

Getting Instructions from First Nation Clients: Individuals

Matt McPherson

OKT Internal Seminar

Rules of Professional Conduct

2.02 (1.1) Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization.

Commentary

... While the organization or corporation will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected. Further....**the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.**

Indian Act, s. 2(3)

Exercise of powers conferred on band or council

(3) Unless the context otherwise requires or this Act otherwise provides,

(a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and

(b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

General rules for individuals instructing

- Alberta only jurisdiction with a “double-check” rule
 - Lawyer “must ensure instructions accurately reflect wishes of client”
- General rules in case law outside Alberta consistent with LSUC rules

Rules for individuals in corporations

- With proper authorization individual board members may provide instructions to commence an action
- The general delegation is sufficient for a board member to give instructions to defend an action
- Indoor Management Rule
 - Lawyer may take instruction from persons acting with actual or ostensible authority
 - Instructions need to be within the scope of the representative's authority

Status of Band Councils

- Not persons
- Not corporations
- Sometimes compared to unincorporated associations
- Often compared to municipal corporations

What can be delegated?

- Related to the powers the Band Council has and how it can exercise those powers (s. 2(3), *Indian Act*)
- Bands have both express powers and implied “necessary” powers, including power to launch claims and make contracts
 - *Assu v. Chickite*, [1999] 1 C.N.L.R. 14 (B.C.S.C.); *Gitga’at Development Corp. v. Hill*, 2007 BCCA 158
- Inherent powers (i.e. non-*Indian Act*) may not be subject to limits of s. 2(3), i.e. no need for BCR
 - *Bone v. Sioux Valley Indian Band No. 290*, [1996] 3 C.N.L.R. 54

What can be delegated?

- Contracts and other tasks?
 - No
 - *Isolation Sept-îles v. Bande des Montagnais de Sept-Iles et Maliotenam*, [1980] C.S. 1038 (Q.C.A.)
 - *Heron Seismic Services v. Muscowpetung* (1991), 86 D.L.R. (4th) 767 (Sask. C.A.)
 - *Leonard v. Gottfriedson*, 1980 CanLII 585 (BC S.C.)
 - *Conseil de bande des Abénakis de Wôlinak c. Bernard*, [2000] J.Q. no 160 (C.Q.)
 - Hiring and firing people, retaining lawyers, allocating funds all require BCRs
 - Yes, delegation is okay if project approved or later acquiesced to by council
 - *Woodstock Indian Band v. Basque*, 1996 CanLII 4875 (NB CA)
 - *McDonough v. Maliseet First Nation at Tobique*, [2001] N.B.J. 49 (QB)
 - *Maloney v. Eskasoni First Nation*, 2009 NSSC 177 (CanLII)
 - When authorization granted by council no need for formality around the expression of majority consent

Probably can't be delegated

- Non-employment contracts?
- Decisions to launch an action

Definitely can't be delegated

- Powers vested in the band itself
 - Amalgamation
 - Surrender
 - Assuming control of membership list

To whom can Band delegate

- Chiefs or individual councillors?
 - Probably yes for contracting if given clear authority (*Maloney*)
- Individual staff members?
- Tribal Councils?

What kind of authorization do you need to take delegated instructions?

- Difference between contracting and given instructions
- Verbal or written direction at a duly convened meeting
- BCR
 - Needed for everything or just some things?
- Do you need to confirm the instructions, à la Alberta?