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FIRST NATIONS' POST-SECONDARY FUNDING WON'T BE TAXED BY REVENUE CANADA

Steven R. McLeod
Associate
Toronto
smcleod@millerthomson.com

The Minister of National Revenue has recently confirmed that the Canada Revenue Agency (the "CRA") has withdrawn its plans to treat a band's post-secondary funding payments as taxable to students.

Since 2003, the CRA had signaled that commencing in 2006, a First Nation's funding of students through their education programs would be taxable and that bands would be required to issue T4A slips in respect of those payments. The impetus for the proposed change to the tax treatment of post-secondary payments arose from Indian and Northern Affairs Canada's characterization of such payments as being pursuant to social policy rather than to treaty rights.

The significance of this distinction is that property provided to First Nations pursuant to a treaty or an agreement is deemed to be situated on a reserve and therefore exempt from tax pursuant to section 87 of the *Indian Act*. If post-secondary payments are not considered to be paid pursuant to a treaty right then the infamous "connecting factors" analysis comes into play where the payment's nexus to a reserve is examined to determine if the receipt is tax exempt.

As late as June of this year, the CRA was poised to start treating post-secondary payments as taxable to students and to impose requirement that bands issue T4A slips to their students who receive band funding for post-secondary. The Minister of National Revenue stated that the recent withdrawal from this planned action is the result of discussions that took place at the Canada-Aboriginal Peoples Roundtable held in Ottawa on April 19, 2004.

The net result is that post-secondary payments made from First Nations will be treated as if they were tax exempt to students. However, even though the result is positive for First Nations the federal government still apparently maintains the position that post-secondary payments are made pursuant to social policy. The significance of this is that the tax-free characterization of First Nations' post-secondary payments to students is now considered by the federal government to be pursuant to an administrative policy rather than by treaty right.

CONSULTATION AND RELATIONSHIP-BUILDING BETWEEN FIRST NATIONS AND BUSINESS [1]

Wendy A. Baker
Partner
Vancouver
wbaker@millerthomson.com

Meaningful Engagement

Companies involved in resource development must engage in a meaningful dialogue with all affected First Nations and must recognize the unextinguished Aboriginal rights and title of the First Nations. Successful companies will recognize Aboriginal rights and title at the outset, and move on to the next step of working with the aboriginal groups to determine what interests will be affected, and finding ways to accommodate those interests.

Adequate notice to the potentially affected First Nations is critically important. Notification must take place during the project planning stage. It will be difficult for the First Nations to accept the *bona fides* of the company if the project is fully planned and located before any contact is made with the First Nations.

For meaningful discussions to take place, it is important to research and identify the governing bodies within the First Nations in the affected areas. Is there more than one First Nation that must be consulted with? Is there a separate governance body which must be consulted? Are several First Nations represented by a joint council and, if so, under what authority? In addition, the community as a whole must be consulted and informed, through public meetings and information sessions. Companies must identify what the community wants, whether there are benefits such as jobs and training which younger people are interested in, whether there are concerns the elders have particularly with respect to impacts on waterways or migratory patterns, whether there is any fundamental opposition to the project, etc.

Legal Obligation to Consult

The need for Crown consultation with aboriginal communities was confirmed in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73. The essence of the duties set out by the Supreme Court of Canada are: (1) the duty to consult and accommodate Aboriginal people stems from, in part, the Honour of the Crown, (2) the positive duty to consult arose before Aboriginal title or rights were determined, (3) both sides must negotiate in good faith and that the Crown must not engage in "sharp dealing," and (4) Aboriginal people cannot frustrate the consultation process either, but in the end there is no duty to agree. Meaningful consultation may require the Crown to change its proposed course of action so as to accommodate a strong prima facie case of Aboriginal title or rights and to minimize the impact of the proposed action and preserve the strong prima facie case until final resolution of the issue. While the legal obligation to consult and accommodate lies with the Crown, the reality is that companies are often in the best position to provide meaningful accommodation, and have a vested interest in ensuring that the consultation is conducted properly to ensure that their permits and licences are upheld.

Sustainable Relationships

Sustainability is very important to First Nations and sustainable relationships are essential for the long-term success of any project. Projects may create a serious and permanent interference to the environment and the way of life of a people. Any company wishing to develop in an area where there is Aboriginal title must recognize and minimize the potential disruption, and make the most of opportunities for the First Nations.

Disputes between First Nations and resource development companies can be minimized by effective, meaningful communication, consultation and consent. Some of the most useful tools in engaging the First Nations communities to create solutions that support the communities and the project, are impact benefit agreements.

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1 This is a summary of an article prepared by Wendy Baker of Miller Thomson LLP and Kelly Russ for The Continuing Legal Education Society of British Columbia. The original paper was also contributed to by Martin Gifford, of Miller Thomson LLP, and Barbara Harvey, articled student with Miller Thomson LLP.

Impact Benefit Agreements, Environmental Agreements

Impact and Benefit Agreements ("IBAs") are negotiated between private companies and First Nations in the context of resource development. They can address issues such as employment and training of Aboriginal people, profit-sharing, compensation and environmental regulation. An IBA reflects the principle that Aboriginal people should share in the benefits of resource development, and allows the shaping of those benefits to the requirements of individual communities and Aboriginal groups.

Negotiations of IBAs are required in some land claims agreements and are also found in some legislation that regulates gas and oil development. For example, Article 26 of the Nunavut Land Claims Agreement specifically requires that IBAs be negotiated prior to the commencement of a "Major Development Project" and provides a list of the issues that are appropriate for inclusion in an IBA.

Some examples of where IBAs have been used are the Golden Bear Mine in Telegraph Creek, Red Dog Mine, Vancouver Island's Eagle Rock Quarry Project, and the BHP Ekati Mine. The government of Canada maintains a website which provides a summary of the many IBAs presently in effect in Canada at http://www.nrcan.gc.ca/mms/sociprac/p_e.htm.

In addition to IBAs, environmental agreements, which involve various levels of government, First Nations and companies, provide an important avenue for ongoing consultation with First Nations. In environmental agreements, First Nations can have an important role in monitoring the project. Typical powers include: the power to monitor for compliance with environmental standards, permits and undertakings; the power to carry out studies; and the ability to report to the responsible government authority on breaches. A key feature of environmental agreements when dealing with mining projects is how reclamation of the site is addressed. For the First Nations who live on the land, and will continue to live on the land after the life cycle of the mine has expired, reclamation is critical.

Mining companies entering First Nations' territories must enter with respect, and with the intent to meaningfully engage the First Nations in the project at all levels. If this is the approach at the outset, companies have the potential to develop long term, sustainable relationships with the First Nations, and to develop a project that benefits the companies and the First Nations.
