

# Hybridity and Precarious Personhood: Limited Partnerships and Indigenous Economic Development

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B R A D L E Y B R Y A N \*

## ABSTRACT

Indigenous governments in Canada use sophisticated corporate structures to achieve their various economic development goals, of which the limited partnership is most certainly the most common. In a series of recent cases on the personhood of both Indigenous parties and on limited partnerships, courts have been redefining the relationship of personhood and property in the context of limited partnerships. This article canvasses developments in the case law of the personhood of Indigenous peoples alongside similar developments surrounding the nature of limited partnerships, raising questions about the ways that Indigenous governments may be further constrained by formerly unidentified colonial aspects of the law, as well as to identify specific issues that both general and limited partners need to confront before turning to this common business vehicle. The paper closes with some observations about colonial trends in the law governing the use of associations and business structures, posing questions for future research about the policy objectives at play.

KEYWORDS: *Indigenous economic development, limited partnerships, legal personhood, Indigenous governance, colonialism*

## I. INTRODUCTION

Indigenous peoples come to engage in economic development through an incredibly diverse and complicated set of organizations under provincial and federal law, and this strategy is largely the result of colonialism . As is (relatively) well known, Indigenous polities and civilizations had been self-organizing for millennia prior to the colonization of the Americas by European states. The deep diversity among Indigenous peoples across Canada is evident not just in extensive historic, linguistic and cultural differences, but in the legal traditions and forms of authority that exist today. This deep diversity is, however, effaced in Canadian law, which has generally identified this variety as a handful of “kinds” of “Indigenous peoples” . This diversity is further effaced when Indigenous governments enter the Canadian economy by way of a set of legal institutions and entities that give structure to private market relations, doing so to become visible as legal persons under Canadian law. Indigenous peoples’ governments exist and act through a stunning variety of legal forms, but only a few of these have come to be recognized under Canadian law: Modern Treaty First Nations, Indian bands, Métis organizations, and Inuit polities have a kind of official status, and certain Tribal Councils and representative Indigenous organizations have achieved a kind of representative status that allows them to deal with local, provincial and federal authorities but does not confer any kind of juridical personhood.<sup>1</sup> Thus, while a specific Indigenous polity or First Nation may be comprised of many smaller “Indian bands” (as defined under the *Indian Act*), the legal person that enters into market relations has tended to be these smaller and identifiable units precisely because their legal presence is amenable to using legal associations.

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<sup>1</sup> In this article, “Indigenous peoples” refers to and includes Métis peoples and Inuit peoples, “First Nation” refers to the polities of Indigenous peoples, and “First Nation government” includes Indian bands, “modern” treaty First Nations or “land claim” First Nations with treaties that have taken them out from under the *Indian Act*, as well as certain tribal councils with an established presence, such as for example the Tsihlot’ in National Government. See Karen Drake, “A Right without a Rights-Holder Is Hollow: Introduction to OHLJ’s Special Issue on Identifying Rights-Bearing Aboriginal Peoples Special Issue: A Right without a Rights-Holder Is Hollow” (2020) 57 Osgoode Hall LJ iii–xxxvii at iv–vi; and Bradley Bryan, “Indigenous Peoples, Legal Bodies, and Personhood: Navigating the ‘Public Body’ Exemption with Private Law Hybrid Entities” (2020) 6 CJCL 58 at 60–61.

Because of the colonial constraints on the legal personhood of Indigenous peoples, their discrete governments engage in economic development through a series of sophisticated business vehicles, and the main vehicle has been the limited partnership. Indigenous governing bodies use limited partnerships to carry out passive investment projects and to participate in economic ventures with technically skilled non-Indigenous partners in their territories (and beyond) while ensuring protection from possible exposure to liability.<sup>2</sup> In practice, however, the vagaries of the various steps that Indigenous governments must go through to be involved in their own local economies are aggravated by the proliferation of tiers of business structures, and the most challenging of these tends to be the limited partnership.

This article looks at some particular problems that arise for Indigenous governments when they use limited partnerships for economic development, canvassing recent case law and government policy to show that the vagaries of their use have increased considerably, which presents some challenges for Indigenous governments that would deign to use them. In what follows, I argue that the status of legal person of three of the parties involved in this sort of partnership present some antimonies for Indigenous economic development: namely, the legal personhood status of (i) the limited partnership, (ii) the limited partner in a limited partnership, and (iii) the Indigenous government that would serve as a limited partner. By looking at recent judicial considerations and certain policy developments, we will have occasion to see that the limited partnership presents various uncertainties to the parties, and has become a difficult form of organization for Indigenous economic development because the capacities and / or rights-bearing attributes of limited partnerships, limited partners and Indigenous governing bodies have not been consistently interpreted in relation to each other nor with respect to the specific regulatory and policy environments in which they act. The article closes with some possible avenues for alternatives in legislative, executive policy and judicial legal practice that touch on these relationships.

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<sup>2</sup> See Tracy MacKinnon and Michael Welters, "First Nations: Taxation and Business Structures," in *Report of Proceedings of the Sixty-Sixth Tax Conference, 2014 Conference Report* (Toronto: Canadian Tax Foundation, 2015), 39:1-29 at 11-12; and Michael McDonald, *First Nation Partnerships* (Vancouver, BC: CLEBC, 2016) at 2.

## II. INDIGENOUS ECONOMIC DEVELOPMENT AND LIMITED PARTNERSHIPS

### *A. The Ideological Context of Indigenous Economic Development*

The 1980s and 1990s witnessed a particularly important shift in the discourse of self-determination from “self-government” to “self-sufficiency”. It can be difficult for us to ascertain the movements and vicissitudes of government policy towards Indigenous peoples over the past fifty years, especially in light of the continual effects of settler-colonialism amidst a more widespread awareness. If one were to consider the federal government’s current policy directions toward reconciliation considering the colonial atrocities of the not-too-distant past, one might consider such efforts new, even laudable. But we do a disservice to the long history of Indigenous engagement with all levels of governments by assuming the substance of “reconciliation” is somehow original. There has been, since the “beginning”, an on-going conversation about and resistance to the univocal assertion of Canadian sovereignty, one led by Indigenous peoples and accompanied by many non-Indigenous settlers. Indeed, to imagine that a government can move from publishing a call for the assimilation of Indigenous peoples (in the White Paper of 1969)<sup>3</sup> to constitutionally entrenching aboriginal rights in section 35 of the *Constitution Act, 1982*<sup>4</sup> in a mere thirteen years is surprising to many of us today who see politics move much more slowly. In the immediate aftermath of the inception of section 35, the government commissioned a special committee led by Keith Penner to review “Indian government”. The Penner Report of 1983 made broad recommendations for recognizing Indigenous peoples as another branch within federalism, and called for a constitutional amendment to ensure that proper self-government based on a nation-to-nation relationship could be achieved.<sup>5</sup> The immediate government response to the Penner report came the following year, tabled by John C. Munro, Minister for Indian and

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<sup>3</sup> See the Pierre Elliott Trudeau government’s White Paper of 1969: Canada, Indian and Northern Affairs, *Statement of the Government of Canada on Indian Policy*, Ottawa: Department of Indian and Northern Affairs, 1969.

<sup>4</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.

<sup>5</sup> Keith Penner, *Indian self-government in Canada: Report of the Special Committee* (Ottawa: Queen’s Printer for Canada, 1983).

Northern Affairs.<sup>6</sup> After the report and response were circulated, however, a change in government and of government priorities shifted the discourse from “self-government” to “self-sufficiency”, most notably witnessed in the Ministerial Task Force on Program Review of 1986 (the “Nielsen Report”) and particularly set out in an infamously leaked budget report, the *Memorandum to Cabinet: Report of the Ministerial Task Force on Native Programs* (the “Memorandum”).<sup>7</sup> The Nielsen Report was a key initial component of the Mulroney government’s aim of taking stock of all government expenditures, hence the Memorandum characterized all government funding of Indigenous peoples as “expenditures” that had come to be seen as flowing from “Aboriginal rights”. The recommendation of the Memorandum was to drastically devolve these expenditures to provinces, municipalities and to Indigenous groups by 75% while disbanding the Department of Indian Affairs and Northern Development, such that the remaining expenditures were solely for “legal rights”. Both the White Paper 1969 and the Memorandum saw the relationship between Canada and Indigenous peoples in terms of these government expenditures, rationalizing them as part of a relationship of dependency rather than flowing from treaties, rights or other fiduciary obligations arising from a nation-to-nation relationship.<sup>8</sup>

The rest of the 1980s saw policy makers concerned with figuring out ways to disentangle questions about self-sufficiency from the deeper question posed in the Penner Report (and by Indigenous peoples since at

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<sup>6</sup> See John C Munro, *Response of the Government to the Report of the Special Committee on Indian Self-Government* (Ottawa: Indian and Northern Affairs Canada, 1984).

<sup>7</sup> The Memorandum was alternatively referred to as “The Buffalo Jump of the 1980s”. See Menno Boldt, “Appendix 8: The Ministerial Task Force on Program Review (‘The Nielsen Report’ and ‘The Buffalo Jump of the 1980s’): Summary”, *Surviving As Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993); Sally M Weaver, “Indian Policy in the New Conservative Government, Part 1. The Nielsen Task Force of 1985” (1986) 2:1 *Native Studies Rev* 1.

<sup>8</sup> An illuminating piece from this time is the collection of essays, notes and documents in Menno Boldt & Anthony J. Long (eds.) *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985). See, specifically, the Right Honourable Pierre Trudeau, “Statement by the Prime Minister of Canada to the Conference of First Ministers on Aboriginal Constitutional Matters, 8-9 March 1984”, pp. 148-56; and the Right Honourable Brian Mulroney, “Notes for an Opening Statement to the Conference of First Ministers on the Rights of Aboriginal Peoples”, pp. 157-64.

least since the signing of the historic treaties) regarding the fiscal sovereignty of Indigenous peoples, as policy-makers nudged the very terms of Indigenous fiscal policy towards two particular axes: (i) access to capital, and (ii) accountability. The first milestone along the “self-sufficiency” path was the set amendments to the *Indian Act* in 1988 that created a new regime of property taxation powers for Indian bands (often referred to as the “Kamloops Amendments”), a regime that would be mimicked in various self-government and land claims agreements in the following years.<sup>9</sup> Along the “accountability” track, the federal government attached a variety of fiscal reporting mechanisms to funding through the 1990s and early 2000s.

It was into this milieu of fiscal surveillance that the research of the Harvard Kennedy School Project on Indigenous Governance and Development, formerly known as the Harvard Project on American Indian Economic Development, (the “Harvard Project”) inserted itself, almost entirely through the work of its co-founders, Stephen Cornell and Joseph Kalt.<sup>10</sup> These two scholars are well-known in Indigenous communities in North America because of the body of work they produced under the auspices of the Harvard Project. From the late 1980s until well into 2000s, they made an impact in Indigenous communities in Canada by not only articulating, but by actively propagating, a vision for Indigenous economic development that could be easily disseminated and widely adopted, the evidence of which is found in numerous reports to a wide variety of government bodies: it is no understatement to say that their work formed a number of axes of support for a particular vision of “Aboriginal self-determination” in the *Final Report of the Royal Commission on Aboriginal Peoples*.<sup>11</sup> Since that time, Cornell and Kalt have continued to bring their work north to Canada, producing reports for, and presenting their work to, local Indigenous governments, tribal councils, regional assemblies, the Assembly of First Nations, research institutes, municipal governments, provincial governments, and to many ministries, departments and agencies

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<sup>9</sup> Bill C-115, *An Act To Amend the Indian Act (Designated Lands)*, SC 1988, c 23, amending the *Indian Act*, RSC 1985, c I-5.

<sup>10</sup> See: Harvard Kennedy School, “About the Harvard Project on American Indian Economic Development”, online: *Harvard Kennedy School* <<https://indigenousgov.hks.harvard.edu/about> > [perma.cc/F4SN-NNCT].

<sup>11</sup> Canada, “Chapter 5: Economic Development” in *Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, Vol 2 (Ottawa: Supply and Services, 1996) at 794–95, 810–11.

of the federal government.<sup>12</sup> Indeed, anyone working in Indigenous economic development in Canada today will be familiar with their work, and weight of their legacy in Canada cannot be underestimated; they will have heard talk of the “Harvard Project”, of Cornell and Kalt and, of course, of the successful directive that sums up their research: “*separate business from politics*”.<sup>13</sup> It is often said timing is everything in politics, and the reception and force of the Harvard Project would seem to prove it. Because the discourse of the self-determination of Indigenous peoples shifted from “self-government” to “self-sufficiency” at the same time that the Harvard Project found an audience in Canada, the adage of “separating

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<sup>12</sup> The list of all their presentations is extensive, but for a small but representative sample, see: Stephen Cornell, *Accountability, Legitimacy, and the Institutional Foundations of Native Self-Governance: Reflections on United States Cases* (Harvard: Harvard Kennedy School Project on Indigenous Governance and Development 1993); Stephen Cornell, John Loxley, David Newhouse, and Frederic Wien, “Governance for Economic Development: The Metis Settlements of Alberta” A Report to the General Council, Metis Settlements of Alberta (December 2000); Stephen Cornell, Miriam R Jorgensen and Joseph P Kalt, *The First Nations Governance Act: Implications of Research Findings from the United States and Canada: a report to the Office of the British Columbia Regional Vice-Chief, Assembly of First Nations*, (Tucson: Native Nations Institute for Leadership, Management and Policy 2002); Stephen Cornell, Cheryl Goodswimmer and Miriam Jorgensen, *In Pursuit of Capable Governance: A Report to the Lheidli T'enneh First Nation* (Tucson: Native Nations Institute 2004); Stephen Cornell, Maura Grogan, Miriam Jorgensen, and Cheryl Larson, “The Osoyoos Indian Band Economic Development Corporation: A Case Study in Community Entrepreneurship” A report to the Osoyoos Indian Band (May 2007); Stephen Cornell, Stephen Brimley, Joseph Thomas Flies-Away, Miriam Jorgensen, and Rachel Rose Starks, “Resurgent Justice: Rebuilding the Mohawk Justice System: A Case Study for the Mohawk Council of Akwesasne” (August 2007) Stephen Cornell & Miriam Jorgensen, “Nation Within a Nation: An Analysis of Siksika Governance” A Report to the Siksika Nation. (February 2010); Stephen Cornell & Neil Sterritt, “Economic Development, Governance, and the Cowichan Tribes” A Report to the Cowichan Tribes (March 2010); and Stephen Cornell, Renee Goldtooth, Michele Guerin, Miriam Jorgensen, Beaver Paul, Rachel Rose Starks, Sheldon Tetreault, and Anisa White, *Making First Nation Law: The Listuguj Mi'gmaq Fishery* (Tucson: Native Nations Institute; Vancouver: Centre for First Nations Governance 2010).

<sup>13</sup> Stephen Cornell & Joseph P Kalt, “Sovereignty and Nation-Building: The Development Challenge in Indian Country Today” (1998) 22:3 *Am Indian Culture & Research* J187 at 198–201.

business from politics” came to be interpreted as the most important policy principle for “successful” Indigenous governance institutions.<sup>14</sup>

The *First Nations Fiscal Management Act* (“FNFMA”) had its precursor in a suite of legislative instruments that focused on economic development,<sup>15</sup> which included support for the nascent First Nation Tax Commission’s role in fostering institutions for “raising capital” as it combined with the subsequent institution of the First Nations Finance Authority (“FNFA”)<sup>16</sup> and the First Nations Fiscal Management Board (“FNFMB”). In order to pass property taxation and assessment laws, a First Nation government must pass a *Financial Administration Law* (or, “FAL”, as they are often referred to), which brings the governing body under the FNFMA and under the purview of the FNFMB as the standard bearer for sound fiscal governing practice.<sup>17</sup> While the goal of accountability features significantly throughout the legislation, a key theme of the provisions and the standard legislative instruments is to restrict a First Nation’s active participation in “running” a business, such that the accountability provisions encourage a model of state-like administrative oversight of economic activity instead of active participation.<sup>18</sup> In this way, Indigenous governments have become

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<sup>14</sup> For a summary of this shift to economic development in the late 1980s, see W J R Austin, “Self-Government and Fiscal Relations: Fundamental Changes in the Relationship” (2000) 48:4 Can Tax J 1232 at 1240–45. For the importance of timing in politics, see Niccolò Machiavelli, *The Prince*, WK Marriott (trans) (Vancouver, BC: AD Books, 2009) at ch 6-7.

<sup>15</sup> This legislation began as the *First Nations Fiscal and Statistical Management Act*, SC 2005, c 9

<sup>16</sup> The FNFA was statutorily incorporated for the purposes of issuing debentures using real property tax revenues and providing investment opportunities in 1995 on the model of municipal finance authorities in many provinces.

<sup>17</sup> See the First Nations Fiscal Management Board, “Tools and Templates” online: <<https://fnfmb.com/en/tools-and-templates>> [perma.cc/YBF8-H747].

<sup>18</sup> See the First Nations Fiscal Management Board, “What’s in a FAL?” online: <https://fnfmb.com/en/services/certify-first-nations/financial-administration-law-fal> [<https://web.archive.org/web/20240301174101/https://fnfmb.com/en/services/certify-first-nations/financial-administration-law-fal>]; and FNFMB, “Sample FAL”, online: <https://fnfmb.com/en/services/certify-first-nations/financial-administration-law/sample-fal> [<https://web.archive.org/web/20240405015422/https://fnfmb.com/en/services/certify-first-nations/financial-administration-law/sample-fal>]. See also AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> ed) (London: Macmillan, 1915);



“legislatively restricted” from actively engaging in business, in the sense of running and directing the commercial activities of a specific business. Of course, there is great sense in this, and the commonsense force of the synoptic summary Cornell and Kalt’s corpus of work seems to support a clear distinction between the public sphere as government and the private sphere as economy and personal affairs.

### ***B. The Use of Limited Partnerships by Indigenous Governments***

The Indigenous economic development corporation has been the staple business form for Indigenous economic development, and Indigenous governments have legal reasons for using them beyond any commonsense business reasons.<sup>19</sup> Indigenous governments are not “legal persons” with the same capacities and legal presence as other entities under Canadian law, and thus, because of the different ways that Indigenous communities exist, it is not always obvious what sort of legal identity they have under Canadian colonial law (i.e. under common law and civil law). An “Indian band” is defined in section 2 of the *Indian Act* as a “body of Indians”, and courts have consistently indicated that the terms “Indian” and “Indian band” are to be understood only with respect to their legal usage in relation to the *Indian Act*, as they are *sui generis* in every other way.<sup>20</sup> Huddart JA emphasized this restricted legal sense in *Gitga’at Development Corporation v. Hill*: “‘Band’ is an important legal term that has existed for over 100 years, and is well known to all First Nation and aboriginal peoples. It has no ordinary meaning other than the *Indian Act* meaning.”<sup>21</sup> Perhaps not surprisingly, Indigenous peoples are confronted with the problem of having to organize

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James Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press, 1998).

<sup>19</sup> See Bob Kayseas *et al*, *Indigenous Rights and Entrepreneurship: Social Capital Formation and Modes of Social Regulation* (Rochester, NY, 2015); Robert B Anderson *et al*, “Indigenous Land Claims and Economic Development: The Canadian Experience” (2004) 28:3/4 *Am Indian Q* 634; Kevin Hindle *et al*, “Relating Practice to Theory in Indigenous Entrepreneurship: A Pilot Investigation of the Kitsaki Partnership Portfolio” (2005) 29:1/2 *Am Indian Q* 1; and Ronald Trospen *et al*, “Institutional determinants of profitable commercial forestry enterprises among First Nations in Canada” (2008) 38:2 *Can J For Res* 226.

<sup>20</sup> *Indian Act*, RSC 1985, c I-5, s 2.

<sup>21</sup> *Gitga’at Development Corporation v Hill*, 2007 BCCA 158, at para 17.

themselves in ways that allow for their traditional modes of existing comport with the colonial framework according to which Canadian colonial law can grasp them. To that end, Indigenous peoples generally seek to be “seen” by Canadian colonial law as tax immune or tax exempt polities, be they via non-profit structures (in the case of certain tribal councils) or via the specific exemptions under the *Indian Act* and *Income Tax Act*.<sup>22</sup> Most First Nation governments (i.e. Indian bands as well as “modern” treaty and “land claim” governments) are (generally) considered to be “public bodies performing a function of government” under paragraph 149(1)(c) of the *Income Tax Act*, which ensures that they will be exempt from paying tax on any income received in the year from any source within Canada (an exemption conferring a much broader sphere of activity than the exemption under section 87 of the *Indian Act*).<sup>23</sup> However, because Indian bands are barred from owning land in fee simple, and because the legal status of the “First Nation” apart from its instantiation in an Indian band or modern treaty or land claims government,<sup>24</sup> First Nation governments use development corporations as the means by which to act in private law.<sup>25</sup> To this end, the development corporation can be generally tasked with working on any aspect of an Indigenous community’s economic relations – from holding title to land, shares of businesses, interests in limited partnerships or trusts, or actively running or promoting various businesses on and off the reserve.<sup>26</sup>

Now, notwithstanding that the development corporation is a legal person, it does not enjoy the same broad exemption on its income as a First Nation government. On the one hand, it is not an “Indian” under the *Indian Act*, and so its income is not exempt under section 87. However if the development corporation is wholly-owned by the First Nation government, it will be exempt on income earned in the year under paragraph 149(1)(d.5) of the *Income Tax Act* so long as it earns all or substantially all of its income within the territory of the “public body” that

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<sup>22</sup> *Income Tax Act*, RSC 1985, c 1 (5<sup>th</sup> Supp.).

<sup>23</sup> For a full account of these ambiguities, see Bryan, “Indigenous Peoples, Legal Bodies, and Personhood”, *supra* note 1; and CRA Doc Views 2016-064503117 (re: para 149(1)(c) applies to *Indian Act* bands).

<sup>24</sup> As Wright J. noted: “There is no entity known to the law as a ‘First Nation.’” *Lac Des Mille Lacs First Nation v Canada (Attorney General)*, [2002] 24 CPC (5th) 127 at para 6.

<sup>25</sup> Bryan, “Indigenous Peoples, Legal Bodies, and Personhood”, *supra* note 1.

<sup>26</sup> Titi Kunkel, “Aboriginal values and resource development in Native Space: Lessons from British Columbia” (2017) 4:1 *Extractive Industries & Society* 6.

owns it (i.e. within the boundaries of the reserve or settlement lands, as the case may be). The peculiarities of the tax-exempt status of First Nation governments and the non-exempt status of their development corporations are part of what drives the turn towards the limited partnership. Since the 1980s, the limited partnership has also been widely deployed as part of the arsenal of structures available for organizing Indigenous economic activity precisely because the First Nation government can draw tax-exempt income from a limited partnership while serving as a limited partner . As noted, the development corporation can actively pursue economic activity by holding title to land and pledging it, as well as transacting other commercial relations without hindrance. The most basic form for structuring the economic activity of a First Nation is to use the development corporation as the general partner, along with the First Nation government itself as the limited partner.<sup>27</sup> The shares of the development corporation are either held by the First Nation government or by some representative of that government for the benefit of the First Nation as a whole (and usually held as bare trustee).<sup>28</sup>

The overall structure of the form of relationships in a basic First Nation limited partnership is set out in Diagram #1.

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<sup>27</sup> That is, the First Nation government as an Indian band or as a modern treaty or land claim First Nation, as these entities will be “persons” for the purpose of holding units in a limited partnership.

<sup>28</sup> The facts in the case of *Gitga’at Development Corporation v Hill* concerned the holding and transmission of development corporation shares . The shares of the development corporation were held by the hereditary chiefs of the Gitga’at First Nation, and not by the councillors of the Hartley Bay Indian Band. The BC Court of Appeal noted that the trust documents identified the “beneficial owner” of the shares as the band and not the First Nation, and thus hereditary chiefs were to be dispossessed of their ownership interests of the shares on petition. See *Gitga’at Development Corporation v Hill*, *supra* note 21.

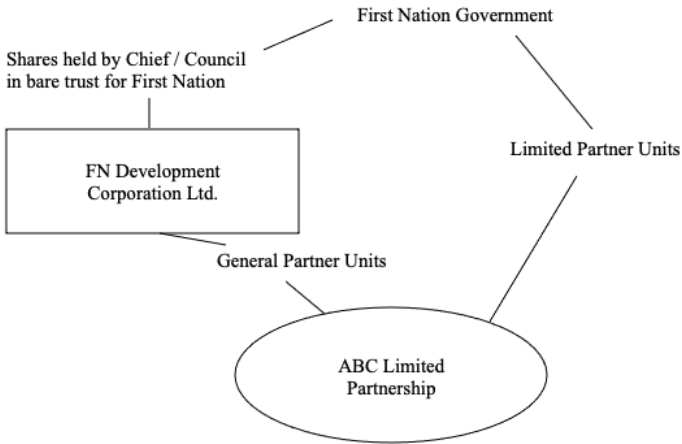


Diagram 1: Basic First Nation Limited Partnership

If the First Nation has interests in a variety of industries, such as forestry and fisheries, the development corporation can hold the shares of lower-tier corporations with the specific aims of serving as the general partner in a limited partnership dedicated to the specific venture or industry. This tiered structure can be increased to hold many more different kinds of ventures, and business trusts and settlement trusts can also be added into the mix. The result is a fairly complicated set of corporate governance structures that are used to organize and pursue the economic development of an Indigenous government.<sup>29</sup>

A more dispersed and tiered set of limited partnerships might be structured something like those depicted in the Diagram #2.

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<sup>29</sup> See McDonald, *First Nation Partnerships*, *supra* note 2; and Merrill Shepard & Marie Sophie Poulin, *Structuring for the Tax Exemption* (Vancouver, BC: CLEBC, 2002).

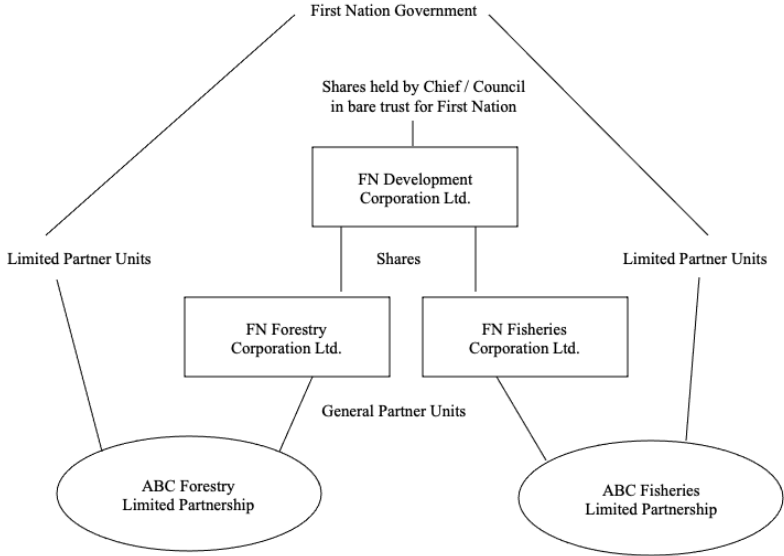


Diagram 2: Tiered First Nation Limited Partnership

Note that there is a separation of business and politics only insofar as the members of the First Nation government are not involved directly in the running and management of the discrete entities, including the management of the development corporation. Most lawyers will strive to avoid attracting unnecessary liability of the Chief or individual council members, or of the Band Council or Indian band as a whole.<sup>30</sup> To that end, it would be rare that a Chief or Council member would act directly as a director in a development corporation or in the general partner of a limited partnership, as it is not always possible for a Chief or Council members to rid compartmentalize their fiduciary duties as government leaders. Relatedly, concerns of conflict of interest may arise from the Indigenous community, or from non-Indigenous governments or partners. As one practitioner notes,

Perhaps the most important one of these initial building blocks from the point of view of separating business from politics is the one on conflicts of interest.

<sup>30</sup> See Merrill Shepard, “Separating Business from Politics – Why? How much? How?” Conference Paper, Aboriginal Law Section, Canadian Bar Association (January 30, 2013).

Conflicts of interest rules address the possibility that the Chief or a member of Council or a Director of a corporation carrying on a business for the community might seek preferential treatment for himself or herself.<sup>31</sup>

The use of limited partnerships achieves the goal of separating business from politics, as it were, by ensuring that the First Nation government is at a level removed from the management of their businesses . This separation is grounded in the concerns expressed by Cornell and Kalt when they indicate that the key to Indigenous sovereignty involves stable institutions and policies, which can only be achieved if the focus on governing is not distracted by the discrete goals of pursuing businesses: the separation of business and politics is thus the separation of Indigenous governance into a “public sphere” with the economic activity of businesses in the “private sphere”.<sup>32</sup> The limited partnership allows for Indigenous governments to perilously bridge this divide, and one may surmise that the peril lies in the fact that this separation comes at the cost of jurisdiction. But before we can gather the full extent of the precarious position of Indigenous governments in facing economic development across this “separation”, we need a better view of some of the intricacies and developments in the law governing limited partnerships.

### III. THE STATUS OF LIMITED PARTNERSHIPS

The basic elements of the limited partnership stand in contrast with its non-limited counterpart . A partnership is simply the relation that subsists between two parties carrying on a business in common with a view to a profit.<sup>33</sup> This contractually grounded relationship has certain key elements that are well-known.

*Agency relationship:* The partnership is an agency relationship formed between two or more parties such that every party is both principal and agent of the partners of the partnership and thus each partner has the ability to legally bind all other partners. The property of a partnership is jointly

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<sup>31</sup> *Ibid* at 4.

<sup>32</sup> Cornell & Kalt, “Sovereignty and Nation-Building”, *supra* note 13 at 198.

<sup>33</sup> This definition is now legislatively found in partnership legislation across Canada. See, for example *Partnerships Act*, RSO 1990, c p.5, s 2; *Partnership Act*, RSBC 1996, c 348, s 2; and *The Partnership Act*, CCM c P30, s 3. With respect to limited partnerships, compare, for example, *Limited Partnerships Act*, RSO 1990, c L 16; *Partnership Act*, RSBC 1996, c 348, ss 48-60; and *The Partnership Act*, CCM c P30, ss 55-66.1

held by the partners, and the profits and losses of the partnership are divided among the partners according to the terms of the partnership agreement.<sup>34</sup>

*Not a legal person:* A partnership is not a legal person or separate entity, which is why it is often described as a “flow-through” entity: partners share in the profits and losses of the firm, and are jointly and severally liable for the debts of the partnership according to the terms of the partnership agreement.

The profits and losses are not “held” in the partnership, and the liability of partners in a partnership is not limited by their being partners. Under the *Income Tax Act*, the partnership is treated as a unit only for the purposes of calculating the income or loss of the firm for the year for the purposes of flowing out income or losses to the partners for inclusion in their own computation of tax payable.

*Default legislative provisions:* While a creature of contract that takes on specific attributes by virtue of legislation,<sup>35</sup> the partnership is further defined by the legislation that governs it, which exist in the various partnership legislative regimes in each province . Thus, where partnership agreements are silent with respect to certain matters, partnership legislative provisions will govern things like the dissolution of a partnership, the rights and duties of partners, and the relationship of a partnership with its debtors and creditors. Other legislation may give a partnership certain capacities that it might not otherwise have. Under the statutory interpretation legislation partnerships are often identified as “parties” or “firms”, or even as “persons” depending on legislative context. Further, as there is no requirement to “register” or otherwise make one’s business officially known, such a relationship will be deemed to be a partnership for tax purposes.<sup>36</sup>

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<sup>34</sup> Kevin Patrick McGuinness, *Canadian Business Corporations Law*, 3rd ed (Toronto, Ontario: LexisNexis Canada Inc., 2017) at c 1.

<sup>35</sup> That is, any time that two or more persons are engaged in a common venture with to profit, the law will deem it to be a partnership under provincial legislation. See *supra* note 33.

<sup>36</sup> See *MNR v Braat*, [1969] CTC 294, 69 DTC 5219 (Ex Ct); *Cornforth v Canada*, [1982] CTC 45, 82 DTC 6058 (FCTD); but see *Backman v Canada*, 2001 SCC 10.

In short, this body of common-law rules, designed to facilitate capital accumulation and economic activity, encourages a certain kind of economic risk while protecting creditors.<sup>37</sup>

Limited partnerships are a relatively new form of business vehicle considering that corporations and partnerships extend back a number of centuries, if not further.<sup>38</sup> They are commonly understood as a specie of partnership, often described as being comprised of a silent partner and one that runs the business of the firm. Despite being taxed in the same fashion as partnerships, i.e. considered entities for the purposes of computation of income, in many ways the similarities with partnerships cease there. Under Canadian law, the limited partnership is characterized by the fact that it must be registered to exist. While not incorporation *per se*, the requirement of a state sanction, name, and possible perpetual existence might make it seem akin to the corporation.<sup>39</sup> Every limited partnership must have at least one general partner (i.e. with unlimited liability) and one limited partner whose liability is capped at their contribution to the partnership, much in the same way that a shareholder is not liable for the obligations or debts of a corporation. Unlike a corporation, however, if a limited partner takes part in the affairs or management of the partnership, it loses its liability protection status as a limited partner, and thus is deemed to be a general partner.<sup>40</sup> The defining feature of the limited partnership relationship is to confer different legal identities and responsibilities on these two specific kinds of partners along lines of liability and involvement: one will act in the

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<sup>37</sup> See Alison R Manzer, *A Practical Guide to Canadian Partnership Law* (Aurora, Ont.: Canada Law Book, 1994) at 9-10 and 9-11; R C P'Anson Banks, *Lindley & Banks on Partnership*, 22<sup>nd</sup> ed (London: Sweet & Maxwell, 2022) at 26-39.

<sup>38</sup> Harold Berman notes that the *commenda* was a medieval form of contract that was similar to the limited partnership, with an investing partner and a travelling partner – though one wonders the extent to which this civilian legal relationship finds its analogue in contemporary agency relations. See Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983) at 352-53.

<sup>39</sup> Michael Welters provides a very interesting account of the corporation along these lines, and one wonders if it could be extended to the limited partnership. See Michael Welters, “Towards a Singular Concept of Legal Personality” (2013) 92 Can Bar Rev 417.

<sup>40</sup> A shareholder may attract liability for “managing” the affairs of a corporation only to the extent that it has acted as an actual agent of the corporation or in a fiduciary capacity.



name of the partnership to bind the firm, and one remains silent as an investor. The distinction between general and limited partners is grounded in a distinction between their respective roles in a partnership, with the former being responsible for holding the assets of the partnership and conducting partnership business while the latter is limited to making a capital contribution to the limited partnership. Thus, the limited partner's liability status is akin to that of a shareholder of a corporation: the limited partner's liability is restricted to the amount of capital contributed to the partnership by the limited partner, just as a shareholder's liability for corporate debts is limited to the shareholder's contribution. Because the silent partner does not "act" on behalf of the firm, and thus cannot bind other partners, it is reasoned that the silent partner ought not to be liable beyond its capital contribution. Here, the name of the limited partnership is key: it cannot have any of the names of the limited partners in the name of the limited partnership because the name of the firm can indicate to third parties just who is acting on behalf of the partnership.<sup>41</sup> In this way, the limited partners are not agents for other partners in the firm because they cannot hold themselves out as doing business on its behalf. This limitation also means that the limited partner has no control over the assets and cannot direct how they are to be used or disposed of for partnership purposes.

It is interesting to note that the core aspects of the partnership are significantly muted in the limited partnership, to the extent that one wonders if a limited partnership is properly a partnership, i.e. an agency relationship of agreement or contract by the terms of which a business is pursued by two or more persons in common with a view to profit. In sum, a limited partnership is formed by registering the fact that a limited partnership agreement has been struck, with the sharing of profits and losses of the partners being set out in it. But is this a classic agency relationship if the limited partnership cannot be said to "hold" property in its name, or that partners are not able to bind each other in all

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<sup>41</sup> This restriction is found in partnership legislation, as well as being treated under case law. See *Partnership Act*, RSBC 1996, c 348, s 53. See also *Nordile Holdings Ltd v Breckenridge* (1992), 66 BCLR (2d) 183 (CA); and *Haughton Graphic Ltd v Zivot et al* (1986) 33 BLR 125 (Ont HC).

circumstances.<sup>42</sup> In the past ten years, it might be said that a “new doctrine” has arisen, finding its most recent expression in the British Columbia Court of Appeal’s decision in *Harrison Hydro Project Inc. v. B.C. (Environmental Appeal Board)* in 2018.<sup>43</sup> As we will see, one might wonder whether the particular kind of relationship that typifies a limited partnership is somewhere between a partnership and a trust, with the general partner holding partnership property on behalf of (for the benefit of?) the limited partner. But noting these divergences from the fact that partnerships do not need state sanction to exist, and that the identity of the limited partner is, in important ways, different than the identity of the firm itself, we might ask in what ways the limited partnership remains a species of partnership, or perhaps its own hybrid form of business entity.<sup>44</sup> Even though the limited partnership is relatively new as a business structure in the common law world, we ought to have expected that it would evolve as these entities’ various attributes received judicial attention.

### A. *Development of a New Doctrine*

In 2013, a series of cases reconsidered certain aspects of the personhood of limited partnerships under certain circumstances, beginning with an appeal of the B.C. Supreme Court’s decision in *Edenvale Restoration Specialists Ltd. v. The Queen*, and ending with the consideration of the B.C. Court of Appeal’s decision in *Edenvale* in a decision of the Saskatchewan Queen’s Bench in *Tron Power Limited Partnership v. The Queen*.<sup>45</sup> These cases looked to the way the limited partnership exists as a juridical entity in relation to the specific capacities and attributes of the limited partner in the context of sales tax liability, and they articulated limits to the dimensions of

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<sup>42</sup> Michael Welters has commented that limited partnerships can indeed hold property: see Michael Welters, “Limited Partner’s Interest in Partnership Property” (2013) 21:7 Can Tax Highlights 3–4.

<sup>43</sup> See *Harrison Hydro Project Inc v BC (EAB)*, 2018 BCCA 44.

<sup>44</sup> Thinking comparatively, we might note that the limited partnership shares certain tax and liability attributes that make it more like a “hybrid entity”: an entity that combines the attributes of liability protection for investors, separating owners and managers, and yet provides flow-through treatment to profits and losses. Matias Milet, “Hybrid Foreign Entities, Uncertain Domestic Categories: Treaty Interpretation beyond Familiar Boundaries” (2011) 59 Can Tax J 25.

<sup>45</sup> See *Edenvale Restoration Specialists Ltd v The Queen*, 2011 BCSC 1748; *Edenvale Restoration Specialists Ltd v The Queen*, 2013 BCCA 85; and *Tron Power Limited Partnership v The Queen*, 2013 SKQB 179.

a limited partnership's legal personality, even if those limits render the personhood of limited partners and limited partnerships contingent upon the legal regime that governs them. In a unanimous decision of the B.C. Court of Appeal, Justice Tysoe considered whether sales tax was payable in respect of a sale of tangible personal property by the appellant, Edenvale Restoration Specialists Ltd. ("Edenvale"), to a limited partnership when part of the purchase price was paid by issuing units of that limited partnership to Edenvale. Justice Tysoe noted that the issue of whether the amount of tax on the entire value of the sale was to be remitted turned on the interpretations of "sale", "purchaser" and "use" under section 1 of the *Social Service Tax Act*,<sup>46</sup> and that to properly interpret these terms turned on the nature of the limited partnership in relation to these. Specifically, Justice Tysoe notes:

It is the general partner, not the limited partnership, who acts on behalf of the limited partners, ...[and that] the general partner is the agent for the limited partners... The General Partner was a "purchaser" within the meaning of the definition in the Tax Act because it acquired the property "on behalf of or as agent for a principal" and the property was intended to be used by "the principal or by another person at the expense of that principal".<sup>47</sup>

In *Tron Power*, the Saskatchewan Queen's Bench had to consider a similar situation, but one that involved a limited partnership run by the English River First Nation ("ERFN"), an Indian band under *Indian Act*. The main economic development corporation owned and run by the ERFN was Des Nedhe Development Inc. ("Des Nedhe"), which in turn owned all of the shares in the corporation it created to be the general partner, Tron Power Inc. ("Tron"), of a limited partnership that dealt with the provision of power to the community, the Tron Power Limited Partnership ("TPLP"). The ERFN owned 99.9% of the units of the TPLP, and Tron, the general partner, owned 0.01%, and the profits and losses were to be allocated to the partners on this basis. All of the directors of both Des Nedhe and Tron were members of the ERFN, and the head offices of both corporations and the limited partnership was the English River First Nation Grasswoods Reserve 192J (the "Grasswoods Reserve"), just outside of Saskatoon. As in *Edenvale*, the issue before the court was whether Tron was responsible for

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<sup>46</sup> *Social Service Tax Act*, RSBC 1996, c 431

<sup>47</sup> *Edenvale*, BCCA, *supra* note 45 at paras 23 and 27.

the sales taxes levied against it, or whether it ought to have been levied against the TPLP .

At the trial, officials from Tron and ERFN provided evidence that Tron paid sales tax when purchases were made off of the reserve, but when goods were purchased and delivered to the reserve it did not, as its financial officers were under the impression that they were exempt under section 87 of the *Indian Act* because the limited partner ERFN was an Indian band and possessed 99.9% of the units of the TPLP. Further, because a limited partnership is not a person at law, counsel for Tron argued that the tax consequences are flowed through to the partners because the appropriate taxpayer in this interest is the TPLP. As the preponderant ownership interest of the TPLP lay with ERFN, the purchases on reserve ought to have been exempt from sales tax. It is important to note that such limited partnership arrangements, prior to both *Edenvale* and *Tron Power* were remarkably common . Indeed, the parties were somewhat surprised to be audited and assessed tax, and Justice Danyiuk noted the way the shift in tax policy in Saskatchewan seemed have happened “behind closed doors”.

[15] ... Brent Hebert, the Director of Audit at Saskatchewan Finance... testified that in 2007 (at the time of this audit), Saskatchewan Finance had an internal policy regarding First Nations-owned limited partnerships, which policy was not disclosed publicly. Indeed, even the existence of that policy was not disclosed to the appellant until the hearing had already commenced. ...

[18] Mr. Hebert further testified that the internal, non-public policy on limited partnerships was developed when on-reserve casinos (such as Dakota Dunes, outside of Saskatoon) were being built. The government wanted to acknowledge those “special, unique situations” and therefore developed this policy. He acknowledged that this policy was used in the assessment under appeal.

[19] It appears that in developing this policy, Saskatchewan Finance held no consultations with any stakeholders. Indeed, no one was told of this policy, notably not Indian bands, more notably not the appellant. Disclosure of this policy during the hearing itself (in spite of previous requests for disclosure of same) placed the appellant in a position where it was fighting against an assessment based on a policy it had never seen.

[20] Further, it appears that at all material times the Province of Saskatchewan’s publicly-stated policy (driven by elected officials) was the encouragement of Indian bands’ and people’s development and diversification into a variety of commercial enterprises, so as to enhance the development of First Nations economic self-sufficiency. During that same time, the taxation of those same bands and peoples (in terms of PST) was governed by a secret policy (driven by non-elected

officials) that Saskatchewan Finance failed to disclose to anyone affected, to and including the holding of an appeal hearing regarding such a PST assessment.

[21] That seems a remarkable way for Saskatchewan to conduct its mandate.<sup>48</sup>

Nevertheless, Danyiuk J. proceeded to the legislative regime to inquire whether Tron would be liable for the tax or whether it could be assessed against the TPLP with tax consequences flowing through to the limited partner ERFN. As in *Edenvale*, Danyiuk J. turned to principles governing limited partnerships when he noted: “when an asset is purchased for use in such an enterprise, it is purchased and owned by the general partner. That is true irrespective of whether that general partner is corporate or individual.”<sup>49</sup> Following the analysis in *Edenvale*, the court dismissed Tron’s appeal on the basis that the general partner acquired partnership property “for the benefit of” the limited partner.

[41] While such property is acquired for the benefit of the limited partnership, that is hardly surprising. The general partner exists for the limited partnership’s benefit. However, it is clear from this agreement and from the authorities that purchases and sales of assets conducted by the general partner are transacted by that general partner. It becomes the owner of such assets. For tax purposes, it is treated independently. As well, the learned British Columbia chambers judge [at the BCSC in *Edenvale*] held the common law prorated property rights of partners in a general partnership were no different than those rights within a limited partnership. With respect, this analysis appears to have conflated certain common law rights with those derived purely from statute.<sup>50</sup>

The rulings in these cases caught the attention of British Columbia’s Ministry of Finance, which followed the lead of Saskatchewan and rearticulated how limited partnerships would be treated for the purposes of sales tax in BC PST Bulletin 319, which stated:

If you acquire a limited interest in such a partnership, you are not considered to be purchasing an interest in the partnership’s assets and, therefore, do not need to pay PST. Unless a limited partnership agreement provides otherwise in writing, any transaction involving the limited partnership is considered to be a transaction with the general partner(s). A transfer of assets from the partnership to a limited partner is treated as a sale from the general partner to the limited partner. The

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<sup>48</sup> *Tron Power Inc*, *supra* note 45.

<sup>49</sup> *Ibid*, at para 39.

<sup>50</sup> *Ibid*.

limited partner pays PST on the full value of the taxable assets because the limited partner does not have an interest in the assets prior to the transfer.<sup>51</sup>

It created a very narrow exception, however, for First Nation Limited Partnerships – noting that so long as *all* of the partners in the limited partnership are First Nations individuals or bands (ostensibly with exempt status under the *Indian Act*) and the purchases were made and goods received on reserve land, the purchase will be exempt from PST. Of course, this would mean that the general partner cannot be a corporate entity. As we will see, these particular alterations created interestingly difficult situations for Indigenous limited partnerships. In the short term, B.C.’s PST Bulletin 319 saw lawyers for Indigenous governments in B.C. looking for novel ways to reorganize limited partnership holdings so as not to attract any PST, sometimes devolving the limited partnership into unincorporated partners, or converting the entire limited partnership into limited liability partnerships. These specifically tax-driven transactions and reorganizations underlined the extent to which First Nation governments were operating in a public sphere that was defined by colonial law, and subject to the private-law terms of provincial commercial law. While Cornell and Kalt’s vaunted “separation of business from politics” is present in these structures, it is less clear whether the institutional basis for sovereignty or the bureaucratic expertise were being developed under this model of economic development.

Lawyers realized that they needed to properly grasp the nature of the relationship between the general partner and the limited partner, but it may not have yet sunk in that the relationship was determined more directly by the regulatory regime under which the limited partnership transacts than by any innate features of limited partnerships. It was not until 2018 with the B.C. Court of Appeal’s decision in *Harrison Hydro Project Inc. v. B.C. (Environmental Appeal Board)*<sup>52</sup> that the ambiguousness of limited partnerships is ironically somewhat more visible.

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<sup>51</sup> Ministry of Finance (BC), *Provincial Sales Tax Bull 319: Partnerships* (December 2013) at 5. See also Terry G Barnett and Noah M Sarna, “Sales Tax Setback for First Nations” (2013) 21:9 *Can Tax Highlights* 8-9.

<sup>52</sup> *Harrison Hydro*, BCCA, *supra* note 43; affirming *Harrison Hydro Project Inc v Environmental Appeal Board*, 2017 BCSC 320.

## ***B. Situational Personhood in Harrison Hydro Project Inc. v. BC (EAB)***

Harrison Hydro Project Inc. (“Harrison Hydro GP”) was the general partner of five limited partnerships, each of which was involved in a separate “run-of-the-river” hydroelectric project. As each project required a water licence issued under the *Water Users’ Communities Act*<sup>53</sup> (the “*Water Act*”), Harrison Hydro GP had entered into bare trust agreements “in respect of” each of the limited-partnership projects, such that it

held title to the Limited Partnership’s property as bare trustee for the sole use, benefit and advantage of the Limited Partnership, had no beneficial interest in the Limited Partnership’s property and would be only acting as agent for the Limited Partnership in dealing with the Limited Partnership’s property.<sup>54</sup>

The court found as fact that up until 2013, the Ministry of Finance had invoiced each limited partnership individually for their respective water rental charges.<sup>55</sup> By billing each limited partnership separately, the amount payable in each instance was much lower than had the total water usage of all five limited partnerships been combined to calculate the water rental charge under the terms of each licence. In 2013, after conducting a review of the way that “land appurtenant to a particular licence matched the land tenures on which the beneficial use of water diverted under that licence was occurring”,<sup>56</sup> the Comptroller of Water Rights for the Ministry<sup>57</sup> had found that the names on the specific water licences was the name of the limited partnership while the name on title of the appurtenant land was that of Harrison Hydro GP.<sup>58</sup> As limited partnerships were not able to be registered on land titles as owners, the Comptroller directed that the names on the respective water licences be altered to reflect their ownership by Harrison Hydro GP. This re-inscribing of the ownership of the water licences meant that the amount owed under the terms of the combined licences being held

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<sup>53</sup> *Water Users’ Communities Act* RSBC 1996, c 483 [*Water Act*]

<sup>54</sup> *Harrison Hydro*, BCCA, *ibid* at para 9.

<sup>55</sup> *Ibid* at para 11.

<sup>56</sup> *Ibid* at para 12.

<sup>57</sup> Or, the “Comptroller of Water Rights, Ministry of Forest, Lands and Natural Resource Operations”.

<sup>58</sup> *Harrison Hydro*, BCCA, *supra* note 43 at para 12.

by one party would be close five times higher in total than under the previous computations.<sup>59</sup>

At issue before the Environmental Appeal Board was whether each limited partnership could be said to hold the water licence associated with its hydro project, or whether Harrison Hydro GP is the proper licensee for each of the five licences. In its reasons, the Board noted that s. 16(1) of the *Water Act* requires that a water license must pass with a conveyance or disposition of the land, and that the fact that licences are appurtenant to land supports interpreting the word “owner” under the *Water Act* restrictively (i.e. as not being applicable to limited partnerships).<sup>60</sup> Writing for the majority in a 2-1 decision of the B.C. Court of Appeal, Justice Tysoe drew attention to the fact that the definition of “owner” under the *Water Act* requires attention, first, to the nature of limited partnerships. He noted that whether a limited partnership could admit of attributes of legal capacity depended upon the statutory regime under which they were subject, and that simply because the *Income Tax Act* treats limited partnerships as ‘persons’ for the purpose of the computation of income does not mean it will be a person in all legislative contexts, and that it makes more sense to look to areas of law that contemplate a limited partnership’s ability to hold property.<sup>61</sup> Reflecting on the nature of limited partnerships, Tysoe J. notes that a “general partner has exclusive control of the management of the business of the limited partnership and its property..., [and] the property of the limited partnership can be held only by the general partner.”<sup>62</sup>

In a persuasive dissent, Justice Hunter noted that there is nothing within the legislative regime of the *Water Act* that bars an interpretation of limited partnerships as licensees. Hunter JA notes that the water licences were assigned to each of the limited partnerships prior to the leasing of appurtenant land, and the only reason that the limited partnerships were not able to be registered for the purposes of leasing the appurtenant land was because the Land Title Office (“LTO”) had a policy of not permitting limited partnerships to be registered owners. Thus, it would seem to be the policy of the LTO, and not any incongruity between legal regimes of

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<sup>59</sup> *Ibid* at para 2.

<sup>60</sup> *Re Harrison Hydro Project Inc and Comptroller of Water Rights*, 2019 CarswellBC 180 (BC Environmental Appeal Board) at 16.

<sup>61</sup> *Harrison Hydro*, BCCA, *supra* note 43, at paras 51 and 53.

<sup>62</sup> *Ibid* at para 55.



ownership, that created the mismatch between the registered owners of appurtenant leases and of the water licences. Instead, Hunter JA continues, the appropriate way to determine whether a limited partnership can be a licensee is with reference to the legislation itself, and in this instance the legislation involves the definitions of “licensee”, “owner” and “person” under the *Water Act*, which, upon analysis, devolves upon the question as to whether a “person” includes a “firm, association or syndicate”. Hunter JA notes that the scheme of these definitions under the *Water Act* are either “expansive” so as to expand the ambit of who might be a licensee, “or it has some other, less consequential significance”.<sup>63</sup> Following through on the analysis, Hunter JA agrees with the EAB’s initial determination that a limited partnership is not barred from being a licensee providing it has the requisite connection with the appurtenant land, but he disagrees with their conclusion that it cannot be because it is not a “legal entity”. This second step misconstrues the issue, and he states that “the question before us is not whether limited partnerships are legal entities for general purposes, but whether they are to be treated as independent entities for the limited purpose of holding water licences under the *Water Act*. That, in my view, depends primarily on the legislative scheme of the *Water Act*.”<sup>64</sup>

But Justice Hunter was not finished there, and he referred to the rule in *Foss v. Harbottle*, a UK case involving derivative actions brought by shareholders against the corporation.<sup>65</sup> Hunter JA notes that the case supports the proposition that limited partnerships may be treated as independent entities for specific purposes, and noted that the principle in *Foss v. Harbottle* had been applied in the context of limited partnerships previously by the B.C. Court of Appeal in *Watson v. Imperial Financial Services Ltd.* and in *Everest Canadian Properties Ltd. v. CIBC World Markets Inc.*<sup>66</sup> Citing Newbury JA’s judgment in *Watson*, Hunter JA noted that the principle in *Foss v. Harbottle* supports allowing derivative actions where members of an association hold beneficial interests in its assets.<sup>67</sup> Extending

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<sup>63</sup> *Ibid* at para 93.

<sup>64</sup> *Ibid* at para 107.

<sup>65</sup> *Foss v Harbottle* (1843), 2 Hare 461, 67 ER 189 (UK Ch).

<sup>66</sup> *Watson v Imperial Financial Services Ltd* (1994) 88 BCLR (2d) 88 (CA) at paras 24-28; *Everest Canadian Properties Ltd v CIBC World Markets Inc*, 2008 BCCA 276 at paras 19-20.

<sup>67</sup> *Harrison Hydro*, BCCA, *supra* note 43, at paras 109-10.

this analysis to whether the limited partnership can be an owner, Hunter JA notes this is more consistent with the scheme of the *Water Act*, and that to read down the definition of “owner” under the *Water Act* to be consistent with the LTO’s interpretation of “owner” under the *Land Title Act* is to give a very restrictive definition to “owner” – one Hunter JA takes pains to indicate is inconsistent with the regulatory scheme of the *Water Act*.

### C. *Expanding or Restricting?*

If anything is clear about the legal personhood of the limited partnership or its parties, it is its contingency depending upon the legal regime. Recall that, in reaching to consider the rule in *Foss v. Harbottle* in relation to the legal personhood of a limited partnership, despite the fact that the latter concerned the ability of shareholders to bring a derivative action in the name of the firm and against those who were purportedly harming it, means a significant expansion of where one might look to ascertain the circumstances under which a limited partnership can be a legal entity.<sup>68</sup> As Colin Baxter notes, there is considerable confusion about what *Foss v. Harbottle* suggests about legal personhood in the abstract, but perhaps even more confusion in practice:

Most of the heat is generated by rival perceptions of the exceptions to the *Foss v. Harbottle* rule. The rule itself is straightforward. Because companies are legal persons, they alone are competent to complain about wrongs done to them. Similarly uncontroversial is the need for exceptions to this pleasing simplicity. What is to happen, for example, if a company is unable to complain because those holding the reins of power within it are the persons injuring it and it suits them to watch it suffer?<sup>69</sup>

It is well-known that for tax purposes the “reality” of a legal relationship may be deemed to be otherwise depending on the discrete policy goals of the provisions that would apply and so as to properly attribute tax liability. Deeming provisions are a common feature of the *Income Tax Act*, and they are crucial for interpreting the movement from the identification of the tax base through to the computation of tax payable. Without deeming provisions, it would be difficult to imagine how to properly determine the income of a partnership, much less the basis upon which the taxable income would flow out to partners. In *Harrison Hydro*, Justice Tysoe noted that there

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<sup>68</sup> O A Osunbor, “A Critical Appraisal of ‘The Interests of Justice’ as an Exception to the Rule in *Foss v Harbottle*” (1987) 36:1 Intl & Comparative L Q 1.

<sup>69</sup> Colin Baxter, “The True Spirit of *Foss v Harbottle*” (1987) 38:1 N Ir Leg Q 6 at 7.

is authority for treating limited partnerships as entities depending on the context in which they appear, citing, among other cases and legislation, the judgment in *Backman*. Justice Hunter's dissent calls this into question, *but on the basis that it is true* – partnerships and limited partnerships can be treated as independent entities depending upon the way the policy context of the legislation aims to regulate the affairs and transactions of the parties.<sup>70</sup> In *Backman*, as in *Watson* and *Everest Canadian* (applying *Foss v. Harbottle* to limited partnerships in B.C.), the limited partnership is treated as an entity so as to give effect to various policy goals of the legislation that would otherwise be frustrated. While the legislative regime of the partnership provisions in the *Income Tax Act* at issue in *Backman* explicitly require that a limited partnership be treated as an entity for the purpose of computing the income of the limited partnership, in *Watson v. Imperial Financial Services Ltd.*, the B.C. Court of Appeal applied the rule in *Foss v. Harbottle* to allow a limited partnership to be considered an entity so that a number of limited partners could bring an action akin to a derivative action.<sup>71</sup> In contrast with *Foss v. Harbottle*, however, *Watson* dealt with an appeal from a chambers judgement granting a motion to strike portions of the pleadings that identified the limited partnerships in question as entities. The Court of Appeal allowed the appeal on the basis that the striking of pleadings prior to the hearing of the action will not succeed where there is a novel issue to be tried – and the Court indicated that the issue of the limited partnership's status as an “entity” was sufficiently novel so as to not warrant striking the pleadings. Thus the actual legal context in which the limited partnership could be said to be an “entity” had not yet been put in question, but remained a “novel” question to be determined at trial.<sup>72</sup>

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<sup>70</sup> See Christopher J H Donald, “Limited Partnerships and the Control Liability of Limited Partners” (2006) 44:3 Can Bus LJ 398; and compare Joel Nitikman, “Who Has *de Jure* Control of a Corporation When Its Shares Are Held by a Limited Partnership?” (2011) 59:4 Can Tax J 765.

<sup>71</sup> *Watson*, *supra* note 64, at para 15.

<sup>72</sup> In the context of corporate persons, there are a number of excellent critical studies that have informed this analysis. See James Boyd White, “How Should We Talk about Corporations? The Languages of Economics and of Citizenship” (1985) 94:6 *Yale L J* 1416; Joshua Barkan, “Liberal Government and the Corporate Person” (2010) 3:1 *J of Cultural Economy* 53; Margaret M Blair, “Corporate Personhood and the Corporate Persona” (2013) 2013:3 *U Ill L Rev* 785; Mark M Hager, “Bodies Politic: The

It is intriguing that the role of the specific provisions of the limited partnership agreements receive only passing reference, and that the relationship between limited partners and general partners in general attracts attention in a way that invites the application of *Foss v. Harbottle* instead of any provisions of the limited partnership agreement. Because the relationship struck between limited and general partners in a limited partnership are conditioned by factors that extend beyond the terms of both the contract and the statutory requirements for limited partnerships in partnership legislation, the status of the juridical personhood of the limited partnership will be contingent upon the way legal provisions end up applying in the context; the legal personhood of the limited partnership will need to be determined on a case-by-case basis. Note that the relationship in a limited partnership, while not of agency, is not necessarily simply “contractual” – which is why courts have referred to *Foss v. Harbottle* to interpret the kinds of rights that limited partners have. That is, their rights and obligations are not only specified under the agreement, *but at law*. This consideration of the specific mode in which limited partners have recourse against a limited partnership or against general partners will depend upon the procedural rules to an extent, but will also bring in a certain kind of “legal transplant”, i.e. of the rights of minority shareholders *vis-à-vis* a corporation and / or its management from *Foss v. Harbottle* . These identities and rights will shift depending upon the particular legislative scheme or regulatory situation in which legal issues arise . Questions about corporate groups as well, where tiered corporate groupings hold shares or interest in other partnerships or limited partnerships . The liability protection aspects of limited partnerships notwithstanding, it is certainly clear that the regulatory regimes become challenged when there is no regularity to the vertical ownership structures of consolidated business groups, a challenge augmented because of the conceivably endless permutations of the holdings of limited partnerships.

Even so, it would seem, on this basis, that the majority and minority opinions in *Harrison Hydro* loosely agree on this particular point, such that the most important consideration in discerning the legal personhood of a limited partnership will require not just a superficial interpretation of the terms of the statute, but a deep dive into its purposes . In short, *Harrison*

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Progressive History of Organizational ‘Real Entity’ Theory” (1988) 50:2 U Pitt L Rev 575.

*Hydro* and its related jurisprudence and policy suggest that the limited partnership is really only about liability protection for investors whose rights are akin to those of shareholders or even beneficiaries, but that whether it is an entity will always depend upon the legal environment in which it acts.

#### IV. AMBIGUOUS PERSONS AND “INDIGENOUS BODIES”

In the recent decision of the B.C. Court of Appeal in *British Columbia v. New Westminster Indian Band No. 566* (“NWIB 566”), Justice Newbury carried out an extensive analysis of the legal personhood of an Indian band, being careful to not make generalizations, while also astutely limiting the question of the Indian band’s legal personhood to the specific legislative regime under which that personhood came into question.<sup>73</sup> The case involved whether the Qayqayt First Nation (“QFN”) would be liable for taxes calculated on the premiums paid with respect to certain insurance policies by the Nation. There two related issues before the court were whether the New Westminster Indian Band No. 566 (the “legal face” of the QFN) was a legal person for the purposes of the taxing statute, and if so, whether the band would be exempt given that it was, at that time, without a reserve of its own.

The QFN had been pursuing a specific claim for reserve lands it claimed were unlawfully taken from it, and though it did not have “reserve lands”, it had a legal presence as the New Westminster Indian Band No. 566 (“NWIB”), which is the legal title by which it signed and secured certain insurance policies to finance the specific claim. Under the *Insurance Premium Tax Act* (the “IPTA”),<sup>74</sup> the B.C. government assessed a tax on the insurance premiums payable by the NWIB, and the NWIB challenged the determination on the grounds that (i) it was not a “person” under the IPTA, and (ii) even if it were, it would be exempt under section 87 of the *Indian Act*. The chambers judge granted the petition on the grounds that the NWIB was not a “person” within the meaning of the IPTA, because Indian bands are *sui generis* and unique in ways unlike other rights-bearing entities. As the Indian band was not a “person”, nor could it be a “taxpayer” and was thus not subject to tax on the premiums. The Court of Appeal dismissed the appeal, but on opposite grounds, holding that the NWIB was a “person”

<sup>73</sup> *British Columbia v New Westminster Indian Band No 566*, 2022 BCCA 368 [NWIB 566].

<sup>74</sup> *Insurance Premium Tax Act*, RSBC 1996, c 232.

for the purposes of the IPTA.<sup>75</sup> Newbury JA’s analysis of the “personhood” of the NWIB is illuminating in because it links the attributes of legal personhood with the way that the law might apply to that person . Beginning with section 88 of the *Indian Act*, Newbury JA notes that the IPTA, as a “law of general application”, applies to the NWIB, and thus gives rise to the issue of whether the NWIB, as an “Indian band”, is a “person” within the meaning of “taxpayer” under the IPTA, as a law of general application. Differing with the chambers judge, Newbury JA notes that legal personhood is not to be conflated with legal capacity, but that the relationship between legal capacity and personhood can differ or align according to the legislative context in which they are called forth. She then notes that, in light of the NWIB’s clear capacity to enter into commercial arrangements by virtue of s. 88 (and other provisions) of the *Indian Act*, the word “person” includes a band’s “capacity to enter contracts, to sue and be sued.”<sup>76</sup> On this basis, the fact that an Indian band is often remarked to be *sui generis* or “unique” does not mean it is unknown to law: the Court held that Indian bands most certainly are a sort of “person” despite being “unique” depending on the legislative context. “Indeed, the unique nature of a band as a ‘body of Indians’ that must transact business with and have relationships with other Indians, other bands and other persons outside the First Nations community, would seem to militate in favour of legal personhood.”<sup>77</sup>

Bringing the Court’s decision in *NWIB 566 Harrison Hydro* and the administrative practice of sales tax authorities in Saskatchewan and British Columbia, one can see why Lisa Philipps has referred to the limited partnership as “three-headed”,<sup>78</sup> though in the case of Indigenous governments using limited partnerships, one might want to count five . Indigenous governments are always bifurcated into a mode of existing as the kind of legal body that the colonial law creates for them (be it the Indian

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<sup>75</sup> The Court also held that the NWIB was ultimately exempt from tax by virtue of paragraph 87(1)(b) despite not presently having its own reserve lands, noting that it had signed the requisite agreements on “a” reserve, and that reconciliation required a broad interpretation of what the funds were in fact being used for, i.e. for a specific claim involving the wrongful expropriation of the QFN’s reserve lands.

<sup>76</sup> *NWIB 566*, *supra* note 73 at 2.

<sup>77</sup> *Ibid* at para 55.

<sup>78</sup> Lisa Philipps, “The Amazing Three-Headed Limited Partner: Reflections on Old Loopholes and New Jurisprudence” (1992) 21:3 *Can Bus LJ* 410.

band, treaty First Nation, Inuit government, or Métis governing association) alongside the linguistically grounded legal traditions that underlie the distinct Indigenous polities standing in relation to their colonial counterparts.<sup>79</sup>

## V. CONCLUSION: HYBRIDITY AS *DE JURE* SEPARATION OF BUSINESS FROM POLITICS

The requirement that Indigenous governments separate business from politics has been understood as a policy that “simply makes sense” only as part of the transformation of Indigenous economic development from terms of self-determination as self-government into one of self-sufficiency and a model of economic development that requires the use and proliferation of business vehicles like the limited partnership. The aim of Cornell and Kalt’s work may have once been to articulate the need for Indigenous governments to have their own jurisdictional space, such that they could create the conditions for their economies along the lines of their own laws. While the lines of traction are not clear, their work has been interpreted in Canada to support a model of Indigenous sovereignty grounded on economic self-sufficiency and with a commitment to the market economics that separate business from politics . In the end, Indigenous governments have been encouraged to transform themselves via limited partnerships and holding arrangements so as to become private subjects under colonial law, which is exactly what has happened. The various restrictions on “acting” as a government has driven Indigenous groups to utilize limited partnerships because of the way the flow-through nature of limited partnerships ensures they must remain passive portfolio investors in economic projects that will serve the interests of some of the members of their communities. Note however that using limited partnerships to pursue economic development is not the same as pursuing economic development by creating the conditions for that economic development to occur in their territories . As the Organization for Economic Cooperation and Development notes, the tax base of a political unit requires a certain kind of jurisdiction over and responsibility for creating entitlements. Because Indigenous governments must act as private

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<sup>79</sup> See also Bradley Bryan, “The Person and the Mirror: On the Colonial Force of Corporate Law” (2023) 38:2 *Can J L & Soc* (forthcoming).

parties in their own communities, they become subject to provincial jurisdiction. Note, too, that when they do act, their ability to create legal relations will depend upon the way that their personhood is interpreted – be they as Indian bands, treaty governments, First Nations, tribal councils, or any other kind of representative Indigenous organization. And, as we have seen above, their personhood only becomes a question in light of the legislative regime that would confer a legal status on them.

There are thus two particular ways that Indigenous governments bear a precarious form of personhood when engaging in economic development with limited partnerships. First, the particular personality of the limited partnership and the partners will be in question depending upon the particular set of circumstances that draw them into a regulatory framework of some sort. Second, the First Nation itself bears marks of being a peculiar sort of legal entity, one continually called *sui generis* by courts, and thus is also likewise dependent for its legal personhood on the specific legal rules that denote the sort of relation they have to the affairs regulated by that legal regime . In short, the situationally-dependent definitions of the legal personhood of Indigenous governments that employ limited partnerships takes on the set of various regulatory and tax attributes that these two ambiguous kinds of legal subjects (i.e. the limited partnership and the Indigenous governing body) can bear, rendering their participation in the Canadian economy as exhibiting the hybrid tendency we see in foreign-based companies acting in Canada . While there is no particular policy that deems an Indigenous limited partnership as a particular kind of entity, on the basis of *Harrison Hydro*, we can see that the way in which such a limited partnership can operate as an owner or in relation to land or water licences is, on its face, dependent on circumstances . Not all limited partnerships will be the same, even in the same circumstances.

The limited partnership has the business choice for most Indigenous governments because it provides a kind of state sanction for their business holdings, allowing the receipt of tax-free income on the basis of the exemption for public bodies performing a function of government . However, it is become harder for Indigenous governments to use limited partnerships and their associated corporate vehicles with any reliability because of the ambiguities of how limited partnerships exist as legal persons, determined as they are by the regulatory regimes in which they would transact. Add to this the ambiguities attending to the legal personhood of Indigenous governments, and it would appear that attempts to create



conditions for the economic livelihoods of their members will be fraught with varying forms of organizational hybridity.

Under the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission, the call has been for looking at better ways to “include” and respect Indigenous peoples without assimilating them, and to create specific ways in which their cultural traditions and laws can be practiced in ways that foster their self-determination . As early as the Penner Report of 1993, it has been remarked that Indigenous governments need jurisdiction, not simply a delegated jurisdiction to tax or pass bylaws, but rather the kind of jurisdiction over the affairs that take place in their territories . This particular lack of jurisdiction is not to say that Indigenous people have not been and are not currently carrying out their own legal traditions and practices, but it is to acknowledge that we have not yet found ways for Canadian common law and civil- law traditions to interface with Indigenous legal traditions in a way that would accomplish the trans-systemic aims of an intersocietal law for Canada . The limited partnership regime is handcuffing Indigenous governments by forcing them to divest themselves of what they would have realized on the basis of their own rights in their own ways . And non-Indigenous business partners will have an increasingly more difficult time entering into these common pursuits and arrangements so long as the colonial effect of these is a *de facto* alienation of rights and authority