

Indigenous Sovereign Wealth: Strengthening Indigenous Trust Knowledge

A Report by Crowe MacKay LLP
& the National Aboriginal Trust
Officers Association

In response to the growing number of Indigenous trusts in Canada and corresponding issues raised by Chief and Councils, community leaders, and trustees, the National Aboriginal Trust Officers Association engaged Crowe MacKay LLP to lead their Indigenous Sovereign Wealth Project. This is a three-part project with this report completing the first phase.

The National Aboriginal Trust Officers Association (NATOA) began as an idea amongst a group of individual First Nation trustees that saw the need to be able to share information and strengthen the collective Trust knowledge amongst Indigenous communities. Since then, NATOA has continually evolved and grown to share knowledge and support their members through Trustee training, annual Trust conferences, the Reconciliation and Responsible Investment Initiative in partnership with SHARE, and their womxns and youth conferences and initiatives.

The purpose of this project is to change the law in Canada to empower Indigenous nations to create their own law that meets their cultural, financial, and community goals. To start this, we first reviewed international sovereign wealth funds and compared them to Trusts to see where the differences and similarities were.

- Vickie Whitehead, Director of Indigenous Services at Crowe MacKay, and current Chair of NATOA, brings over eight years of experience specializing in Indigenous trust administration and structuring; and over 20 years of Indigenous governance, programming, financial advisory, and policy development. She serves as the lead on this project.

The end goal of this project is to:

1. Create a new law for Indigenous sovereign wealth that will allow for distinct needs, culture, language, and governance.
2. Use the knowledge gained through this project to build on existing wealth management structures and expand them into new, evolving “trail ways to sovereign wealth.”
3. Provide an outline for NATOA for training, guidance, and support for the creation and implementation of Indigenous sovereign wealth structures.

There are three phases of this project: Environmental scan, Engagement, and Implementation. Included here is the summary of the results of Phase 1, which includes Indigenous Trusts, Sovereign Wealth Funds, Trust law, a jurisdictional review, as well as key findings.

Review of Indigenous Trust Structures & Sovereign Wealth Funds

The review of Indigenous Trust structures focused on the why and how of their structure. For Sovereign Wealth Funds (SWF) the research centred on their overall purpose and evolution.

Indigenous Trusts

There are four key structural issues when a community is creating a Trust:

Legal

Trust law is currently “the best fit” law used to set aside money for the long term earning and protection of Indigenous wealth. This law is based on where the community is in Canada as each province/territory has their own Trust law. It provides minimum terms and conditions that have to be written into a Trust Agreement which sets out the terms to be followed.

Every Trust Agreement includes a “Settlor” that places the money into the Trust (the Council/Authority of the Band, Metis Community, Inuit community); “Trustees” to manage the Trust Agreement; and “Beneficiaries” who will receive a benefit from the Trust. In most cases, funds settled onto Trust come from a specific claims settlement with the government, joint ventures, partnerships or from their economic development corporation. It is the Trustee(s) that take legal responsibility for the management of the funds on behalf of the beneficiaries per the Trust Agreement, and can be personally sued if they do not manage it per the terms and conditions.

Purpose

Purposes are set when the Trust Agreement is drafted. During that phase of work, community members are usually engaged to garner their input and feedback on the Trust. There are three main reasons for creating a Trust, and some Trusts are a combination:

Legacy: to set aside a one-time large amount of money and only release a certain annual amount of income for beneficiary purposes.

Growth: to set aside funds until they reach a specific amount to then be used for beneficiary purposes.

Specific Purpose: to hold funds for a specific purpose or until a specific event happens, such as funds being held for minors or a community infrastructure project.

Governance

The governance is written into the Trust Agreement and often those terms cannot be changed without a community vote or varying the Trust agreement in court. It sets out the number of Trustees, whether a youth or Elder Representative will be on the Trust committee and if the Trust will use outside advisors. Advisors include the Corporate or Administrative Trustee, the investment consultant, investment manager, accountants/auditors, and legal advisors. This is a very important factor as this is where management of the Trust funds is set.

Financial

The amount of funds placed in a Trust depends on the community's circumstances and goals. Release of funds are generally for community and member programs, services, infrastructure, and sometimes include economic development. Investment criteria is usually established in the Trust Agreement and there is not much diversity in how Trust funds are invested. An investment consultant with an investment manager(s) is commonly used, and then Trusts funds are invested in various stock and bond portfolios. Some also include real estate, infrastructure, private equity, and direct community economic investment. Financial and expenditure reporting is commonly done through an annual audit and an annual report to beneficiaries.

Sovereign Wealth Funds

According to the International Forum for Sovereign Wealth Funds, the three main structural components of a SWF are:

Legal Framework/Goals/Financial

A SWF is created using national legislation of the country which allows the operation and investment of the SWF in accordance with their own and international laws.

Institutional Framework & Governance Structure

The governance structure is clearly laid out in the legislation or strategic structure including how and when funds are invested, managed, and released to the government.

Dutch Disease

Dutch disease is an economic term that comes from a specific situation in the Netherlands. It can happen when:



A country has a natural resource discovery which is in high demand or has a high dollar value.



The exchange rate rises in value in the home country because of the purchasing of the high-demand commodity and wealth quickly accumulates.



The government spends new wealth on infrastructure, focusing more on that export and how to maximize the output.



As the dollar value rises, other domestic exporting industries are unable to compete globally as the new resource prices their output out of the market.



This makes the new natural resource industry the most attractive; employees and entrepreneurs move into that industry or side industries.



As the natural resource declines, or commodity prices drop, the country is left with infrastructure it can't support, workers without jobs, no replacement industries it can rely on, and no savings to support its failing economy.

Investment and Risk Management Framework

The SWF investment and risk management strategy is matched to the overall purpose and longevity of the SWF, including a range of policies and tools to assist with the day to day observance and implementation of the Santiago Principles.

In the early years, SWF's were created for two main reasons: for stabilization of the economy or for saving purposes.

Stabilization was used by countries to protect against "Dutch Disease".

A SWF can protect against Dutch Disease by stabilizing the funds through investing them outside the country and only spending a certain amount each year. It can also allow for strategic investment inside the country in areas such as education and training, as well as supporting those industries that need subsidies to remain competitive.

In the case where countries have excess bank reserves they can implement a savings for the creation of a long term legacy or a pension-reserve fund. The purpose of these funds is for long term growth and

protection of the fund for the life of the fund, which could be forever. These can grow to be quite large over time if they are invested competently and have strict spending rules.

Another reason for creating SWF's are for strategic purposes, where a country wants to increase its presence in a specific economic sector, build infrastructure, and/or attract foreign investment into their economy. In this case, corporate law is often used as the founding legislation. This provides the fund with a recognized legal character, which makes it easier for it to borrow from a bank or partner with a joint venture. The more direct investing the fund seeks, the better fit this structure is as it creates a separate legal entity. In recent years, most new SWF's have been created for strategic purposes, especially in developing and growing countries.

The final purpose is what is known as a hybrid model. An example of a hybrid model is where a country utilizes funds from its expected non-renewable resources and place them into two or three areas: such as savings (long term growth and revenue), budget stabilization, and strategic domestic spending and investment.

Trust Law & Indigenous Jurisdiction Review

A summary review conducted by Borden Ladner Gervais LLP (BLG) compared the following requirements in each of the provincial/territorial Trust laws:

- Variation of the Trust terms and termination clause
- Powers of Trustees regarding Investments
- Trustee eligibility, appointment, & removal
- Distribution (to minors)
- Powers and duties of Trustees
- Liability & indemnity of Trustees

The review of each of the requirements above shows that each provincial/territorial law differ slightly on where the emphasis is placed. Depending on any jurisdiction issues that may arise while creating a new law, we may need to take these variations into consideration.

Jurisdiction and Indigenous Services Canada Legislation

BLG also looked at the federal/provincial debate of who has legislative authority over First Nations, Métis, and Inuit people based on court cases and legislation. The following is a summary of the history of Canada's Indigenous legislation and impactful decisions:

1867 Constitution Act – Section 91(24)

The federal government has primary jurisdiction over “Indians and lands reserved for them.”

1876 Indian Act comes into power

Includes the Gradual Civilization Act and the Gradual Enfranchisement Act.

1939 Supreme Court Ruling

Supreme Court of Canada rules that Inuit people fall within the meaning of “Indians” in subsection 91(24) of the Constitution Act.

1982 Constitution Act

Includes broader definition of “Aboriginal peoples of Canada” as Indian, Inuit, and Métis people. Federal government holds that the Province has jurisdiction over all Aboriginal people living off-reserve.

2016 Daniels Decision

Both federal and provincial governments have alternately denied having legislative authority over non-status Indians and Métis. Supreme Court of Canada declares that both non-status Indians and Métis are “Indians” under subsection 91 (24) meaning the federal government has primary jurisdiction.

The CRA declares that despite this decision, Métis and non-status do not have the same tax treatment as “Indians” as they are not defined as “Indians” under the Indian Act.

Self-Managed Areas for First Nations within the Indian Act

There are four acts in which First Nations under the Indian Act can drawdown and self-manage specific areas within the Indian Act:

- First Nations Oil and Gas Money Management Act (FNOGMMA): To control the management of the Capital and Revenue Trust accounts.
- First Nations Land Management Act (FNLMA): To take over the governance and management control of their First Nation land and natural resources.
- First Nations Commercial and Industrial Development Act (FNCIDA): Provides for the adoption of regulations on reserve that are compatible with existing provincial regulations for complex commercial and industrial development projects on reserve.
- First Nations Fiscal Management Act (FNFMA): To create laws over financial management, property taxation and local revenues, and financing for infrastructure and economic development.

There are 29 First Nation self-government agreements across seven provinces and territories which in effect move the First Nation out from under the Indian Act and related federal legislation.

Key Findings

The following is a summary of findings from the research conducted on SWFs.

Jurisdictional Issue

Given the provincial/federal debate we may need more work in this area to ensure we can create this law for all Indigenous communities.

Current Issues with Trusts

- There is an inability to lead with community beliefs, culture, language, and historic governance when creating a Trust utilizing Trust law.
- Leadership identifies a disconnect between the purposes written in the Trust and the community plans, and are powerless to change it.
- A Trust can create a competing leadership entity where Trustees have control over the release of funds and more power than the community leaders. Equally, external service providers are seen to be “in control” of the Indigenous community’s money and future.
- The creation of multiple Trusts when settlements are reached or when new funds come into the community creates a web of Trusts, increasing costs and complexity.
- Limited flexibility in investment policies that don’t recognize the long term positive impact that community investment can have on providing tangible benefits for the community and members.
- Taxation issues both in Canada and with foreign governments, at the Trust taxable income level and at the community member as beneficiaries and/or Trustees level.

- There is a growing trend of large per capital distributions and lack of research in this country into the socio/economic impacts to nation members. Many NATOA members have identified the negative impacts to the nation and the members can outweigh the positive benefits. This is of great concern and will be part of the focus of phase two of this project.

Interesting information about SWFs

- Appropriate SWFs structures and mandates are based on the country’s culture, language, and governance structure.
- SWFs are integrated into the government’s policies. The government can use the SWF to manage their financial and investment needs as one tool of many.
- Some SWFs allow for shareholder voting rights, (this is the same as the work NATOA is doing with SHARE on the RRII project initiative).
- The ability to borrow against capital assets and if allowed, to raise funds through a bond issuance.
- The creation and adoption of the IFSWF’s Santiago Principles has provided SWFs with an excellent governance framework against which to measure themselves.
- For the largest SWFs, the investment has evolved from using institutional investment managers to building in house expertise.
- For some SWFs, building skills for Indigenous peoples is part of their mandate. Many sovereign funds can invest in a range of assets - they are not limited to stocks and bonds - and can be invested inside and outside their country depending on their mandate.

About the Author



Vickie Whitehead

Vickie Whitehead is the Director of Indigenous Services at Crowe MacKay. She is driven by her values of community, integrity, and respect for Indigenous peoples and Nations by working with them to achieve their goals. Vickie has been serving Indigenous communities for over 25 years in B.C. and across Canada. Her speciality is in Indigenous financial management, program management, and Trust services.

The majority of her early career up to 2012, was at the Government of Canada at Indigenous Services Canada in the B.C. and national offices in various financial and management related roles. Vickie is Cree Métis, and sits on the following boards as a member: Vancouver Aboriginal Health Society, AFOA Canada, NATOA, and a B.C. First Nation Finance and Audit Committee per their Financial Administration Law. She is the recipient of the 2018 CPABC distinguished services award for her volunteer work with Indigenous organizations.

Vickie completed her Masters of Business Administration in the spring of 2012, holds a CPA, CGA, designation, and is a Certified Aboriginal Finance Manager (CAFM). She enjoys spreadsheets, spending time with her family and friends, hiking trails, and reading.

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