Negotiating Key Agreements for Aboriginal Organizations

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Outline of Presentation

1. The key drivers of negotiations
2. Setting the negotiation table
3. Initial agreements
4. Effective negotiation techniques
5. Benefits agreements
6. Partnerships and joint ventures
Understanding the Key Drivers of Negotiations
Why Might the Parties Negotiate?

- **Proponents:**
  - Social licence
  - Access to labour and other services
  - Most of all, certainty of access to a First Nation’s territory (de-risking the project): confirmation of the adequacy of consultation and that the First Nation will not assert s. 35 right to delay or hinder the project

- **First Nations:**
  - Financial benefits
  - Contracting opportunities on a sole source basis
  - Jobs and training for members
  - More input into mitigation measures
  - Risk that the project will be approved with few benefits to the First Nation
Risk and Uncertainty Are the Key Drivers

- The Duty to Consult is highly uncertain
- Risks to the proponent:
  - Prolonged consultation with government
  - Court challenges (new federal legislation is untested)
  - Protest, social opposition
- Risks to the First Nation:
  - The duty can be met – it is not a veto
  - Accommodation need not include substantial financial benefits; where financial benefits are made, they are impact-related
Bases of Value

- Every agreement delivers benefits to both the proponent and the First Nation

- Long-term agreements usually provide benefits to First Nations in exchange for First Nations’ support of projects (or at least non-objection)

- A key question: how to approach the total value of the benefits that should be delivered to the First Nation in an agreement?
Two Approaches to Value

Impacts on the First Nation
• Traditional approach, reflected in an Impact Benefit Agreement (IBA)
• Term derived from environmental assessments
• Focuses on compensation for negative impacts to the environment and traditional uses

Value to the proponent
• More modern approach, reflected in a Benefits Agreement (BA) or Participation Agreement
• Commercial basis for the agreement
• Focuses on the value to the proponent of gaining more certainty and social licence through the First Nation’s support
Providing Certainty for the Proponent

- Long-term agreements generally provide that the First Nation:
  - Supports the project
  - Has been adequately consulted and accommodated
  - Will not challenge the project (or Crown) in court
  - Will respect tenures and approvals
  - Will not delay or hinder work
  - Will limit involvement in ongoing consultative processes on permits to bona fide mitigation of impacts
The Value of Certainty for Proponents

- Business certainty is critical for proponents
- Where there is or may be a DTC, extremely difficult to make investment decisions based only on the case law
- Agreements with First Nations can provide more certainty over:
  - Whether the project will be approved
  - How long approval will take
  - What the costs of the process will be
Example: LNG Projects

- Enormously expensive projects:
  - 13 projects proposed, with projected total capital investment of almost $80 B
- Very time sensitive – race to market
- Impacts on many FNs are lower than with oil

- Huge gap between value of certainty and cost of impacts
Proponents want certainty in exchange only for compensation for impacts.

First Nations should also seek benefits equal to a fair share of the commercial value of the project having their support.
Setting the Negotiation Table
Information Is Powerful

- Gather information about the project, the market and the proponent
- Try to understand the commercial basis of the project – its potential payoffs, and its vulnerabilities
- Determine which personnel are the key decision-makers for the proponent (financial officers)
- What does the proponent want, and why?
Define Your Objectives

- Is this a project that might be supportable under the right conditions? If so:
  - What are those conditions?
    - Impact mitigation
    - Jobs and training
    - Contracting opportunities
    - Direct financial benefits
- List and rank your objectives and try to envision – at least generally – the ideal agreement
- Remember: negotiation is not consent
Select Your Negotiation Team

- Lead negotiator
  - Strong community leader
- Technical support
  - Lawyer, consultant, economic development manager
- Political leader/Elders
  - Able to engage at critical roadblocks
Communication Is Key

- The negotiation team needs to understand the community’s needs and aspirations, and community members need to feel they are understood.
- Consult the community often, and start early – before any negotiations begin.
- Be careful disclosing confidential information, and the team’s ultimate objectives.
- Make sure the consultations occur away from the proponent.
Unity Is Strength

- Disunity within First Nations can be a significant weakness
  - Consultation is critical
  - Chief and Council – Hereditary Leadership
- Disunity among First Nations can also be damaging
  - Proponents are looking for a critical mass of Aboriginal support, and may focus on favourable deals for First Nations who are less affected
  - Consider entering into “collaboration agreements” with other bands or larger Aboriginal groups
Initial Agreements
Common Elements

- Initial agreements are early stage, intended to provide the framework for ongoing negotiations over support of the project.
- Include: negotiation agreements, LOIs, MOUs, Consultation Protocols, Capacity Agreements, etc.
- Matters include (not necessarily in one agreement):
  - sharing of traditional knowledge and other proprietary info
  - capacity funding
  - EA process issues
  - early work on the project (services agreements)
Be Creative

- Example: a “two-track” approach

  1) Negotiation toward early support of the project in exchange for benefits on a commercial basis

  2) Participation and funding for the EA process

- The initial agreement must make clear that the First Nation may decide to oppose the project
Some Key Issues

- Confidentiality: what can be shared with regulators, and what is confidential?
- What happens if the negotiations aren’t successful? Is consent required?
- When can the agreement be terminated?
- Can the First Nation oppose the project during the course of negotiations?
Confidentiality

- Four issues to consider:

1) Confidentiality with respect to government: to what extent are the negotiations incorporated into the consultation record?

2) Confidentiality with respect to other groups

3) First Nation’s control over its cultural intellectual property (TK)

4) Restrictions on use of certain information from the proponent
What Happens If Negotiations Fail?

- Is resolution of issues required before the proponent may seek regulatory approval?
- The Initial Agreement should acknowledge that, subject to any BA, the First Nation may take positions adverse to the proponent, including in court.
- The Initial Agreement is not First Nation support.
- Termination
  - How much notice?
  - Payment of outstanding invoices.
Some Effective Negotiation Techniques
Take Charge

- Define the issues
  - Craft the meeting agenda
  - Set the order for discussing the issues
  - It may be best to start negotiating toward principles on the hard issues

- Hold the pen
  - Take minutes of every meeting
  - As much as practicable, draft the meeting minutes and versions of agreements – the specific language matters!

- Meet in the community and use your indigenous language
At the Negotiation Table

- Principle of equivalency: match the stature of the personnel on the other side
- Build relationships; share with the proponent your culture and your challenges
- See the opportunities, not just the risks
- Listen to each other
- If negotiations reach an impasse:
  - Bring in powerful community figures
  - Remove obstructive people
  - In extreme cases: walk out, protest, go to the media
Benefits Agreements
BAs Must Be Customized

- First Nations, proponents and projects are unique
- The only way for an agreement to be successful for both sides is if it addresses their unique needs and the project’s unique opportunities
- Look to precedents, but don’t rely on them
Common Heads of Agreement

- Interpretation
- Representations and Warranties
- Project Scope
- Environmental Management
- Cultural Heritage
- Training and Education
- Employment Opportunities
- Business Opportunities
- Financial Payments
- Project Certainty
- Assignment and Financing
- Confidentiality
- Implementation Committee
- Remedies
- Dispute Resolution
Interpretation

- Sets out definitions of terms
- Try to be as readable as possible – BAs are not just for lawyers
- Put detailed provisions into schedules
Representations and Warranties

- The provisions that provide certainty of the authority to enter into the agreement and bind the parties
- Proponent:
  - Resolution of the Board approving the execution of the agreement
- First Nation:
  - Band Council Resolution
  - Approval from Hereditary Leadership and/or community at large?
Project Scope

- This is a key provision; its wording is important
- This provision defines what the First Nation is supporting:
  - One project, with a specific design (project description)?
  - One project, the design of which may change?
  - An activity, where the scope may expand in the future?
- Use a schedule to define the scope. Avoid vagueness in order to avoid disputes.
Business Opportunities

- These provisions provide preferences for the First Nation in winning project contracts of certain kinds, which are set out in a schedule.
- Typically First Nation businesses are given advance notice of contract opportunities plus either a presumptive right to a contract or a first chance to negotiate.
- Often the First Nation must keep a registry of qualified businesses.
- Possible arrangement:
  - Cost-plus pricing if just one First Nation business is qualified.
  - Competitive pricing if multiple qualified FN businesses.
  - If no qualified FN businesses, then open to non-FN businesses.
Business Opportunities cont.

- Consider the unique circumstances
- Considerations:
  - Breaking up large contracts into smaller subcontracts to provide more opportunities
  - How to define a First Nation business (ownership and location?)
  - Establishment of specific targets (such as a percentage) or proponent to use “best efforts”?
  - Requirements should flow through to contractors
Financial Payments

- These provisions provide for various monetary payments to the First Nation.
- These provisions vary greatly with the circumstances of the project; they are likely to be a key focus of negotiations.
- Payments are commonly in the nature of:
  - Compensation for specific disturbances
  - Payment for services provided by the First Nation
  - Participation in the project
Payments cont. – Fixed Payments

- Participation payments are fixed or variable. Often both will be appropriate.
- Examples of fixed payments include: an annual payment, or milestone payments that are tied to the project reaching some point

- Benefits to the First Nation: low risk; predictable cash flow; can provide more funds up front
- Detriments: tend to devalue the First Nation’s position
Variable Payments

- **Royalties**: a percentage is applied to revenues (either gross or net), as opposed to profits
  - Lower risk for the FN, and easier to calculate
- **Profit sharing**: payments based on a percentage of profits, without an ownership position in the project
  - Because it is lower risk for the proponent, can potentially be higher reward for the FN.
  - However, harder to calculate, much more volatile, and can result in payments being very delayed
- **Equity**: an ownership position in the project, entitled to dividends/distributions based on profits
  - Can be structured through partnerships, unincorporated joint ventures, or corporations
  - Can involve the First Nation taking on substantial debt in order to finance the equity participation
Project Certainty

- This is the key provision for the proponent
- Proponent will want it to be broad and comprehensive and include:
  - Sufficiency of consultation and accommodation
  - No claims against the proponent or the Crown
  - Respect for tenures and approvals
  - No delay or hindering of work
- Be careful about the scope of the provisions. With an “early” BA, a First Nation might:
  - Retain the right to participate in any regulatory review and advocate for greater mitigation measures, and
  - Limit its support to the project as it is approved through the regulatory process, with all the resulting conditions
Implementation Committee

- This is a critical provision. Forming an agreement is one thing; implementing it is another. You don’t want to have to rely on the dispute resolution clause.
- Usually provides for a joint committee (often 2 members from each side) to oversee implementation.
- A need for institutional memory: committee members must understand the agreement and how it came to be.
- Consider who pays implementation costs.
Joint Ventures and Partnerships
Initial Considerations

- Generally joint ventures and partnerships are used where a First Nation wants to take on a more active role in the project.

Key initial considerations:
- What benefits do you want to get out of the joint venture/partnership?
- Do you want to be an active or passive participant in the management and key decision making?
- Is technology transfer an ultimate goal?
- Are there political concerns?
- How sensitive to risk are you?

The answers to the above questions will serve to inform your
- selection of the proper structure for your joint venture/partnership;
- negotiations with your commercial partners and identification of the key terms of the governing agreements; and
- participation in the future operation of the joint venture/partnership.
Joint Ventures may be structured in many different ways; each has its own advantages and disadvantages. The most commonly utilized structures are as follows:

- Unincorporated Joint Ventures
- Limited Partnerships
Unincorporated Joint Ventures

- The simplest structure – the Joint Venture Agreement governs the relationship
- The First Nation remains entitled to tax exemptions including s. 149(1)(c) of the Income Tax Act (ITA)
- Creates liability risk for First Nations – commercial partner should provide indemnities to the First Nation and maintain appropriate insurance and pay the premiums on behalf of the First Nation
First Nations may enter into joint ventures through an existing or newly incorporated development corporation

Provide greater protection from liabilities arising out of Joint Ventures

Can be used to insulate the activities of the joint venture from internal band politics

Downside: fewer/narrower tax exemptions available to development corporations as opposed to band participating directly (under s. 149(1)(d.5) of the ITA, 90% of work must be done within geographic boundaries of tax authority – i.e. a reserve)
Limited Partnerships

- Most common structure used for joint ventures by First Nations and their commercial partners
- Allows for First Nation participation in management and key decisions through representation on the board of directors of the general partner and through share holdings in the general partner
- The First Nation, as a limited partner, remains entitled to tax exemptions including s. 149(1)(c) of the ITA, among others
- Creates limited liability, but commercial partners should provide indemnities to the First Nation and maintain appropriate insurance and pay the premiums on behalf of the First Nation
Benefits

- Some key benefits of partnerships and joint ventures:
  - Involvement in management and key decisions
  - Capacity building and funding
  - Technology and skills transfer
  - Provision of low cost financing
  - Legacy applications (provision of equipment to First Nation at minimal or no cost at end of arrangement)

- Limited partnerships are also used to structure the participation of multiple First Nations and provide a governing entity and means of allocating benefits

- As with benefits agreements, it is important to be flexible and creative in order to maximize benefits
Safeguards

Key safeguards that governing agreements should include:

- Audit rights with respect to the calculation of revenue, profits, royalties, expenses etc. (an appeal mechanism to a third party accountant should also be included for verification)
- Costs of the joint venture should be largely if not fully borne by the commercial party and capacity funding should be provided to the First Nation to cover its costs of setting up and participating in the joint venture/partnership
- Non-competition clauses – commercial partners should be prohibited from partnering with other First Nations to perform similar work within the Territory without consent
- A dispute resolution process should be put in place
- Indemnities and insurance should be provided by the commercial party to protect the First Nation and its key personnel from liability
Thank you

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