

Negotiating the Deal with Your Indigenous Business Partner

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With economic reconciliation gaining momentum, proponents of energy and natural resource projects may need to pursue the consent and participation of the Indigenous communities that will be impacted. Further, in addition to facilitating unhindered access to land and resources, many Indigenous communities are now able to access project capital and are quickly being recognized as solid and enterprising business partners. While doing business with Indigenous communities has become increasingly more common, it still involves several unique legal considerations. Here are three key things to know for negotiating a deal with your Indigenous business partner that will increase the chance of a successful, long term business relationship.

Take an Interest-Based Approach to the Negotiation

While an important aspect of any commercial relationship is getting to know each other, it is even more so with an Indigenous business partner as the goal is not just to complete the transaction but rather to build and maintain a constructive, long-term working relationship - one that enjoys commercial success but also creates benefits to the community.

The starting point is to recognize that an Indigenous business partner (even if a wholly owned corporate structure) is not simply a corporate entity but rather comes from and is part of an Indigenous community - each of which is historically and culturally distinct, with different governance structures, community challenges, aspirations, economic opportunities and capacity. The non-Indigenous partner should come to the negotiation table having done its research and be prepared to learn about its business partner and its community. The Indigenous government or Indigenous company may have values and interests that go well beyond typical commercial considerations including environmental stewardship, land acknowledgement, engagement and support within the community, training and employment opportunities, senior management capacity and one or more seats at the board table. By taking an interest-based approach to your negotiation, both parties can learn about each other from the beginning and put the relationship on solid ground.

Once you have a sense of your business partner's goals and aspirations, the overall pattern of interaction between the parties both at and away from the negotiation table should be one of calm, respectful interaction. Good communication is a must. Regular updates and the fulsome exchange of information are a must. Common mistakes to avoid include not being prepared, not structuring the negotiation, being inconsistent with communications, not fulfilling basic commitments, and turnover in the non-Indigenous negotiation team. Above all, learn to disentangle the merits of the business deal from the relationship itself, and take care of the relationship. The goal should be to build and maintain a good working relationship right from the beginning - one that can deal well with differences during the negotiation as well as into the future, operational phase of the proposed business.

The bottom line is that the process of negotiating and entering into a legally binding agreement is going to either help or hinder the long-term commercial success of the parties. Taking the time to get to know and respect your Indigenous business partner's values, interests, aspirations, and specific goals will pay off in the long run.

Understand Your Indigenous Partner's Governance Structure

When doing business with an Indigenous community, it is critical to understand and respect its unique governance structure. Prior to colonization, Indigenous peoples were generally self-governing, and many communities used a governance system based on hereditary systems. The type of hereditary governance structures varies from nation to nation but for many Indigenous communities, leadership was and is still passed on from generation to the next either through bloodlines or hereditary customs. In addition, some communities have councils of elders that are, or were the primary decision-making body and the community may have a tradition of making decisions through a collaborative approach.

An elected chief and council system was introduced by the *Indian Act*. In the case of First Nations under the *Indian Act*, the *Indian Act* and the *Indian Band Council Procedure Regulation* set out a legislative framework for band council decision-making. Section 2(3)(b) of the *Indian Act* requires that a power of the band council must be exercised by consent of majority of the councillors at a duly convened council meeting. This section has been held by the Courts to capture both express and implied powers.¹ The council could negotiate an agreement directly or they could authorize someone like the Chief or a band administrator to negotiate the contract and report back to council. Note that the subject matter of the contract needs to be within the First Nation's jurisdiction or there is a risk that it may not be valid.

First Nations also have the ability to implement their own custom community electoral system under section 74 of the *Indian Act*, which may include establishing its own election laws and governance structures based on traditional hereditary systems. In the case of First Nations with their own governance structures, any relevant by-laws should be carefully examined.

In the case of other Indigenous governance systems, it is important to review any relevant legislation or internal by-laws to understand the relevant decision-making power. For example, here in Alberta, the eight Metis settlement corporations must contract in a manner that complies with the *Metis Settlements Act*.² Generally, the settlement chair (or councillor designated by the council), and the settlement administrator must sign the agreement and execution of the agreement should be supported by written resolution.

Many other Indigenous communities, particularly in the North and in British Columbia, are self-governing through modern treaties. Modern treaties give the Inuit, First Nation or Metis community control over their land and resources and need to be reviewed in order to understand the Indigenous government's governance structure. In some cases, the treaty stipulates that resource development will not go ahead without the participation of or the negotiation of an impact benefit agreement with the community.

Understand What Makes Your Agreement Legally-Binding

Whether your agreement is legally-binding will depend in large part on whether the applicable legal procedure was followed.

For example, a band council resolution (**BCR**) has been commonly used to demonstrate consent of a band council and their authority to act, and viewed by some Courts as necessary to demonstrate compliance with section 2(3)(b).³ In a recent decision, the Alberta Court of Appeal held that a specific, written band council resolution approving a contract is not strictly necessary for the contract to be found to be legally enforceable against the First Nation.⁴ Rather, the BCR was viewed as one of several ways by which the council may exercise its authority to bind the band in contract. The Court found that a band council may

¹ *Maloney v Eskasoni First Nation*, 2009 NSSC 177 at paras. 252-255; recently endorsed in *Sands v Walpole Island First Nations Band*, 2018 ONCA 188, [2018] OJ No 1014.

² RSA 2000, c S-14.

³ For example, the Court in *W. Downer Holdings Ltd. v Red Pheasant First Nation*, 2012 SKQB 468 held that an agreement signed solely by the Chief or a majority of the council outside of a duly convened meeting was insufficient to create a legal and binding obligation on the First Nation.

⁴ *Kehwin Cree Nation v Kehew Construction Ltd.* 2022 ABCA 78.

also exercise its powers by authorizing a member of the council to negotiate on its behalf (e.g., the Chief) or to delegate that authority to another individual (e.g., a business manager or land administrator).

Nevertheless, a BCR still provides good legal clarity that the band council's power to enter into a contract on behalf of the First Nation was properly exercised. Good practice is to ensure that the BCR addresses the specific contract at issue and references the meeting and quorum at which the contract was executed.

The First Nation may also have one or more wholly owned business entities or perhaps, there is a society that is affiliated with the Indigenous community. In that case, it may be possible to contract directly with the corporation or society as a natural person under normal business corporation legislation i.e., the contract needs to be signed on behalf of the company or society by a person with express or implied authority (the indoor management rule). If the First Nation is a custom-election band, then the First Nation's by-law should be reviewed to ensure compliance with quorum and decision-making for the First Nation government.

In some cases – particularly in the case of a large or controversial resource project – the decision whether to proceed may need to go to the community for ratification. This may be part of the First Nation's established practice, or the magnitude and potential impacts (positive and negative) may warrant extensive engagement and informed consent by the community.

The New Natural Resource Development Reality

There is no going back. The years of abuse, systemic racism and economic inequality will forever be a dark chapter of Canada's history however, Indigenous interests are now being recognized and are starting to be reconciled with mainstream, non-Indigenous resource development. As Indigenous peoples regain control over their land and resources, and their rightful and prosperous place in the Canadian economy, there will be opportunities for Indigenous communities and their progressive partners to move forward. Natural resource companies that recognize this reality and strive to align their business interests with those of the potentially impacted Indigenous community, will ultimately be rewarded.