

Capital Markets 201 Commercial Structuring for Major Projects

HANDBOOK FOR LEARNING MODULE #2





About Us

The First Nations Major Projects Coalition (FNMPC) is a national 90+ Indigenous nation collective working towards the enhancement of the economic well-being of its members. We understand that a strong economy is reliant upon a healthy environment supported by vibrant cultures, languages, and expressions of traditional laws. With a project portfolio exceeding a combined total capital costs of over \$20 billion, our key area of focus at the FNMPC is to support our members in making informed decisions about their participation in major clean energy, natural resource, and infrastructure projects.

Colliers Project Leaders and **Gowling WLG** (Canada) LLP both prioritize our relationships with the FNMPC and their membership, and seek our ways to leverage their resources to advance mutually beneficial outcomes that contribute to true, lasting, and meaningful reconciliation, including economic reconciliation. Colliers Project Leaders and Gowling WLG (Canada) LLP supported the Major Projects Coalition in the development of this learning module handbook: *Commercial Structuring for Major Projects*.



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Foreword

First Nations are increasingly becoming involved in major industrial projects that require large scale financing. Financing for major projects can be a very complex undertaking for First Nations that have not had the experience in securing large scale financing for projects, sometimes costing in the billions of dollars.

The FNMPC has direct experience in working with many First Nations across Canada to secure financing for major projects where they are seeking to acquire equity ownership. The FNMPC's professional staff and advisors are seeing, in many cases, First Nations lack of understanding of the concepts and constraints that go along with major project financing.

This is the second in a series of modules that is aimed at assisting First Nations to better understand the key concepts that guide financing of major projects. To accomplish this, this handbook seeks to simplify and provide guidance for commercial structuring for First Nations participation in major projects and presents the topic for those without a financial or legal background.

The overall purpose of this module handbook is to better prepare First Nations to be able to ask questions and enter a constructive dialogue with major project proponents, financiers, lawyers, or governments and to better understand the processes and challenges that often accompany financing major projects.

As First Nations become more knowledgeable about major project financing, they will be better equipped to negotiate terms in agreements with major project proponents that address the unique challenges First Nations face in financing participation in major projects.

This module will look specifically at the topic of what First Nations, proponents and government need to think about when developing and negotiating key business terms that will result in a commercial structure that will identify the unique characteristics of a project.

First Nation equity ownership in major projects requires proponents and governments to work with First Nations to ensure they can fund their participation. By providing First Nations with the knowledge to better navigate the various financing options, this handbook further assists First Nations in realizing meaningful equity ownership in major projects.

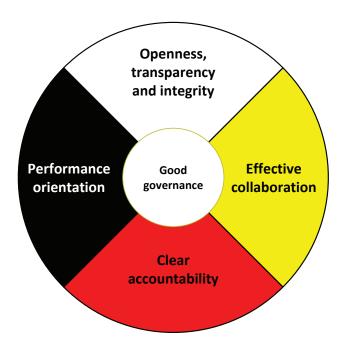
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Introduction

Good governance provides the frameworks, structures and processes for informed and collective decision making with clarity around accountability.

A project governance structure helps to ensure organizational and developmental objectives are implemented efficiently and effectively, team responsibilities and accountabilities are clearly understood, and decisions are being made at the appropriate level.



Project governance is an important component in major projects and, if properly crafted, should support an efficient and streamlined process and structure for making both small and major decisions concerning a project. Governance can be used to balance the interest of stakeholders and provide high level approvals and guidance to the project team. Increasingly, the value of early engagement with First Nations in the project development process includes an important role in project governance. Accepting this important role provides First Nations with an opportunity to formally shape the project, include Indigenous perspectives into project design and delivery, and develop important business capacity within the community. Effective project governance requires a clear terms of reference, processes, level of authorities, escalation procedures, and decision-making bodies, and is often the single source for a record of decisions.

1. Commercial Considerations:

Governance First Principles

To understand the importance of governance in the formation of a business structure, it is critical to understand that project governance is the formal management framework within which project decisions are made. The role of a governance committee is to provide a decision-making and responsibilities framework that is logical, robust, and repeatable, and represents the interests of all project owners.

A governance structure is in place to ensure a clear chain of command, timely decision making and effective coordination amongst owners and their project delivery partners. It is designed to support the owners in achieving their desired outcomes and to ensure regular reviews of project risks and issues, including changes to the scope of the project, schedules, and costs.

It is a framework used to develop and deliver all commercial and technical aspects of a project. It involves:

- » Establishing or ratifying the qualitative and quantitative project objectives supported by owners;
- » Creating an efficient project organization with clear lines of responsibility and defined roles;
- » Developing policies and procedures to guide consistent performance across the organization;
- » Implementing systems that support the reporting of key project performance indicators; and
- » putting in place mechanisms that identify and mitigate performance risk.

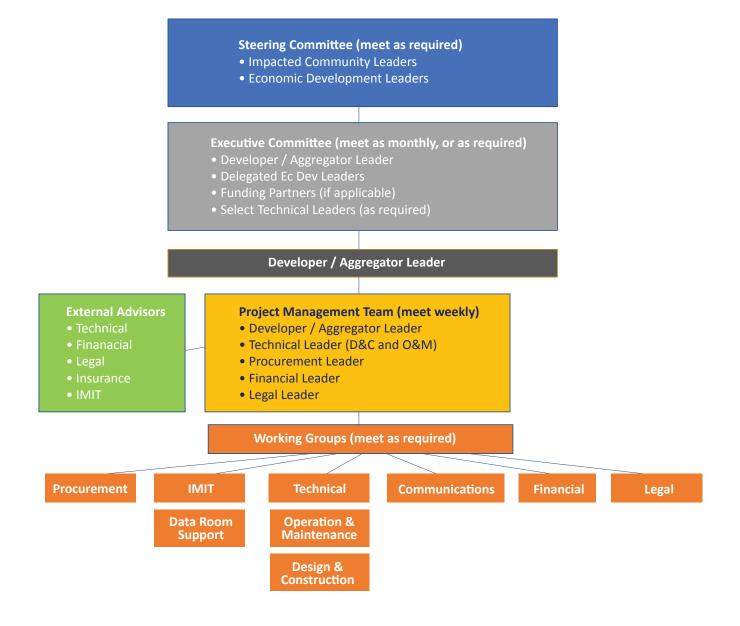
Characteristics of Good Governance

- » Clear project definition including cost, schedule estimates and scope
- » A clear line of sight into project performance, costs, schedule, and quality at every stage
- » Internal accountability for achievement of project goals
- » Clear decision-making authority (by group and role)
- » Effective contracting and procurement strategies and ownership
- » Rigorous communication and reporting
- » Delegated approvals

Delegated approvals have two prevalent models including (1) upfront approval to proceed with project expenditures within pre-determined scope and cost constraints. This exclusive authority would be delegated to the Project Team under the supervision of Executive Committee; and (2) staged approvals upon the achievement of select milestones during contracting and procurement. This requires some or all internal stakeholders to actively voice their feedback and participate directly in the decision-making processes.

Employing a strong and well-developed commercial structure will strengthen a project's perceived creditworthiness. Commercial and financial markets will assess the project's ownership structure and its complexity, whether there are multiple owner parties or if there is an aggregated (collective) interest among owners, the potential for change of ownership, and the flexibility to resolve issues relating to the building or operation of the project. The alignment of interests between owners, contractors, and lenders is collectively

reviewed from a critical perspective particularly in the case where there are disputes or conflicts or, conversely, evidence of a history of a constructive working relationship where there have been disputes or conflicts. A governance structure for infrastructure projects often has multiple levels. The internal governance structure ensures a clear chain of command, timely decision making and supports effective coordination amongst different internal and external stakeholders. The organization structure illustrated below demonstrates a commonly used governance model for large infrastructure projects with multiple owners.



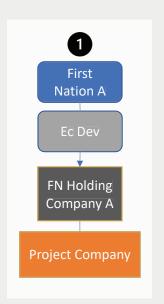
The roles and responsibilities of each of the 'groups' within this governance structure are discussed in detail in Appendix A to this report. Each group should also have an agreed upon Terms of Reference document, which clearly establishes the mandate of each group, the scope of its authority, membership and hierarchy, meeting frequency and deliverables. A blank terms of reference template is attached as Appendix B to this report.

Transaction Structuring and Liability

To develop an awareness of how a transaction's commercial structure affects the liability of owners to that project's potential risks, the following information is intended to identify the difference between:

- » risky transaction structures that could lead to project owners and their personal (or community) assets being liable for any claims against the project, and
- » non-recourse, or limited liability transaction structures that limit or eliminate owner liabilities against claims to the assets possessed by the project.

Each of the following models demonstrate varying levels of strength in their transaction structure.

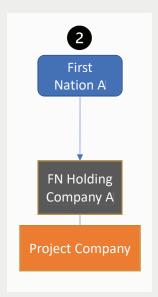


Model 1:

The strongest model demonstrates that a business-oriented entity, the First Nation Economic Development Entity (Ec Dev) holds the decision-making authority for the First Nation with respect to the project and the investment. Ec Devs can be used for multiple projects and purposes. Ec Devs are further discussed in Section 2, Legal Considerations.

The First Nation Holding Entity, also known as a special purpose vehicle (SPV) which can be comprised of one or several First Nation owners, is established with the sole purpose of investing in the project through 'Project Company', which exists for the sole purpose of conducting the business related to the project in partnership with other owner entities. Since the SPV is structured for a single project, should the project fail, the other projects or assets within the Ec Dev are protected.

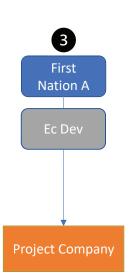
In Model 1, the First Nation has demonstrated the readiness to provide a simple and commercially savvy entity through which to do business that establishes ownership continuity through the Ec Dev and limits the liability to the First Nation and its Ec Dev by using a First Nation Holding Entity.



Model 2:

This model holds some, but not all the strengths of Model 1; the key difference here is that the First Nation opted to not establish or use an Ec Dev to manage the business of the project. The business and commercial interests and activities instead lay with the decision-making authority designated by the community, often the elected chief and council.

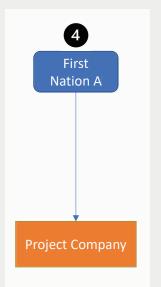
The long-term duration of ownership of infrastructure assets (often up to 30 or 40 years) in contrast to two-year election cycles means that there could potentially be fifteen or more new decision-making authorities in a project's life. This is further discussed in section 2, Legal Considerations. Each time there is a new council, the track record of the partnership management resets, and strategic ties can be severed; creditworthiness will be assessed on the probability and impact of this risk, which can increase financing costs for the First Nation that opts to use this structure.



Model 3:

This model presents a scenario in which the First Nation delegates the decision-making authority to the Ec Dev, which presents a commercially savvy enterprise as a partner to the project (like Model 1), however in this example they have not established a SPV to act as the risk-bearing entity.

The absence of this SPV means that the Ec Dev is the risk-bearing entity for project costs or claim. In the event of an incident related to the project, the Ec Dev could be responsible for liabilities and claims, making other assets vulnerable. This is a direct risk to the well-being of the Ec Dev and the protection of other assets it has, if any. We will discuss the value of establishing an SPV (to separate a single project from a group of projects in the Ec Dev) and describing non-recourse financing in the next section of this report.



Model 4:

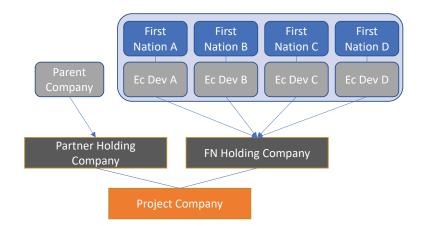
This model is the least organized and most risky model in the spectrum of potential structures. This model carries non of the commercial / financial benefits of using an Ec Dev as the delegate authority, and by excluding the First Nation Holding Entity this also fails to provide a limited liability (non-recourse) structure. In this case, the First Nation could be responsible for liabilities and claims, making all the First Nation's assets vulnerable. The creditworthiness assessment of this model would consider it to be the riskiest, and the ability to successfully partner and raise capital using this model would be most challenging and unadvisable from a conventional commercial standpoint.

Liability

Establishing a special purpose vehicle (described above as First Nation Holding Entity, or SPV, often structured as a Limited Partnership) offers a legal entity for First Nations and their private-sector partners alike to provide a commercial and financial solution to the Project, which carries what is known as "limited recourse financing". The benefits of choosing a limited partnership are further explored below in Section 2, Legal Considerations. This limited recourse financing model, also known as project finance, is favoured for several commercial and economic factors, including, for instance:

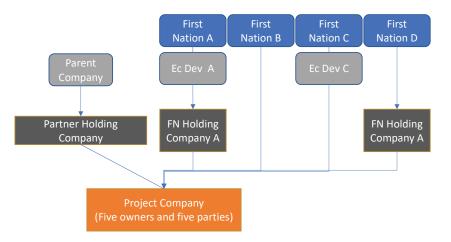
- » Managing and sharing risk with other important partners.
- » Capacity to develop a project outside of a First Nation's (or company's) own balance sheet, which improves its financial capabilities.
- » Ability to invest and develop a project with little to no recourse back to the First Nation or Ec Dev.
- » Liability for project risks and claims are confined to the assets possessed in the holding companies that own Project Co.
- » Other assets owned by First Nations, their Ec Dev, and assets owned by private-sector parent companies are not owned by the SPV and are therefore protected from liabilities or claims that SPV may incur.

Project finance structures protect First Nations and developers against downside risks and financial exposure beyond their respective equity commitments and liability to the project. Additionally, it offers leverage (i.e., option to borrow debt capital, and invest required equity capital), which has the effect of improving economic outcomes for equity owners / investors. Due to these factors as well as the possibility that some owners may have little available equity capital, First Nations and their private-sector partners often use this structure when developing commercial transactions by leveraging the projects future cash flows returns to obtain loans. Once both the First Nation and the private-sector partner have established their SPV holding entities, they can align themselves into a single SPV Project Company, which may take the structure shown below:



This commercial structure demonstrates an uncomplicated and proven simple solution, characterized by an aggregation of First Nation owners whose interests are clearly aligned, evidenced by their joint participation in a single First Nation Holding Entity. Once a simple, reliable, and equitable commercial structure is organized, the owners are prepared to explore financing options. In this case, there are two entities, structured as fully incorporated holding companies and representing five owners, that need to contribute capital to Project Company. For potential lenders, the simplicity of lending to an aggregated owner group (e.g., First Nation Holding Entity) drastically reduces the quantum of due diligence, fees, expenses, and overall redundancy.

Conversely, the following diagram demonstrates a fractured approach where each of the five owners will be required to undertake identical due diligence and attempt to raise financing without knowing how the rest of the owners are planning to do the same. Timing will be uncertain, readiness of each party and legitimacy of their participation will be inconsistent and unpredictable. These challenges are not impossible to overcome, but they do insert unnecessary and undesirable risks, delays, uncertainty, and very low alignment of interest in the short and long terms.



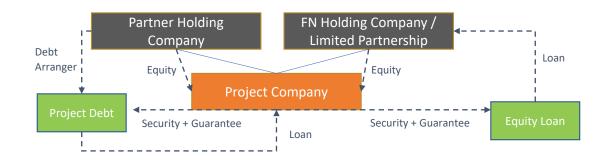
Financing Considerations

The ability to attract loans used to finance the project depends primarily on the quality of future project revenues and the qualifications or experience of the project sponsor(s), but also on the commercial structure, and the ability of all owners to align themselves.

A well-structured and simple-to-execute and simple-to-administer commercial entity (project company), along with good project governance are perhaps the most important elements in defining, understanding, and mitigating the major risks inherent to project development and delivery. Project complexity can be managed when owners work together and leverage experienced advisors and specialists to develop a sophisticated understanding of the common or systemic risks for major commercial projects, and those that are project specific. Ultimately, the ability to deliver an economically profitable project may rely on the project team's ability to align their interests and mitigate risks. Alignment of interests can be clearly signalled to capital markets¹ and industry by developing a commercial structure characterized by its simplicity and appropriate distribution of risks, liabilities, and rewards.

A highly experienced sponsor with significant experience developing and operating assets within their own sector and geographic markets is viewed positively. Owners with demonstrated experience and demonstrated willingness to support projects during economic declines and adverse events are also viewed positively. When there are several owners in a project, is it viewed favourably when those owners gather, align interests, and agree to common business terms in a consolidated special purpose vehicle held together by a good governance model.

Practically speaking, the commercial structure demonstrated above, must also consider majority / minority ownership implications, and prioritize financing considerations. Commercial or capital market lenders will assess the experience and qualifications of the owners, and in particular the majority owner to assess the creditworthiness of the Project Company. Conversely, First Nations who often have modest commercial experience should not be expected to raise project finance debt against an asset over which they have a minority interest. The figure below illustrates how the private holding company sponsors the debt loan to finance the project company and contributes their own equity to project company; the First Nation Holding Entity sponsors a debt-style equity loan, which is the use of debt to fund their equity portion of the project company.



⁴ "Capital Markets are where financial securities* issued by businesses and governments are bought and sold", Accessed At: www.budget.gc.ca *"Financial securities are an instrument that represents ownership (equity securities), a creditor relationship (debt obligation), or other right to ownership (option)." Accessed at: Thomsonreuters.com A creditworthiness assessment also considers the owners' commitment to the project. Owners with significant resources, time and reputation invested in the project, including higher levels of direct equity investment or financial guarantees combined with covenants (requirements placed on loans by lenders) to retain adequate capitalization are considered stabilizing factors. These factors all contribute to a positive credit rating for the project.

A Projects organizational strength assessment, when compared to the Projects risk profile, may lead to a positive or negative adjustment to the Project's creditworthiness and ability of owners to raise debt or attract equity. Positive impacts from these assessments are hard-earned, however the negative impacts could cause severe downside effects on project profitability.

Conclusions

While First Nation's equity contributions for small projects can sometimes be financed or funded from the community's own resources, larger projects may require capital markets or commercial financing. Communities should evaluate what level of investment is desirable given the size of the project and the risks associated with the community's financial resources and risk tolerance.

There are several ways to improve financial outcomes for communities. For example, increasing project financing leverage and possibly retaining financing support provided by developers in the form of loans (equity loans), or credit enhancements (loan guarantees) to support commercial market First Nations equity loans.

In summary, when First Nations partners pursue commercial opportunities with private sector developers of infrastructure assets, the First Nations should organize themselves in a way that makes them an attractive business partner. Ultimately the First Nations owners will have dependencies and responsibilities that are likely essential to the project's success, and a unified voice representing First Nations interests and perspectives will be perceived as a significant strength and will benefit the impacted communities throughout the project's life.

2. Legal Considerations:

Introduction

The issue of how to legally organize and structure your economic participation in a Major Project is a key preliminary issue that must be addressed early in the participation of a Major Project. This section on legal considerations seeks to provide information on common approaches and best practices relating to:

- 1. A First Nation organizing its own economic participation in a Major Project; and
- 2. A First Nation organizing with others—either other First Nations or non-First Nation entities how the group will participate in a Major Project.

While this section provides general legal information about legal organizations and structures, related legal considerations, and legal concepts and documents, **it is not legal advice or a substitute for legal advice.** The legal information in this section is not specifically tailored to a First Nation, a particular investment, or a Major Project and, accordingly, the information should not be relied on as legal advice. When a First Nation is interested in legally organizing itself in order to participate in a Major Project, it will need to seek legal advice from a law firm that has specific experience and expertise at the cross section of corporate, Indigenous law, and First Nation tax issues in order to work through the considerations set out below as well as other more specific legal matters that are outside the scope of this document.

1. First Nations organizing their own participation in a Major Project

As described above, the current best practice is for First Nations to participate in a Major Project through their wholly owned Economic Development Entity ("**Ec Dev**"), rather than directly as First Nations. It is most common for a First Nation to form a limited partnership to be used as its Ec Dev, and so this section will assume a limited partnership structure is used.

The current best practice is also for Ec Devs to have a governance model that requires direction and management that is independent from Chief and Council. This concept is often referred to as "board independence".

WHAT IS A LIMITED PARTNERSHIP?

A limited partnership is a legal structure that has a minimum of two partners, working together with a view to a profit. Typically, there will be:

- » One **general partner**—typically a corporation, which manages the business of the limited partnership and is responsible for all the operations and liabilities of the limited partnership: and
- » One or more **limited partners**—who are typically "silent partners" who are restricted from managing the business and are generally responsible only for the liabilities of the limited partnership up to the amount that the limited partner contributes or agrees to contribute to the limited partnership. Any profits that a limited partner earns from the limited partnership and any assets that the limited partner otherwise has cannot generally be used to pay the limited

Why an Ec Dev?

Ec Devs play a key role in helping to insulate First Nations from liability that could potentially arise when participating in a Major Project. Key risks relate to requirements to contribute additional capital to the Major Project to fund planned expansions and to cover unexpected Major Project liabilities that may at times exceed the funds available to the Major Project.

The Ec Dev is considered a distinct and separate legal entity from the First Nation and, if the First Nation uses this separate entity to participate in the Major Project, it can "shield" itself from the liabilities associated with Major Projects, third parties, and even lenders and creditors of the Ec Dev (unless the First Nation guarantees these obligations). Without this "liability shield", the First Nation may be required to satisfy all those liabilities directly, with no limits. However, with an Ec Dev, if the Major Project passes liabilities on and the Ec Dev does not have sufficient funds to satisfy those liabilities, there is no recourse or limited recourse to the First Nation's assets outside the Ec Dev (unless the First Nation has provided guarantees to the project).

In addition to the Ec Dev, whether a First Nation would like to partner with others to participate in a Major Project or participate on its own, it is always recommended that the Ec Dev form a First Nation Holding Entity, or SPV (as discussed above in Transaction Structuring and Liability). This provides an additional layer of liability protection between the Project risks and the Ec Dev so that, if the First Nation is using the Ec Dev for other investments or to hold other assets (or would like the ability to do so in the future), the investments and assets of the Ec Dev will not be compromised by the Major Project's risks.

What is Board Independence?

Board independence means that Chief and Council (and often key members of Administration) may not take up most of the positions on the board of directors or be appointed to officer roles. Ideally, these officials may also be *prohibited* from having any positions on the board of directors.

Increasingly, the trend has been for First Nations not to appoint their Chief or Councillors as directors of their Ec Devs' boards. This trend has included appointing community members to the board (to ensure the Ec Devs benefit from the community's ways of knowing and being, experience, expertise, cultural considerations, etc.), together with outside, independent directors with particular skill sets, experience, and expertise that are relevant to the business the Ec Devs' will carry out.

In that regard, several First Nations have been concerned that the community will lose control over its investments if Chief and Council are not appointed as directors and/or officers of the Ec Devs, and the community will not be able to ensure accountability and transparency. While there are examples of this happening, this does not need to be true.

First, directors and officers have a fiduciary obligation to the corporation that they are elected or appointed to and are bound to act in the best interest of that corporation. The fiduciary obligation prioritizes the interests of the shareholders (i.e., the First Nation), and where the corporation is the general partner of the Ec Dev, it can extend to the limited partnership and its First Nation partner. If the directors and officers are not fulfilling this fiduciary obligation, there can be legal recourse against them. Directors should be clearly apprised of their fiduciary obligations.

Second, shareholders and partners have certain legal rights and tools available to them to ensure greater controls and protections are in place, beyond relying on the basic fiduciary obligation. With proper legal structuring and tailored governance provisions in respect of the Ec Dev, even without Chief and Council being appointed into director or officer roles, the First Nation, as the sole shareholder, will retain the right to appoint and/or remove directors. Moreover, the proper mechanisms can be put into place to require transparency about investments and to provide for community and Chief and Council input as and when necessary. A corporate lawyer can help put in place the proper safeguards and governance measures that best suit a First Nation's needs.

Why is Board Independence Important?

As As noted above, directors and officers owe a fiduciary obligation to the Ec Dev. This fiduciary obligation requires a certain level of time and attention be given to the Ec Dev's business and operations. Chief and Council also owe fiduciary obligations to the community. When Chief and Council are also directors or officers of the Ec Dev, those different fiduciary obligations may conflict from time to time, increasing liability risk for Chief and Council.

Additionally, if the Ec Dev is a limited partnership and the First Nation is the Limited Partner, if Chief and Council are also appointed as directors of the General Partner, the First Nation could lose its limited liability status or could suffer adverse tax consequences. In addition to the above, there are numerous academic studies emanating from Harvard University and other academic institutions which support the idea that First Nation Ec Devs are most successful when Chief and Council are not the driving forces behind investment. This is due to several factors, including the following:

Time and Attention:

Chief and Council have the very important task of managing and governing the affairs of the community and attending to the political and governing functions demanded of them. It is a very busy, more-than-full-time job. Reviewing and assessing investments, consulting with advisors on business matters, chasing down financing, negotiating an investment and monitoring its financial performance is also a busy, full-time job. Both jobs frequently require quick (and often urgent) attention to be paid by its managers and decisive action to be made. Most times, there are not enough hours in the day for anyone to adequately perform both jobs within the necessary timelines. The needs and customs of the community will often - and should - take precedence over business matters, which may lead to lost business and investment opportunity due to delay in action.

Election Cycles Versus Investment Cycles:

Major Projects are often very long-term endeavours that can span decades. Therefore, any participation by an Ec Dev on behalf of a First Nation will also likely be a long-term endeavour. Those who manage these investments will benefit from gaining and maintaining long-held institutional knowledge so that changes in the investment can be considered in the proper context and decisions can be made with the history of the investment in mind. However, elections can occur as frequently as every two to four years. If the Chief or Councillors in charge of the investment portfolio are not re-elected, that institutional knowledge can be, and is often, lost, to the detriment of the investment. Additionally, an election is an important event that will inevitably take attention away from Chief and Council's ability to focus on business matters that occur during election season. Moreover, owing to the ever-looming idea of future elections, conflicts of interest may arise as business decisions may come in conflict with political motivations, which can potentially result in either (i) detriment of the investment or (ii) potentially adverse consequences for the Chief or Councillor who is in the conflict of interest.

Summary

An Ec Dev with Board independence is recommended whether a First Nation participates in a Major Project alone or with other First Nations. If a First Nation does not have an Ec Dev, or has an Ec Dev without board independence, it is highly encouraged that a First Nation first engage legal counsel to organize itself before meaningfully pursuing an opportunity to participate in a Major Project.

2. First Nations Organizing with Others to Participate in A Major Project

When participating in a Major Project, for many reasons – usually commercial reasons – it is very common for a First Nation to either: (i) organize with one or more other First Nations partners, (ii) organize with one or more non-First Nation partners, or (iii) organize with some combination of First Nation and non-First Nation partners.

One of the most common reasons to organize with others is to pool resources: usually to obtain more decision-making power, to create more leverage, to obtain a more diversified set of skills and experience, share risk or to spread resourcing requirements across multiple parties.

To Obtain More Decision-Making Power

If the Major Project is being led by a third party, a First Nation's level of participation in that Major Project will typically directly correlate to the amount of capital that its Ec Dev can contribute, which will result in a "percentage participation". If, for example, and using round numbers for ease of illustration, the Major Project already has one participant who invested \$500 million, the Ec Dev would need to also contribute \$500 million to be able to reasonably expect to receive equal decision-making rights (otherwise known as "governance rights") over the Major Project. While decision-making rights *may* flow to all financial participants in a Major Project, the more capital that is contributed by the Ec Dev, the more decision-making rights it can reasonably expect to receive. By pooling resources with others—whether with other First Nations or non-First Nation entities—the Ec Dev can obtain greater decision-making power for itself and its partners.

To Create More Leverage

A key consideration in deciding how to participate in Major Projects that are in the territories of more than one First Nation (for example, linear projects like transmission lines or pipelines that cross several territories) is whether to work with your neighboring First Nations. FNMPC's experience has been that deciding to aggregate, meaning to work together through a single legal entity, creates a considerable amount of leverage for the First Nations who are participating in a Major Project together. This leverage can then be used to secure more favourable business terms for your equity participation in the Major Project, including increasing the size of your equity ownership, reducing investment risk, reducing the cost of your equity ownership, reducing your cost of capital, and negotiating a transaction structure which more effectively addresses the many barriers First Nations face in achieving equity ownership in Major Projects.

To Obtain More Diversified Skills and Experience / Capacity Building

Some Ec Devs have more capacity to participate in a Major Project than others do. Some skills and experience may have been developed already by an Ec Dev, while it is still developing other skills and experience. By working together, partners can contribute their own respective skills and experience while assisting others in developing other skills and experience. This can help with capacity building.

To Share the Burden of Resources

If a First Nation's Ec Dev has multiple investments or limited resources, it may be challenging to keep up with the demands of participating in the Major Project. By partnering with one or more other parties, each Ec Dev can contribute fewer resources and pool them to ensure that it satisfies all demands of the Major Project. In FNMPC's experience, it is often not feasible for each First Nation to do its own due diligence, negotiate a properly structured equity ownership of a Major Project, secure affordable capital, as well as take the many other steps that are required to secure meaningful equity ownership of a Major Project. As such, working together through a single legal entity can significantly reduce First Nations' transaction costs and help remove barriers to achieving meaningful equity ownership.

As with Ec Devs, when organizing with others there are many different legal structures to choose from, but the most common legal structure is a limited partnership.

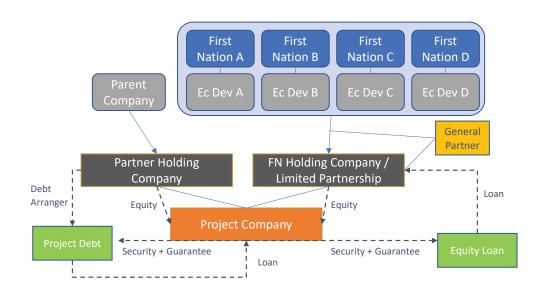
The main benefits of choosing a limited partnership are:

- » Limited partners are shielded from full liability for the limited partnership's loss, both monetary and non-monetary, other than what the limited partners have contributed to the partnership.
- » Limited partnerships are not taxable. Instead, the limited partnership will calculate its income and loss in each period and then "allocate" it to its general partner and limited partners in agreed proportions. If a First Nation's Ec Dev is properly structured to be tax-exempt, then any income allocated to Ec Dev will not be subject to income tax.
- » There are very few legal requirements that dictate what a limited partnership arrangement needs to include, allowing the partners to be free to negotiate the commercial arrangement that best suits them. Other legal structures can be more prescriptive and restrictive and impose certain commercial realities on the parties involved.

Important considerations when organizing with others:

- » When organizing with another First Nation: Just as it is important for a First Nation to organize itself and to participate in a Major Project through an Ec Dev that has board independence, it should be equally important to you that a First Nation partner has organized itself with an Ec Dev that has board independence. This will make it easier to agree to a legal structure as between the two (or more) First Nations and to settle on governance terms.
- » When organizing with anyone, whether First Nation or non-First Nation:
 - it is crucial that there be trust in the relationship and, even if you do not share the exact same values and perspectives, partners must be able to respect each other's values and perspectives; and
 - the legal structure and governance provisions of a First Nation's Ec Dev may need to be amended to "work together" with the legal structure and governance provisions established between the Ec Dev and its other partners.

When a First Nation chooses to form a limited partnership with others, this is ideally at the SPV level, and the ideal structure looks like this (though there is not necessarily a "magic number" in terms of number of partners—four is used for illustrative purposes only):



Framing Considerations

When a First Nation (or group of First Nations) approaches a lawyer and requests legal advice and assistance with forming a legal structure to invest in a Major Project, the lawyer does not have a "one-size-fits-all" solution. While the building blocks for forming a legal organization are similar in most cases, all legal organizations can and should be customized for each First Nation (or group of First Nations) to best address and respond to its goals, intentions, concerns, restrictions, strengths, and weaknesses.

Importantly, the Major Project's structure and governing documents may dictate, at least in part, the type of structure that the First Nation(s) will want and what kinds of additional governance points will need to be addressed in the definitive documents. Therefore, any definitive documents should be designed to be flexible and adaptable. A good way of creating flexibility is to enter into a Term Sheet or a Memorandum of Understanding, where the key governance and other terms are decided in principle only, with the final definitive documents to be settled and signed at the appropriate time in the life cycle of assessing a Major Project investment opportunity.

Negotiating the Definitive Documents

Each type of legal structure will require a different set of definitive documents. However, as a limited partnership is the most common legal structure, this section will focus on the definitive documents for a limited partnership:

- 1. A **Limited Partnership Agreement**, which sets out the business deal as between the partners in terms of how each partner will participate in the investment; and
- 2. A **Shareholder Agreement**, which sets out how the investment will be managed and what rights a First Nation investor will have in terms of decision-making.

When negotiating the definitive documentation for a new legal organization, there are five key matters that will need to be addressed: (i) governance and control, (ii) information sharing—transparency, information, and confidentiality, (iii) accepting new partners, transfers and exits, and removal of partners, (iv) sources of funds and (v) distributions of profit and return of capital. The following discussion on these five key matters below will focus on limited partnerships; however, these five key matters are the primary building blocks for designing any new legal organization.

Also, in cases where there is only one limited partner, the definitive documents will be much simpler and will focus on how the First Nation will maintain control over the limited partnership and ensure transparency and accountability for the benefit of its community. However, the definitive documents will become more complex as the number of limited partners increase and will focus more on shared decision-making. The discussion below focuses on a limited partnership with at least two limited partners.

$\left(I\right)$ Governance and control

The general partner will be responsible for all governance and management of a limited partnership's business. Basic governance principles dictate that the directors of the general partner will provide the overall direction and management of the business. If appointed, the officers (like the President, Chief Executive Officer, or Chief Financial Officer) will then manage the day-to-day affairs of the partnership's business in accordance with the direction provided by the directors.

Ec Devs, will exert their control as shareholders of the general partner primarily by participating in the director selection process and by approving those special decisions that are most important to them.

Director selection process:

- » Shareholders are entitled to elect the directors that serve on the board. Consider whether each shareholder can nominate one person, or if the shareholders must work together to approve any director.
- » Consider the size of the board. A board that is larger than five can become unwieldy and odd numbers are generally preferred to avoid "ties" in voting. If there are more than five partners, there may be a desire to increase the size of the board so each shareholder can appoint one director—while it can be an "easy" way to ensure representation, it is not generally advisable. In those cases, consider approving a slate of directors that must be agreed upon by a majority or super majority of shareholders and incorporate shareholder oversight by establishing a shareholder advisory committee or by building in shareholder approval rights in the organizational document (more on that below).
- » As discussed above in detail, Chief and Council (and perhaps other members of a First Nation's administration i.e., band manager) should not be appointed as directors to have board independence.
- » It is generally recommended to include a requirement for all directors to meet some "skills and experience" criteria which can be set out in the Shareholder Agreement. When selecting directors, shareholders should consider what stage that the partnership and the Major Project is in. For example, evaluating and negotiating an investment opportunity requires a different skillset than monitoring and report on an ongoing investment.

Shareholder or partner approvals / decision-making participation:

- » The law provides shareholders of a general partner with default voting rights for any decision that is considered "fundamental" to the business. However, these "fundamental" decision rights are focused on the protection of the investment and a few technical legal matters, but do not address matters that may have unique importance to First Nation investors. First Nation partners should think about the critical things that their communities would want to approve and/or explicitly restrict the directors from taking certain actions without their prior and express approval.
- » While shareholder approvals provide a First Nation investor with veto rights, First Nation partners may be satisfied with the right to submit non-binding feedback on certain decisions, instead of a full veto right. If this is of interest, it might be useful to form shareholder advisory committees.

- » While tempting, unanimous decision-making is **almost never a good idea** when there are more than two parties working together. If a decision requires unanimous approval, that permits the will of one to overcome the will of the many, most often to the detriment of the group. It also means that if one partner is not available, the opportunity to decide or act will be lost, along with the prospective benefits of having made the relevant decision.
- » As the main feature of a limited partnership is the limited liability status for its limited partners, limited partners often do not retain much decision-making power and will instead contribute to decision-making in their capacity as shareholders of the general partner.

Governance provisions are very flexible and can be tailored to the goals of the organization's participants, however the most common mistake in negotiating governance provisions are:

- 1. Not knowing / not remembering that the more decision-making power a shareholder or partner takes on, the more liability that shareholder or partner will have for those decisions. If limiting liability is important, approvals should be minimized.
- 2. Forgetting that Major Projects will often require its investors to act and make decisions quickly. While a First Nation wants assurances that the decision-makers are going to make the right decisions and act appropriately when the time comes, there is a need to avoid adding too many special approvals or frequent mandatory consultations with advisory committees that will slow that process down.

(II) Information Sharing

Chief, Council, and community members will have certain expectations regarding transparency about the investments. Information about the investments will need to be shared with each of these stakeholders from time to time. Some expectations regarding transparency and information sharing may sometimes come into direct conflict with confidentiality obligations and expectations, which are necessary for the success of the Major Project. When establishing rights in the definitive documents for community members and Chief and Council to receive information about a Major Project, it is important to be reasonable in the context and consider how widely sharing information about the Major Project may harm its financial or operational success.

Sometimes, confidential information of the Major Project may be made available to the general partner and its officers or directors only, so that they can make fully informed decisions as managers of the First Nations' participation. However, those individuals may be restricted, in whole or in part, from sharing that information with its shareholders or with the limited partners.

Shareholders and limited partners should nevertheless expect to receive, a minimum, detailed financial statements relating to profits received by the limited partnership, regular reporting about the status of the Major Project and the investment, and summaries of information received from the Major Project.

(III) Partner shares, new partners, transfers, exits and removal

Investments are often made on a long-term basis, and it is conceivable that your organizational membership may need to undergo changes over time. You and your partners will need to initially decide whether each of the limited partners should have an equal or unequal share of the profits (this decision is usually driven by whether each partner contributes an equal amount of capital to the partnership), but you will also need to consider how to deal with future possibilities, like:

- » Will the partnership accept new limited partners? Do the limited partners need to be First Nations or owned by First Nations, or can non-First Nation parties participate?
- » Can a limited partner leave the limited partnership before the Major Project is over? Depending on how long the Major Project is expected to last (in some cases it is for an indefinite amount of time), limited partners will want to know how to exit and what amount of cash or other value it may receive on its departure, if any.
- » Are there any situations where it is acceptable for a limited partner to be removed from the limited partnership? Note that if a shareholder of the general partner (or its appointed director) chronically misses meetings or fails to participate in important matters where participation is required, it may be necessary to remove that Ec Dev (and its First Nation) from the investment so that their non-involvement does not hurt the investment opportunity for the remaining limited partners.

(IV) Source of funds

In respect of the proposed investment, limited partners will need to assess what their current and future financing needs are and what the sources of funds will be. To ensure that the limited partnership has access to funds as and when funds are needed, there will need to be provisions in the definitive documents that dictate matters such as:

- » Can the limited partnership accept new limited partners to raise money?
- » Can the general partner request limited partners to contribute money beyond their initial investment if the limited partnership does not have sufficient cash to cover its ongoing obligations in respect of the Major Project?
- » If a limited partner does not contribute more money when asked, can it be *forced* to contribute more, or can its percentage participation be reduced? As an example, if there are two limited partners, each with a 50% interest, and only one limited partner contributes money when requested, can that limited partner receive a 75% interest and the non-contributing limited partner's interest be reduced to 25%?

(V) Distributions of profit and return of capital

The definitive documents will need to set out when profits can be distributed, when initial contributions can be returned to the limited partners, and to what extent the limited partnership can reinvest or hold back profits for future use *instead* of distributing it to the limited partners. In the negotiations, limited partners will need to decide what the appropriate balance is between (1) ensuring that the limited partnership has sufficient cash reserves to cover its expenses in respect of the Major Project investment, and (2) distributing profits out to the partners whenever profits are received.

The Role of FNMPC; Other Business

FNMPC has extensive experience throughout Canada in providing its members with wrap-around technical capacity, services, commercial expertise, and advice in relation to achieving equity ownerships in Major Projects. In that regard, FNMPC is currently advising its members on Major Projects in the energy, natural resource, and infrastructure space with a combined value of \$20 billion. FNMPC has extensive experience in working with First Nations to structure participation in major projects. To accomplish this, the FNMPC works with select professional, legal, and financial advisors and environmental consultants, to ensure that First Nations participation in major projects is carried out in a manner that makes sense for First Nations.

Involving FNMPC at the onset of the development of Major Projects can ensure your First Nations have access to high quality advice, which will ensure you structure how your First Nation(s) will participate in the Major Project to maximize your leverage and, ultimately, your financial returns.

For More Information

The First Nations Major Projects recognizes that we are stronger together. We continuously work to promote our Indigenous Nation members' interests and will continue to develop additional educational modules to help improve their literacy and understanding of financing participation in major natural resource and infrastructure projects. Meanwhile, please feel free to browse our existing resources at https://fnmpc.ca/resources/.







Appendix A

Roles and Responsibilities of Governance Model Groups

Steering Committee

The Steering Committee (SC) provides the authorization for execution of the project and oversees and provides direction regarding all matters associated with the project. SC is the group that reports into the impacted communities' Economic Development Leaders and knows what decisions or information will need to be presented to them for approval, review, or input.

Executive Committee:

- » The Executive Committee (EC) are the overarching governing group that sanctions the project and approves the Project Charter that defines the overall authority for execution of the project. The Executive Committee will be updated on the status of the Project as major project milestones are achieved.
- » The Executive Committee will provide direction to the Project Team on key strategic decisions, as required. It will be responsible for due diligence and oversight, will review and approve or deny essential project scope adjustments, and will monitor and validate project development progress and procurement process.

Project Team:

- » The Project Team (PT) is the day-to-day management and operation of the project. The PT reviews recommendations from the Working Groups and provides recommendations to the SC for key decisions. It is responsible for ensuring that the project's development phase identifies an implementation plan that best achieves the stated qualitative and quantitative priorities of the project.
- » The PT has delegated authority to make day-to-day decisions regarding the project's development and delivery. This authority includes responsibility to manage advisors and approve their deliverables, manage the development of the procurement documents for approval by the EC and SC, responsibility for solicitation period activities including responding to Requests for Information (RFIs), hosting commercially confidential meetings, response and bid evaluation.
- » It is the main decision authority for the project and is responsible for coordination among the project sponsor lead, procurement lead, financial lead, technical lead, and legal counsel. The PT is chaired by the project sponsor lead, who reports to the EC.
- » The PMT is comprised of the following members:
 - The Project Sponsor Lead is the project authority's designated executive tasked to build a team to develop and deliver the project.
 - The Financial Lead is responsible for developing and delivering the financial analysis during the development phase, the financial components of the procurement documents, responding to financial-topical RFIs, and leading or supporting the financial evaluation of submissions during the procurement phase.

- The Technical Lead is responsible for developing and delivering the technical analysis including schematic design during the development phase, the technical components of the procurement documents including output specifications, responding to technical-topical RFIs, and leading or supporting the technical evaluation of submissions during the procurement phase.
- Internal Legal Counsel provides assistance and guidance to the PT on legal issues as they arise, and manage to develop and refine key project documents, including the RFQ, RFP and PA.
- The Communications Lead provides assistance to the PT and EC to ensure all external communications have consistent messaging and coordinate regular project updates and community consultation events.
- The Procurement Lead role is to oversee the entire procurement process and manage the day-to-day work tasks and teams until procurement is complete.

Working Groups:

Working Groups (WGs) provide information regarding the requirements of the project. WGs review and respond to all design documentation and reports. WGs may be set for the duration of the project or specific parts of the design, construction or operationalizing of the project.

Appendix B

Terms of Reference Document Template

Group: [Name of Group]

Mandate: The role of the [NTD] working group is to: • 4-5 bullet points With respect to the [project-specific subject matter 1], the group will: • 4-5 bullet points With respect to the [project-specific subject matter 2...], the group will: • 4-5 bullet points

Scope:	
Chair:	
Co-Chair:	
Secretary:	
Lead:	
Deputy Lead:	
Report To:	
Quorum: [adequate representation from owners (TH	3D) represents quorum]
Owner A Members: Add positions as necessary	
Owner B Members: Add positions as necessary	
Deliverables: (Description)	
Meeting Frequency: Bi-Weekly (minim	um)
Dispute Resolution Process: (Process D	Description)
Escalation Process: (Process Description	n)
Authority & Changes: (Process Descript	tion)
Reporting Requirements:Meeting notesMonthly reportingQuarterly reporting (other)	
Roles and Responsibilities: Chair	

Chair Co-Chair Meeting Agenda and Notes

Procedures and Practices: (Process Description)

Replacement of Members: (Process Description)







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