

An economic transformation

Business law, with an aboriginal twist, has gone mainstream.

BY RICHARD FOOT



It's not often business lawyers find themselves practising social justice. Redressing society's wrongs may be familiar territory for human rights or sexual abuse claim lawyers, even criminal practitioners, but corporate and commercial lawyers? Yet Max Faille says that's precisely what's happening today at the crossroads of business and aboriginal law.

"A huge part of what we do now that we

call aboriginal law is in fact business law," says Faille, who heads the aboriginal law group at Gowling Lafleur Henderson LLP. "A major component of our work is structuring transactions, creating joint ventures and limited partnerships on behalf of aboriginal communities or businesses seeking to work in aboriginal communities. That is a relatively new development. It's also legally interesting, it's on the cutting edge of the law, and at the end of the

day it's meaningful. We're part of a process within this country of righting some past wrongs — dealing with this reality we have in our own borders of, in effect, a third world."

An economic transformation is underway in many aboriginal communities across Canada once mired in "third world" conditions. From the Osoyoos Indian Band in British Columbia — which owns construction and wine-making businesses — to the Whitecap Dakota First Nation in Saskatchewan — hotels and a golf course — to the Membertou First Nation in Nova Scotia — a trade and convention centre — aboriginal people are embracing resource development, entrepreneurship, and commercial partnerships as a means of lifting their communities out of dependency and poverty.

Total aboriginal incomes doubled to \$24 billion in 2011 from \$12 billion in 2001. TD Bank predicts they will exceed \$32 billion by 2016 — an amount greater than the GDP of each of the Atlantic provinces.

Much of that growth comes from business income, especially the incomes of band-owned Economic Development Corporations that are becoming fixtures on First Nations as equity partners with private developers, and also business owners and operators in their own right. Growth has also come from private aboriginal entrepreneurs, who "have been increasingly flexing their economic muscle," according to TD Bank.

Such activity is fueling demand for specialized legal services among First Nations and private industries pursuing projects in those communities. As a result, business, finance, and taxation needs have turned

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aboriginal law — once a niche and somewhat obscure area concerned with self-government and rights — into a mainstay of large, full-practice law firms, and also many smaller ones. And the demand is being filled in many firms by young lawyers, native and non-native, drawn to an area of the law that’s evolving quickly, and comes with the added attraction of helping aboriginal communities grow and prosper. “Only a few years ago the number of people who expressed interest in aboriginal law were few and far between,” says Faille. “Now there’s a tremendous amount of interest among young lawyers and law students and articling students.”

Katherine Koostachin, a Cree lawyer with the Toronto firm Willms & Shier Environmental Lawyers LLP, intended to work in family and criminal law when she started practising five years ago. But the needs of First Nation clients seeking commercial and corporate guidance pushed business law, with an aboriginal twist, to the forefront of her practice. Koostachin says the economic development wave sweeping many First Nations isn’t purely accidental. It has its roots in a series of aboriginal rights and land title cases since 2004 that have affirmed and strengthened the Crown’s obligation to consult any native community where the government is considering action that could affect native rights, either claimed

or established. “The demand for all these legal services,” says Koostachin, “has been the requirement of the duty to consult. That’s what’s driving the legal work in this area.”

Although the exact contours of the law are still unclear, the requirement has led to a flood of negotiation and consultation between First Nations and industry, which often undertakes the Crown’s duties on its behalf. Sometimes there is conflict, as witnessed by aboriginal protests against mining in northern Ontario and shale gas fracking in New Brunswick. But elsewhere, and often out of the news, the duty to consult is bringing First Nations and private industry together as necessary partners in extracting timber, exploring for gas, opening mines, or building wind farms and run-of-river hydro projects on aboriginal land.

Another factor fueling economic activity is the young aboriginal population, which grew by 20 per cent from 2001 to 2011 compared to only five per cent for non-aboriginal Canadians. The median age of aboriginal people was also 27 in 2011, compared to 40 for non-aboriginals. This represents a vital labour pool in an otherwise aging country, particularly in a growing resource economy.

All this — population, aboriginal-industry consultation and partnership, and the explosion of entrepreneurship on First Na-

tions — is creating new opportunities for the legal profession.

Janelle Dwyer, a partner with Mandell Pinder LLP, a Vancouver firm specializing in aboriginal rights, practises almost exclusively in economic development with First Nations clients, advising them on commercial, real estate, and corporate law. One of Dwyer’s B.C. clients, the Nlaka’pamux Nation Tribal Council, operates a heavy equipment excavating business along with a private industry partner. Another, the Cayoose Creek Indian Band, independently owns and operates a native plant nursery that supplies material for its industrial landscaping business. Other clients operate a fish hatchery, and work with industry partners to log forests, or build malls or commercial and residential real estate on and off aboriginal land.

Dwyer provides standard business law services: creating corporate entities and joint partnership agreements, and facilitating real estate transactions. “Where we differ from regular business lawyers — and this is where the First Nations side comes in — is that we advise our clients on how the aboriginal title and rights aspect fits into their business work,” says Dwyer. “This is not something I would expect most business lawyers are aware of.”

Dwyer guides First Nations through any duty-to-consult process they might engage in with industry. She also advises them on

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the creation of "impact benefit" or royalty agreements with private partners, and she structures band-owned corporations that take an active role as business operators.

Whether lawyers represent aboriginal communities or industry partners, Dwyer says there are important differences of culture and mindset to understand. "First Nations, when doing business in their territory, they and their people have been here for thousands of years, so they come at business with a different approach. It's not just, 'come in, make money, and get going.' They wear a different lens. It's about having respect and a need for longevity with the land and the resources."

Innovation is also critical when it comes to business structures. Any business deal must be structured in a way that preserves any existing tax exemptions available to the band. Bands under the Indian Act may also not be empowered to become shareholders of corporations. So corporations are often set up with the chief and council holding the shares in trust for members of the actual

band. Some communities in B.C. with clan-based social systems want clan heads to be directors of their corporations.

"You take regular business law, and you end up melding in this cultural awareness. It demands that you be as creative as you can with established business law structures," says Dwyer. "The aboriginal way of organizing themselves has existed for longer than the Business Corporations Act, so it's kind of like trying to jam a square peg into a round hole."

Koostachin says good practitioners will take note of the labour and skills capacity on any First Nation, and allow that to guide the shape of any partnership deal. "I work in remote communities. They face many challenges — social challenges, infrastructure challenges — in addition to growing economically. Proponents have to be creative in setting up projects, in a way that benefits both parties.

"What's the point in setting up a corporation," she asks, "if the community doesn't have the human resources of the skills-

based workforce? That's a challenge for some First Nations communities."

The key for lawyers, says Faille, whose firm represents First Nations and industry, is fostering relationships between aboriginal and private partners. "Good relationships translate into goodwill," he says. "The vast majority of aboriginal communities are pro-development. They have endured crushing economic and social problems as a result of Canadian policies over the decades. There is huge need, so no one is going to walk away from an opportunity for employment, for economic benefit, for growth, for partnerships with industry. In the vast majority of cases we see an openness to development, but with conditions: that they will see some of that upside, and that those things that are sacred to them will be protected."

As wealth and economic capacity builds and percolates through First Nations, Faille calls this "a tremendously exciting and rewarding time" for the aboriginal bar in Canada. "We're very grateful to be part of it." ☐

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