Indigenous Trusts

Canada's Indigenous peoples – First Nations, Métis and Inuit – face a myriad of complex legal issues related to the protection and defence of their inherited rights, lands and resources.

As communities receive payments from land claims, land entitlements, impact and benefit agreements, joint ventures and limited partnerships, the leveraging of Indigenous rights, or as existing assets are sold, questions arise as to the appropriate trust structure through which to grow, protect, and administer the resultant funds. Where trust agreements are already in place, challenges present themselves, sometimes requiring amendments to a trust to meet unforeseen circumstances.

BLG's Private Client Group and Indigenous Law Group – lawyers with specialized legal expertise in designing, defending, administering, and amending trusts – provide innovative, pragmatic services to effectively protect legacies and settlement funds and meet community needs. Our services ensure that the right trust structures are chosen: innovative, flexible, and defensible; trusts that will endure the test of time.

A collaborative, thoughtful approach

Given our level of involvement with Canada's Indigenous peoples across diverse areas of the law, we are intimately familiar with the challenges related to identifying and meeting the needs of diverse communities, particularly as they relate to the establishment of trusts. This includes proactive consideration of the duty to consult, economic development, administration, financing, and governance issues, as well as ensuring community inclusiveness and implementing a process for proper community consultation. We respect and acknowledge the value of traditional knowledge and work collaboratively with clients to ensure that community, cultural, and traditional priorities are understood and seamlessly incorporated into our approach, the trust structures and any amendments put forth.

Deep expertise, valuable insights

To be effective, trust structures should be flexible and innovative, and ensure desired outcomes of various stakeholders without undue administrative burden. Clients rely on us to advise them on the benefits and challenges of different types of trusts and to relay insights and lessons learned through the hundreds of trusts we have established.

BLG acts directly on behalf of Indigenous communities as well as through trust companies, banks, and credit unions, to:

- Design tax-efficient business structures

- Design and negotiate the appropriate trust agreements (including trusts which appoint administrative and/or community trustees and outline the related duties and responsibilities, particularly in respect of the lending and investing of funds)
- Evaluate economic and legal implications of the trustee or successor trustee roles
- Manage the trust settlement process, including community information sessions
- Assess conflicts such as when a party has multiple roles (e.g., is both a trustee and service provider)
- Amend existing trust agreements
- Implement terms and resolve disputes through mediation, arbitration and, as necessary, at all levels of court, including the Supreme Court of Canada
- Determine the right compliance as it pertains to governance matters, including interaction with the community, its Chief and Council

Establishing the right trust structure

A variety of different trust structures exist. These include traditional structures, which impose a high level of risk and responsibilities upon trustees, and alternative structures, which consider the nature of the funds to be settled on trust and the impact it will have with regard to compliance with local laws and consideration of community economic development.

The decision to choose one trust structure over another is arrived at through an examination of the objectives for the trust and its functional/operational aspects. Objectives need to be clearly articulated, and even quantified. Functional/operational considerations include where to invest and why, how to allocate the funds, to whom and how to structure and calculate payments, including per capita distributions, business economic development, adjustments for increases in value over time, provisions to provide for minors, deceased and incapable members, and location ticket holders, who will make the payments (the Nation or the trustees) and how responsibilities are divided. Additional considerations also arise, such as income tax efficiency and anti-money laundering. Clients rely on us to guide them through this and to ask the necessary questions to ensure the final trust agreement meets objectives.

A specific benefit of working with BLG is that we provide legal and tax advice – our Private Client Group is integrated with our tax group, providing clients with this added advantage as well as client/attorney privilege.

Experience

- Advised a **confidential First Nation** in the North Coast of British Columbia and assisted in helping to set up a Minors Trust for members of the First Nation. BLG provided legal opinions on the proposed trust structure.
- Advising five of the **Robinson Huron Treaty Nations** in Ontario in the development of trusts, including community engagement, to receive portions of their respective share of the RHT settlement
- Assisted community trustees for a **band government of two Kwakwaka'wakw peoples** in British Columbia in the negotiation and development of a settlement agreement with His Majesty the King in Right of Canada to establish a trust to receive settlement funds to be used as long-term assets for the use and benefit of the Band. BLG provided legal opinions and advice relating to whether the Trustees could change their practice relative to annual distributions made from the trust to or for the benefit of Minor beneficiaries of the trust, and whether the Trustees must remit annual distributions made from the trust to a beneficiary of the trust after receiving notices of attachment from the BC Family Maintenance Program.

- Engaged by a **confidential First Nation band** in the Fraser Valley of British Columbia to provide legal opinions relative to loan powers of the Trustee of the First Nation Trust in respect of a proposed loan to the First Nation considering whether the Trustee was authorized to pledge trust property as security for the loan and restrictions on Trustee powers.
- Acted for an independent **Treaty 8 First Nation** in northern B.C. on the creation of a new trust for the use and benefit of the beneficiaries who did not a receive a per capita distribution from the First Nation Trust established in a Settlement Agreement pursuant to which Canada and British Columbia agreed to fulfill their respective outstanding land and related obligations under Treaty No. 8 to the Band. BLG provided advice and opinions regarding trust perimeters and investments, drafted the Trust Indenture including the investment policy clause and revisions to per capita distribution clause, and oversaw the final version and execution.
- Engaged by the **Mohawk Council of Akwesasne** to assist in the legal drafting and development of the **Mohawks of Akwesasne Community Settlement Trust** to provide benefits to members of the Mohawks of Akwesasne from the funds received from the Kawehnoke Easterbrook Settlement Agreement and OPG Settlement Agreement. BLG reviewed and amended their Trust Agreement as it had some unworkable provisions, and in doing so, we guided the Trustees in respect of the consultation process with Chief and Council and the community. BLG drafted new amendments to the existing Trust Agreement, provided legal opinions and advice in relation to Trustee governance and administration matters, and responded to many urgent and immediate inquiries under a tight timeline.
- Provided legal trust services for **Chippewas of Kettle and Stony Point First Nation** (CKSP) including the drafting and development of a Trust Agreement for a large Settlement Trust to receive settlement funds for a claim of significant value to the community from the corporate trustee, a leading Canadian Schedule I Bank. Drawing upon our expertise from across the country to respond to the CKSP's questions and those from the Trustee to make amendments to the trust under a very demanding timeline, BLG developed the Agreement to set out the terms of the trust and ensure the management, investment, and distribution of funds in accordance with the First Nation Investment Policy for the use and benefit of the Beneficiaries of the CKSP.

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

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