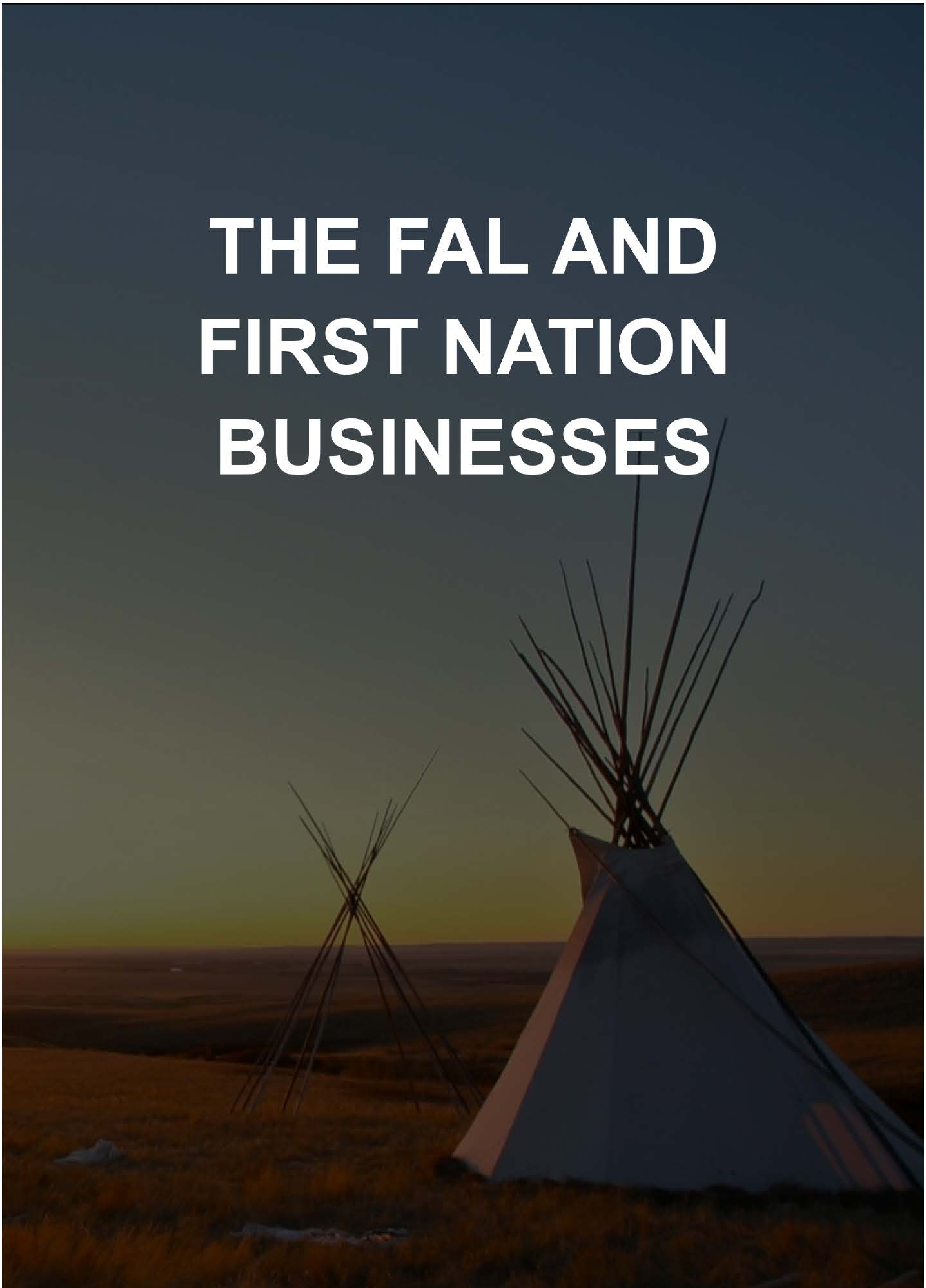
THE FAL AND FIRST NATION BUSINESSES



First Nations
FINANCIAL
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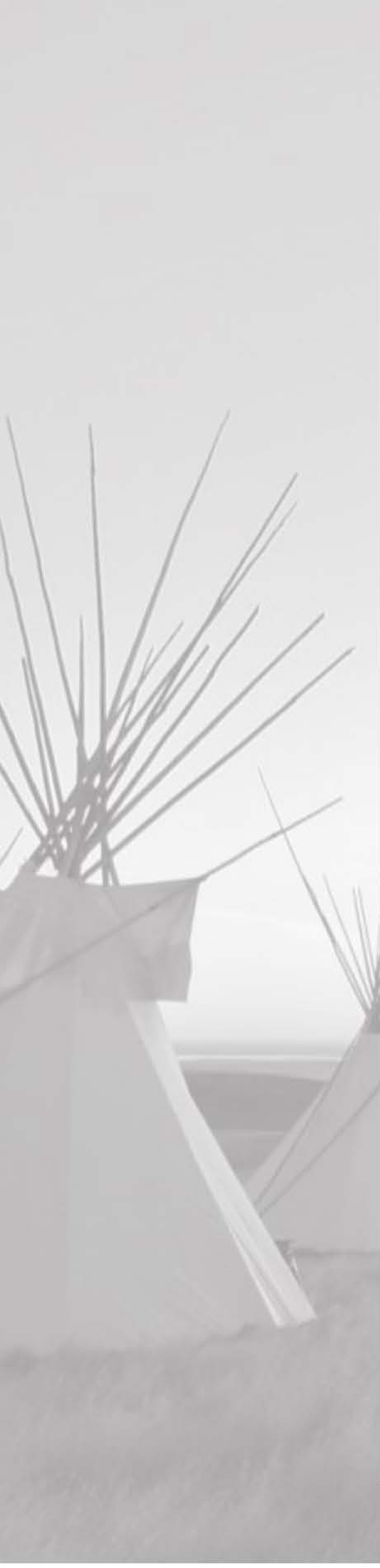
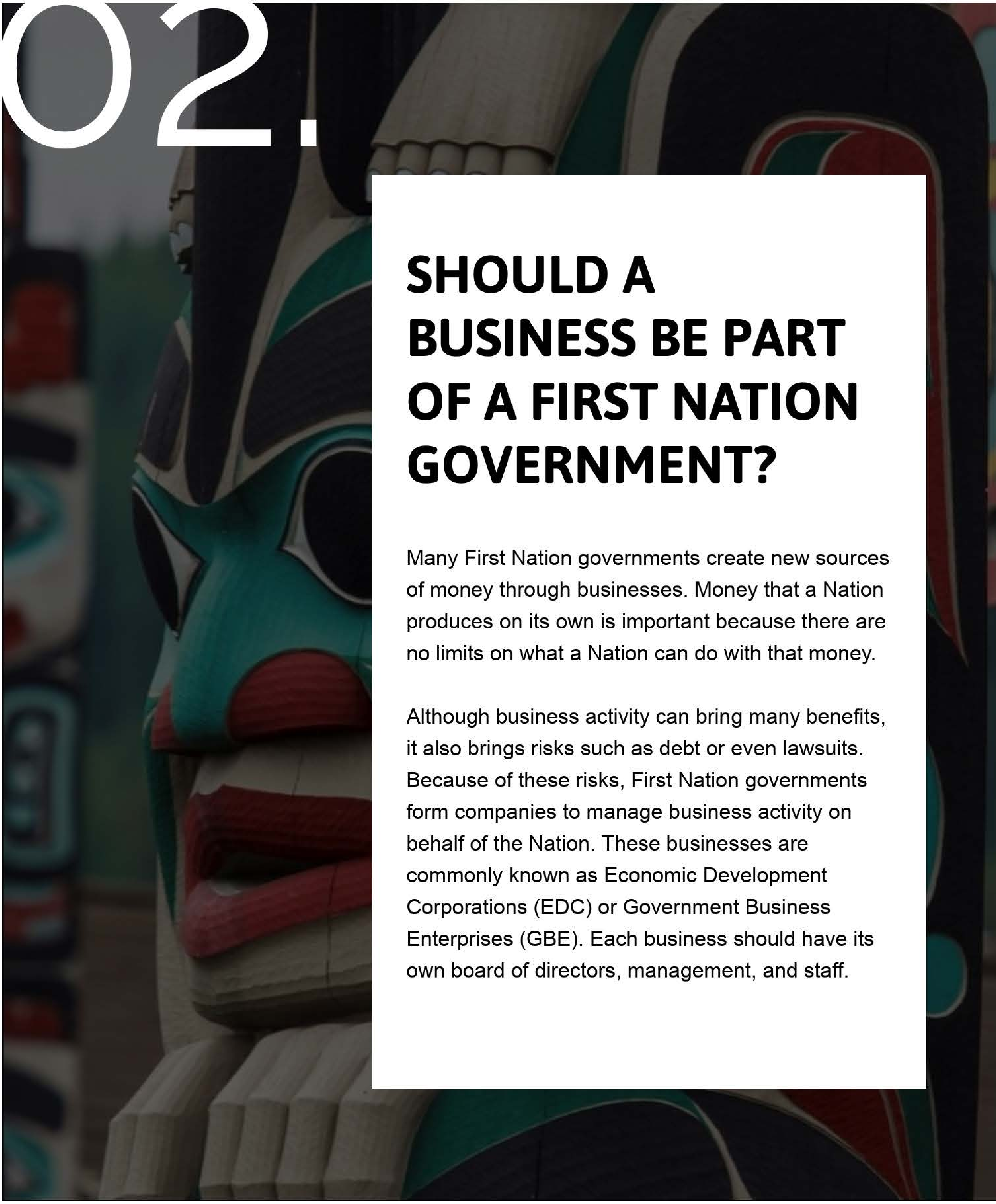


HOW DOES MY FAL RELATE TO MY BUSINESSES?

Many First Nation governments have money coming in that is not transfer funding. This money can come from gas stations, stores or any other kind of business from fishing to forestry to food. First Nation governments with businesses and who have put in place a Financial Administration Law (FAL) under the *First Nations Fiscal Management Act* fall under certain rules related to watching over these businesses.

A FAL applies to a First Nation government's administration. **It does not regulate in any way any legal entities other than a First Nation government**. For a First Nation government's businesses, the FAL sets out rules for Council to watch over its investments, loans and guarantees in its businesses. This includes understanding and managing the risks related to these businesses. It also includes making sure that the First Nation government meets the accounting rules for reporting on the businesses in their audited financial statements.

Although operating businesses is outside of the scope of the FAL, the purpose of this overview is to provide guidance on how a First Nation government can protect itself when overseeing its business investments.



02.

SHOULD A BUSINESS BE PART OF A FIRST NATION GOVERNMENT?

Many First Nation governments create new sources of money through businesses. Money that a Nation produces on its own is important because there are no limits on what a Nation can do with that money.

Although business activity can bring many benefits, it also brings risks such as debt or even lawsuits. Because of these risks, First Nation governments form companies to manage business activity on behalf of the Nation. These businesses are commonly known as Economic Development Corporations (EDC) or Government Business Enterprises (GBE). Each business should have its own board of directors, management, and staff.

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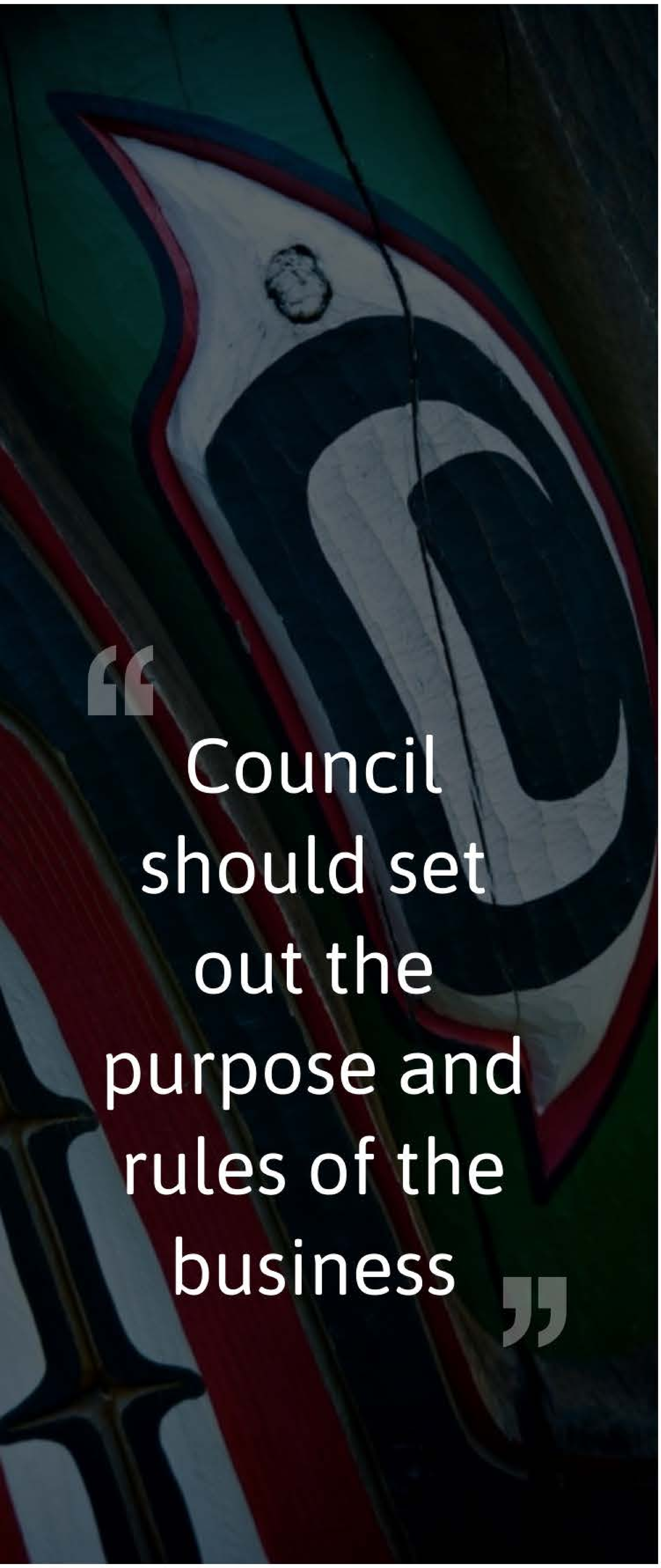


WHAT IS COUNCIL'S ROLE IN ITS FOR-PROFIT BUSINESSES?

Ownership
Council acts as the shareholders, on behalf of the Nation, of each business. Council is responsible for appointing a board of directors to oversee each business. The board makes decisions on behalf of the business and maximizes the value for shareholders.

Purpose
Council should set out the purpose and rules of the business in the core documents (documents needed for setting a business up). Be clear on the purpose of the business (e.g. profits, job creation).

Accountability
Although Council should not manage the day-to-day business, Council can still make sure that the business is performing well by asking the board of directors to report to them on a quarterly basis. If the board of directors is not meeting Council’s expectations, Council can appoint or remove directors as needed. It is important to seek legal advice when appointing or removing a director.

Communication
Council may want to share information with the community about the business: who makes the business decisions, where the profits will go, and how the business is doing.

04.

WHAT IS THE BOARD OF DIRECTORS' ROLE IN A FOR-PROFIT BUSINESS?

The board of directors is a group of people that the shareholder (Council) appoints to oversee a business. The board approves budgets, adopts strategies, approves policies, oversees management, and is responsible for the success or failure of the business. Directors of the board have the duty to act in the best interests of the business and make informed decisions. It is important to choose directors that can lead the business to success. Good directors should have business, legal, financial, managerial, human resources, and board experience.

To recruit directors, a Nation might want to start by exploring its network. A Nation might have community members with business, legal, or finance experience. Retired executives, finance professionals, or lawyers can make great directors. Your Nation may even have business advisors, accountants, or lawyers who know of good candidates.

COUNCIL SHOULD CONSIDER THE FOLLOWING WHEN CHOOSING DIRECTORS:

- Will this person be available to attend regular meetings and actively participate in the meetings?
- Does this person have the knowledge and experience to fulfill the role of director?
- Will this person avoid conflicts of interest?

WHAT TYPES OF BUSINESSES ARE THERE?

There are several business structures in Canada, including sole proprietorships, partnerships, co-operatives, and corporations. Nations pursue different types of business structures and strategies, depending on their needs. **It is important to seek good legal advice when choosing a business structure.**

Nations usually need their businesses to maximize profits and limit the Nation's liability. If a Nation's business will earn 90% of its money on reserve, it can form its business as a corporation and still be exempt from taxes under the *Income Tax Act*.

First Nations often form their businesses as limited partnerships. When a Nation's business will be earning money off reserve, this structure gives the Nation tax benefits while protecting it against the risk of lawsuits and claims.

It is important to note that if Council or its staff gets involved in managing a limited partnership, the Nation can lose its limited liability protection and could be responsible for debt, lawsuits, taxes or other obligations.

Depending on their needs, Nations sometimes pursue other business structures, such as co-operatives. In British Columbia, Nations can form another type of partnership called a limited liability partnership.

SOLE PROPRIETORSHIP

Pros

- Easy and not costly to set up
- Direct control of decision-making

Cons

- Unlimited personal liability
- Limited to one owner

CORPORATION

Pros

- Limits owners' (shareholders) liability
- Separate legal entity

Cons

- Corporations are closely regulated
- Corporations are taxable, unless it is First Nation-owned and makes 90% of its money on-reserve

PARTNERSHIP

Pros

- Tax advantages for First Nation partners
- Limited partnerships can protect Nations from liability

Cons

- Limited partners cannot participate in managing the business
- Partnership structures can be complex and difficult to understand

CO-OPERATIVE

Pros

- Limits owners' (co-op members) liability
- Group of owners (co-op members) control business through voting

Cons

- Long decision-making processes
- Limited to situations when groups of individuals or businesses decide to work together

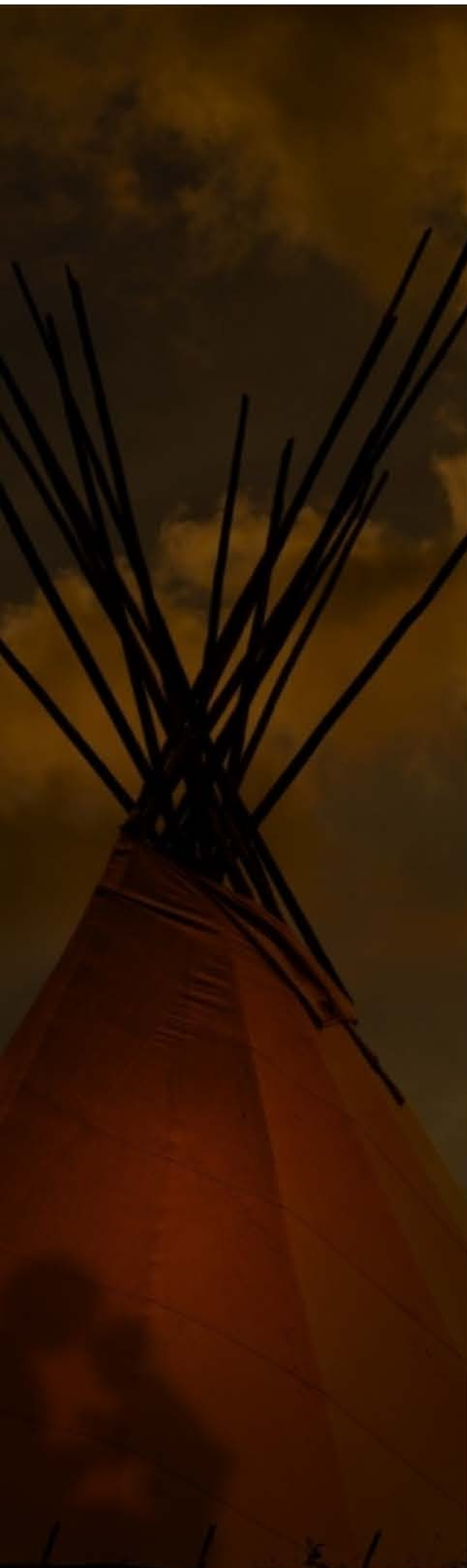
Source: https://canadabusiness.ca/starting/before-starting-your-business/corporation-partnership-or-sole-proprietorship/ (accessed 02/15/19).

WHAT IS THE FINANCE AND AUDIT COMMITTEE'S ROLE IN FIRST NATION-OWNED BUSINESSES?

First Nation-owned businesses sometimes need investments from the Nation to start or grow. In many cases, the Nation will give loans to the business and/or certain guarantees.

The Finance and Audit Committee’s role is to provide Council with advice and recommendations. It has the responsibility to advise Council on investment strategy and to review the risks of these investments. This risk assessment may include reviewing feasibility studies or business plans that support the investment. The Finance and Audit Committee supports Council in its responsibility to monitor the Nation’s investments.

The Committee also recommends to Council the external review level of detail of the businesses' financial statements (audit, compilation, or review). The Committee should receive the financial statements of all First Nation-owned businesses because those statements are included in the First Nation government's audited financial statements.



KEY TAKEAWAYS

- Seek expert legal and tax advice when setting up a business
- Be clear on the business purpose
- Appoint experienced board of directors to oversee the business and its management team
- Make sure that board of directors has insurance
- Make sure that board of directors meets with Council regularly to report on financial performance and direction of the business
- Review the roles, responsibilities and performance of the board of directors on a regular basis

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