

Ontario First Nation Economic Forum

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Workshop: Legal and Tax Immunity

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Overview of Presentation

1. Taxation of First Nations Business Income
2. Purposes and Objectives of Economic Development Groups
3. Structuring Matters and Governance Frameworks
4. Select Issues in the Negotiation of Legal Agreements
5. Select Issues in a Litigation Context

Taxation of First Nations Business Income

Section 87 (*Indian Act*)

- ❖ “ Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to Section 83 and Section 5 of the *First Nations Fiscal Management Act*, the following property is exempt from taxation:
 - a) the interest of an Indian or a band in reserve or surrendered lands;
 - b) the personal property of an Indian or band situated on a reserve.”
- ❖ The exemption under section 87 applies only to individual Indians, or bands
- ❖ Corporations and trusts are not exempt
- ❖ Much debate over the meaning of the phrase “situated on a reserve”

Section 81(1)(9) (*Income Tax Act*)

- ❖ “There shall not be included in computing the income of a taxpayer for a taxation year,
 - a) an amount that is declared to be exempt from income tax by any other enactment of parliament, other than an amount received or receivable by an individual that is exempt by virtue of a provision contained in a tax convention or agreement with another country that has the force of law in Canada;...”

Taxation of First Nations Business Income (con't)

- ❖ Currently, the courts appear to be applying more weight to:
 - a) the location at which the activities of the business are being carried out; and
 - b) the location of the customers of the business
- ❖ Relying on s. 87 for an exemption from business income taxation is very fact specific
- ❖ Every situation will be different
- ❖ Indian bands typically want more certainty when establishing business enterprises
- ❖ Many First Nations seek reliance on the s. 149(1)(c) – “Public body performing a function of government” exemption
- ❖ If qualified under the exemption, then the income from business need not to be situated on reserve (unlike reliance on s. 87 of the *Indian Act*)

Taxation of First Nations Business Income (con't)

- ❖ What is considered “performing a function of government in Canada”?
- ❖ Generally, CRA has accepted that a band passing by-laws under s. 81 (ex. health, nuisance, law and order, etc.) and s. 83 (ex. “money by-laws” such as property taxes) is performing a function of government
- ❖ In some situations, it may not be possible to pass a property taxation by-law, so the determination then becomes a question of fact
- ❖ Factors to consider:
 - Health services transfer agreement with Canada
 - Providing elementary and secondary education in band-operated schools
 - Ongoing involvement in treaty negotiation and settlement implementation
 - Under any Comprehensive Funding Agreement, responsibility for delivering social programs, infrastructure, and land management
- ❖ The more factors in existence, the better. If there is any uncertainty you can apply for an advance tax ruling

Taxation of First Nations Business Income (con't)

- ❖ But must consider whether or not a Band should be carrying on a business directly (i.e. conflict between tax immunity and legal immunity):
 - Liability considerations
 - Ability to obtain financing
 - Governance
- ❖ A further exemption under s. 149(1)(d.5) applies to corporations owned at least 90% by a band qualifying under the s. 149(1)(c) exemption as a public body performing a function of government in Canada
- ❖ Although corporations are not generally exempt from income tax, this exemption could be applicable in certain circumstances

Taxation of First Nations Business Income (con't)

- ❖ General criteria for s.149(1)(d.5):
 - Owned at least 90% by a band qualified under s. 149(1)(c)
 - Net income from off-reserve activities cannot be >10% of total net income
- Additional criteria in s.149(1.2) and (1.3) and elsewhere
- ❖ Traps:
 - If the business fails to meet the test in one year, and then meets the test in the next year, there is a disposition of the company's assets for tax purposes
 - There is no exemption from GST/HST under this subsection

Advance Income Tax Ruling Request (“AITR”)

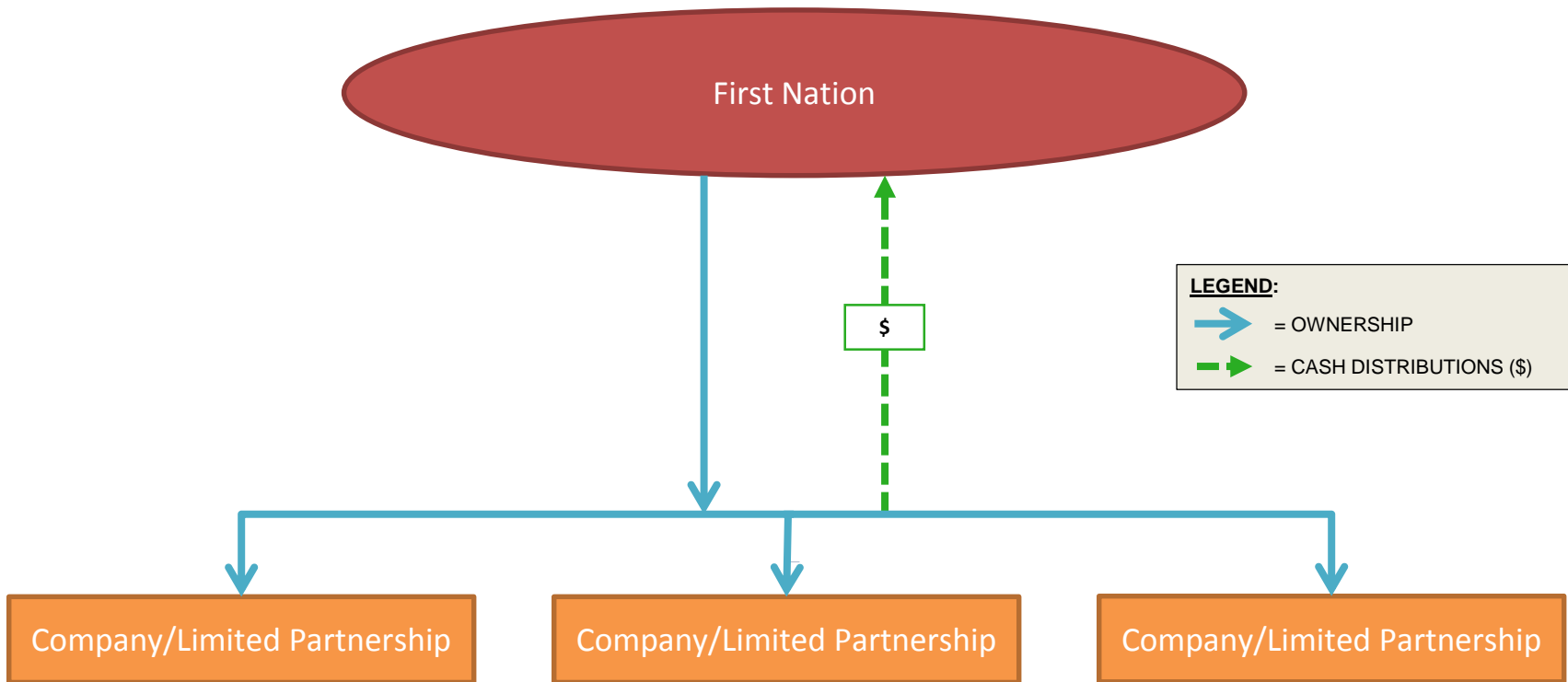
- Objective:
 - Ensure income generated by businesses which operate under the proposed Economic Development Group structure is exempt from income tax
 - Ensure income earned by employees of the proposed Economic Development Group is exempt from income tax
 - Generally, the AITR request briefly describes, among other things, the history and purpose of the proposed transactions and requests confirmation that First Nation be treated as a public body performing a function of government in Canada, within the meaning of paragraph 149(1)(c) of the Income Tax Act, and that the above exemptions from income tax are available
 - Legal opinion is alternative

Common Purposes and Objectives of Economic Development Groups

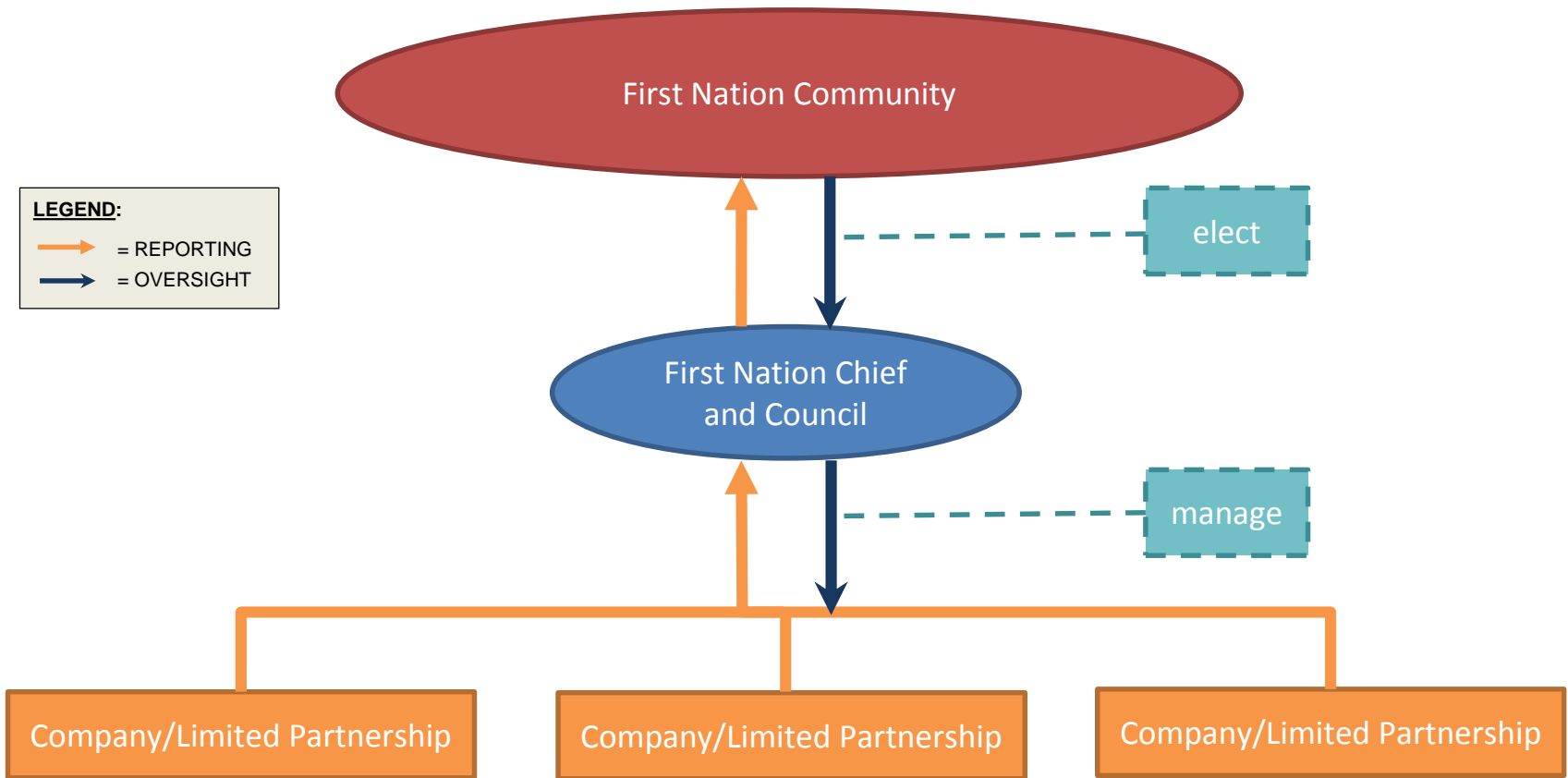
– Select Issues:

- Allow First Nation to derive economic benefits and thereby create employment for its members and generate income to support its governance, public works, infrastructure and development
- Permit First Nation to manage its risk by separating its interests in businesses one from another and from other assets of First Nation
- At the same time as part of improving its governance of economic activities and First Nation owned businesses, First Nation wants to further separate its businesses from direct governance by elected officials
- Move First Nation owned businesses into a separate "arm's length" corporation in order to:
 - de-consolidate (i.e. separate) the financial results of those businesses from First Nation current financial statements
 - address Own Source Revenue calculations
- Other purposes and objectives (different objectives of “settlement trust” v. “community trust”)

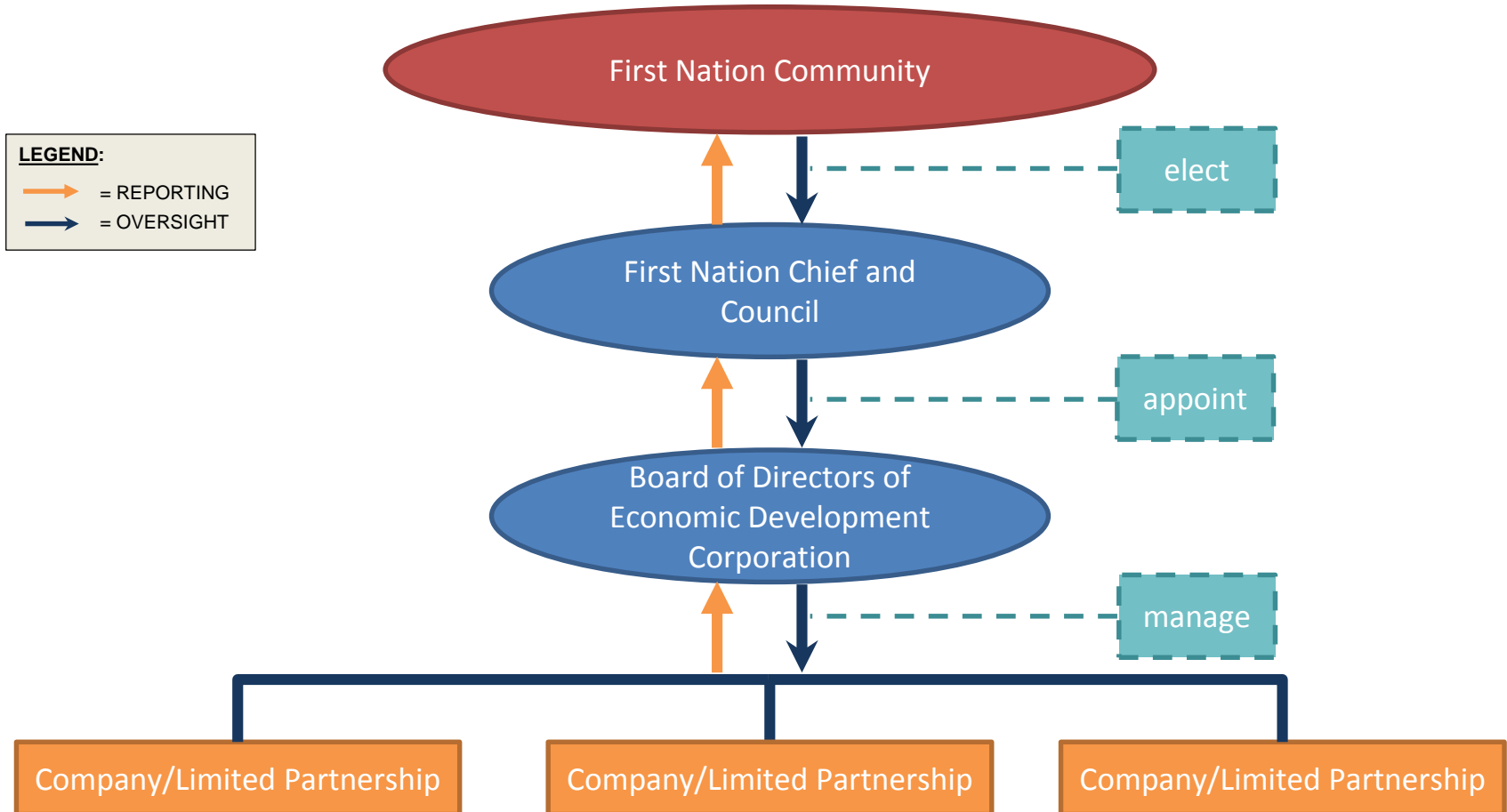
Economic Development Group Ownership Structure (“INAC” Model)



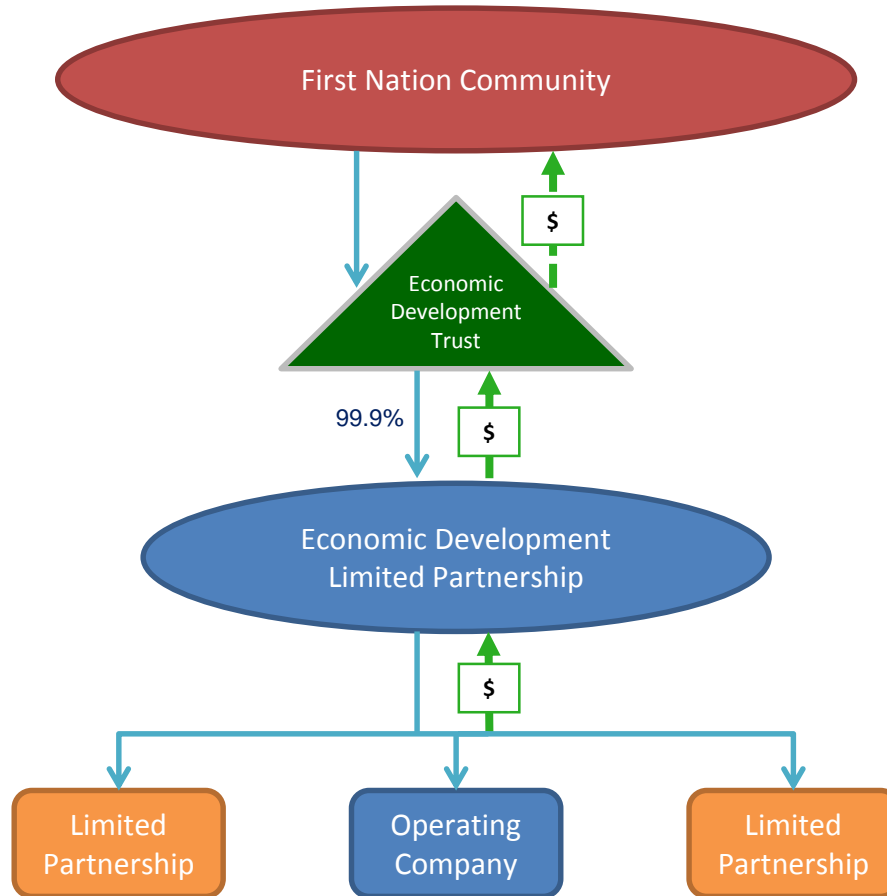
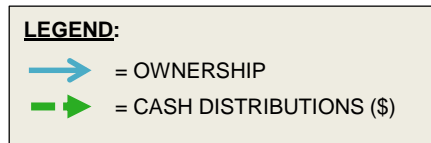
Economic Development Group Governance/Oversight (“INAC” Model)



Economic Development Group Governance/Oversight (“Standard” Model)



Economic Development Group Ownership Structure (“Custom” Model #1)



Economic Development Group Governance/Oversight (“Custom” Model #1)

LEGEND:
→ = REPORTING
→ = OVERSIGHT

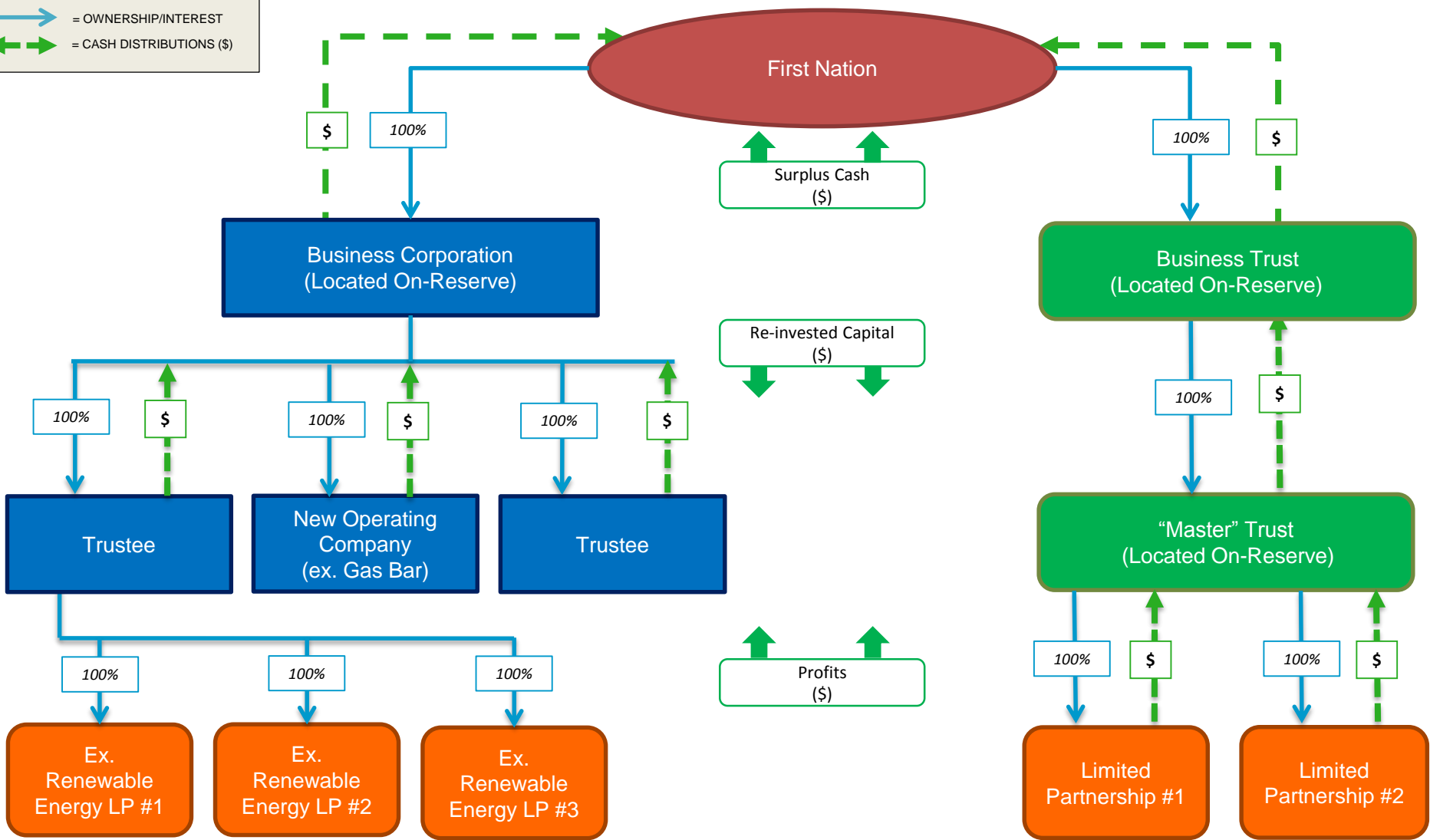


Economic Development Group Ownership Structure (“Custom” Model #2)

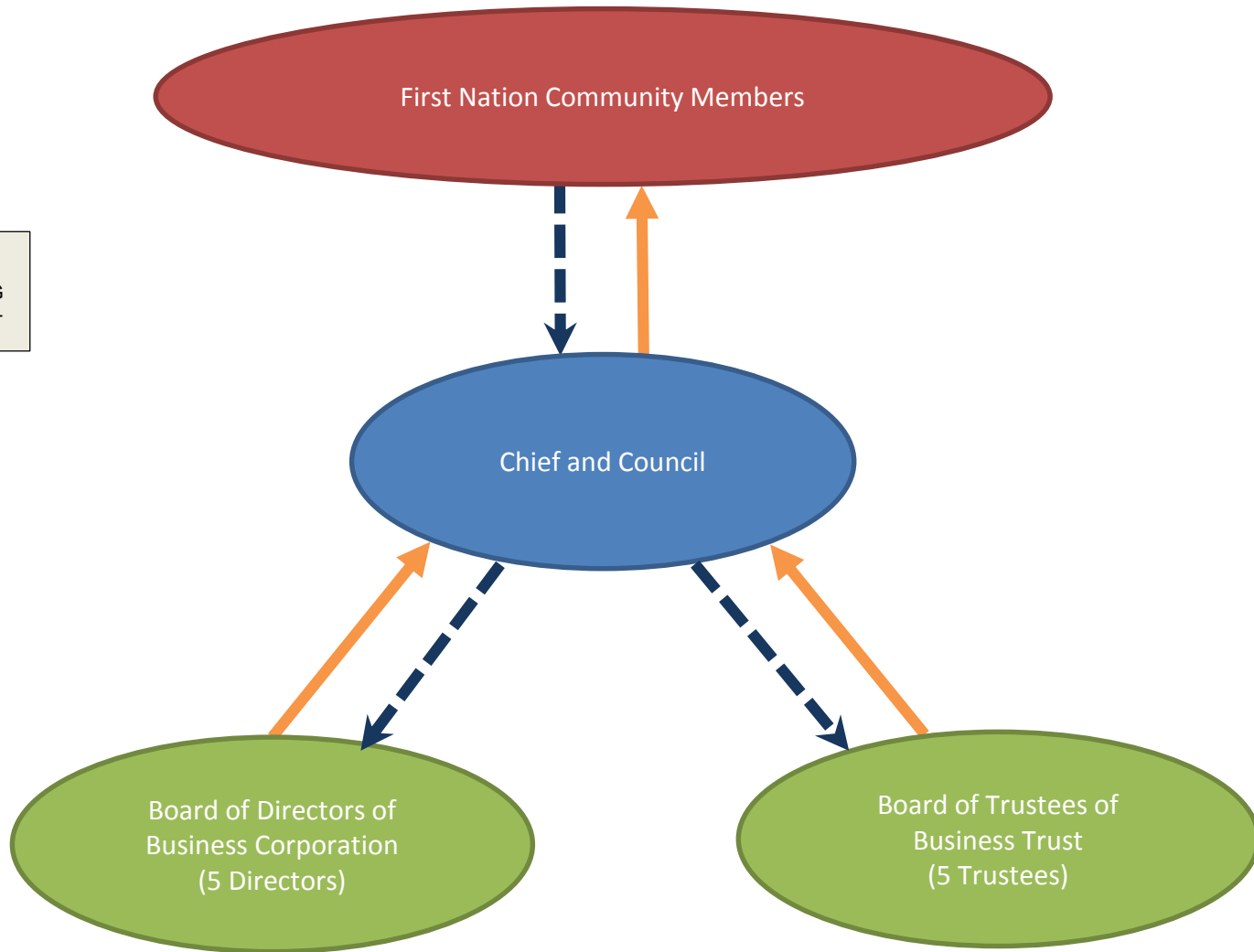
LEGEND:

→ = OWNERSHIP/INTEREST

↔ = CASH DISTRIBUTIONS (\$)

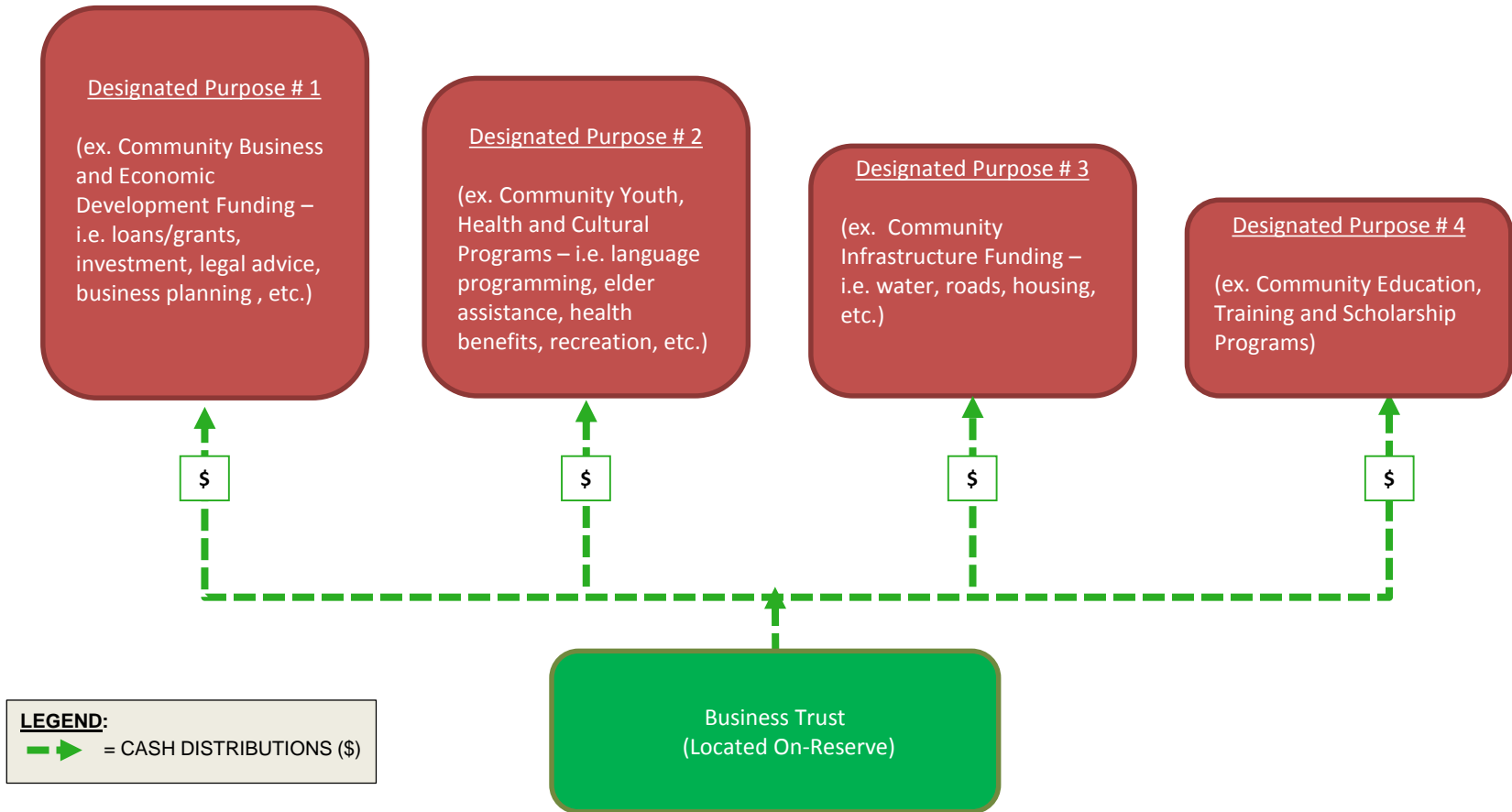


Economic Development Group Governance/Oversight (Example 1)



Economic Development Group

General Overview of Business Trust (Example 1)



Select Issues

Negotiation of Legal Agreements

- ACKNOWLEDGEMENT OF TRADITIONAL LIFESTYLE
- PRESERVATION OF TREATY RIGHTS AND CLAIMS
- COMMUNITY INVOLVEMENT
- CONFIDENTIALITY
- COMMUNITY BENEFITS
- FINANCING
- COSTS

Select Issues
Litigation Context

THANK YOU

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