



Developing Successful Commercial Structures with Aboriginal Communities

The Canadian Institute's 5th Annual Forum on Engaging and
Negotiating with Aboriginal Communities

Timothy J. Murphy

tim.murphy@mcmillan.ca

The Opportunity

- TD Bank estimates that there are \$315 billion in major resource developments on or near Aboriginal communities
- Ontario's Feed in Tariff program offers significant benefits to Aboriginal participation – both in project returns and contract priority

Indicators of Successful Aboriginal Ventures

- **Sovereignty matters**

- When Native nations make their own decisions about what development approaches to take, they consistently out-perform external decision makers on matters as diverse as governmental form, natural resource management, economic development, health care, and social service provision.

- **Institution matters**

- For development to take hold, assertions of sovereignty must be backed by capable institutions of governance. Nations do this as they adopt stable decision rules, establish fair and independent mechanisms for dispute resolution, and separate politics from day-to-day business and program management.
- 1987, Harvard Study.

Indicators of Successful Aboriginal Ventures

- **Culture matters**

- Successful economies stand on the shoulders of legitimate, culturally-grounded institutions of self-government. Indigenous societies are diverse; each nation must equip itself with a governing structure, economic system, policies, and procedures that fit its own contemporary culture.

- **Leadership matters**

- Nation-building requires leaders who introduce new knowledge and experiences, challenge assumptions, and propose change. Such leaders, whether political, community, or spiritual, convince people that circumstances can be different and inspire them to take action.

Aboriginal Perspectives on Development

- “Many Aboriginal spiritual and community leaders wish that public policy discussions--economic, social, political, educational--would take place with all participants mindful of our shared responsibilities to the **seventh generation.**”
- “We have not only a right to manage and plan for the use of our land. We have an obligation to do so. We are responsible for the land and its **stewardship.**”
- “Each member of our Nation, present and future, is entitled to the peaceful enjoyment of a mode of life **consistent with the practice of their elders...** These rights ensure that each member can use, access, and reside in, freely and with confidence, the **cultural places and resources**, specific and general, that give their rights meaning and substance.”

Initial Thoughts – Avoid Costly Assumptions

- The relationship with First Nations or Métis is not just commercial
- Need to take account of community principles, historical experience and a different approach to business
- Engage the Chief, council members, band administrators, elders and the community as a whole
- Time isn't money

The Duty to Consult and Accommodate

- The Crown has a duty to consult and accommodate an Aboriginal group where a decision is being made that may adversely impact the land and resources that the group lays a claim to.
- The duty requires “meaningful consultation,” which may include willingness on the part of the Crown to understand the concerns of an Aboriginal group, have good faith discussions, and compromise on issues based on information that emerges through the process.

The Duty to Consult and Accommodate

- Although the Crown cannot assign its ultimate responsibility to meet this obligation, in practice procedural aspects of this duty are delegated to a business looking to get approval on a proposed project.
- As a result, businesses must ensure that they effectively discharge this duty on behalf of the Crown in order to gain approval on a project in partnership with the Aboriginal group.

Negotiating with Aboriginal Communities

- Assessing more than just economic and commercial factors:
 - Impact of project on the community;
 - Respect for the land and resources, including on-going stewardship;
 - Community-based decisions guided by elders.
- Engaging the community early is a key step in successful negotiations, including:
 - Raising community awareness and council support;
 - Disclosing technical and financial feasibility; and
 - Building relationships, aligning interests, and sharing the same vision for the success of the project.

Building Capacity

- Supporting effective decision-making by the Aboriginal community:
 - Procedural:
 - Support for financial, legal and technical assessment;
 - Information sharing (and confidentiality protection);
 - Access to government programs.
 - Technical:
 - External advisors;
 - Information sharing.
 - Substantive:
 - Infrastructure;
 - Financial support;
 - Training;
 - Contracting and employment;
 - Family and community supports.

Degrees of Participation

- Support letters
- Cash Payments – Upfront or Royalties
- Impact and Benefit Agreements
- Partnerships and joint ownership

Degrees of Participation

- Cash Payments
 - Minimal partnership
 - Low community 'buy-in'
- Joint Venture Agreements
 - Mechanics of project control
 - Tax considerations
 - Financing limitations
 - Liability Concerns
- Impact and Benefit Agreements
 - Broad catch-all for a wide variety of arrangements

Degrees of Participation

- Impact and Benefit Agreements may include:
 - the project's scope,
 - the implementation plan,
 - the business and employment opportunities for First Nations to be included with the project,
 - the education and training programs that will be offered to the First Nations community,
 - the protection of the community's culture and lands,
 - the financing and royalty arrangements,
 - the commitment by the community to support the project, and
 - clauses dealing with representations and warranties, confidentiality, dispute resolution, remedies, conditions, etc.

Degrees of Participation

- Partnerships and Joint Ownership
 - Fast becoming the preferred model
 - Impact in Ontario of renewable energy development and benefits of Aboriginal ownership
 - Form of shared ownership:
 - Limited Partnership
 - Corporation
 - Trusts
 - Income and tax considerations
 - Managing other “community” requirements

The First Nation as Government

- The Band Council can pass bylaws and Acts related to the governance of reserve lands under their control. They may require a business (with the force of law) to:
 - Obtain permits for proper use of land,
 - Reflect specific values and principles in the dealings with land and resources, such as respect for sovereignty, environment, traditional knowledge and cultural heritage,
 - Enter into a compensation agreement for damage,
 - Enter into an impact agreement addressing employment, training, supply of goods and services, infrastructure investment, or royalties,
 - Enter into agreements related resources management and conservation of land /resources, or
 - Enter into a remediation agreement where the business is required to restore the land or refrain from certain acts on traditional or reserve land.

The First Nation as a Business Partner

- Managing information flow (confidentiality, community consultation, contracting)
- Protecting the procurement process
- Reserve vs. off-reserve
- Reporting
- Change in law

Structure of the Relationship

Tax Factors

1. Section 87 of the *Indian Act*:

- Property and income of Band or Indian situated on a reserve is exempt from tax
- May include other organizations depending upon structure
 - A trust can be, corporations generally not

2. Section 149(1)(c) of *Income Tax Act*:

- Public body performing function of a government

Choosing an Appropriate Structure

- A Limited Partnership arrangement:
 - Commonly used.
 - The general partner is responsible for day to day management and is liable for all debts and actions against the partnership.
 - The liability of the limited partner is limited to the capital invested.
 - Parties share of profits and losses are reported on individual tax returns.

Choosing an Appropriate Structure

- A Limited Partnership arrangement:
 - Income distributed to an Indian Band or First Nations group, earned by an Indian-owned business operated on a reserve will be exempt from taxation.
 - Issues with taking security may create complications for raising capital from financial institutions.

Choosing an Appropriate Structure

- Use of Trusts:
 - Income earned by trusts are not eligible for tax exemptions under the Indian Act, except trust could pay out all income to an Indian Band to avoid taxation.
 - All assets are deemed to be disposed at fair market value every 21 years.
 - Beneficiaries are protected from third party liability.
 - May be required for AGLP program.

Special Provisions in USA's and LPA's

- Consider the following in negotiations:
 - Non-derogation of sovereignty
 - “Economic interest” and OPA contracts – timing and character of ownership interest
 - Veto provisions – decision-making
 - Limitations on powers of General Partner
 - Information sharing by the FN with the FN community

Special Provisions in USA's and LPA's

- Information sharing with governments (other than the First Nation)
- Information sharing with the FN by the Project entity
- Conflict of interest protection in contracting
- Cross-defaults to other agreements
- Board membership (tax issues re Chief or Councilor)

USA Specific Issues

- Board approval vs. shareholder approval
- Budget Change approvals
- Compliance with other agreements
- Scope of veto approvals:
 - Standard plus:
 - Management agreement terms
 - Self-dealing of other owner (threshold)
 - Budget changes
 - Admission of new partners
 - Tax impact issues

LPA Specific Issues

- Cash calls and consequences of default for First Nation
- Conflict of interest of private sector operator and owner
- Sale approval rights
- Tag along and drag along rights

Other Common Agreements

- Contracting and Employment Agreements:
 - Training obligations
 - Employment obligations
 - Payments
 - Contracting rights and information sharing
 - Survival and default
 - Procurement processes and control

Other Common Agreements

- Remediation Agreement
 - Standards of environmental performance
 - Obligations to remediate
 - Reserves or security for performance
 - Standard of remediation
 - Reporting

Other Common Agreements

- Permits for development:
 - Protection of medicinal and culturally important species;
 - Recognition of cultural and heritage practices and traditional knowledge;
 - Cost certainty issues;
 - Change in law and priority of federal, provincial and municipal legal requirements;
 - Protection of traditional rights (hunting/fishing);
 - Environmental protection and remediation.
 - Repatriation protocols
 - Permitted Activities

Legal Capacity

- *Indian Act* is not clear on the legal status of Indian Bands.
- Can depend upon provincial laws re “associations”.
- Right to hold shares.
- Courts have found that Bands are capable of the following either as a Band or through their properly elected Band Council:
 - To sue and be sued under contract,
 - To contract and incur legal obligations in the course of fulfilling statutory mandates (in the pursuit of self governance),
 - To act as an employer under the Canadian Labour Code,
 - To act as a juridical person for the purposes of suing to determine the validity of a surrender of reserve lands, and
 - Executing a contract of Guarantee.
- Can be a beneficiary of a trust.

Legally Binding an Indian Band

- Any agreement entered into with an Indian Band must be approved by its Band Council (section 2(3) of the Indian Act):
 - a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band;
 - b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councilors of the band present at a meeting of the council duly convened.

Legally Binding

- Band Council Resolutions used as evidence of the intention of an Indian Band to adopt a contract and be bound by its terms.
 - The Band Council Resolution should recite the decision it purports to document, that it was in fact made by the majority of the council at a duly convened meeting, and should be signed by a majority of the councilors.
 - Strict adoption of this requirement is necessary for an agreement with a third party to be enforceable at a later date.

Legally Binding

- Band Council Resolutions have been challenged on the grounds that:
 - the meeting was not duly called,
 - that one or more of the councilors was improperly excluded, or
 - that there was no meeting and the BCR was simply circulated for signing.
- Diligence is required to ensure that the Band Council Resolution has been properly passed.

Dealing with Structuring Issues – Taking a Security Interest in Property

- The Indian Act restricts the ability of third parties to (section 28(1), 29, and 89(1) of the Indian Act):
 - Take a security interest in real and personal property situated on a reserve, and
 - Seize real and personal property situated on a reserve.

Dealing with Structuring Issues – Taking a Security Interest in Property

- Any attempt to pass title to property situated or deemed to be situated on a reserve will require Ministerial consent.

However there are some limits build into these restrictions:

1. Off-reserve assets belonging to Indians or bands are subject to execution,
2. Section 89 does not apply to a creditor who is an Indian or a band according to legal definitions found in section 2 of the Indian Act, and
3. Section 89(2) carves out conditional sales contracts, whereby personal property sold to a First Nations person in this manner is available for seizure by a non-First Nation vendor regardless of whether the property is situated on or off reserve.
4. Certificates of Possession re land

Asset Situated off-Reserve: Pledge of LP Interests

- There is uncertainty about the appropriate test to use when determining whether an asset is “situated on a reserve”:
 - For section 89 of the Indian Act, the term should be given an “ordinary and common sense meaning”
 - If the location of the property is objectively easily to determine, this test should be used
 - For taxation cases under section 87, the contextual “connecting factors” test may be more appropriate
 - More logical where the property is intangible and part of a multi-faceted taxable transaction
 - For seizure cases under section 89, more reliance should be placed on common law and *situs* rules
 - Still subject to uncertainty.

Asset Situated on a Reserve – Pledge of LP Interests

- Location of the asset
- Location of the business
- Where business decisions are made (Board members, registered office etc.)
- Type of business and nature of the work
- Where is payment made
- Where is the certificate of the interest and LP register held
- Project loans vs. equity loans to a First Nation

Government Sponsored Financing

- A non-exhaustive list of federal and provincial programs currently still active, include:
 - The Feed-in Tariff Program (a program intended to promote renewable energy projects across Ontario);
 - The Aboriginal Loan Guarantee Program (supports Aboriginal participation in renewable green energy infrastructure in Ontario like wind, solar power, and hydroelectricity);
 - The Aboriginal Renewable Energy Fund (designed to provide funding for First Nations and Métis communities to develop renewable energy generation facilities);
 - The Aboriginal Community Energy Plan (designed to assist First Nations and Métis communities in Ontario in understanding and planning for their electricity needs);

Government Sponsored Financing

- The Economic Development Fund (comprises \$58 million to support eligible sustainable businesses and community-based employment opportunities in a specific area);
- The Municipal Rural Infrastructure Fund (federal, provincial and local governments in British Columbia each contribute one third of the \$51 million within the total program funding);
- ecoENERGY for Aboriginal and Northern Communities Program 2011-2016 (focused exclusively on providing funding support to Aboriginal and northern communities for clean energy projects);
- FedNOR – Northern Ontario Development Program (has provided more than \$237 million in support to 1,205 projects through the NODP); and
- Canadian Environmental Assessment Agency – Participant Funding Program (supports individuals, non-profit organizations, and Aboriginal groups interested in participating in federal environmental assessments).



McMillan LLP

Timothy J. Murphy

tim.murphy@mcmillan.ca

6141781