

**The Legal status of the band and band government**

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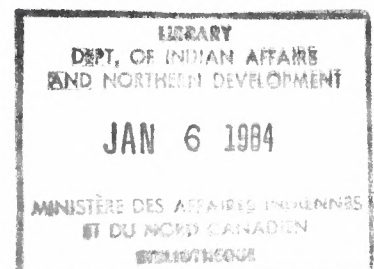
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## THE LEGAL STATUS OF THE BAND

### Introduction:

Reference may be made to the Legal Status of the Band: Discussion Papers No. 1 and 2 of May 8th, 1978 and June 8th, 1978 for a complete discussion of the issues and conclusions raised in this paper.

This paper is divided into Three Parts; first, the present law as such obtains to the Band pursuant to the Indian Act, R.S.C. 1970, c.1-6. Secondly, the inadequacies of such a legal framework pursuant to the Indian Act for the purposes of Band Government. Thirdly, the necessity to consider the future of Band Government in a corporate form pursuant to Federal legislation. In this Part of the paper, the concept of the Charter is discussed as a means whereby Band Government may be established.

Part I

The Legal Status of the Band: Present Situation  
and Future Considerations

Subject to the Mintuck decision (Mintuck v Valley River Band No. 63A et al (1977) 2 W.W.R., 309; and to the Mathias decision (an as of yet unreported decision of the Supreme Court of British Columbia), the Band pursuant to the Indian Act, R.S.C. c.1-6, may be ascribed the legal status of an unincorporated association for the purpose of liability in tort and contract. The significance of these decisions is that through the law of unincorporated associations the concept of a fiduciary duty as between an agent and a particular constituency is established. In contrast, it can as a general proposition be stated that a corporation which would be formed for the purpose of local self-government is not a trustee or agent for the inhabitants. Therefore, a right of action by a member of a particular person in a municipality does not need to rely on a fiduciary relationship. In a broad sense a municipal government can be said to have a trust relationship; this occurs in so far as that body has the responsibility to carry out a public duty. However, in the strict legal sense, there is no fiduciary relationship between

the corporation and its inhabitants. The most practical significance of the Mintuck decision is that members of the Band may be found vicariously liable for the wrong-doing of a member's agent; that is, a Band Councillor as a member of the Band who is acting on behalf of the Band. However, as a matter of general application this problem does not arise unless that member's agent was warranting on behalf of the member at the time of the wrongful act or omission.

Of some initial importance for future policy considerations is the difficulty that may emerge from Mintuck. On one hand, as stated above, the band may be found to be an unincorporated association: liability would then attach in a situation as described as above. On the other hand, if the Band through the Band Council is to function as a local government; then it is quite possible to argue that a Band Councillor is at all times acting on behalf of the Band members. Therefore, the concept of agency can be applied to an executive or legislative function of a Band Councillor.

Therefore, in the broadest sense, there is a legal foundation for attacking a decision of the Band govern-

ment grounded in the Law of Agency. As stated previously, such a legal relationship between an inhabitant, and as an example, a municipal corporation does not exist in Canadian Municipal Law.

Under the present Indian Act, the legal significance of Mintuck acquires added complexity because pursuant to that Act there are matters over which the Band may act; and, there are matters over which the Band Council may act.

It is arguable, that under the Indian Act, vicarious liability will attach to members of the Band acting in either decision-making forum; this arises because matters may be acted upon in either forum according to the Indian Act.

In the paper, Legal Status of the Band, May 8th, 1978, considerable attention was given to the tests that a Court might apply in determining liability to a Band subject to the Law of Agency. Specifically, reference was made to the "management" theory; that is, the Courts may look to the question

as to whether or not management was left to the executive; the patterns of usual authority or actual authority; and, the character of a particular transaction. The issue is raised in this paper; not to anticipate litigious questions, but rather, to raise a significant policy question which will be fully discussed in Part II and Part III of this paper. That issue may be formulated as follows: if pursuant to a revised Indian Act matters could be acted upon that were an extension of the administrative capacity of the Federal Government and not a matter pursuant to the corporate character of the Band; then, the Band may be subject to the reasoning of Mintuck.



Part II

Inadequacies of Present Indian Act for the Purposes  
of Band Government

Introduction

Subject to the present Indian Act, neither the Band, nor the Band Council can be incorporated for the purposes of establishing a Band Government. The practical and theoretical difficulties of that legal situation have been reviewed in Part I of this paper. Therefore, provision must be made for the Incorporation of Bands pursuant to Federal Legislation in a revised Indian Act. This subject will be reviewed in Part III of this paper.

For the moment, attention must be drawn to the present Indian Act with respect to the inherent difficulties posed by that legislation to facilitate Band Government.

Native of Local Government

While there remains considerable opinion as to the exact nature of local government, particularly with respect to its authority; some attempt must be made to establish a definitional understanding. Such an understanding must incorporate both legal and political issues.

In Canada, there is the generally held conventional wisdom that the Municipality is a creature of Provincial Statute. In the courts, this has been held to mean that the Provincial Legislature maintains the final authority over the Municipality. In a strict sense this is translated into the proposition that the Municipality has no inherent jurisdiction. The lack of an inherent jurisdiction means that the municipality does not possess any authority that is not derived from another authority.

Conventionally, the Municipality has dual functions; in Canada this has been traditionally defined as dual aspects. For the purpose of this paper the term function will be used in order to focus more sharply as the purpose of local government.

First, the municipal government is given powers for the benefit of the inhabitants within a geo-political area. These government functions are of a limited and prescribed jurisdiction to be employed in administering for all of the people in the community. In this sense, there is a capacity to govern as specific to a defined population.

Secondly, a municipality may have authority to act for the general public; in this sense, the municipality may be viewed as an agent, or as an instrument of the Province. However, notwithstanding the fact that the municipality may be an instrument of the Province, it has been held that the municipality is not without some independence.

Therefore, a municipal government can act in a function appropriate to the Province; and, it may act in a function appropriate to itself as a municipality. Placed in another context, a municipal government may have functions appropriate to a private and public corporation. However, and this remains a critical problem; a matter exercised upon in its private capacity may have a significant public aspect, and a potentially great impact on an individual citizen.

The dual function of the municipality reflects in part, social necessity: notwithstanding the legal principle that the municipality is a creature of the Province; there exists the reality that certain local groups have a life of their own that is not merely delegated to them by the Province. They are capable

of directing their own concerns. Their interest in themselves is sustained and directed by their sense of responsibility. Such authority does not form from a weak delegation of authority. Conversely, demands for efficiency have created demands for standardization, regionalization and unity.

The distinction drawn between private and public functions as related to municipal government bears some analogy to the present Indian Act, and for our considerations of the future of Band Government.

First, those matters of a public nature, pursuant to the Indian Act are such matters that ought to be viewed as applying generally to all Indians pursuant to the Act, or to a revised Act.

Secondly, those matters that are private are such matters that ought to be viewed as applying specifically to a particular Band, and the Band members.

With respect to the first category, the public nature of Band Government, the critical issue is to what extent such matters that are public to all Indians and

non-Indians with respect to a geo-political unit can be transferred and what would be the significance of such a transfer.

It is suggested that matters that should fall under this heading will include the following:

- 1) the definition of the Indian pursuant to a revised Act;
- 2) the nature of the relationship of the Federal Government to the Canadian Indians, and to the Band Government; and,
- 3) the scope and authority of the two Governments pursuant to the Charters.

In effect, there should be a statement of:

- 1) the confirmation of the status of the Canadian Indian in Canadian Society;
- 2) the confirmation that the Canadian Indian has the right and privilege of Band Government; and
- 3) the nature of the jurisdiction of both Governments.

The principle consequence of such a declaration would be that all or some of the matters over which the Minister has exclusive jurisdiction could upon consent

be transferred to the Band or the Band Council.  
As a matter of practical consequence, such matters over which the Minister has jurisdiction would have to be reviewed and their transfer to the Band be subject to negotiation.

The principles behind this position are two-fold: first, that there should be no matter which affects the Band Government pursuant to the Indian Act over which the Minister has exclusive jurisdiction. Such a situation would defeat the principle of the Band as an instrumentality of the Federal Government. The reasons are quite simple; the Band would not administer policy over which they had no decision-making capacity. Secondly, the retention of exclusive jurisdiction would probably create administrative and jurisdictional difficulties as between Band powers and Ministerial powers.

Therefore, all matters presently held by the Minister should be placed on a consensual basis whereby:

- 1) they may be administered with the consent of the Band by the Federal Government;
- 2) they may be administered jointly by the Band and the Federal Government; or
- 3) they may be regulated for and administered by the Band.

With respect to the second category, the private nature of Band Government, it is suggested that such matters, upon the consent of the Band be transferred to the Band authority. Such authority as vested in the Band would include the capacity:

- to pass legislation;
- to pass by-laws;
- to pass regulations; and
- to administer the same.

Such matters may include, but not be limited to the following:

- Band Health and Safety;
- Education;
- Economic Development; and
- General Maintenance and care of property.

Part III

Band Government and the Charter

As previously indicated, it is suggested that the Band be permitted to adopt a corporate character. The following would be the basic elements of the Band Governments corporate capacity:

- 1) A corporate name as the principal means by which identity, notwithstanding constantly changing membership, can be manifested;
- 2) A common seal by which the assent of the corporate body can be manifested, notwithstanding internal differences of opinion;
- 3) Membership as defined by those resident within the corporate limits;
- 4) Territory, the defined limits of which also confine jurisdiction;
- 5) Perpetual succession notwithstanding death of its members;
- 6) Power to acquire and hold property for authorized purposes and to alienate same in its corporate name;
- 7) Power to sue and be sued in its corporate name;
- 8) Power to contract in its corporate name;
- 9) Exemption of agents from liability when acting in conformity with the fundamental law of the corporation;
- 10) A governing body which exercises the powers of the corporation;
- 11) Right to exercise through its council certain authority over the population of a defined area; and



- 12) The manner in which decisions can be made and their binding power on the members.

It should be noted that pursuant to 10 and 11, that such bodies may be the Band and/or the Band Council.

Such basic elements of the corporate capacity of the Band would be incorporated into a Charter described below. However, the elements previously described would form the basic requirements.

### The Charter

#### Nature and Definition of the Charter

The Charter would be understood to be the establishment of the Band Government as a corporation together with all other laws, regulations and constitutional provisions relating to the rights, duties, powers, privileges, liabilities and immunities of the Band Government as a corporate entity. As a matter of general understanding, the Charter becomes the organic law of the corporation establishing:

- the right to local self-government;
- the right to govern with respect to local matters; and,
- the incorporation of the residents.

Creation of the Charter

Because of the large number of Bands and the concomitant socio-economic differences that exist; it may be difficult to prescribe in legislation all of those characteristics that might constitute a Charter. Furthermore, it might be inadvisable to require an Act of Parliament for each Charter; that is, Parliament could in each circumstance pass the necessary legislation.

It is now a common practice for Provincial legislation to permit the power to incorporate to the Lieutenant-Governor in Council; the Minister of Municipal Affairs; a judicial officer; or a provincial board. Needless to say, superior legislation must exist to permit such bodies to so incorporate. Such a position is supported by case-law (*Molison v Woodlands*, (1915) 32 W.L.R. 25.).

Furthermore, the incorporating document, may in addition to statute take the form of an order-in-council; a proclamation; a decree or an order.

Therefore, Parliament may:

- 1) Pass legislation of a General Nature that permits a Charter (the incorporating document) to be established; and

- 2) Establish that a Charter may be utilized as the means of incorporation and that it may be established in one of several ways.

Furthermore, a Charter may be adopted, if the legislation so permitted for a particular Band to adopt a particular Charter, subject to the general provisions of the Act. Therefore, on an acceptance by the Band of a particular Charter pursuant to constitutional authorization, a Band may become incorporated.

#### Legislative Control over Charter

As a general rule, the Charter does not convey any inherent jurisdiction; the concomitant of this proposition is that Federal legislation may contravene any act of the Band Government. This would be particularly the case where the subject-matter under disagreement was one of a public concern as previously defined.

However, the Federal Government could, pursuant to the Legislation apply the doctrine of inherent jurisdiction and impose limitations upon itself to control the Band Government.

Amendment to Charter

It would appear to be case-law in Canada that a municipal corporation created by Charter cannot amend that Charter. Therefore, absent other provisions, a change in Legislation would be required. Therefore, provision for amendment will have to be incorporated into the Charter; such provisions would have to specify those matters that could be amended; the authority that could amend, and, the procedures that must be followed.

Repeal of Charters

In the absence of provision to the contrary, the Federal Government could repeal a Charter. The consequence would be to bring about the dissolution of the corporation. Furthermore, the legislature could provide that the court or the inhabitants could pursuant to the Act, dissolve the Charter.

Special Problems

As a matter of public policy the concept of the Charter, while providing the document that permits local self-government may not contravene Provincial legislation. By analogy, such a document could not contravene Federal Legislation. Nor could it contravene Constitutional Principles; public policy;

or the common law. Such principles, unless mentioned to the contrary, can contravene the Charter even after its enactment.

Therefore, provision must be made in the Charter that will permit for the uniqueness of the Band Government subject to the general application of Federal Legislation.

#### Summary and Conclusions

- 1) That the present legal status of the Band is inappropriate for the furtherance of Band Government, pursuant to the present Indian Act. Furthermore, subject to any revisions to the Indian Act, the status of the Band must be clarified.
- 2) That, the Band be established for the purposes of facilitating the principles of Band Government as a corporation. Such a corporation would be entitled:

The Band Corporation of \_\_\_\_\_.

- 3) That, the functions of the Band Corporation be defined as having private functions and public functions.
- 4) That all matters that are private or specific to the local affairs of the Band be so designated and upon consent they may be transferred to the Band.
- 5) That pursuant to such a transfer the Band then re-negotiate the manner in which they shall be administered with the Federal Government.
- 6) That all matters that are public be specified; those matters that are public (as applying to all Indians) may upon consent be transferred to the Band with the appropriate designation of Ministerial authority.

7) That Federal Legislation be passed entitled:

The Band Government Act.

- 8) That the Act specify the authority to incorporate the Bands. Such an authority may be a Commissioner; the Minister; or an Order-in-Council.
- 9) That the uniqueness of the Band Government requires that provision be made in the Act to exclude Federal laws of general application and the common law where they are not appropriate.

