

**Indigenous Ownership of Natural Resource Projects: A Framework for Partnership
and Economic Development**

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I. INTRODUCTION

Six years ago, our esteemed CELF colleagues JoAnn Jamieson and William Laurin delivered a prescient paper to the 2015 CELF Jasper Seminar entitled "Aligning Energy Development with Aboriginal Interests",² the major thesis of which was that energy industry project proponents (each an "EIPP") could significantly de-risk their proposed projects by structuring their commercial relationships with Indigenous communities ("**Indigenous communities**" or "ICs") in a manner that established long term alignment of the parties' respective interests through co-ownership. In effect, Jamieson and Laurin persuasively argued that, going forward, the recommended path for strategically minded EIPPs and ICs alike was to negotiate and implement equity participation in natural resource projects providing for active involvement by ICs.

The ensuing years have witnessed a veritable surge, both internationally and domestically, of transactions in which ICs have acquired significant and meaningful ownership in infrastructure projects across the full spectrum of the energy value chain. In Canada, this nascent phenomenon has manifested itself recently in several headline-grabbing, landmark transactions such as the acquisition of 50% of Clearwater Seafood by a coalition of Mi'kmaq communities, the longstanding and vibrant role of the Haisla First Nation in the LNG Canada project, the investment by an alliance of six Alberta First Nations in the 900 megawatt natural gas fired Cascade Power Project, and the purchase by seven ICs of a 40% interest in Alberta PowerLine, a 508 kilometre 500 kilovolt transmission line running from Edmonton to Fort McMurray. These transactions are part of an emerging paradigm shift towards a framework of partnership and shared economic prosperity in the development of energy projects in Canada. This paper includes a survey set forth in Appendix "A" that provides a further overview of recent transactions involving IC ownership interests in energy projects which have been publicly announced, and have been completed or are pending as of the date of publication of this paper.

Given the above context, this paper explores the recent evolution of IC investment transactions and examines the legal architecture of the resultant co-ownership structures, incorporating IC perspectives from Indigenous community and business leaders, including our co-author Stephen Buffalo, who have been instrumental in progressing this increasingly pervasive and influential model. In the course of this analysis, we address specific IC ownership and equity participation matters relating to: (i) typical IC investment terms and structures; (ii) governance structuring and related project governance issues, including recognition and incorporation of traditional IC governance models; (iii) financing of IC investments, including an overview of government and private funding sources, and key IC financing/lender issues; and (iv) material IC investment transaction issues and process requirements.

The focus of this paper is on the legal structure and commercial design of a significant emerging form of business association. In investigating and analyzing these commercial relationships, we have assiduously sought to avoid engaging, except where the context so demands, in discussion of the law of consultation and accommodation or on the potential effects of implementing the *United Nations*

¹ The authors wish to thank Steve Major (Partner, Bennett Jones LLP) and Sharon Singh (Partner, Bennett Jones LLP) for their generous contributions to this paper as well as Mikayla Hill (Student at Law, Bennett Jones LLP), Sydney Olsen (Student at Law, Bennett Jones LLP) and Jason McNiven (Summer Law Student, Bennett Jones LLP) for their invaluable research assistance.

² JoAnn Jamieson and William Laurin, "Aligning Energy Development with Aboriginal Interests" (Paper delivered at the Canadian Energy Law Foundation 2015 Jasper Research Seminar, 19 June 2015) (2016) 53:2 Alta L Rev 453.

Declaration on the Rights of Indigenous Peoples ("UNDRIP")³ in Canadian federal law⁴ and British Columbia provincial legislation. This subject matter is beyond the scope of our analysis and has been thoughtfully and comprehensively scrutinized in previous CELF papers and other resources, all of which we highly recommend.⁵ While we are of the view that the engagement and negotiation inherent in these structures represents a host of positive and synergistic opportunities for ICs and EIPPs across the board (as detailed in this paper), we do not purport to opine on or draw conclusions on the extent to which these primarily economically driven legal arrangements satisfy the Crown's obligations to ICs. In addition, to the extent of any comment on the role such relationships play in the overall process of reconciliation, please note such interpretations flow from only those with the requisite qualifications to make such judgments, namely co-author Stephen Buffalo and the additional Indigenous community business leaders interviewed in connection with this paper. The other authors of this paper are not Indigenous persons and we do not purport to speak on behalf of any Indigenous community or ICs generally.

A Note on Terminology: Throughout this paper, we have used the prevailing term "Indigenous community" to refer to communities of First Nations, Métis and the Inuit peoples of Canada. The term "First Nations" is used as an equivalent of the term "bands" under the *Indian Act*.⁶ In certain sections of this paper, we have used the term "Indian" as it has legal meaning in the *Indian Act*, although it is recognized that many First Nations peoples do not use or describe themselves using this term. The *Indian Act* defines "Indians" as "persons registered or entitled to be registered as Indians" under the *Indian Act*.⁷ A person is entitled to register under the *Indian Act* if they meet specific requirements set out in section 6 of the *Indian Act* and is not disqualified by any of the criteria set out in section 7 of the *Indian Act*. The *Indian Act* does not apply to Inuit or non-status "Indians",⁸ nor does it apply to Métis, as self-identified Métis can register themselves as members of a Métis organization.⁹ Notably, some of the analysis with respect to taxation and governance in this paper will not apply to certain ICs that are not subject to the *Indian Act*. In addition, these sections may not apply to First Nations or other Indigenous groups that have entered into a self-governing agreement with the Canadian government.

II. EVOLUTION OF INDIGENOUS OWNERSHIP AND EQUITY PARTICIPATION IN NATURAL RESOURCE PROJECTS

In Canada, for much of the past two decades, EIPPs have frequently engaged with ICs impacted by proposed natural resource development through the mechanism of impact benefits agreements (an "IBA"). One of the essential aspects of these arrangements was mitigation of risk for both the IC and the EIPP. As has been analyzed extensively in the legal literature, an effectively negotiated and executed IBA could have the effect of diminishing regulatory uncertainty for the EIPP, while also providing certainty to the IC in respect of the project in question through legally enforceable assurances, over and above statutory requirements. There are often other additional benefits and assurances such as relating to environmental stewardship and

³ A Res 61, 295, UNESCO, 61st Sess (2007) [UNDRIP].

⁴ On December 3, 2020, the Government of Canada tabled Bill C-15, the United Nations Declaration on the Rights of Indigenous Peoples Act (Bill C-15). As of the date of this paper, Bill-C-15 is currently headed towards royal assent.

⁵ Sam Adkins et al, "Calculating the Incalculable: Principles for Compensating Impacts to Aboriginal Title" (2016) 54:2 Alta L Rev 351; Nigel Bankes, "Implementing UNDRIP: some reflections on Bill C-262" (27 November 2018), online (blog): *ABlawg* <ablawg.ca/2018/11/27/implementing-undrip-some-reflections-on-bill-c-262/>; Sam Adkins et al, "UNDRIP As a Framework for Reconciliation In Canada: Challenges and Opportunities for Major Energy and Natural Resources Projects" (2020) 50:2 Alta L Rev 339; Diana Audina et al, "Forging a Clearer Path Forward For Assessing Cumulative Impacts on Aboriginal and Treaty Rights" (2019) 57:2 Alta L Rev 297; Peter Forrester, Kent Howie & Alan Ross, "Energy Superpower in Waiting: New Pipeline Developments in Canada, Social Licence, and Recent Federal Energy Reforms" (2015) 53:2 Alta L Rev 419; Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729; Alan Hanna, "Reconciliation Through Relationality Indigenous Legal Orders" (2019) 56:3 Alta L Rev 817; Angela D'Elia Decembrini & Shin Imai, "Supreme Court of Canada Cases Strengthen Argument for Municipal Obligation to Discharge Duty to Consult: Time to Put Neskolith to Rest" (2019) 46:3 Alta L Rev 935.

⁶ RSC 1985, c I-5 [Indian Act].

⁷ *Ibid*, s 2(1) "Indian".

⁸ *Ibid*, s 4(1).

⁹ Indigenous Services of Canada, "What is Indian Status" (29 April 2020), online: *Government of Canada* <www.sac-isc.gc.ca/eng/1100100032463/1572459644986>.

investment in community programs including training, employment and capacity building.¹⁰ While such agreements are typically confidential, there are ample examples of IBA-based relationships resulting in completed projects that have delivered material mutual benefits to both ICs and EIPPs. In the same context, there are also highly publicized and extensively analyzed examples of projects that have not proceeded despite the existence of highly negotiated IBAs with affected communities.

It has been noted by many commentators that such agreements were by definition focused on *mitigation* of impacts of natural resource developments on the traditional territories of ICs. As Professor Ken Coates has observed, over time and through various means, ICs acquired an increasing body of knowledge and sophistication regarding the prevailing metrics of such arrangements, and in many cases viewed this solution as inadequate to the longer term needs of the community.¹¹ Reinforcing this view, in the Calls to Action of the Truth and Reconciliation Commission of Canada ("**TRC Action**"),¹² the Commission called upon the corporate sector in Canada to apply the principles of *UNDRIP* to corporate policies when involving Indigenous peoples and their lands and resources.¹³ The examples provided include access to jobs and training, benefits from development projects and actual participation therein.¹⁴

Perhaps not independently, EIPPs globally are increasingly measured by their environmental, social and governance ("**ESG**") performance. A June 2020 report by Moody Investor Services observed that, in Canada, an EIPP's future access to equity or debt capital would be predicated on their ability to integrate ESG concepts into their corporate strategy and their capacity to recognize and embrace alignment possibilities with ICs.¹⁵ While the ESG label is not new,¹⁶ such considerations have recently enhanced a calibration in corporate behaviour away from evaluating investments solely through a traditional financial performance framework, and towards understanding the impact of a proposed project's social and environmental outcomes and governance standards on its broader community stakeholders, most often ICs. As recently underscored in a report released by the First Nations Major Projects Coalition ("**FNMPC**"), EIPPs have started to consider Indigenous equity ownership investments as part of larger ESG strategies, and "[t]he overall growth of ESG adoption globally is catalyzing a growth of new opportunities for Indigenous nations as investors, proponents, or partners in projects".¹⁷

Set in the above context, it is of no surprise that the natural resource sector has seen a significant number of transactions in recent years through which ICs have sought meaningful ownership in long term projects. Similarly, investors are increasingly focused on sustainable and socially conscious investment opportunities. In Canada, this has led to a framework of partnership between EIPPs and ICs for shared economic prosperity in the development of natural resource projects.¹⁸

¹⁰ Thomas Isaac & Arend J.A. Hoekstra, "Canadian Law and Realpolitik Regarding Indigenous-Industry Agreements" in Dwight Newman & Ibronke Odumosu-Ayanu, eds, *Indigenous-Industry Agreements, Natural Resources and the Law* (New York: Routledge, 2020) at 246; Ken Coates, "Towards a Comprehensive Engagement" in Dwight Newman & Ibronke Odumosu-Ayanu, eds, *Indigenous-Industry Agreements, Natural Resources and the Law* (New York: Routledge, 2020) at 265.

¹¹ Coates, *ibid.*

¹² *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) [*TRC Action*].

¹³ *Ibid* at no 92.

¹⁴ *Ibid* at no 92(ii).

¹⁵ "Focus on Indigenous Rights Increasingly Vital for Project Execution, Corporate Activities" (22 June 2020), online (pdf): *Moody's Investors Service* <www.moody.com/research/ESG-Canada-Focus-on-Indigenous-rights-increasingly-vital-for-project--PBC_1182205>.

¹⁶ United Nations, Press Release, SG/211 ECO/106, "Secretary-General Launches 'Principles For Responsible Investment' Backed By World's Largest Investors" (27 April 2006), online: *UN Meetings Coverage and Press Releases* <www.un.org/press/en/2006/sg2111.doc.htm>.

¹⁷ "TOP TEN LIST for Roadmap for Investing in Canada: Indigenous Investment in ESG" at 5, online (pdf): *First Nations Major Projects Coalition* <securerervercdn.net/45.40.145.201/14x.5f4.myftpupload.com/wp-content/uploads/2021/06/FNMPC_Top10_v3.pdf>. The First Nations Major Projects Coalition's ("**FNMPC**") mandate is to advance the capacity needs of its members in the areas of economic participation and environmental stewardship, which is further discussed in Part IV. Its membership is comprised of over 70 First Nations from across Western Canada.

¹⁸ Please refer to the summary of recent transactions included in Appendix "A" to this paper.

The balance of this paper examines the common structural apparatus of such transactions and the means to achieve them.

III. INDIGENOUS COMMUNITY INVESTMENT GOALS AND PRIORITIES

While we do not purport to be in a position to speak directly on behalf of ICs in relation to the implications of Indigenous ownership and investments in the natural resource sector, our co-author Stephen Buffalo has provided significant guidance. The authors have also consulted with other Indigenous community and business leaders for this paper, particularly for this section regarding IC goals and priorities.¹⁹ While recognizing that Indigenous peoples in Canada are not a homogenous group, the primary purpose of this section is to provide context for the subsequent sections of this paper, on the basis that an understanding of some of the core aims, drivers and concerns that underpin IC investments in natural resource projects is critical to structuring and implementing these transactions.

A. *Meaningful Ownership and Economic Participation*

A common feature (and key structuring goal for both ICs and EIPPs) in Indigenous equity ownership transactions, including those referenced in Appendix "A", relates to the level of IC ownership and economic participation being "meaningful". While it is difficult to draw bright lines around what constitutes a meaningful IC ownership interest universally, in our experience the use of this term speaks to the IC ownership resulting in: (i) a long-term stable revenue source, distinct from one-time payments that would be more common under traditional IBAs; and (ii) a considerable total percentage ownership interest that is beyond *de minimus* or token and that affords the IC owner the right to participate in the governance and affairs of the project.²⁰

In looking to organizations or programs focused on supporting IC equity investment, the FNMPC and the Alberta Indigenous Opportunities Corporation ("**AIOC**")²¹ are leading examples. The FNMPC has identified that a key criteria of "meaningful" IC equity investment is that the transaction and project must be commercially viable and provide "predictable revenue streams to support investments in community infrastructure (i.e., water, wastewater, roads, connectivity, health, education), employment opportunities and training and capacity building".²² The FNMPC has further indicated that meaningful IC economic participation is one criterion that they use to assess whether a project will be eligible for support from the FNMPC.²³

Similarly, while the AIOC does not define what specific level of ownership in a project constitutes a meaningful interest, the AIOC does identify that meaningful ownership will be a key criteria in assessing whether AIOC support will be provided, and further highlights that "meaningful" may be interpreted on a relative or proportionate basis:

¹⁹ In addition to expressing our gratitude and deep appreciation to our co-author Stephen Buffalo for his contributions to this paper and this section specifically, the authors also wish to thank the many other Indigenous community leaders consulted in connection with this project.

²⁰ For further a discussion regarding what constitutes "meaningful" IC ownership in energy projects, see Serge Dunpoint, Will Osler & Sharon Singh, "Infrastructure and Indigenous Engagement" (17 September 2020), online (podcast): *Bennett Jones Business Law Talks Podcast* <www.bennettjones.com/Podcasts-Section/Infrastructure-and-Indigenous-Engagement/>.

²¹ Alberta Indigenous Opportunities Corporation, <https://www.theaioc.com/> [AIOC]. The AIOC is a crown corporation and its mandate is to facilitate investment by Indigenous groups in natural resource projects and related infrastructure.

²² Jason Calla & Temixw Planning, "Improving Access to Capital for Indigenous Groups to Purchase Equity Stakes in Major Resource Projects" at 18, online (pdf): *FNMPC* <securerervercdn.net/45.40.145.201/14x.5f4.myftpupload.com/wp-content/uploads/2021/04/FNMPC_Reviewing_Access_final.pdf> .

²³ "FNMPC Guidance Documents: Project Identification & Support" (March 2021) at 5, online (pdf): *FNMPC* <securerervercdn.net/45.40.145.201/14x.5f4.myftpupload.com/wp-content/uploads/2021/04/FNMPC_Guidance_Document_final.pdf>.

AIOC looks favourably upon applications with a level of alignment created by the direct participation of the applicant that is meaningful relative to the financial resources of the applicant involved (not necessarily meaningful relative to the size of the proposed development).²⁴

The ultimate use of and drivers behind obtaining a long term, stable revenue stream from a project is a fundamental distinguishing feature of IC equity ownership transactions from non-IC investments. The distributions from the project and economic rights of the IC owner are critical for sustainable economic growth and necessary in order to leverage the revenue stream to fund additional developments within the community.

B. *Environmental Stewardship and Sustainability*

Effective stewardship and sustainability is a common value shared by many Indigenous communities globally. In discussing such topics, Joseph & Joseph suggest considering Indigenous beliefs on creation: "Indigenous communities were given lands by the Creator, and these lands were to be used and protected for the Indigenous communities' benefit and are required for their long-term cultural survival for the next ten thousand years and beyond".²⁵

Understanding this worldview provides context for how important environmental stewardship and sustainability is in Indigenous communities, and how Indigenous communities may view project development on their traditional lands. Sustainability is rooted in a deep understanding of a duty to, and connection with, the land. For Indigenous communities, stewardship and sustainability is a way of life and an obligation that they must fulfill:

To allow development on traditional territories, there is a need to reaffirm inherent rights as a culture and a nation to maintain stewardship of the land. This does not necessarily mean that they seek independent sovereignty. For some communities, this means they want to be a part of Canada, including its economy and remain under Canadian citizenship and laws. However, they want agreements to allow them to determine their own future as a participating and equal partner-nation within Canada...development therefore has to include the concept of generational sustainability to facilitate acceptance within Indigenous communities.²⁶

For ICs then, equity ownership, and the influence that comes with it, allows them to have a role in project development and operational decisions with a view to stewardship and sustainability of their traditional lands. In turn, EIPP-IC co-ownership transactions may facilitate better integration of Indigenous knowledge and the exchange of Indigenous ideas and values regarding stewardship and sustainability, which may contribute to the overall success of the project by assisting EIPPs in developing their ESG strategies.

C. *Preservation and Sharing of Traditions, Culture and Language*

As with stewardship and sustainability, the preservation of traditions, culture and language is very important to ICs. The impacts on Indigenous traditions, culture and language caused by the implementation of the *Indian Act*, Residential Schools, the Sixties Scoop and the ongoing effects of colonization are among the many historical and present factors that have contributed to ongoing challenges for ICs.

²⁴ "Loan Guarantee Investment Program Guidelines" (4 June 2020) s 2.2, online (pdf): *AIOC* <www.theaioc.com/wp-content/uploads/2020/07/2020-06-04_AIOC_Loan_Guarantee_Investment_Program_Guidelines_V1-2.pdf>.

²⁵ Bob Joseph & Cynthia Joseph, *Indigenous Relations Insights, Tips & Suggestions To Make Reconciliation a Reality* (Port Coquitlam, British Columbia: Indigenous Relations Press, 2019) at 47-48.

²⁶ Rodney Nelson, "Beyond Dependency: Economic Development, Capacity Building, and Generational Sustainability for Indigenous People in Canada" (2019) 9:3 *Sage Open*.

Both *UNDRIP* and the TRC Action acknowledge these concerns and, among other things, affirms cultural preservation as a right of Indigenous peoples. In the TRC Action, the Commission called upon the corporate sector in Canada to apply the principles of *UNDRIP* to corporate policies when involving Indigenous peoples and their lands and resources.²⁷ *UNDRIP* includes the following key principles:

Article 11

- 1) Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.²⁸

Article 31

- 1) Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.²⁹

The ability to effectively preserve and promote the sharing of Indigenous traditions, culture and language increases greatly with the enhanced economic stability that equity ownership brings. Through equity ownership, ICs also have the opportunity to integrate Indigenous knowledge into the practices of the EIPPs and the project as a whole. For EIPPs, understanding this perspective will assist in building the commercial relationship, and as noted above, may help inform the development of ESG strategies on these co-owned projects or elsewhere within their organization.

D. Capacity Building Opportunities

Capacity, in the form of access to capital, training and employment, has historically been a barrier for ICs to achieve meaningful economic development.³⁰ The shift towards meaningful equity ownership, along with the engagement by EIPPs and increasing private and governmental-support options, is presenting solutions to these issues for ICs.

Equity ownership in energy projects can create much needed employment and training opportunities for Indigenous people as well delivering the long-term revenue streams needed to make further self-funded investments in capacity development and infrastructure improvements. Experience has demonstrated that where an IC is able to avail itself of stable and long-term sources of revenue, this enhances the ability of the community to identify additional opportunities and implement proprietary investment strategies unlocking even further access to capital.

²⁷ TRC Action, *supra* note 12 at no 92.

²⁸ *UNDRIP*, *supra* note 3, article 11.

²⁹ *UNDRIP*, *ibid*, article 31.

³⁰ Nelson, *supra* note 26.

While access to capital continues to be a challenge for many ICs, with the support of EIPPs and organizations whose mandate is to provide capacity building (some of which are mentioned in this paper), many Indigenous communities have become increasingly positioned to take on an active governance role within investment vehicles that develop, own and operate natural resource projects. For ICs, the objectives of moving beyond having a passive interest in natural resource development and finding ways to drive capacity within their communities are key metrics in determining whether to engage in an investment opportunity.

The reflections and comments in this Section III are intended to provide context for ICs' investment goals and priorities when evaluating a natural resource development opportunity. Although opportunities will be evaluated using many of the same business objectives as the EIPP, for the representatives of ICs there is an additional layer of history, culture and ensuring they have the support of their broader community, that will impact how they approach and engage with EIPPs, including negotiating and structuring each equity ownership opportunity.

IV. TRANSACTION STRUCTURE, FINANCING AND KEY COMMERCIAL TERMS

A. *Overview*

As IC equity investment transactions have become more prevalent, patterns and commonalities are emerging with respect to how these transactions are structured, funded and implemented in the project and ownership contracts. This section explores trends and key concepts in the foregoing areas, and highlights the unique aspects, challenges and opportunities associated with completing IC equity investment transactions in the current environment.

B. *Transaction Structuring*

For corporate liability protections and taxation purposes, the most common legal structure for equity investment in natural resource projects between EIPPs and ICs is the limited partnership. Although the investment entity into the limited partnership may vary for each EIPP, where ICs comprised of First Nations³¹ are participating in the investment opportunity, the First Nation or a syndicate of First Nations, will typically invest through a limited partnership in order to maintain its tax-exempt status. The following section provides an overview of these transaction structures, including the legislative and traditional Indigenous governance requirements to approve investment decisions, as well as tax considerations.

(i) IC Governance

Although project structuring may be relatively consistent across equity investments, as discussed in Part III, each Indigenous community will determine what investment opportunities align with its communities' interests, taking into account their own internal governance requirements, their investment goals and priorities, and support for the project. The corporate vehicle used for an investment opportunity will be subject to an additional layer of approval, beyond corporate law requirements, as the ICs' process for review and determination of support for the investment opportunity will be undertaken based on its internal governance structure. An understanding of this process is an important element in developing the commercial relationship.

³¹ Use of First Nations in this context refers to an "Indian" or a "band", as this has legal meaning under the *Indian Act* which is the focus of this section of the paper

There are two primary governance structures within First Nation communities. One such system was created by the *Indian Act*, which imposes a local system of governance through a band³² led by an elected chief and council³³ and grants certain powers to the band council.³⁴ The second governance structure is the hereditary system.³⁵ Prior to colonization, First Nations were self-governing³⁶ and many communities used a governance system based on leadership by hereditary chiefs.³⁷ The type of hereditary governance structure varies from one nation to the next, but for many First Nation communities, a hereditary chief's power is passed down from generations, either along bloodlines or by other cultural protocols.³⁸ In addition to hereditary systems, some communities have councils of elders that are, or were, the primary decision-making body or take other collaborative decision-making approaches for leadership selection.³⁹

The *Indian Act* introduced an elected chief and council system that altered the traditional forms of governance.⁴⁰ Running parallel to this, however, is the ability for First Nations to request that an order pursuant to section 74 of the *Indian Act* be repealed in order to permit the First Nation to implement its own custom community electoral system, including through the determination of its own election laws and governance structures that best suit the needs of its individual community.⁴¹ Although the majority of bands and their governance systems operate under the *Indian Act* or, even more increasingly, through a custom system, some First Nation communities have maintained their traditional hereditary systems or have created a dual system by having a hereditary and an elected chief.⁴² Other First Nations exercise their form of leadership through self-governance. Although the focus in this section is on First Nations, certain Intuit and Metis communities, who are not governed by the *Indian Act*, are pursuing self-government arrangements through negotiated agreements with the Government of Canada.⁴³

Under the *Indian Act*, once there is an elected band council there is no legal recognition of hereditary chiefs, but hereditary chiefs may still maintain their traditional positions.⁴⁴ The authority of the band council is delegated by, and their powers are limited under, the *Indian Act*. By contrast, hereditary chiefs are not subject to the terms of the *Indian Act*. Under the dual system, hereditary chiefs hold ceremonial and historical importance and are responsible for traditional lands and lands that extend beyond *Indian Act*

³² CED 4th (online), *Aboriginal Law*, "Some specific subjects: Affiliation and Governance, Statutory Powers of Self-Government, Constituting Indian Bands" (III.2.(c).(ii)) at § 491. The *Indian Act* defines "band" as: "... a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951; (b) for whose use and benefit in common, moneys are held by Her Majesty; or (c) declared by the Governor in Council to be a band for the purposes of this Act": s 2(1) "band."

³³ *Indian Act*, *supra* note 6, s 74(2), pursuant to which a council of a band will "... consist of one chief, and one councillor for every one hundred members of the band, but the number of councillors shall not be less than two nor more than twelve and no band shall have more than one chief."

³⁴ Jack Woodward, *Native Law* (Toronto: Thomson Reuters Canada Limited, 2089) at 7§10 (ProView).

³⁵ ICs use oral transmission to pass down histories, and other knowledge, and therefore, the information related to the hereditary section of this paper is taken from secondary and tertiary sources and is general in nature.

³⁶ Crown-Indigenous Relations and Northern Affairs Canada, "Self-Government" (25 August 2020), online: *Government of Canada* <www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314>.

³⁷ Amanda Robinson, "Chief" (6 November 2018), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/chief>; "Bands: What is a Band?" (2009), online: *Indigenous Foundations* <indigenousfoundations.arts.ubc.ca/bands/> [Indigenous Foundations].

³⁸ See e.g. the Wet'suwet'en First Nation. To become a hereditary chief, Elders, Shaman's and Chiefs would feel an expectant mothers womb and determine if the child was destined to become a chief: "Governance: Becoming a Hereditary Chief", online: *Wet'suwet'en First Nation* <wetsuweten.com/culture/governance/>; See also the Haida Nation. The Haida Nation's Constitution recognizes the role of matrilineal descended hereditary chiefs. A chief from each matrilineal clan, conferred with status and rank through a potlatch, will then sit at the Hereditary Chiefs Council: Haida Nation, "Constitution of the Haida Nation" (October 2018), online (pdf): *Haida Nation* <haidanation.ca/wp-content/uploads/2018/10/Constitution-2018-10-signed.pdf>; See also the Tseshaht First Nation. Traditionally, the Tseshaht Nation was led by a hereditary chief, Watty, who had no children, so when he passed, his chieftainship was given to his younger brother, who then passed the title onto his oldest son, Adam: "Hereditary Chief (Tyee Haw'iiah)", online: *Tseshaht First Nation* <tseshaht.com/governance/hereditary-chief-tyee-hawiih/#:~:text=At%20the%20time%20of%20Adam's,hawiih%2C%20the%20Tseshaht%20hereditary%20chief>.

³⁹ *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 121.

⁴⁰ *Indian Act*, *supra* note 6, s. 74

⁴¹ Indigenous Services Canada, "Conversion to Community Election System Policy" (June 1, 2015), online: *Government of Canada* <<https://www.sac-isc.gc.ca/eng/1433166668652/1565371688997>>.

⁴² Indigenous Foundations, *supra* note 37; Robinson, *supra* note 37.

⁴³ *Supra* note 36.

⁴⁴ Woodward, *supra* note 34 at 7§920.

reserve lands,⁴⁵ while the band council is responsible for the matters delegated to it under the *Indian Act*. Notwithstanding the legal treatment under the *Indian Act*, individual First Nations may view the role of the chief and council and hereditary chiefs very differently, including the authority that each may hold within the community. The exploration of this topic is beyond the scope of this paper.

First Nations that have self-government agreements have their own selection process and are not subject to the election provisions imposed by the *Indian Act*,⁴⁶ as self-government agreements are not regulated by the *Indian Act*. Instead, self-government agreements cover many aspects regulated by the *Indian Act*,⁴⁷ such as their law-making powers, financial arrangements and their governments' structure.⁴⁸

Another method to become self-governing is by way of a modern treaty.⁴⁹ Much like a self-government agreement, a treaty is formed by negotiating with the federal government and gives First Nations control over their internal affairs.⁵⁰

The *Indian Act* and the *Indian Band Council Procedure Regulations*⁵¹ sets out a legislative scheme for band council decision-making processes. The *Indian Act* requires that any decisions made by the band council occur during a duly convened council meeting, and a majority of the councilors must consent to the decision.⁵² Although neither the *Indian Act* nor the *Procedure Resolutions* define or discuss use of "Band Council Resolution" (a "**BCR**"), it is a common method to demonstrate consent of the majority of a band council and their authority to act.⁵³ Unlike a corporation where a board may circulate resolutions for signatures outside of a meeting, a BCR is valid only if it was signed at the council meeting.⁵⁴

The *Indian Act* is silent on whether a band may enter into a contract. Nonetheless, the courts have found that band councils have the implied authority to contract.⁵⁵ This ability is deemed to be incidental to a chief and band council exercising its powers under the *Indian Act*. Section 2(3)(b) of the *Indian Act* regulates the legality of entering into a contract with a band. Under this section, the consent of the majority of a band's councillors present at a duly convened council meeting is required for power conferred onto the band council to be exercised appropriately. In addition, a First Nation may pass general bylaws related to a band and band council's administrative procedures. Some administrative procedure bylaws enacted under section 81(1) of the *Indian Act* may impose limits on how a band may enter into contracts, including requiring contracts to be executed by at least three members of council and limitations on contract value.⁵⁶

⁴⁵ See e.g. the Wet'suwet'en First Nation: Kate Gunn & Bruce McIvor, "The Wet'suwet'en, Aboriginal Title, and the Rule of Law: An Explainer" (13 February 2020), online (blog): *First Peoples Law* <www.firstpeopleslaw.com/public-education/blog/the-wetsuweten-aboriginal-title-and-the-rule-of-law-an-explainer#:~:text=Menu-.The%20Wet'suwet'en%2C%20Aboriginal%20Title%2C%20and%20the.Rule%20of%20Law%3A%20An%20Explainer&text=The%20RCMP's%20enforcement%20of%20the,the%20rights%20of%20Indigenous%20people>.

⁴⁶ Senate, *First Nations Elections: The Choice Is Inherently Theirs: Reports of the Standing Senate Committee on Aboriginal Peoples* (May 2010) (Chair: Honourable Gerry St. Germain) at 5; *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

⁴⁷ Woodward, *supra* note 34 at 7§20.

⁴⁸ Crown-Indigenous Relations and Northern Affairs Canada, "Getting Out of the Business of Indian Registration" (28 November 2018), online: *Government of Canada* <www.rcaanc-cirnac.gc.ca/eng/1540403121778/1568898903708>.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ CRC, c 950 [*Procedure Regulations*].

⁵² *Indian Act*, *supra* note 6, s 2(3)(a).

⁵³ See "ISC Forms" (last modified 10 May 2021), online: *Indigenous Services Canada* <www.sac-isc.gc.ca/eng/1592232608805/1592234588002#sec6>, which provides a template for a Band Council Resolution.

⁵⁴ *W Downer Holdings Ltd v Red Pheasant First Nation*, 2012 SKQB 468 at para 35 [*Red Pheasant*].

⁵⁵ *Telecom Leasing Canada (TLC) Ltd v Enoch Indian Band of Stony Plain Indian Reserves No 135*, [1993] 1 WWR 373, [1994] 1 CNLR 206 at para 8 (ABQB).

⁵⁶ By way of example only, see Black Lake Denesuline First Nation, By-law 97-10-11, *Administration Procedures Bylaw* (31 January 2000), s 28, online: *First Nations Gazette* <partii-partiii.fng.ca/fng-gpn-II-III/pii/en/item/473205/index.do?q=Black+Lake+Denesuline+First+Nation>.

Although there is conflicting authority on whether the procedural requirements of obtaining a BCR is mandatory,⁵⁷ there is supporting case law in Canada that suggests a contract can be valid despite the absence of a BCR consenting to the contract.⁵⁸ *Maloney v Eskasoni First Nation*⁵⁹ is an important case regarding this trend and courts across Canada continue to reference it. In this case, the Supreme Court of Nova Scotia did not require a formal BCR affirming the contract as the majority of council, at a duly convened band meeting, approved of the decision to authorize the chief of the band council to negotiate and conclude a contract on behalf of the band.⁶⁰ This case also demonstrates that a duly convened meeting that formally appoints a designate to negotiate a contract replaces the need for a band meeting affirming the same contract. When a designate has been given actual authority to enter into contracts on behalf of the band, the contracts that the person enters into will satisfy the requirements of section 2(3)(b) of the *Indian Act* and bind the band.

Courts have also accepted the proposition that a contract based on ostensible authority and reliance can bind a band – equivalent to the indoor management rule which applies to corporations.⁶¹ However, since case law is not definitive regarding ostensible authority to ensure agreements between industry and First Nation governments are valid and binding on both parties, evidence of a BCR authorizing the execution of a contract is best practice.

A corporate vehicle formed by a band for investment purposes will operate outside of the band council and bylaws regarding contracting rights and limitations. While most direct equity investment in natural resource projects by ICs will be done by way of a limited partnership, it is important to understand the governance structure, particularly where a source of equity funding may be provided by the band and the contracting entity has the support of the Indigenous community.

(ii) Indigenous Investment Structure

As discussed above, for purposes of equity investment, the most commonly used vehicle by ICs is the limited partnership.⁶² A business trust may also be used as an investment vehicle into a limited partnership structure that owns or invests into a project. However, as limited partnerships are regularly used for off-reserve business ventures, it is the focus of this paper.

In 2016, the Canadian Revenue Agency ("**CRA**") issued a ruling⁶³ confirming that First Nations created under the *Indian Act* constitute "public bodies" for purposes of paragraph 149(1)(c) of the *Income Tax Act*. A person is exempt from tax on income if such person is "a municipality in Canada, or a municipal or public

⁵⁷ CED 4th (online), *Aboriginal Law*, "Some specific subjects: Affiliation and Governance, Statutory Powers of Self-Government, Executive Powers of Band Governance, Procedural Requirements" (II.2.(c).(v).B) at § 559, which cites the proposition that several decisions have held that an agreement requires a BCR to be valid.

⁵⁸ Woodward, *supra* note 34 at 7§1163; *Red Pheasant*, *supra* note 54 at paras 34-36.

⁵⁹ 2009 NSSC 177 [*Maloney*].

⁶⁰ *Ibid* at para 231.

⁶¹ See *Maloney*, *supra* note 59 at paras 251-261; *Chipewyan Prairie First Nation No 470 v Kent* 2020 ABQB 283 at paras 51-54; *Sands v Walpole Island First Nations* 2016 ONSC 7983 at para 83; *Red Pheasant*, *supra* note 54 at paras 34, 39 and 41. For the indoor management rule: *Canada Business Corporations Act*, RSC 1985, c C-44, s 18(1)(d).

⁶² For First Nation peoples and First Nations, the tax exemption provisions contemplated by section 87 of the *Indian Act* and section 81(1)(a) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*] are used in undertaking tax planning. The tax exemption contemplated by section 87 of the *Indian Act* applies only to an interest of an Indian or a band in reserve or surrendered lands, or personal property situated on a reserve or income of an Indian that is earned on a reserve: *Indian Act*, s 87(1); *ITA*, s 81(1)(a). The tax exemption in s 87 of the *Indian Act* does not extend to Inuit, Métis or non-status Indians, as the *Indian Act* only applies to "Indians" and bands. The decision by the Supreme Court of Canada in *Daniels v. Canada*, 2016 SCC 12, declared that Métis and non-status Indians are "Indians" for the purpose of the Canadian government's jurisdiction under s 91(24) of the *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, No 5, but does not extend to "Indians" as defined in the *Indian Act*. However, in the event an Indigenous Community has entered into a self-governing agreement with the Government of Canada, this arrangement may address tax matters. See "Information on the tax exemption under section 87 of the *Indian Act*" (last modified 16 March 2021), online: *Government of Canada* <www.canada.ca/en/revenue-agency/services/indigenous-peoples/information-indians.html?=&>.

⁶³ Canada Revenue Agency, Interpretation Bulletin IT-2016-064503117, "Indian Act Bands" (27 July 2016) [IT 2016].

body performing a function of government in Canada."⁶⁴ The rationale set out in the ruling is "the very nature of an Indian band and its council under the Indian Act is that of a local government, similar in nature to a municipality."⁶⁵

As a corporation is a distinct legal entity, having an existence separate from that of its shareholders,⁶⁶ it does not qualify as an "Indian" or a "band" under the *Indian Act* (even if wholly-owned by a First Nation or First Nation peoples) and cannot rely on the 149(1)(c) Tax Exemption.⁶⁷ A First Nation-owned corporation will be taxable on its income unless a different exemption applies. The analysis related to other exemptions, which are largely tied to a geographic connection to activities carried out on reserve, and the treatment of income distributed to shareholders of a corporation that are an "Indian" or a "band," is a different analysis that is beyond the scope of this paper.

A limited partnership, on the other hand, is not a distinct legal entity,⁶⁸ and is not a taxpayer under the *Income Tax Act*.⁶⁹ Thus, the income of the First Nation partner is taxed as if the activity were undertaken by it personally. As the CRA recognizes a First Nation as a public body performing a function of government, pursuant to the 149(1)(c) Tax Exemption, the income earned through the limited partnership will not be subject to Part I income tax.⁷⁰ Most importantly, unlike section 87 of the *Indian Act*, the 149(1)(c) Tax Exemption does not require that income be generated on reserve in order for it to be exempt, providing access to economic development opportunities that might not otherwise be available on reserve.

(iii) Project Structure

In Canada, partnerships are governed by provincial partnership legislation enacted in each province and territory, which defines what constitutes a partnership. Generally, a partnership involves two or more persons agreeing to carry on business with one another, with a view to profit.⁷¹ As "partnership" is not defined in the *Income Tax Act*, this characterization, for tax purposes, is determined by the laws of the applicable jurisdiction in respect of the formation of a partnership.⁷²

As with any business venture, comprehensive partnership agreements are used to govern the management and operation of the partnership business in order to address the ongoing relationship between the partners and the contingencies that may arise over the term of the relationship. They are also used to expand on, and where permitted at law, to limit the application of the partnership legislation. Key legal and commercial terms in partnership agreements are addressed further in Part D below.

The fact that a limited partnership is not a distinct legal entity, along with its tax treatment, are what distinguishes partnerships from other business vehicles. Limited partnerships provide an additional feature – a limited partner typically only assumes risk equal to its capital investment.⁷³ For limited partnerships, the general partner is responsible for the day-to-day management of the business and affairs of the limited

⁶⁴ *ITA*, *supra* note 62, s 149(1)(c) [149 Tax Exemption].

⁶⁵ *IT 2016*, *supra* note 63.

⁶⁶ Definition of "Person" under the *Business Corporations Act*, RSA 2000, c B-9, s 1(x) includes "individual, partnership, association, body corporate, trustee, executor, administrator or legal representative" [emphasis added].

⁶⁷ *Indian Act*, *supra* note 6, ss 2(1) "Indian", "Band".

⁶⁸ Heather Heavin, "Reform of General Partnership Law: The Aggregate vs. Entity Debate" (Paper delivered at the Uniform Law Conference of Canada Civil Law Section, August 2006) [unpublished].

⁶⁹ *ITA*, *supra* note 62, s 96(1)(a),(b); See Elizabeth Johnson & Genevieve Lille, *Understanding the Taxation of Partnerships*, 6th ed (Toronto: Wolters Kluwer, 2010) [Lille] for an in depth review of the taxation of partnerships.

⁷⁰ Paragraph 149(1) of the *ITA* is specific to taxes payable under Part I Income Tax.

⁷¹ *Partnership Act*, RSM 1987, c P-30, s 3 [*Manitoba Partnership Act*]; *Partnership Act*, RSS 1978, c P-3, s 3 [*Saskatchewan Partnership Act*]; *Partnership Act*, RSA 2000, c P-3, s 1(g) [*Alberta Partnership Act*]; *Partnership Act*, RSBC 1996, c 348, s 2 [*BC Partnership Act*].

⁷² The Supreme Court of Canada has concluded that the determination of whether a partnership has been formed for income tax purposes is assessed through the applicable jurisdiction in which the partnership has alleged to have been formed: *Continental Bank Leasing Corporation v the Queen*, [1998] 2 SCR 298; *Spire Freezers Ltd v The Queen*, 2001 SCC 11; *Backman v The Queen*, 2001 SCC 10.

⁷³ *Manitoba Partnership Act*, *supra* note 71, s 53; *Saskatchewan Partnership Act*, *supra* note 71, s 57; *Alberta Partnership Act*, *supra* note 71, s 57; *BC Partnership Act*, *supra* note 71, s 57.

partnership and will not have liability protection. Provided a limited partner is not involved in the day-to-day management of the limited partnership, each limited partner's limited liability protection will be preserved.

The tax treatment of corporate entities is a significant consideration when determining the legal structure for investing in, and owning, natural resource projects. In Canada, partnerships are considered "flow through" vehicles under the *Income Tax Act*.⁷⁴ Although taxable income is calculated as if the partnership is a separate legal entity, partnerships are not taxed as separate legal entities. Instead, the partners are allocated the net income and losses, and are taxed at the partner level.⁷⁵ For the First Nation indigenous investor, as noted above, it will not be subject to income tax on the income allocated to it. For the non-First Nation partner, there may be further tax planning opportunities to reduce income tax exposure. Disproportionate allocation of income and loss to the non-First Nation partner, or the tax impact where the non-First Nation partner is a public company or another publicly traded entity, are beyond the scope of this paper.

This tax treatment allows for greater flexibility when structuring the investment and is why a partnership can be a valuable business vehicle for investment opportunities. Accordingly, the EIPP and the IC can join together in a common enterprise while allowing each to take advantage of their own tax objectives.

C. IC Investment Financing Matters

This section provides a primer on project finance to provide background on the funding options available to ICs and EIPPs, and explores both the challenges to ICs in accessing or raising capital, as well as current and emerging sources of funding and support that are aimed at facilitating IC equity investments in natural resource projects.⁷⁶

(i) Project Finance 101 - Debt vs. Equity

Generally, natural resource projects can be financed through debt, equity or a combination of the two. The choice of financing a project through debt or equity largely depends on which source of funding is most accessible, the company's cash flow, and the particular values of the company.⁷⁷

Debt involves borrowing funds or obtaining credit from individuals or institutional investors that have no ownership interest in the project. Financing a project through debt involves either a loan agreement, which is typically secured, or the issuance of debt securities such as bonds, debentures, or notes.⁷⁸ Regardless of the financial instrument used, the critical attribute of debt financing is that it requires repayment of the debt by some agreed upon future date.⁷⁹ Along with the repayment of the principal amount of the debt, the lender may want a return in the form of interest, the rate of which would be determined by market rates and the creditworthiness of the borrower. The borrower typically looks to secure the lowest possible interest rate in order to minimize the possibility of default.

⁷⁴ *Lille*, *supra* note 69 at 381.

⁷⁵ *ITA*, *supra* note 62, s 96(1)(c).

⁷⁶ The authors wish to thank Kiel Depoe, Director, Investment Banking of TD Securities Inc. for input on this particular section of the paper.

⁷⁷ For a concise and high-level discussion and comparison on debt vs. equity, see JB Maverick, "Equity Financing vs Debt Financing: What's the difference" (26 Apr 2021), online: *Investopedia* <www.investopedia.com/ask/answers/042215/what-are-benefits-company-using-equity-financing-vs-debt-financing.asp>.

⁷⁸ Christopher C Nicholls, *Corporate Finance and Canadian Law*, 2nd ed (Toronto: Thomson Reuters, 2013) at 11.

⁷⁹ Kevin Patrick McGuiness, *Canadian Business Corporations Law*, 3rd ed (Toronto: LexisNexis, 2017) at 1157.

In contrast to debt financing, equity financing involves selling a portion of the ownership of the company or project (usually common shares, preferred shares, or other) to an investor in exchange for capital. Equity transactions can be done through a private placement of stock with investors or venture capital firms, or through public stock offerings.

Debt financing is predictable in terms of forecasting future expenses and it does not involve giving up any control in the project - lenders may impose restrictive covenants in the credit agreements that impact governance,⁸⁰ but generally do not receive governance rights or other rights to directly participate in the project.⁸¹ The downsides of debt include the potential difficulty in obtaining debt financing, often requiring the borrower to obtain a guarantee from a suitable guarantor to backstop the loan (depending on project-specific risks as well as the balance sheet of the borrower, among other factors which are outlined in further detail below),⁸² and the requirement for the borrower to repay the loan even if funds are spent and the project does not proceed.⁸³

Equity financing, by contrast does not entail an obligation to repay. While the invested funds may eventually be paid out in the form of dividends, there are no month-to-month interest charges or borrowing expenses. This allows for other sources of capital to be freed up to invest further into the project or company. The trade-off for the project owners in respect of equity financing is that a portion of control as well as future profits are given up to the investors.

(ii) IC Investment Financing Terms and Requirements

The above general parameters regarding debt and equity in project finance serve as the backdrop for ICs looking to participate in natural resource projects. The recent paradigm shift in energy transactions involving ICs and EIPPs entails both ICs participating by way of equity investments in the project, and looking to obtain financing to support their investment.

ICs, and specifically bands as defined under the *Indian Act*, have historically encountered difficulties obtaining financing for development and investments as a band's real and personal property cannot be used as collateral.⁸⁴ While the creation by the IC of a special purpose investment vehicle ("**SPV**") may alleviate some of these challenges,⁸⁵ obtaining financing will typically require ICs to navigate several financing terms and requirements with lenders. Although an exhaustive list of IC financing issues is beyond the scope of this paper, some commonly encountered terms and requirements for financing in relation to IC natural resource project investments are:

- credit risk issues and the requirement for potential ICs investors to obtain a guarantee or backstop support;⁸⁶
- the potential impact of provisions in the *Indian Act* which exempt certain First Nation property from charge or seizure;⁸⁷ and

⁸⁰ Robert J Rhee, *Essential Concepts of Business for Lawyers*, 2nd ed (New York: Wolters Kluwer, 2016) at 252.

⁸¹ Alejandro Cremades, "Debt vs Equity Financing: Pros and Cons for Entrepreneurs" (19 August 2018), online: *Forbes* <www.forbes.com/sites/alejandrocremades/2018/08/19/debt-vs-equity-financinpros-and-cons-for-entrepreneurs/?sh=67a56f2a6900>.

⁸² Christopher C Nicholls, *Corporate Finance and Canadian Law*, 2nd ed (Toronto: Thomson Reuters, 2013) at 66.

⁸³ Alejandro Cremades, "Debt vs Equity Financing: Pros and Cons for Entrepreneurs" (19 August 2018), online: *Forbes* <www.forbes.com/sites/alejandrocremades/2018/08/19/debt-vs-equity-financinpros-and-cons-for-entrepreneurs/?sh=67a56f2a6900>.

⁸⁴ Frankie Young, *Indigenous Economic Development and Sustainability: Maintaining the Integrity of Indigenous Culture in Corporate Governance*, 2021 17-2 McGill Journal of Sustainable Development Law 149, 2021.

⁸⁵ *Ibid.*

⁸⁶ IC special purpose vehicles that seek to obtain debt financing to support an investment but do not have significant existing equity or assets to support the loan are typically placed in a high category of credit risk, and as a result are required to have a guarantor or other backstop of support in order to obtain funding.

⁸⁷ Section 29 of the *Indian Act* provides specifically for an exemption stating that reserve lands are not subject to seizure under legal processes. Section 89 of the *Indian Act* places restrictions on whether property "situated on a reserve" can be charged or made subject to security interests which can be enforced in the event of default. In addition, section 90(1) of the *Indian Act* deems property "given to Indians or to a Band under a

- whether the concept of sovereign immunity presents any concern for lenders.⁸⁸

(iii) IC Investment Support and Funding Sources

Historically, credit risk issues in respect of ICs obtaining debt financing for equity investments and the unavailability of guarantors has resulted in many ICs being unable to proceed with investment opportunities. However, the following government-backed funding providers and loan guarantors outlined below are levelling the playing field in this regard. The backstop support programs in particular address the traditional credit risk barriers head on.

Source	Products Offered	Support Range (\$ million)	Project Coverage (%)
Alberta Indigenous Opportunities Fund (AIOC)	Loan guarantees and limited capacity funding (available only to applicants under the loan guarantee program).	20 - 250 ⁸⁹	Up to 100 ⁹⁰
First Nations Finance Authority (FNFA)	Loans to First Nations and Aboriginal Entities in Canada that are investing in community infrastructure and economic development.	Unlimited ⁹¹	N/A ⁹²
Canada Infrastructure Bank	Direct funding for community-based projects that provide a service and a direct benefit to an Indigenous community or communities. ⁹³	5 - 50 ⁹⁴	Up to 80 ⁹⁵

The Alberta Indigenous Opportunities Corporation's loan guarantee program enables Alberta-based Indigenous groups, or a consortium of Indigenous groups, to seek out third party debt financing.⁹⁶ Eligible projects include those in the energy (upstream, midstream and downstream oil and gas, renewable energy,

Treaty or agreement between a Band and her Majesty" to always be situated on a reserve. The provisions are connected with other sections of the *Indian Act* which provide for an exemption of First Nations and Bands from taxation. Whether such provisions of the *Indian Act* are applicable to the particular IC equity investment will be a case-by-case analysis and will depend on a variety of factors and considerations. The Supreme Court of Canada has discussed the purpose of these provisions and whether the application of such sections of the *Indian Act* may be the subject of a waiver by the IC, including in *Bastien Estate v Canada* [2011] 2 SCR 710, *McDiarmid Lumber v God's Lake First Nation*, [2006] 2 SCR 846 and *Tribal Wi-Chi-Way-Win Capital Corp v Stevenson*, 2009 MBCA 72.

⁸⁸ The concept of sovereign immunity has been summarized by the Supreme Court of Canada in *Kuwait Airways Corp v Iraq* [2010] 2 SCR 571 at para. 13 as "[a] fundamental principle of public international law in recognition of the autonomy and equality of states. At the very beginning, the effect of this privilege was to completely shield a foreign state from the jurisdiction of the courts of a host state." While the applicability of the concept of sovereign immunity to ICs in Canada in relation to the same being used as a defence or shield to resist legal proceedings is remote, the lack of any definitive case law in this area has in the experience of the authors resulted in the topic being raised in the context of IC financing negotiations and structuring.

⁸⁹ Calla, *supra* note 22 at 19.

⁹⁰ Calla, *supra* note 22 at 28.

⁹¹ There are no prescribed limits to the amount of loans that a First Nation can access from the FNFA. The amount of the loan is calculated using the revenues that a member can pledge to support the loans ("Frequently Asked Questions", online: *First Nations Finance Authority* <www.fnfa.ca/en/faq/#faqBlock-block_5e2765f4304cb>). Recent loans from the FNFA have been in the range of \$100-\$350 million. As of December 2, 2020, over \$1 billion had been issued in loans by the FNFA ("First Nations Finance Authority Reaches Major Milestone Surpassing \$1 billion in Loans to Indigenous Communities" (2 Dec 2020), online (pdf): *First Nations Finance Authority* <www.fnfa.ca/wp-content/uploads/2020/12/2020-12-02-FNFA_PressRelease_1B_MILESTONE_ENG-1.pdf>).

⁹² Calla, *supra* note 22 at 28.

⁹³ Canadian Infrastructure Bank, "Indigenous Infrastructure", online: *CIB BIC* <cib-bic.ca/en/partner-with-us/growth-plan/indigenous-infrastructure/>.

⁹⁴ "Applicant Guide: Indigenous Community Infrastructure Initiative" (May 2021) at 3, online (pdf): *Canadian Infrastructure Bank* <cib-bic.ca/wp-content/uploads/2021/05/CIB-ICII-Applicant-Guide.pdf>.

⁹⁵ *Ibid.*

⁹⁶ *Supra* note 21.

power and coal), mining or forestry sectors.⁹⁷ If the project involves a consortium of Indigenous groups, at least one Alberta-based Indigenous group must be included and their stake must constitute at least 25% of the total investment.⁹⁸ The AIOC's loan guarantee and capacity grant programs help bridge the gap that has historically prevented ICs from obtaining sufficient financing to gain equity participation in energy projects.⁹⁹

The FNMPC works to create pathways to economic participation for First Nations, while promoting environmental stewardship.¹⁰⁰ The FNMPC is advancing opportunities for First Nations to obtain ownership stakes in major projects by advocating for sovereign loan guarantees, establishing economic models and preparing handbooks and toolkits, among other activities.¹⁰¹ Recently, the FNMPC has been involved with major energy projects such as the Clarke Lake Geothermal Project, Coastal Gas Link First Nation Equity Project, and Netoo Hydropower Project at Kenney Dam.¹⁰² A project is potentially eligible for support by the FNMPC if there is potential for the project to facilitate environmental stewardship and meaningful economic participation of First Nations in the project, the project is economically feasible and the capital cost of the project and economic benefits to the participating First Nations exceeds \$100 million.¹⁰³

The National Indigenous Economic Development Board ("**NIEDB**"), consisting of First Nations, Inuit and Metis business and community leaders, advocates for and acts to improve economic development opportunities for Indigenous peoples. Part of this advocacy involves providing advice and guidance to the Federal Government on issues related to Indigenous economic opportunities.¹⁰⁴ The NIEDB's economic plan for 2020 to 2023 includes, among others, developing a national Indigenous economic strategy, exploring Indigenous land rights in relation to natural resource development projects, adapting Indigenous procurement strategies to improve access for Indigenous businesses, promoting Indigenous-non-Indigenous business partnerships, and reducing barriers for Indigenous businesses to access financing.¹⁰⁵

Aboriginal Financial Institutions ("**AFIs**") have also played a key role in driving economic advancement of Indigenous peoples and communities.¹⁰⁶ AFIs are autonomous, Indigenous controlled, community-based financial organizations that provide developmental loans and business financing to Indigenous entrepreneurs and businesses in Canada.¹⁰⁷ The AFI network provides approximately \$125 million annually in new loans.¹⁰⁸

ICs may also seek assistance from private equity firms, which have the ability to provide the long-term support necessary for more large-scale, complex projects.¹⁰⁹ In addition to funding, private equity firms may provide technical assistance and business consulting, which helps maximize economic and social benefits.¹¹⁰ Private equity firms may facilitate project funding through several different strategies in order to maximize return on investment, including through direct project investment, investment in venture

⁹⁷ *Supra* note 24, s 1.2.

⁹⁸ "Eligibility" (4 June 2020), online: AIOC <www.theaioc.com/program/eligibility/>.

⁹⁹ *Supra* note 21.

¹⁰⁰ Calla, *supra* note 22 at 4; First Nations Major Project Coalition, "About FNMPC", online: FNMPC <fnmpc.ca/about-fnmpc/>.

¹⁰¹ "About FNMPC", online: FNMPC <fnmpc.ca/about-fnmpc/>.

¹⁰² "Our Current Projects", online: FNMPC <fnmpc.ca/projects/>.

¹⁰³ *Supra* note 23 at 5.

¹⁰⁴ "National Indigenous Economic Development Board, Strategic Plan 2020-2023" (Mar 2020) at 5, online (pdf): *The National Indigenous Economic Development Board* <www.naedb-cndea.com/reports/EN%20-%20DRAFT%20STRATEGIC%20PLAN%202020-2023.pdf>.

¹⁰⁵ *Ibid.*

¹⁰⁶ "Indigenous Growth Fund" (14 Apr 2021), online: *National Aboriginal Capital Corporations Association* <nacca.ca/igf/>.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ Carla F. Fredericks & Kate R. Finn, "Harnessing Private Equity for Indigenous Peoples" (December 2020) at 13, online (pdf): *University of Colorado Boulder* <www.colorado.edu/program/fpw/sites/default/files/attached-files/12.20fpwoutcome_doc_finaldraft.pdf>.

¹¹⁰ Fredericks, *supra* note 109 at 13.

capital, or management buy-in or buy-out, among others.¹¹¹ This array of strategies allows flexibility to capitalize deals differently depending on factors such as the experience, resources and risk-tolerance of the prospective IC investors.¹¹²

Lastly, capital may be acquired from investment funds. One such example is the Indigenous Growth Fund ("IGF"), which operates under the management of the National Aboriginal Capital Corporations Association. The IGF is Canada's largest Indigenous social impact fund that will enable Indigenous entrepreneurs to start or expand their small to medium sized businesses.¹¹³ Beginning in 2021, the IGF will increase lending by \$75 million annually, providing loans to approximately 500 businesses.¹¹⁴

D. IC Investments – Key Legal/Commercial Terms and Common Transaction Issues

(i) Overview

The specific issues that will arise on a particular IC investment transaction will be driven by a myriad of factors including project-specific risks, tax and overall transaction structure drivers as summarized above, and the transaction sequencing approach (i.e., an immediate signing and closing vs. a longer auction or option process involving multiple potential IC and non-IC co-owners).

Notwithstanding the above and the difficulties of generalizing around a diverse array of possible IC investment transaction scenarios, this next section presents a non-exhaustive snapshot of IC investment transaction issues which, in the experience of the authors, have frequently emerged as material deal and completion/negotiation items.

(ii) Ultimate Ownership/Benefits to ICs

Whether the IC investment transaction involves one or more ICs investing on their own behalf or through an IC consortium or syndicate, it is a common transaction requirement of EIPP co-owners as well as other IC co-owners that any IC investment vehicle must ultimately be beneficially-owned by the applicable Nation or community. Such requirement may be driven by factors such as:

- government funding eligibility criteria;¹¹⁵
- project owner/proponent requirements; and/or
- the EIPP's goals or priorities.¹¹⁶

In corporate structures of certain ICs, it may be straightforward to ascertain whether the proposed IC investment vehicle has met such requirement, e.g., where the proposed IC investor is a direct and wholly-owned subsidiary of the Nation. However, for ICs with more complex corporate organizational structures (including where historical structuring has been undertaken by the IC due to tax and other considerations as set out in this paper), it may be a critical preliminary due diligence exercise for both the IC investor and other transaction counterparties to confirm that the proposed IC investor meets such ultimate ownership criteria.

¹¹¹ *Ibid* at 14.

¹¹² *Ibid* at 14.

¹¹³ *Supra* note 106.

¹¹⁴ *Ibid*.

¹¹⁵ *Supra* note 24, s 1.3.

¹¹⁶ See discussion in Section II above in respect of the increasing prevalence of ESG priorities in EIPP project structuring.

Stakeholders and EIPP's often require that the co-ownership/governance agreements feature some form of covenant that each owner maintain its ultimate IC ownership for a period of time following the closing of the transaction (which is typically driven by one or more of the above factors). Further discussion on these covenants is included below under the subheading "Exit Rights" in section (vii) below.

(iii) Acquisition Price/Valuation

A fundamental consideration for a potential IC investment to proceed will be determination of the acquisition price, which will typically first involve a valuation of the total IC equity participation tranche (as well as determination of the allocation as between different IC co-owners in a multiple incoming IC co-owner scenario).

While an exhaustive overview of approaches to valuation of natural resource projects is not featured in this paper, as a starting point, the following three approaches to business valuation may come into play for EIPPs and prospective IC owners in determining and evaluating the acquisition price.

- The “market” approach, which determines value based on identifying similar assets with an available market price and making appropriate adjustments.
- The “accounting” or “replacement” approach, which determines value by estimating what the asset cost to create or what it would cost to re-create.
- The “fundamental” or “cash-flow” approach, which is based on calculating the present value of the cash flows that the asset is forecast to produce in the future.

A unique feature of IC equity transactions is that an EIPP may establish a baseline for the acquisition price as part of a competitive sales process (which may be launched prior to or in parallel with the IC investor process), and the prospective IC investors may agree in advance or have an option to pay a price based on a predetermined formula or multiple of such baseline price. The IC investor price may be lower or higher than the baseline price depending on a variety factors including: (a) the project-specific drivers of the IC investment transaction (i.e., whether sales process is targeted at specific IC(s) with an offer to buy in on par/at the same valuation as the EIPP versus a more open-ended offer to multiple ICs where the offer is to buy in at a lower price to incentivize IC owner investment); and (b) the timing of the IC investment relative to the stage of project development (i.e., whether it is to occur pre-commercial operation date when the project faces risks versus post-commercial operation date when the project is largely de-risked).

(iv) Distributions/Dividends

Also fundamental to any investment decision will be the evaluation of the distributions or dividends (i.e., the "income stream") that the project is expected to generate for the owners.¹¹⁷ This review is typically one of the most significant investor-side due diligence workstreams, in terms of both the amount time and resources allocated to such review and the overall impact that the outcome of such review will have on the decision to proceed or pass on the opportunity.

¹¹⁷ See Sections IV(B)(ii) and IV(B)(iii) regarding the benefits of a limited partnership structure for tax purposes.

Broadly speaking, the financial due diligence review regarding the income stream will consider factors such as:

- the overall status and timeline of the project, including prerequisites for the commercial operation or in-service date to occur, and when first distribution is anticipated to be made after such date;
- the frequency of distributions (typically monthly, quarterly or annual);
- the "waterfall", meaning the flow of revenue from the project through the legal entities in the overall ownership structure, which will consider factors such as project financing arrangements (e.g., debt service requirements, reserves, restricted payment conditions and equity lock-up accounts), and regulatory requirements (e.g., whether cash inflows and outflows are subject to restrictions or oversight, depending on the nature of the project);
- the structure of the distribution payment itself, which, while variable based on the type of natural resource projects in question, is generally presented as a base payment out of net revenues received from the project (which covers the return of and return on debt and equity) and which may be subject to various adjustments or deductions. For instance:
 - In respect of oil and gas pipeline or midstream assets, the underlying revenue stream may be subject to inherent variation pursuant to the terms of the underlying transportation, terminalling, or other tolling/services agreements with customers in relation (e.g., due to interruptions or other events which trigger reductions in fixed payments), and the risk of such variations in tolls would typically be passed on to all incoming equity investors as potential variations in the distributions.
 - In respect of larger regulated electricity transmission infrastructure projects, the underlying revenue stream would typically be subject to variations when it comes to operations and maintenance expenses, insurance payments, and potentially holdbacks for different parts of the overall project lifecycle.

Once the financial due diligence review is completed and an understanding of the key project risks and benefits are ascertained, potential IC equity investors and EIPPs may explore a variety of approaches to suit the particular potential investment, including consideration as to reducing or removing project risks (or variabilities in distributions) that may be barriers for IC investors obtaining financing.¹¹⁸

(v) Governance/Management and Control

Another critical IC investment transaction issue is in respect of governance and control rights. A key point of discussion in negotiations is the rights the IC owner(s) will be entitled to, specifically in relation to:

- Rights to appoint directors and/or officers to corporate boards, at both the project SPV and IC consortium levels.
- Rights to appoint representatives to management and other operating committees which, depending on the overall project organizational structure, may be delegated certain key management functions.

¹¹⁸ For commentary on project risks and access to capital, see Calla, *supra* note 22.

- Rights to approve matters of material importance to the business or the project.

When it comes to corporate or committee positions, an individual IC owner's ownership percentage, as well as the overall allocation of ownership interests in the project, will be a determining factor. As we have discussed in this paper, part of the trend towards meaningful IC ownership stakes in natural resource projects is the IC owner(s) having a seat at the table, which in this context means literally having representation on boards and committees. This is in contrast to having no formal governance representation and instead having rights to observe or receive reporting/information only, which is a hallmark of (and more market for) non-meaningful/marginal or passive ownership positions.

The actual number of representatives that an IC owner (or the IC consortium) is entitled to appoint in this regard will be specific to the project. In the authors' experience, there is an increasing willingness of transacting parties to come up with creative solutions to ensure that owners with a meaningful stake in a project receive appropriate formal governance representation, such as through more frequent rotating of appointed members or the ability of sub-groups of owners to pool their interests to reach a mandated threshold to be entitled to appointment rights.

The governance matters that IC owners will have approval rights over will also depend greatly on the nature of the meaningful ownership stake – e.g., a 20% position will typically entail significantly different approval rights than a 49% position. However, three common areas of approval rights for IC equity owners relate to: (a) any changes relating to the calculation or frequency of distributions, (b) contributions or cash calls, and (c) fundamental changes to the business or corporate/partnership actions such as dissolution.

We have also seen instances where the overall project governance structure has recognized and incorporated certain traditional IC governance model elements, such as incorporating ESG criteria into matters that the IC owner(s) have approval rights over, and, in regards to the protocols and structure of governance committees, using chief and council as special advisors to the investment entity, particularly when elements of the project impact the IC's traditional territory.¹¹⁹

(vi) Additional Financial Contributions

Apart from the payment of the acquisition price or equity investment that will be paid at closing, the extent to which co-owners are required to make additional or ongoing financial/capital contributions is another key deal point to be determined in connection with IC equity ownership transaction structuring.¹²⁰

There are a wide variety of approaches to financial contributions (which may be structured as equity or debt) for energy project co-ownership generally, and the same follows for IC equity ownership transaction. At a high level, some approaches that may be taken in this regard include:

- confirming at the outset to the incoming IC investor(s) that no additional contribution will be required, either with respect to specific aspects or risks of the project (e.g., with respect to construction cost overruns if the investment occurs prior to the commercial operation date ("COD")) or as a blanket cap going forward;

¹¹⁹ See e.g. "The Role of Indigenous People in Major Project Development: Paths for Indigenous Participation in Electricity Infrastructure" (10 July 2019) at 12, online (pdf): *FNMP* <static1.squarespace.com/static/5849b10dbe659445e02e6e55/t/5d279f23bfaceb4000114c6ff/1562877756904/MPC+--+Final+v.11.pdf>.

¹²⁰ Such "contributions" to a project or joint venture can take many forms, such as cash/financial, assets, or ongoing commitments such as the provision of personnel or a covenants. The focus of this section is on cash/financial commitments.

- deferring or postponing any such additional contributions from IC investor(s) to a defined date in the future (e.g., COD or x years after COD); or
- a more open ended approach whereby the IC investor(s) and any other co-owners will be responsible for a pro rata share of capital calls as determined to be required from time to time in accordance with the project governance model.

When IC investor(s) and other co-owners are required to provide future contributions, the parties will need to establish terms around such contributions including: (a) the basis for assessing and determining the capital available and required for the project, (b) procedural matters regarding how such capital calls are to be made (including timing for funding), and (c) consequences of an owner failing to pay or paying less than its pro rata amount, which would typically result in, among other things, the non-funding owner's interests being subject to dilution.

In certain cases, the co-owners may build in either optional or mandatory mechanisms around capital calls to allow (or require) the non-funding partner to obtain a carry or temporary loan from the funding partner(s). Such arrangements can take a wide variety of forms but may include features such as any loaned capital amounts being repaid out of the non-funding owner's distributions (until fully funded) and the non-funding owner being entitled to a grace period within which to repay any capital call shortfall before any dilutive or other measures apply.

Ultimately, the structuring of co-owners' obligations for additional or ongoing capital contributions will depend on several project-specific factors, including the type of natural resource project, the stage of development at which investment occurs, whether third party financing has been obtained and the overall ownership allocations. For example, if there is a small number of owners each with large ownership interest stakes, the starting point would typically be that each owner would be required to fund capital calls. In contrast, when an EIPP holds a majority and a large number of IC owners have invested through an IC consortium, the IC owners may argue for a cap or limitation on any future capital commitments to limit any such exposure.

(vii) Exit Rights

The circumstances in which a co-owner can exit or sell out of a joint venture will typically be carefully negotiated, as the exercise of such rights can have fundamental implications for the project and remaining co-owners.

One of the simplest approaches to exit rights is a requirement that any owner looking to sell its interest must first obtain the approval of other owners. Layered on to this type of blanket restrictive approach are a multiplicity of other exit rights that are commonplace in joint venture agreements, which may include some or all of the following: rights of first refusal ("**ROFR**"), rights of first offer ("**ROFO**"), tag/piggyback rights, drag rights and put and/or call rights. A common requirement is that even where a sale by the IC is permitted, EIPPs (and lenders providing backstop or financing to the IC) will require the buyer of the IC's interest to be another IC (or a consortium of ICs).

We would highlight the following as emerging exit right trends in IC ownership transactions:

- Lock-up periods: In many cases having certainty as to IC partners is a critical factor for EIPPs. As such, EIPPs may propose that for a specific "lock-up" period after the closing of the IC investment, the IC co-owners may be required to hold their interests in the project for a period of time. Key facets of these lock-up terms to be negotiated typically include the duration and exceptions/carve-

outs (which may include limited rights to sell out to other IC co-owners in the same project). Most commonly, EIPPs request that there are no ownership changes until after COD.

- **ROFO/ROFR:** Either from the outset and/or after the expiry of a lock-up period, the EIPP may propose having a ROFO or ROFR, primarily to ensure there is a baseline amount of control over the entities with whom they are partnering with over the longer term of the project. The terms of such a ROFO/ROFR will depend on the underlying basis for the co-ownership transaction as well as the overall ownership allocation, as such restrictive rights will inherently adversely impact the ability of IC co-owners to market and obtain full value for their interest in the project.
- **Minority Co-Owner Protections:** In cases where an individual IC co-owner has a minority position, either in its own right or as part of a larger IC consortium, such IC co-owner may look to negotiate tag and/or put rights. In the authors' experience, so far the use of drag and call rights in IC equity ownership transactions has been limited, in part due to underlying principles of such transactions as discussed in Section II above.
- **Regulatory/Financing Requirements:** Other critical factors to consider when evaluating exit rights are the potential impacts that changes in ownership may have in terms of triggering approvals from regulators and/or any third-party lenders, which will be a function of the type of project (and regulator(s) involved in administration and/or operation of the subject assets) and the applicable financing arrangements (and circumstances where lender/agent consents are required).

(viii) Deadlock/Dispute Resolution and Termination

"Deadlock" typically refers to a scenario where the co-owners are at an impasse in respect of a material business issue that cannot proceed without the approval of all owners (or a specific "special" percentage of owners, as outlined above in Section (v)).

A common deadlock resolution mechanism is to refer the matter to arbitration or other form of expert determination in the event that management/senior leadership of the owners is unable to reach consensus after a specified period of time.

Another and more drastic deadlock resolution option is to trigger one or more exit rights, such as a right for an owner to initiate put or call processes. Since these mechanics could result in the termination of the co-ownership arrangements, they are not commonly used for deadlock resolution in co-ownership scenarios involving a larger number of owners. While put/call triggers have been featured in some 50/50 energy project joint ventures historically, they have not been predominant in IC equity ownership transactions to date. The principles of mediation and arbitration have emerged as being more consistent with the expectations of IC owners and EIPPs alike, and as such, are more likely to be featured in IC equity ownership governance agreements than exit mechanisms when it comes to deadlock resolution.

(ix) Capacity Building

Consistent with the overarching goals of engagement of community members and long-term economic prosperity as discussed in Section II above, another key deal point in IC equity ownership transactions relates to the express inclusion of capacity building in the acquisition and/or governance agreements.

"Capacity building" is a broad term that may refer to some or all of the following activities depending on the project and overall ownership allocation:

- hands-on construction, operations and maintenance training and employment/contracting opportunities;
- project administration/day-to-day management; and
- board, governance and strategic management-level functions.

With respect to project-level capacity building, the IC co-owner(s) may look to obtain covenants regarding the facilitation by the EIPP or the project for opportunities to train and develop members of the IC(s) in relation to the business of the project, including negotiating similar requirements with major suppliers, contractors, customers and other third parties involved in the project.

As indicated above in Section (v) above, board and formal management positions will typically require a minimum ownership percentage being held by a co-owner, but we would note that such appointments for IC co-owners is increasingly being recognized as a critical element of capacity building. IC co-owners having participation at the board level, and the commensurate role in project governance that goes along with such positions, has, in the author's experience, been viewed by involved IC investors and EIPP(s) as a critical element of long term success of the project and the co-owners' investments.

While "capacity building" has historically been used as a label to describe goals and priorities of ICs, EIPPs have also expressed interest in building capacity within their own organizations to interface with ICs (both IC partners and more generally). This may include exploring means of integrating traditional IC governance models into board/management committee meeting protocols, and building organizational awareness of IC priorities and cultural traditions.

(x) IC/Member Support Covenants

Obtaining the required governmental authorizations and regulatory approvals is a fundamental prerequisite for all natural resource proponents. The duty to consult and the consideration of potential impacts of proposed project on ICs remains a complex, multifaceted and evolving issue for all stakeholders.

When it comes to negotiating IC equity ownership transactions, there are inherent limitations in what EIPPs can negotiate with prospective IC co-owners when it comes to covenants or agreements aimed at providing regulatory certainty for the proposed project. Specifically, an IC co-owner cannot bind its members or covenant to ensure that no member will objection to the project. It is, however, possible for EIPPs and IC co-owners to craft project-specific covenants around general support and cooperation, which may extend to joint public announcements and formulation of joint strategies in relation to interactions with governmental authorities. That said, it is important to highlight that these covenants or agreements contrast with broad, unequivocal non-opposition covenants, which in most formulations would represent an abrogation of treaty rights or an unenforceable attempt to contract around the duty to consult.

(xi) Non-Competition

Non-compete covenants are fairly common features in a wide variety of natural resource project co-ownership transactions. A non-compete clause is typically a restrictive covenant that sets out restrictions on one or more of the co-owners with respect to their participation in projects that are substantially similar. These clauses are often based on the principle that for a co-owner to engage in a competing project would result in economic harm to the current project and possible unfair advantages or specific other types of

harm (such as the loss of goodwill or loss of a competitive advantage) being incurred by the other co-owners. When crafting non-compete terms, specific requirements or limitations may be imposed with regard to geographic scope, product or service scope, customers, use of technology or intellectual property, or services.¹²¹

In the authors' experience, the inclusion of non-compete covenants in IC equity ownership transactions is relatively uncommon. Particularly where multiple ICs invest through an IC consortium or syndicate, the total indirect interests of each of the IC co-owners in the project would typically not warrant the IC co-owners being subject to non-compete restrictions. The argument in this scenario from the IC perspective would be that a relatively passive ownership interest (and an entitlement to a revenue stream) should not tie-up the IC from investing or engaging in similar projects, as it would be difficult to rationalize how the co-owned project would face economic or other types harm by the IC co-owners participating in similar projects.

Similarly, the EIPP will be reluctant to be constrained by non-compete terms, and before agreeing to any such limitations would need to consider factors such as: (a) whether the EIPP has existing business lines adjacent to the business of the project, (b) the EIPP's long-term strategy and the expectations of the IC co-owners' with respect to EIPP remaining as a partner in the project (subject to considerations regarding exit rights as discussed above), and (c) certainty (or lack thereof) within the project SPV's product market.

However, while non-compete covenants may be more difficult to rationalize for the multiple co-owner scenarios as outlined above, they may be comparatively more appropriate in co-ownership scenarios involving an EIPP and one IC co-owner (or a small number of IC co-owners) holding a large ownership interest. The rationale for this the same as noted above and as would be applicable for any long term project joint venture involving significant capital and other commitments. Particularly, as large scale IC equity investment transactions become more frequent and IC owners' experience and energy project portfolios grow, it stands to reason that in many instances both ICs and EIPPs may consider non-compete provisions in a manner similar to how they would if the proposed transaction were to occur between multinational corporations or other investment/private equity funds (in which case non-compete provisions may be viewed as more readily applicable or appropriate by all parties).

V. CONCLUSION

The evolution towards IC equity ownership that the natural resource sector has experienced over the past few years has operated to bridge the distance between mitigation, a key component of the IBA model, and more comprehensive alignment between ICs and EIPPs in the form of meaningful IC ownership and sharing of project revenue streams. This transition to equity ownership has been embraced by many ICs as a model through which ICs can enhance the long term prosperity of their communities while at the same time exerting control and influence over the fundamental commercial underpinnings of such developments, and a means for IC owners to have a seat at the table when it comes to project development matters such as stewardship and sustainability and preservation of Indigenous traditions and culture. Similarly, EIPPs recognize that alignment through equity partnership transactions with ICs not only serves to mitigate investment uncertainty, but also in many instances reinforces long held corporate values and underscores the organization's commitment to ESG performance. As barriers to access to capital are surmounted and the market continues to assert that the recognition and inclusion of Indigenous perspectives is an essential measure of business performance, we would anticipate that Indigenous equity ownership transactions in the energy sector will continue to be prevalent, and that the momentum of this trend will only intensify.

¹²¹ James Bamford, Kira Medish & Tracy Branding Pyle, "Designing More Durable JV Agreements" (8 September 2020), online (blog): *Harvard Law School Forum on Corporate Governance* <corpgov.law.harvard.edu/2020/09/08/designing-more-durable-jv-agreements> provides an in-depth survey of non-competition provisions in joint venture agreements>.

APPENDIX "A"

Transaction Overview

#	Project Name	Industry	Parties		Project Description
			EIPP Ownership	Indigenous Community Ownership	
Canada					
1	East Tank Farm Development (AB)	O&G	Suncor	Mikisew Cree First Nation Fort McKay First Nations	The facility will consist of bitumen storage, blending and cooling facilities and connectivity to third party pipelines.
3	Alberta PowerLine (AB)	Power	Consortium including: Greystone Managed Investments d/b/a TD Greystone Asset Management, as manager for and on behalf of the Greystone Infrastructure Fund (Global Master) L.P., and IST3 Investment Foundation on behalf of IST3 Infrastruktur Global	Athabasca Chipewyan First Nation; Bigstone Cree Nation; Gunn Métis Local 55; Mikisew Cree First Nation; Paul First Nation; Sawridge First Nation; and Sucker Creek First Nation.	Transaction involved the sale by ATCO and Quanta of 100% of the ownership of Alberta PowerLine and Fort McMurray West 500-kV Transmission Project. IC owners acquired 40% in the aggregate.
4	Wataynikaneyap Transmission Project (ON)	Power	FortisOntario Inc.	Wataynikaneyap Power-owned by 22 First Nation communities	The Project will build approximately 1,800 kilometres of transmission lines to connect 17 remote First Nations communities to the Ontario power grid. The Wataynikaneyap Power LP, FortisOntario Inc. and RES Canada partnership will develop and operate the transmission facilities.

#	Project Name	Industry	Parties		Project Description
			EIPP Ownership	Indigenous Community Ownership	
5	Cascade Power Project (AB)	Power	Kineticor Resource Corp. along with a range of backers (Macquarie Capital, OPTrust, Axium Infrastructure and DIF Capital Partners)	Alexis Nakota Sioux Nation; Enoch Cree Nation; Kehewin Cree Nation; O'Chiese First Nation; Paul First Nation; and Whitefish Lake First Nation	The project involves the construction of a 900-MW combined cycle power generation facility that uses industrial turbines fueled by natural gas. It is anticipated that operations will commence in 2023. This is the first AIOC-backed project.
6	NextBridge East-West Tie Line Transmission Project (ON)	Power	NextBridge Infrastructure LP, a partnership between affiliates of Enbridge, NextEra Energy Canada and OMERS Infrastructure	Biigtigong Nishnaabeg, Fort William First Nation, Michipicoten First Nation, Pays Plat First Nation, Pic Mobert First Nation and Red Rock Indian Band	The project consists of an approximately 450 kilometer, double-circuit, 230-kilovolt transmission line from the Wawa Transformer Station (TS) to the Lakehead TS in the Municipality of Shuniah, near Thunder Bay, Ontario.
7	Nulki Hills Wind Project (BC)	Wind	Innergex Renewable Energy Inc.	Saik'uz First Nation	Development of a 210-MW wind farm consisting of ~70 turbines.
8	Southern Vancouver Island Wind Farm (BC)	Wind	Timberwest and EDP Renewables	T'Sou-ke Nation	300-MW wind farm on the south end of Vancouver Island.
9	Fort Chipewyan Solar Project (AB)	Solar	ATCO Energy	Mikisew Cree First Nation; Athabasca Chipewyan First Nation;	The project consists of 5,760 solar panels, making up Canada's largest off-grid solar farm. A battery storage system will store 1.5-MWh of power.

#	Project Name	Industry	Parties		Project Description
			EIPP Ownership	Indigenous Community Ownership	
				Fort Chipewyan Métis Local 125.	The Government of Alberta provided \$3.3 million and the federal government provided \$4.5 million in funding to the support project.
10	Keeyask Generation Project (MN)	Hydro	Manitoba Hydro	Keeyask Cree Nations made up of Tataskweyak Cree Nation (TCN); War Lake First Nation (WLFN); Fox Lake Cree Nation (FLCN); York Factory First Nation (YFFN) TCN & WALFN = CNP	The project involves a 695-MW hydroelectric generating station to be located at Gull Rapids. The renewable hydroelectric energy produced by the project will be sold to Manitoba Hydro and integrated into its electric system.
11	Adelaide wind power project (ON)	Wind	Suncor Energy	Aamijiwnaang First Nation	40-MW wind power project consisting of eighteen 2.3-MW turbines.
12	Henvey Inlet Wind Centre (ON)	Wind	Pattern Energy Group LP	Henvey Inlet First Nation	300-MW wind farm comprised of 87 turbines.
13	Grand Renewable Energy Park (ON)	Wind & Solar	Samsung C&T; Conner Clark & Lunn Infrastructure	Six Nations of the Grand River (Mohawk, Cayuga, Onondaga, Oneida, Seneca and Tuscarora)	149-MW wind project and 100-MW solar project. The arrangement includes equity interest, a community capacity funding agreement, and construction and maintenance jobs.

#	Project Name	Industry	Parties		Project Description
			EIPP Ownership	Indigenous Community Ownership	
14	Mesgi'g Ugiu's'n Wind Farm (QB)	Wind	Innergex	Mi'gmaq communities of Gesgapegiag, Gespeg and Listuguj	150-MW wind farm consisting of 47 wind turbines.
15	Minashtuk Hydro Project (QB)	Hydro	Hydro Quebec	Pekuakamiulnuatsh Takuhikan	9.9-MW hydro project.
16	Wuskwatim Hydro Station (MN)	Hydro	Manitoba Hydro	Nisichawayasihk Cree Nation (NCN)	200-MW hydro station located on the Burntwood River. The primary works include a powerhouse with three fixed-blade turbine units, a spillway with three bays, and a main dam and dyke to contain the immediate forebay.
17	Oldman Hydro Project (AB)	Hydro	ATCO Power	Piikani Nation	The 32-MW Oldman River Hydro Electric Power Plant consists of two 16-MW turbines.
18	Bow Lake wind project (ON)	Wind	Blue Earth Renewables Inc.	Batchewana First Nation	60-MW wind farm consisting of 36 turbines.
19	Kokish River Hydroelectric Project (BC)	Hydro	Brookfield Renewable Energy Partners	'Namgis First Nation	45-megawatt run-of-river hydroelectric facility. The First Nation's role is focused on decision-making related to environmental protection. They have one representative on the board of directors.

#	Project Name	Industry	Parties		Project Description
			EIPP Ownership	Indigenous Community Ownership	
					The project was made possible by a P3 Canada Fund preferential loan.
20	Lower Mattagami River Project (ON)	Hydro	Ontario Power Generation (OPG)	Moose Cree First Nation	The project involved redeveloping four of OPG's existing hydro stations on the Mattagami River by adding six generating units, resulting in 438-MW of new hydro capacity.
21	China Creek River Project (BC)	Hydro	Synex Energy Resources Ltd.; City of Port Alberni	Hupučasath First Nation; Ucluelet First Nation	6.5-MW run-of-river hydroelectric project.
22	Barr Creek (BC)	Hydro	Synex Energy Resources Ltd.	Ehattesht First Nation Ehattesht First Nation will own a majority share after 35 years.	The plant is a 4.4-MW run-of-river generating station. This project benefited from a \$500,000 equity investment from B.C.'s First Nations Clean Energy Business Fund (FNCEBF).
23	Northwest British Columbia Hydro Electric Facilities. (Forrest Kerr, McLymont Creek and Volcano Creek) (BC)	Hydro	Axiom Infrastructure Canada and Manulife Financial Corporation; . AltaGas Canadian Energy Holdings Limited Partnership .	Tahltan Nation	The facilities comprise of the 195-MW Forrest Kerr, 66-MW McLymont Creek and 16-MW Volcano Creek run-of-the-river projects with a combined power output of 287-MW.
24	Kwoiek Creek Resources (BC)	Hydro	Innergex Renewable Energy Inc.	Kanaka Bar Indian Band (KBIB)	50-MW run-of-river hydro project.

#	Project Name	Industry	Parties		Project Description
			EIPP Ownership	Indigenous Community Ownership	
25	Métis Settlements of Peavine, Paddle Prairie and East Prairie (AB)	Biomass	Active Energy Group PLC	Metis Nations; Westbank First Nation	Biomass electricity production from timber waste using Waste to Energy Canada, Inc.'s Continuous Gasifier System.
26	Sale of Clearwater Seafoods (NS)	Food	Premium Brands	Mi'kmaw First Nations	Purchase of Clearwater Seafoods, North America's largest producer of shellfish. Clearwater holds Canadian harvest licences for a variety of species and has harvesting operations in the United Kingdom and South America along with a worldwide sales operation.
27	Ridley Terminals (BC)	Transport	The AMCI Group; Riverstone Holdings LLC	Lax Kw'alaams Band; and Metlakatla First Nation	The new ownership group runs the marine bulk handling terminal, which provides railcar unloading, product storage and vessel loading services.
28	*Trans Mountain Pipeline Expansion	O&G	Trans Mountain Corporation	<p>A variety of potential ownership structures involving IC equity positions have been proposed by different IC aggregator groups.</p> <p>Potentially involved parties with respect to IC equity interests include: Project Reconciliation, the Western Indigenous</p>	<p>Pipeline system transporting oil products to the West Coast of North America. The pipeline is expected to deliver approximately 300,000 barrels of petroleum products each day through 1,150 kilometres of pipeline in Alberta and British Columbia, and 111 kilometres of pipeline in Washington state.</p> <p>Different models of economic participation are being considered, such as equity-based or revenue-sharing options.</p>

#	Project Name	Industry	Parties		Project Description
			EIPP Ownership	Indigenous Community Ownership	
				Pipeline Group,; the Whispering Pines/Clinton band in BC; and the Alberta-based Iron Coalition.	
29	*Keystone XL Pipeline Project	O&G	TC Energy	Nekaneet First Nation; Ermineskin Cree Nation; Montana First Nation; Louis Bull Tribe; Saddle Lake Cree Nation	<p>KXL was designed to ship 830,000 barrels of oil per day from Alberta's oil sands to Steele City, Nebraska, where it would connect with TC Energy's existing pipeline network and ultimately move oil to U.S. Gulf Coast refineries — many of which are configured to refine heavy oil such as Western Canada Select.</p> <p>TC Energy recently announced the termination of the expansion project</p>
30	*Alberta to Alaska	Transport	The Alaska – Alberta Railway Development Corporation (A2A Rail)	The company has reached out to Indigenous Communities to offer the opportunity for equity holding in A2A Rail. The project Chairman and Founder, Sean McCoshen, is committed to making 49% of the project available to Indigenous Communities.	A2A Rail is a large-scale corridor development project, centered on the construction of a railway between northern Alberta and the international ports in southern Alaska.
31	*Coastal GasLink Pipeline	O&G	TC Energy Alberta Investment Management Corporation	TC Energy is working with 20 First Nations that have executed agreements with Coastal GasLink to provide them with an	The 670 km Coastal GasLink pipeline project will deliver natural gas from the Dawson Creek area to a facility near Kitimat. The pipeline will be built to move 2.1 billion

#	Project Name	Industry	Parties		Project Description
			EIPP Ownership	Indigenous Community Ownership	
				opportunity to invest in the project.	cubic feet per day of natural gas with the potential for delivery of up to 5 bcf/d.
32	*Eagle Spirit Energy Corridor	O&G	Unknown	<p>Backed by 35 First Nations and Eagle Spirit Energy Holdings Ltd.</p> <p>Under this proposal, First Nations and other Indigenous groups will have control and be majority equity holders in the project.</p>	The project envisions an energy corridor of oil and gas pipelines running East to West from northern Alberta to the Prince Rupert area on the northern coast of British Columbia. The project would ultimately consist of two liquefied natural gas (LNG) pipelines and two upgraded bitumen oil pipelines with a capacity of two million barrels a day.
33	*Mackenzie Valley Pipeline	O&G	Imperial Oil Resources Limited; ConocoPhillips Canada; ExxonMobil Canada; Shell Canada Limited	Inuvialuit Regional Corporation; the Gwich'in Tribal Council and the Sahtu Pipeline Trust	<p>Cancelled December 2017: The Mackenzie Valley Pipeline was a proposed project to transport natural gas from the Beaufort Sea through Canada's Northwest Territories to tie into gas pipelines in northern Alberta.</p> <p>Some in the region remain hopeful the six trillion cubic feet of onshore natural gas resources in the Mackenzie Delta will someday benefit the region's economy. The project certificate remains in effect until 2022.</p>