



**National Aboriginal
Economic Development Board**

9th Floor, 10 Wellington Street
Gatineau, QC K1A 0H4

Tel: (819) 953-2994
Fax: (819) 997-7054
naedb@naedb-cndea.com

**Conseil national de
développement économique
des Autochtones**

9^e étage, 10, rue Wellington
Gatineau, QC K1A 0H4

Tél. : (819) 953-2994
Télééc. : (819) 997-7054
naedb@naedb-cndea.com

www.naedb-cndea.com

October 8, 2014.

The Honourable Bernard Valcourt
Minister of Aboriginal Affairs and Northern Development
10 Wellington Street, 21st Floor
Gatineau, QC K1A 0H4

Dear Minister Valcourt:

In June, officials from your Department provided an overview of the Draft Policy on the Transfer of Capital Moneys through Section 64(1)(k) of the *Indian Act* and sought the National Aboriginal Economic Development Board's advice on the potential economic implications of the proposed policy. On behalf of the Board, I am writing to convey our views on the Draft Policy, the principles underlying Canada collecting First Nations' revenues, and the engagement process undertaken on the policy.

The moneys management provisions of the *Indian Act* present a significant barrier to economic development for First Nations people and communities.

Indeed, in our April 2013 report *Addressing the Barriers to Economic Development On Reserve*, the Board noted that "moneys management under the *Indian Act* is an area in which the Crown's fiduciary obligation to ensure that First Nations assets are protected can lead to sub-optimal economic outcomes." A necessary precursor to economic development is flexible and responsive institutional arrangements which allow First Nations to use their own moneys and leverage this idle capital in a timely fashion.

The Draft Policy on the Transfer of Capital Moneys through Section 64(1)(k) of the *Indian Act* proposes to replace a mechanism whereby the Minister (or regional delegate) must authorize expenditures of capital funds with a view to ensuring that they are, in general terms, “for the benefit of the band” via a trust mechanism. While a trust managed by a First Nation directly may prove to be less onerous and more flexible than the current approach under the *Indian Act* – it fails to address the core issue of the Government of Canada capturing First Nations moneys in the first place. Fundamentally, the National Aboriginal Economic Development Board believes that First Nations should not have to seek permission from Canada to spend their own revenues – in fact, the government should not be managing First Nations moneys at all.

If a community does wish to manage its moneys through a trust, the decision as to whether a trust is the most suitable or desirable option for an individual community should rest with the band’s Chief and Council. As the democratically elected officials representing the interests of the band in question, it is precisely these types of decisions that have been placed in their hands through the election process. Managing moneys through a trust may be a suitable financial vehicle under certain circumstances – for example, if a First Nations’ community vision is to manage their moneys for their long-term benefit, reserving the capital and using only the interest it generates. However, when trusts are not properly structured, they become an impediment to meeting community needs. There are many examples of poorly structured trusts and often administrative costs are exorbitant.

The Board notes that there are also moneys management provisions contained in the *First Nations Oil and Gas and Moneys Management Act* which provide an alternative to the management of Indian moneys through the *Indian Act*. Uptake of the *First Nations Oil and Gas and Moneys Management Act* appears to be very limited because of the requirements regarding community consent (majority of a majority) and bonding for individual trustees.

The Board takes issue with the use of “majority of a majority” voting processes in First Nations communities. No community operating in a democracy – Aboriginal or non-Aboriginal – should be subject to this type of voting process; it stops progress. In fact, there are very few, if any, examples of this type of voting threshold being used in national election processes or in private sector financial decision making processes. It is almost universally recognized that this type of voting threshold is not effective and impedes timely and productive business and community development.

Therefore, in the Board’s view, this *Act* does not present a useful option for most First Nations with regards to moneys management. We believe that amendments to the *First Nations Oil and Gas and Moneys Management Act*, specifically to the voting thresholds, should be expedited. And further, amendments to all voting requirements that requiring a majority of a majority as the voting thresholds should be undertaken.

The Board also wishes to note its concern with the engagement process that was undertaken to support the draft policy. The chosen approach used a primarily web-based forum for First Nations’ input. While the Board applauds the Department for engaging directly with the 11 First Nations most affected by the proposed change in policy, we believe that a more active engagement process should have been employed for the remainder of First Nations in Canada. It is the position of the Board that First Nations must be intimately involved in defining and developing the solutions that impact their futures.

It is the opinion of the Board, therefore, that the Draft Policy on the Transfer of Capital Moneys through Sec. 64(1)(k) of the *Indian Act* is, at best, a partial solution and represents a positive but limited step forward. The Board believes that the option for a trust as laid out in the proposed policy should be pursued but only as one of a suite of new options for First Nations moneys management.

Fundamentally, the government should not be capturing First Nations moneys in a regime in the first place, and should act to rectify this.

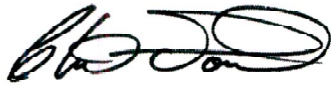
The proposed policy, like other policies drafted by the Department, appears to be drafted in response to concerns about a minority of First Nations governments. The policy imposes, through a new mechanism, unnecessary requirements on the majority of First Nations which embrace good governance and practice transparent and accountable financial management. Positioning the development of a trust as the primary option for management of band moneys places an undue encumbrance on First Nations by imposing a continued oversight on First Nations with regards to the use of their own moneys.

As such, the Board recommends that the federal government: (1) act to develop additional options for moneys management of Indian moneys with a view to increased flexibility and facilitating the ability of First Nations to pursue economic development; (2) address roadblocks that exist due to community consent requirements by removing majority of a majority voting thresholds in opt-out legislative tools and making voting thresholds on reserve consistent with those in an off-reserve context; (3) the engagement process for the new draft policy be extended to allow more active strategies to be incorporated; and (4) begin work to amend sections of the *Indian Act* that prescribe the capture of First Nations moneys which are discriminatory and are based on an entrenched system of paternalism.

The Board also believes that the Government of Canada must be accountable to First Nations in how moneys are being managed on behalf of First Nations. We believe that the Department should develop a system to report back to communities as to the performance of their moneys and work with First Nations to ensure that the management of their moneys meets their interests and needs.

On behalf of the Board, I trust that you will consider our advice and instruct the Department to develop additional options for management of Indian moneys with a view to removing barriers and supporting options for First Nations to seize opportunities for economic development.

Sincerely,

A handwritten signature in black ink, appearing to read "Clarence Louie". The signature is fluid and cursive, with the first name "Clarence" written in a larger, more prominent script than the last name "Louie".

Chief Clarence Louie
Chairperson
National Aboriginal Economic Development Board