mutual self help is consistent with the objectives of Aboriginal peoples.

The dominant legislation in each province that enables and governs the operation of Credit Unions are their respective

Credit Union Acts:

- a) Nova Scotia – The Credit Union Act 1994, C.4
- b) New Brunswick – The Credit Union Act Chapter C-32.2
- c) Prince Edward Island – The Credit Union Act Chapter C-29.1
- d) Newfoundland – The Credit Union Act Chapter C-37.1

Other Legislation that impacts on the operation of Credit Unions include:

- a) Provincial Municipal tax legislation;
- b) Workers Compensation;
- c) Evidence Act in case of civil litigation;
- d) Federal Income Tax Legislation;
- e) Federal Anti-Money Laundering Legislation;
- f) Criminal Code of Canada.

It is important to note that the main difference between banks and credit unions is that banks are federally regulated and credit unions are provincially regulated. There are provisions within the legislation governing each of the four Credit Unions Acts that make provisions for banking operations that are regulated federally. In each Act, there are rules governing liquidity, capital maintenance, and asset and risk management.

There are also Credit Union Deposit Insurance Corporations set up in each jurisdiction to protect depositors and, in most respects, these mirror the protections offered to depositors in banks by the Canada Deposit Insurance Corporation. The legislation is designed to provide a secure environment to conduct financial transactions in a highly provincially regulated environment with a view towards protecting the depositors. The fact that a credit union may be Aboriginal-owned is unlikely to change any of these requirements.

Issues of geography and provincial boundaries complicate the development of an

Atlantic credit union for Aboriginal peoples. Each piece of legislation is different but has similar elements. For example, a credit union operating legally within Nova Scotia must incorporate under the Credit Union Act of Nova Scotia. The requirements of the application for incorporation are enumerated on Part III of the Act, under Section 5. This section specifies that there must be 10 or more individuals named in the application; approved bylaws; and a business plan that meets with the approval of Superintendent. At the same time, similar requirements for incorporation can be found in the legislation of each of the other provinces with slight variations, such as, the numbers required in the initial application. In New Brunswick under Section 6, 10 or more individuals are required to be named in the application for incorporation. In Newfoundland, Section 6(1) specifies that 20 or more persons are required and, in Prince Edward Island, under Section 4(1) 50 or more individuals are required. The main issue surrounding setting up a single credit union to serve all Bands in the Atlantic Provinces is the regulatory requirement of having to incorporate under each provincial Act. In addition, in our review, there is a restrictive tenor of the legislation requiring incorporation and limiting the capacity of the credit union to act only within the incorporating jurisdiction's territory. Each Act generally maintains that only credit unions that incorporate under the Act (each province) can operate as credit unions within a province. For example, in New Brunswick, the legislation states in

Section 5:

No person not incorporated or continued as a credit union under this Act shall carry on the business of a credit union in New Brunswick.

The same holds true for Newfoundland s.5 as well as PEI s.2. Nevertheless, the following wording can be found in each of the Provincial Credit Union Acts with minor variations.

Nova Scotia s.15

Subject to this Act, a credit union may, with the approval of the Superintendent carry on its business, conduct its affairs and exercise its powers in any jurisdiction outside the province to the extent that the laws of that jurisdiction permit.

Similar or identical wording is found in New Brunswick's Act in s.17; in Newfoundland's Act s.17; and, in PEI's Act in s 11(2).

The Nova Scotia legislation allows credit unions incorporated under other jurisdictions to operate within Nova Scotia for limited purposes.

s.140 A credit union incorporated under the laws of a jurisdiction other than Nova Scotia may, if so authorized by the laws of that jurisdiction and upon filing with the Superintendent such documents and other materials as the Superintendent may require, become registered in that province for certain limited purposes approved by the Superintendent, but in no case shall the credit union be permitted to carry on in the province the ordinary business of deposits and loans.

Similarly in Prince Edward Island, the legislation reads:

s.159

(1) Subject to subsection (2), no extra-provincial credit union shall carry on business in Prince Edward Island except to

- (a) register pursuant to applicable legislation of Prince Edward Island a security that was lawfully taken by it as part of a transaction conducted in and under the laws of another jurisdiction;
- (b) realize such security, take title to and possession of the property secured, register and hold title pending the disposal of the property and dispose of the property in accordance with the law of Prince Edward Island; and
- (c) transact business that is incidental to any business referred to in clause (a) or (b).

(2) An extra-provincial credit union may enter into an agreement, directly or indirectly, with a Prince Edward Island credit union for the purposes of permitting its members to transact business with it by means of automated teller equipment or other electronic facilities located in Prince Edward Island. 1992, c.14, s.159.

If a Nova Scotia credit union wants to do business outside Nova Scotia, it requires approval from the Superintendent notwithstanding s.15.

s.141 With the approval of the Superintendent, a credit union may carry on business under the laws of a jurisdiction other than Nova Scotia.

Also under the Nova Scotia Act s 56(4) states:

A credit union may not be a member of another credit union.

Similar clauses are found in the New Brunswick Act in s 60(4) and in the Newfoundland Act s 59(5).

These provisions would preclude a New Brunswick incorporated credit union joining a Nova Scotia incorporated credit union to become a single entity. Ultimately, these provincial jurisdictions may be a hindrance to developing an Aboriginal-owned financial institution across Atlantic Canada.

Conclusion

Banking which occurs inter-provincially is federally regulated and that which occurs only within a province is regulated by that province. The scheme of provincial legislation discourages provincially regulated financial institutions, such as credit unions, from operating extra-provincially. Under the existing legislative regime, it would not be possible to incorporate in one province, be regulated under that Act and carry on business in the same capacity in the other Atlantic Provinces.

Can a creative solution be found for Aboriginal peoples? It cannot be done under the current legislative and regulatory regime but some form of political compromise might be negotiated through bodies, such as the Council of Maritime Premiers.

It may be possible to exempt an Aboriginal Credit Union, with unique membership characteristics, i.e. Bands, from the restrictive provisions of the various Acts and to allow proportionality with respect to the protection of deposited funds.

Apart from dealing with organizational form, the Canadian government and the Aboriginal population must discuss whether the intended purpose of the Indian Act is in fact a benefit to the First Nations people of today. The Indian Act may have

provided great benefit to the people it was intended for, but it now has greater impact on economic development. Without the required flexibility, the social causes around access to capital that have plagued the First Nations for years could continue. There also needs to be a reassessment of business risk as it pertains to Aboriginal access to capital from within financial institutions. It would be expected of institutions to reassess the risk if there were changes to the Indian Act. However, it would be unlikely for lenders to change their policies and their assessment of risk without amendments to the Act. On the other hand, if desirable changes are made, then institutions will be forced to reconsider its current assessment of business risk for Aboriginals.

Implementing these recommendations will involve dedication from the many stakeholders including the various levels of government, financial institutions and most importantly the First Nations people. Changes are being made. Recently, First

Nation businesses in other parts of Canada received news as to narrowing the financing gap. On July 20, 2009, the Government of Canada announced a new funding arrangement with Quebec-based Desjardins Group to provide increased business financing options for the First Nations people of Quebec. Three million dollars will be provided through the Loan Loss Reserve Initiative which works by offsetting a portion of the lenders risk to First Nation businesses. This will reduce the financial risk of lending to on-reserve First Nation businesses (Indian and Northern Affairs, 2009).

The form of a financial institution is just one challenge to Aboriginal peoples and their access to capital. Throughout this paper, many issues became evident as to the reasons for the difficulty in obtaining capital for Aboriginal entrepreneurs and communities. Due to the magnitude of this issue and the volume of people impacted, one simple solution is likely non-existent. Despite this statement, legislative and regulatory review as a first step would result in the First Nations people having greater access to capital and increased prosperity through economic development.

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