

**Business Opportunities from
Impact Benefit Agreements**
CAMA Annual Conference:
Seeking Consent, Securing Resources

Presented By:
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Winnipeg, Manitoba
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Outline of Presentation

1. Business Opportunities within IBA's
2. Structuring Aboriginal Businesses and Joint Ventures

Part I: Introduction

Reasons for Aboriginal Business Opportunities

- Aboriginal Procurement and Preference Policies
 - ⇒ Government Contracting Preferences
 - ⇒ Mandated by Agreement (in IBA's)
 - ⇒ Corporate Policies
- Reduces Costs with Local Business and Labour
- Builds Local Capacity for Future Development and Business

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Part I: Introduction

Stated Opposition with Aboriginal Business

- “No track record”
- “Insufficient capacity” (financial, management, safety, etc.)
- “Increased project costs and reduced competitiveness”

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Part I: Introduction

- “Aboriginal Partnerships shells: may only appear as Aboriginal Businesses”
- “Jobs should be enough”
- “Increased administration/time costs managing Aboriginal Business preferences”
- “Highly regulated field”
- “Highly specialized work”

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Part I: Introduction

Components of a Good IBA (Context)

- Training And Employment Opportunities
- **Contracting Opportunities/Preferences (focus of this presentation)**
- Royalty, Revenue Sharing, Equity Options
- Environmental Protection and Monitoring
- Project Consent/Certainty
- Non-derogation Of Aboriginal Rights And Title
- Cultural Protection/Enhancement
- Dispute Resolution

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Part II: Creating Business Opportunities

- The goal of this portion of an IBA is to create contracting **procedures** that will maximize and promote First Nation business development.
- This is done by creating advantages for Businesses that are owned or controlled by the First Nation or its members without impacting project costs, timing, or quality of services and procurement provided
- In addition, a point system can be used in an open competitive bid process for commitments to subcontracting and employment.

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Part II: Creating Business Opportunities

- Typically a First Nation will establish a list of businesses in a "Registry", which will list businesses that qualify as "First Nation Businesses".
- Usually, this will mean that the business must be owned or controlled by a First Nation or a Member relating to "Ownership" and "Control" are important definitions.
- "First Nation Businesses" can include a joint venture or partnership.

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Part II: Creating Business Opportunities

- The Proponent (Project Owner) should have the right to make all the final business decisions on contracts for the construction and operation of the Project (Price, Quality and Timing).
- However, the Proponent should also follow the contracting process which give advantages to First Nation Businesses, as set out in the IBA.
- Goal: use project costs expected to be spent in any event.

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Part III: Why IBAs Make Business Sense

Construction (Example):

- Value of Project Construction Budget - \$800 million (2 years)
- FN Businesses awarded 60% of contracts - \$480 million
- 10 % profit shared equally in a JV - \$48 million
- First Nation Profit - \$24 million (assuming 50/50 JV's)

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Part III: Why IBAs Make Business Sense

Significant Economic Operations Benefit (example):

- Value of external contracts- \$100 million/yr
- First Nation Business Opportunities – 90%
- First Nation business through 50/50 JV's - \$90 Million/yr
- 10 % profit - \$9 million/yr
- First Nation profit - \$4.5 million/yr

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Part III: Why IBAs Make Business Sense

Other Benefits:

- Management capacity building
- Employment
- Sub-contracting to small businesses
- Training
- New businesses and business growth (spin offs) outside of initial project
- Local business may cost less
- Profits can create equity for capital or community investment

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Part IV: Maximizing Business Preferences

Question:

What is the preferred mechanism/process?

Answer:

Open Book Negotiations!

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Part V: Open Book Negotiations

- A qualified First Nation Business ("FNB") has the first opportunity to negotiate contracts with Proponent in open book negotiations (no competitive bid process) in a confidential setting.
- If FNB and Owner cannot conclude a contract then contract is sent to competitive bid process, but last best price of FNB is "hung up" and competes with other bids.

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Part V: Open Book Negotiations

Pre-Qualification

- An FNB must demonstrate that it can meet the technical, quality, health, safety, environmental and scheduling requirements set out by the Proponent while not increasing the Proponent's costs if it followed a regular bid process
- An FNB that pre-qualifies is eligible to proceed to Open Book Negotiations with the Proponent
- Qualification of a non-Aboriginal Partner in a JV counts towards qualification of whole FNB (This limits excuses about current capacity)

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Part V: Open Book Negotiations

Typical Issues at the Negotiation Table:

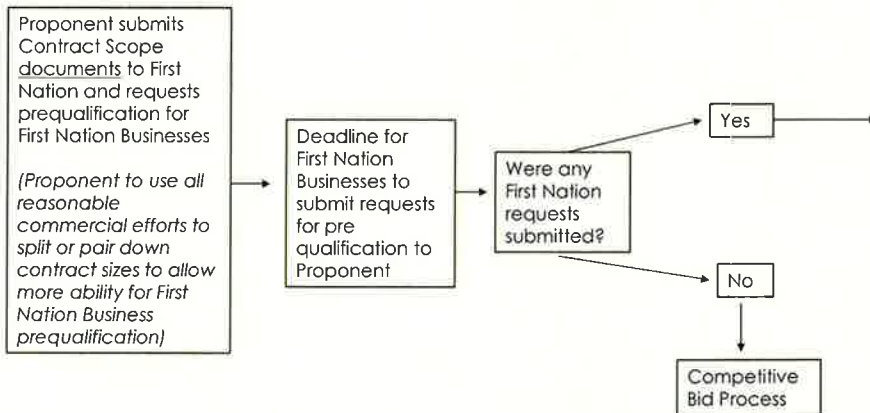
- Definition of "First Nation Business"
- Timing of Process
- Hidden costs potential?
- Open Book Contract List/Excluded Contracts
- Division between First Nation and Member Business Opportunities

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Part VI: Contracting Process

Contracting Procedure

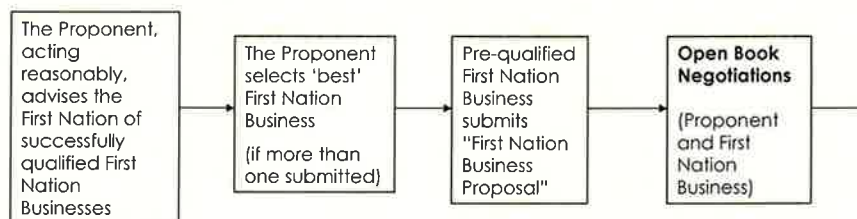


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Part VI: Contracting Process

Contracting Procedure

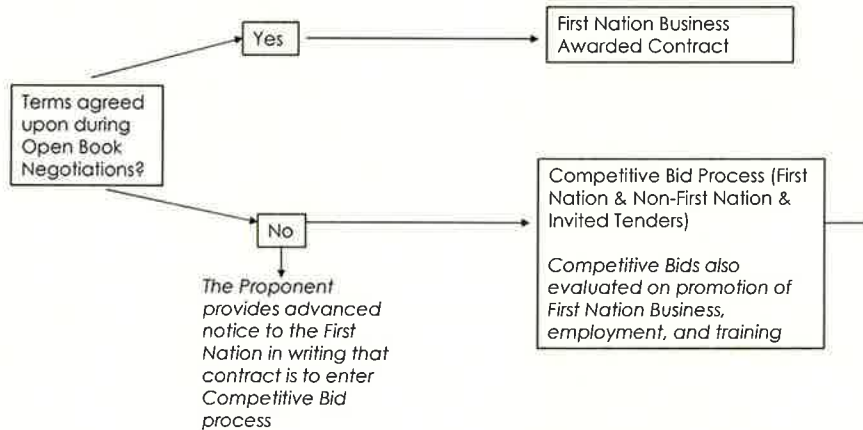


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Part VI: Contracting Process

Contracting Procedure

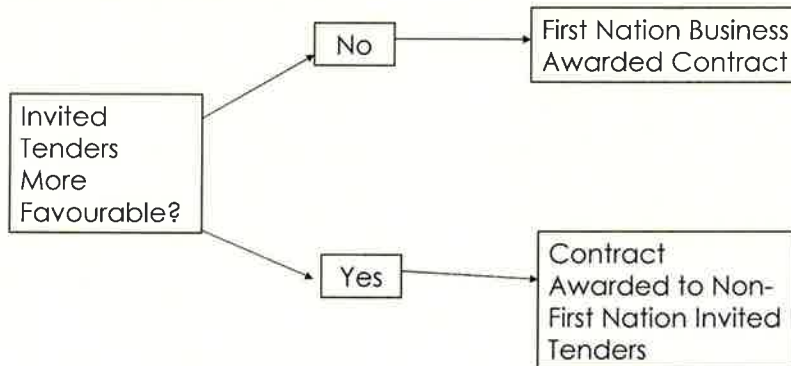


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Part VI: Contracting Process

Contracting Procedure



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Part VI: Contracting Process

Competitive Bid Process

- Proponent sends contracts directly to Competitive Bid Process rather than Open Bid Negotiations
- Proponent still obligated to prefer competitive bid from First Nation businesses over other bids from non-First Nation businesses in this process (using point system for "First Nation content") – applies to all bidders.

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Part VII: Concerns Raised in Negotiations

"Cost Plus Contracting Situation":

- Review of proposal on line by line basis only done to determine if overall proposal is reasonable and cost effective
- Risk of loss or lack of net profit borne by FN Business, not by the Owner
- If proposal does not seek cost plus contract, must adhere to this within open book negotiations or possible competitive bidding
- Increased competitiveness keeps cost down

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Part VII: Concerns Raised in Negotiations

“If unable to determine appropriate pricing scenario, unlikely to agree on in open book negotiations, so it will go to competitive bidding anyway.”

- Open book negotiations allow owner to obtain more information re FN Business Proposal which provides Owner with the ability to determine quality of subsequent bids, if any
- Why not do so without additional costs?
- FN Business proposal can be reduced during negotiations
- Increases competition

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Part VII: Concerns Raised in Negotiations

“Owner can’t be liable for losses after Open Book Negotiations.”

- Risk of loss solely with FN Business
- Built into standard contract language protection of Owner
- Can be added to IBA terms
- Risk of loss to contractor is standard in industry

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Part VII: Concerns Raised in Negotiations

“Too much extra time for Open Book process.”

- Takes relatively little time
- Open Book process can precede planned competitive bid schedule; not affect procurement schedule

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Part VII: Concerns Raised in Negotiations

“Other Contractors scared away from bidding.”

- Must be openness of Open Book process
- No special info shared by Owner in Open Book process, just market assumptions (no advantage)
- Info provided by FN Business to justify costs
- If no agreement, other contractors motivated to bid knowing no price agreed to

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Part VII: Concerns Raised in Negotiations

“Why would any contractor want to Joint Venture with you?”

- That’s FN’s risk, not owners
- Potential Partner has guaranteed direct negotiations opportunity to justify and lower price
- Potential of no competitive bid process
- Well over 50% of contracts awarded in Open Book process where used

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Part VIII: Negotiating Joint Ventures

Joint Venture designed to:

- Maximize participation by and benefits to First Nation by sharing profits, **guaranteeing access to contract negotiations**, and bringing in a qualified and reputable partner
- Minimize general and tax liability and other business risks
- Build management expertise over time

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Part VIII: Negotiating Joint Ventures

Key Business Terms (Typical):

1. JV Partner to assume costs incurred prior to and in respect of bid submission;
2. JV Partner to assume bonding costs required for bid;
3. JV Partner to assume responsibility for any losses, expenses or costs from bid submission or contract performance or adding First Nation as partner;
4. JV Partner to assume responsibility for working capital;

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Part VIII: Negotiating Joint Ventures

Key Business Terms (Typical) (cont'd):

5. JV Partner to pay transaction fee to [FIRST NATION Co.] upon signing of MOU and upon LP being awarded contract with [PROPONENT];
6. Preferred employment and training of FN Members, including management trainee(s);
7. Preferred subcontracting work to FN Members Businesses;
8. Equal and joint overall and strategic management of the business by the Parties;

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Part VIII: Negotiating Joint Ventures

Key Business Terms (Typical) (cont'd):

9. ___% [FIRST NATION Co], ___% JV Partner profit sharing;
10. Management costs with no mark-up and no hidden costs (Don't want one partner to be paid twice);
11. Long term, viable and mutually beneficial relationship for life of Project;
12. Potential to expand beyond Project into markets not yet entered by JV Partner; and
13. Scope of "Business", initially limited to Project or a specific contract.

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Part IX: Structuring Options for First Nations Businesses

Factors to Consider regarding First Nation Businesses

- Tax and other liabilities
- Separation/balance between business and politics
- Allocation of business opportunities between nation owned businesses and member owned businesses

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Part IX: Structuring Options for First Nations Businesses

Three Types of Business Options (Typical):

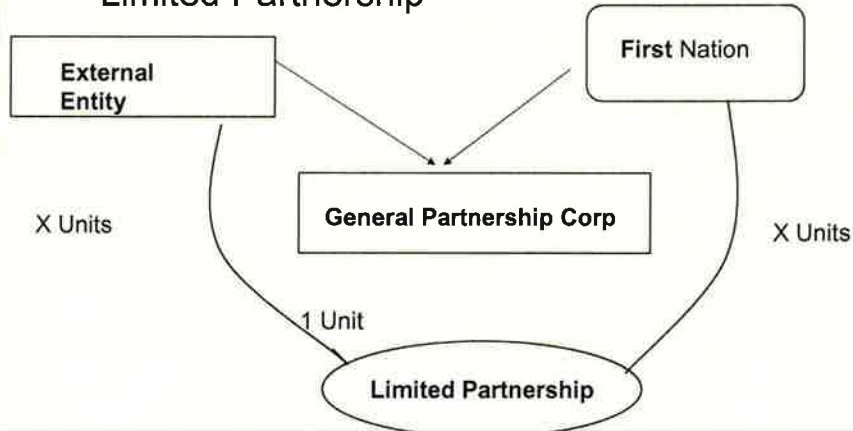
- Limited Partnership Structure;
- Joint Venture Company; and
- Joint Venture Limited Partnership.

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Examples – The Good and the Bad

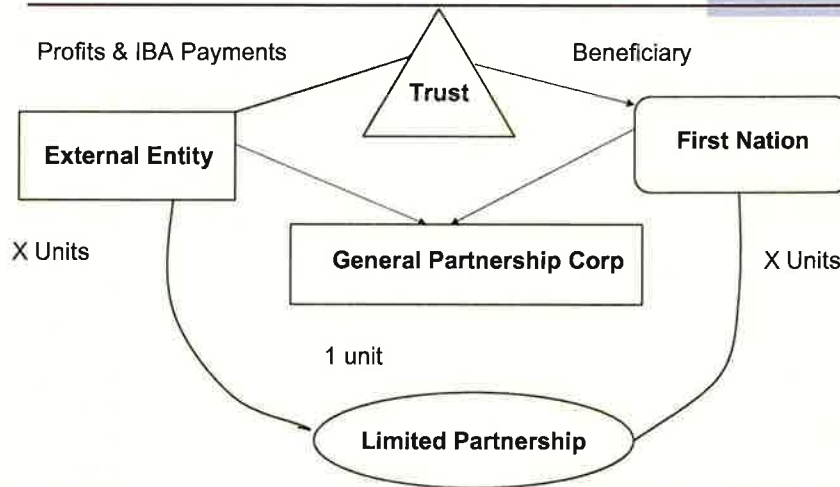
Limited Partnership



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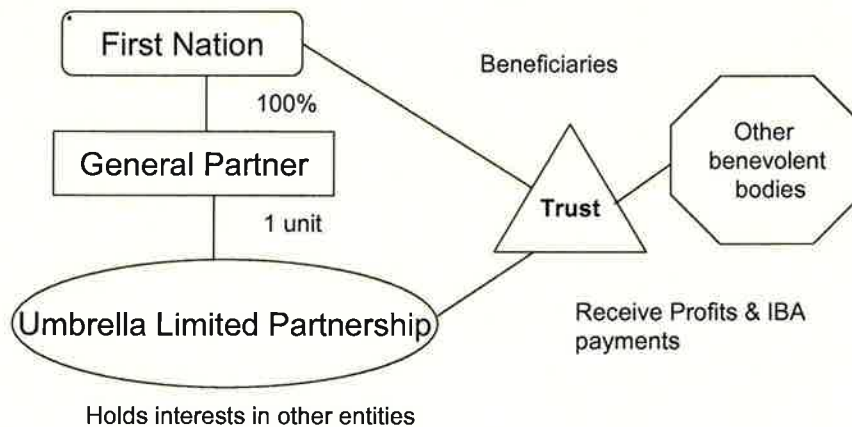
Part IX: LP With Trust Interposed



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Part IX: LP Owned Through Trust



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Part X: Example Documents

Cover Letter

- Brief overview of First Nation Limited Partnership
- Overview of the IBA with Proponent and nature of Contracting Preferences
- Context for key MOU provisions

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Part X: Example Documents

Enclose with Cover Letter

- Sample MOU
- Chart outlining necessary steps for obtaining contracting for Project work
- Organization charts for Joint Venture framework

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Part X: Example Documents

MOU – Key Business Terms

- Ownership and Profit sharing
- Scope of Business/Opportunities (Categories, Location, Timing)
- Management, Operation and responsibility
- Financing and Liability
- Management and Administrative Costs

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Part X: Example Documents

MOU – Key Business Terms (cont'd)

- Exclusions and exclusivity/Non-Competition
- General/Boiler Plate

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[COVER LETTER PRECEDENT]

[FIRST NATION CO.]
[FIRST NATION]
[INSERT ADDRESS]

[DATE]

Potential Joint Venture Partner
Address
City
Postal Code

Attention: Contact Name

Dear Mr./Ms. Contact Name:

Re: Business Partnerships with [FIRST NATION] at [NAME] Project

Thank you for your interest in entering a joint venture with [FIRST NATION] to provide goods and services to the [INSERT NAME OF PROJECT] (the "Project"). A company that enters a joint venture with [FIRST NATION] (a "JV Partner") will greatly increase its chances of securing potentially lucrative Project contracts. Moreover, as a show of good faith, we will agree to a short period of exclusive negotiations with you if you cover our negotiation costs in the amount of ♦ and provide us with a favourable proposal.

In this letter we provide you with:

- (a) a brief overview of [FIRST NATION] Limited Partnership;
- (b) an overview of our Impacts and Benefits Agreement ("IBA") with [PROPONENT] and the nature of the contracting preferences that our joint ventures; and
- (c) the context for the provisions in our enclosed MOU.

We have enclosed the following documents with this letter:

- a) a sample MOU, as mentioned above;
- b) a chart outlining the necessary steps for obtaining contracting opportunities for work at the Project; and
- c) two organizational charts that set out the framework for a joint venture.

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[FIRST NATION] Limited Partnership

[FIRST NATION] Limited Partnership ("FNL") is the business services entity formed by [FIRST NATION] First Nation ("FN"), as the limited partner, and [FIRST NATION CO.], a for-profit entity and general partner, to carry out business ventures, partnerships, joint ventures or enterprises for the general welfare and development of [FN] and its members ("FN Members").

The Impact and Benefits Agreement

In [INSERT DATE], [FN] concluded an Impacts and Benefits Agreement ("IBA") with [PROPONENT]. The IBA sets out the terms of the parties' understandings regarding economic and environmental issues arising from the Project.

The IBA also allows [FIRST NATION] to form joint ventures with industry partners which, because of their relation to [FIRST NATION] or [FIRST NATION] members, [PROPONENT] is obligated to prefer when awarding contracts for the provision of goods and services to the Project.

Known as an "[FIRST NATION] Business", the IBA defines an [FIRST NATION] Business as an entity which:

- [FN] or an [FN] Member owns or exercises a minimum 50% interest, beneficial interest or effective control on key business decisions; or
- has been declared by [FIRST NATION]'s Business Registrar to be an [FIRST NATION] Business because it employs 6 or more full-time employees, 2/3 of which are [FN] Members; or
- has significant [FN] ownership; or
- has been deemed an [FIRST NATION] Business because it employs ♦ or more full-time employees, of which less than ♦ % are [FN] Members, but has significant [FN] benefit, ownership control or employment.

A joint venture between [FN] and your company would be considered an [FIRST NATION] Business under the business opportunities provisions of the IBA and would enjoy the contracting preferences set out there.

Open Book Negotiations

An [FIRST NATION] Business is eligible to engage in "open book negotiations" with [PROPONENT] for certain types of contracts, which would be a significant advantage to our joint venture. Under this process, [FIRST NATION] Businesses have the first opportunity to negotiate contracts with [PROPONENT]. It is only when an [FIRST NATION] Business cannot conclude a competitive contract that the contract will be sent

PRESENTATION EXAMPLE:
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to the competitive bid process where non-[FIRST NATION] businesses may submit a bid.

The awarding of these contracts by [PROPONENT] will depend on the success of the JV Partner's bid in a tender process, which will be evaluated according to such criteria as:

1. cost competitiveness;
2. quality;
3. relevant expertise or experience;
4. capacity to supply and deliver the goods or services;
5. the health, safety, and environmental record of the tenderer; and
6. the extent to which the JV Partner is committed to employ labour from [FN] in its workforce and to purchase any needed goods or services from [FIRST NATION] Businesses.

Competitive Bid Process

Some of the contracts [PROPONENT] is contemplating may be sent directly to the competitive bid process rather than to open book negotiations. [PROPONENT], however, is still obligated to prefer a competitive bid from an [FIRST NATION] Business over other bids from non-[FIRST NATION] Businesses in this process.

Standard Form MOU

The enclosed MOU sets out the proposed relationship between [FIRST NATION] and a JV Partner. The joint venture is designed to maximize participation by and benefits to [FN] and [FN] Members from development in [FIRST NATION]'s traditional territory, while minimizing general and tax liability and other business risks. Establishing a joint venture relationship through a limited partnership prevents liability from one JV relationship affecting another JV relationship, thereby insulating the assets and interests of [FIRST NATION CO.] and each partner from liability.

The joint venture consists of these features:

1. [FIRST NATION CO.] and JV Partner are limited partners respectively holding 51% and 49% interests in a limited partnership (the "Limited Partnership");
2. a separate general partner corporation jointly owned by the Parties (51% by ALP, 49% by JV Partner) holds a token interest and carries out the work of the Limited Partnership;
3. JV Partner forms a wholly-owned subsidiary ("Management Co.") that provides management of day-to-day operations for the general partner; and

4. Management Co. assumes all liability for the work of the Limited Partnership, pursuant to a management fee at actual costs, and indemnifies the Parties, the Limited Partnership and the general partner with respect to all work, costs and expenses.

[FIRST NATION CO.] seeks certain business terms with its JV Partners, including:

- a) assumption by JV Partner of all costs incurred prior to and in respect of the submission of a bid;
- b) assumption by JV Partner of all bonding costs required in connection with a bid;
- c) assumption of responsibility by JV Partner for any losses, expenses or costs arising from bid submission or contract performance or accommodation of [FIRST NATION CO.] as an additional partner;
- d) assumption of responsibility by JV Partner for any funds required for working capital;
- e) payment of a fee by JV Partner to [FIRST NATION CO.] upon signing of the MOU and upon the Limited Partnership being awarded the contract with [PROPONENT];
- f) preferential employment and training of members of [FN];
- g) preferential contracting and subcontracting of work to [FN] Members or businesses;
- h) equal and joint overall and strategic management of the business by the Parties;
- i) profit sharing according to a 51% [FIRST NATION CO.], 49% JV Partner split;
- j) no hidden costs in the joint venture;
- k) a long term, viable and mutually beneficial relationship with the JV partner for the life of the Project; and
- l) Potential to expand beyond the Project into markets that the JV partner has not yet entered.

We look forward to pursuing a joint venture with you based on the principles set out in this letter and our enclosed MOU. If you have any questions, please do not hesitate to contact us.

Yours truly,

[FIRST NATION CO.]

[INSERT NAME]

Encl: Memorandum of Understanding between [FIRST NATION CO.] and JV Partner
[FIRST NATION CO.] – Limited Partnership Structure
[FIRST NATION CO.] -JV Partner – Limited Partnership Structure

**MEMORANDUM OF UNDERSTANDING BETWEEN
◆ PARTNERSHIP AND JV PARTNER**

THIS MEMORANDUM OF UNDERSTANDING (the "MOU") made at ◆, ◆, this ____ day of _____, 2006.

BETWEEN:

FIRST NATION LIMITED PARTNERSHIP, with its registered office in ◆, ◆.

("FNLP")

OF THE FIRST PART,

AND:

JV Partner Inc. a corporation incorporated under the laws of Canada with its registered office in _____.

("JV Partner")

OF THE SECOND PART.

WHEREAS and JV PARTNER (collectively, the "Parties", and individually each a "Party") have reached a preliminary understanding regarding the pursuit of certain business opportunities together;

AND WHEREAS more particularly, the Parties wish to jointly pursue opportunities to ◆ <describe work to be undertaken> (collectively, the "Work");

NOW THEREFORE in consideration of the premises set out above, and other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the Parties agree as follows:

1.0 PURPOSE

1.1 The purpose of this MOU is to set out the joint understanding and intention of the Parties to establish a business enterprise (the "Business") to seek and carry out the Work. The Parties agree to enter into definitive documentation (the "Agreements") substantially based on this MOU which shall establish and govern the Business in a fashion which is legal, appropriate and tax efficient for such Work and in the interests of the Parties.

2.0 SCOPE OF WORK

2.1 The scope of the Work shall include, without limitation:

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- (a) carrying out ... ◆ <detailed objectives for the partnership>;
- (b) any other work as the Parties may agree in writing to undertake from time to time.

3.0 OWNERSHIP AND PROFIT SHARING

- 3.1 The structure of the Business will reflect a percentage of ownership interest and income sharing of 51% for the FNLP and 49% for JV PARTNER. However, if, as currently foreseen, such structure takes the legal form of a limited partnership ("NEWCO Limited Partnership") the foregoing percentages will be reduced to accommodate the necessary negligible equity interests of its general partner ("NEWCO Inc."), as follows:

Partner	% Interest/Profit	Partner Type
NEWCO Inc.	.01%	General Partner
FNLP	50.995%	Limited Partner
JV Partner	48.995%	Limited Partner

- 3.2 NEWCO Inc. shall in turn be owned 51% by FNLP and 49% by JV PARTNER.

4.0 BUSINESS OBJECTIVES

- 4.1 The Business shall qualify as an "First Nation Business" pursuant to the Impacts and Benefit Agreement concluded by ◆ First Nation ("◆FN") and ◆ Inc.
- 4.2 The Business shall be committed to employ as many members of the ◆ (the "First Nation") (collectively, "First Nation Members") as possible at all levels of the workforce, from labour to management. The Business will institute a preference policy that encourages and promotes First Nation Members participation in the Business and the Work.
- 4.3 The Business shall have an active program, for the duration of the Business, for the training of First Nation Members' employees and for the transfer of knowledge, expertise and skills for the Work and other Business activities, to the First Nation Members and the First Nation. The Business shall use its best efforts to negotiate identical requirements in the Business' agreements with all its contractors, subcontractors and other third parties with which it carries on business.
- 4.4 The Parties acknowledge that a primary objective of the Business is to achieve long-term economic and social benefits associated with encouraging and developing businesses controlled by the First Nation or First Nation Members. Consequently, in respect of contracting or subcontracting, the Business shall give preference to businesses controlled by First Nation or First Nation Members ("First Nation Contractors") to perform the Work and any related or supporting activities provided that, subject to paragraph 4.4 below, the First Nation Contractors can perform the Work at a price that is competitive with the price at which the Business can have the Work performed through other

contractors (the "Price Specifications"), and provided that the First Nation Contractors can perform the Work to the quality and service specifications required by the Business (the "Quality Specifications"). The Business shall engage in the following process with respect to the supply of products and services for the Service Contracts:

- (a) FNLP shall provide the Business with a list of First Nation Contractors;
 - (b) the Business shall contact First Nation Contractors to obtain a quotation for the supply of the particular products or services;
 - (c) FNLP shall liaise between the Business and the First Nation Contractors;
 - (d) if only one First Nation Contractor can provide specific and required products or services in accordance with the Price Specifications and the Quality Specifications, the Business shall obtain the goods or services from that First Nation Contractor;
 - (e) if more than one First Nation Contractor can provide specific and required products or services in accordance with the Price Specifications and the Quality Specifications, the Business shall obtain the goods or services from among such First Nation Contractors through a competitive bid process among such First Nation Contractors; and
 - (f) if no First Nation Contractor can provide the products or services in accordance with the Price Specifications and the Quality Specifications, subject to paragraph 4.4 below, the Business may obtain the supply of goods and services from another supplier.
- 4.5 In the event that a First Nation Contractor cannot supply products or services in accordance with the Price Specifications (within 5% of the lowest qualified bid received) but can supply products and services in accordance with the Quality Specifications, FNLP may require the Business to use such First Nation Contractor.
- 4.6 Where the Business uses other contractors and subcontractors it shall use its best efforts to negotiate clauses in its contracts with them that encourage and promote the participation of businesses controlled by First Nation or First Nation Members.
- 4.7 The Business shall employ, when feasible, a specialised staff person designated the First Nation Participation Officer/Management Trainee. The First Nation Participation Officer/Management Trainee will:
- (a) train as a manager capable of managing and operating the Business and carrying out the Work;
 - (b) provide cross-cultural awareness to the Business;
 - (c) develop and promote employment opportunities in respect of the Business and the work among First Nation Members;

- (d) encourage relationships between the Business and other businesses owned by First Nation Members or First Nation ; and
- (e) pass on acquired cross-cultural knowledge about the operation of the Business to the First Nation Members.

4.8 The activities of the Business in the pursuit and performance of the Work and any future business opportunities shall be conducted in such a manner as to:

- (a) reflect respect and concern for the environment, and the rights and traditional ways of life of the ♦Peoples in ♦ ♦region;
- (b) promote the health and safety of workers and the public;
- (c) manage its activities in respect of the Work in such a manner as to ensure sustainable management consistent with all regulatory and contractual requirements, and to continually identify objectives for improved performance;
- (d) maximize community benefits and economic opportunities for First Nation Members in the operation of the Business and in respect of all aspects of the Work;
- (e) report regularly to the Board of Directors regarding these objectives, and perform audits to ensure conformance with its policies and guidelines; and
- (f) provide the management commitment and resources necessary to the above stated objectives.

5.0 MANAGEMENT, OPERATION AND RESPONSIBILITY

5.1 Overall and strategic management of the Business shall be carried out jointly and equally between the Parties, and such equal management shall be reflected in equal representation for the Parties on any boards of directors, as officers and as other strategic managerial personnel.

5.2 Under the limited partnership structure currently contemplated, the Work of the Business will be carried out by NEWCO Limited Partnership. NEWCO Limited Partnership will therefore hold all of the contracts relating to such Work. As general partner to NEWCO Limited Partnership, NEWCO Inc. will be generally liable for all of such partnership's obligations and for the management of the Business.

5.3 If the Parties seek to implement the limited partnership structure contemplated herein, the Parties will enter into a Limited Partnership Agreement that includes, among others, provisions that address:

- (a) the formation and business of the partnership;
- (b) the ownership, capital contributions and profit sharing provisions that reflect the provisions of section 3.2 herein;

- (c) allocations and distributions;
- (d) books, records and financial information;
- (e) restrictions on assignments;
- (f) management of the partnership;
- (g) meetings and voting; and
- (h) dispute resolution.

5.4 As general partner to NEWCO Limited Partnership, NEWCO Inc. will be generally liable for NEWCO Limited Partnership's obligations including the strategic management of the Business. The shareholders of NEWCO Inc. shall enter into a Shareholders Agreement which includes provisions to support the involvement of NEWCO Inc. in the strategic management of the Business. Such Shareholders Agreement shall provide for the unanimous consent of the shareholders with respect to major decisions, including but not limited to decisions that involve:

- (a) the taking or institution of any proceedings for the winding up, reorganization or dissolution of the NEWCO Inc. or any of its Affiliates;
- (b) the making of an assignment for the benefit of any creditors of NEWCO Inc. or any of its Affiliates;
- (c) the amalgamation, consolidation, merger of, or the entering into of any agreement to amalgamate, consolidate or merge NEWCO Inc. with any corporation, partnership, joint venture or firm, or the continuance or corporate reorganization of NEWCO Inc. of any kind;
- (d) the sale, lease, exchange or other disposition of all or substantially all of the assets of NEWCO Inc. or any sale, lease, exchange, or other disposition of any such assets out of the ordinary course of business;
- (e) the purchase or redemption by NEWCO Inc. of any Shares;
- (f) the declaration, payment or setting aside for payment of any dividend, the distribution of any surplus or earnings, the return of any capital, the repayment or retirement of any indebtedness of NEWCO Inc. to any Shareholder, or any other payment or distribution of assets of NEWCO Inc. to any Shareholder;
- (g) amendment of the articles or amendment or enactment of any by-law or special resolution;
- (h) the provision of guarantee or indemnification, or the grant of security by NEWCO Inc. for the debts or obligations of any corporation, partnership, joint venture, firm or Person;

- (i) the making of or repayment of any loans with, the granting of any other financial assistance to or the entering into of any agreement with any Shareholder, employee or Affiliate (excluding for the market value of goods sold or services provided in the ordinary course of business) of NEWCO Inc., any Person related by blood, adoption or marriage to any of the foregoing, or any corporation not dealing at arm's length with any such Person;
- (j) the employment or hiring of, or the payment of any advance, salary, bonus, consulting fee, management fee, incentive compensation, bonus or other payment to any director, former director, officer, Shareholder, employee or Affiliate (excluding for the market value of goods sold or services provided in the ordinary course of business) of NEWCO Inc., any Person related by blood, adoption or marriage to any of the foregoing, or any corporation not dealing at arm's length with any such Person;
- (k) the creation of any agreement which would obligate NEWCO Inc. to make any payment described in section 5.4(j) above, except to the extent that such fees, bonuses or other payments constitute normal remuneration payable to bona fide employees or consultants of NEWCO Inc.;
- (l) the acquisition or agreement to acquire any capital assets, any lease or agreement to lease of real or personal property, or any acquisition or agreement to acquire property or business;
- (m) any material change in NEWCO Inc.'s business, undertaking or strategic focus, or the taking of any action which may lead to or result in such material change;
- (n) the incorporation or acquisition of any corporation that would be an Affiliate of NEWCO Inc., or the taking, holding, subscribing for or agreeing to purchase or acquire shares of a corporation or Person;
- (o) the incurring, creating or assuming of any debt, other than for trade credit or the use of arranged lines of operating credit in the ordinary course of business;
- (p) the hypothecation, mortgage, pledge or any act otherwise encumbering NEWCO Inc.'s assets or any of them except as may be required by the bankers in connection with NEWCO Inc.'s normal banking activities and arranged lines of credit;
- (q) the granting of any right, option or privilege to acquire any Shares, other than as contemplated in this Agreement;
- (r) any change in the number or ownership of issued and outstanding Shares or any increase or reduction in the capitalization of NEWCO Inc., including, without limitation, by way of any split, conversion or exchange of Shares, except as may be permitted by this Agreement;

- (s) the appointment of NEWCO Inc.'s auditors or bankers or any change in such auditors or bankers;
- (t) any material revisions to existing contracts between NEWCO Inc. and any Shareholder or Affiliate or associate thereof, and the entering into by NEWCO Inc. of any new material Contracts with either Shareholder, including contracts with a financial obligation in excess of \$◆ or any Contract which otherwise would be out of the ordinary course of business; and
- (u) the changing NEWCO Inc.'s fiscal year.

5.5 To assist NEWCO Inc. in the ongoing day-to-day operation and management of the Business, JV PARTNER shall establish a designated wholly-owned subsidiary ("JV PARTNER Management") for the purposes of providing management services to NEWCO Inc. pursuant to a management services contract (the "Management Agreement").

5.6 The principles that shall apply to relationships among FNLP, NEWCO Inc. and JV PARTNER Management for the duration of the Management Agreement are set out in this Section 5.4:

- (a) JV PARTNER Management's services will be provided to NEWCO Inc. at cost plus a percentage of costs (the "Management Fee") as determined between NEWCO Inc. and JV PARTNER Management from time to time. For purposes of the calculation of JV PARTNER Management's costs and the associated Management Fee:
 - (i) JV PARTNER Management resources dedicated and used directly and solely for purposes of the Business shall be valued at 100% or the lower of their cost to JV PARTNER Management or fair market value, and
 - (ii) JV PARTNER Management's resources used and expended for the benefit of the Business in addition to other uses (such as partial use of centralized accounting, collections, payroll services, etc.) shall be valued at a percentage of their cost to JV PARTNER Management or fair market value, whichever is lower, such percentage to be determined between the NEWCO Inc. and JV PARTNER Management from time to time.
- (b) JV PARTNER Management will bill NEWCO Inc. directly for its Management Fee on a quarterly basis.
- (c) After payment of NEWCO Inc.'s costs (which shall include, but may not be limited to JV PARTNER Management's billed Management Fees) any remaining profits will be distributed to the partners in accordance with their ownership interests, unless such partners agree to retain such amounts as retained earnings or in respect of operating capital requirements.

- (d) All persons employed in the day-to-day Business will be employees of NEWCO Limited Partnership.
 - (e) The Parties agree that JV PARTNER Management shall, subject to the terms of the Management Agreement, retain the sole right to manage the day-to-day operations of the Business in compliance with any operational guidelines and parameters established by NEWCO Inc. and any government legislation, regulations, bylaws and guidelines as apply to the Business.
 - (f) Notwithstanding 5.4(e), it is the intention of the Parties that as the officers and employees of NEWCO Inc. and of NEWCO Limited Partnership acquire the required skills and experience to perform the duties and to exercise the responsibilities of management of the Business, both the scope of management services provided by JV PARTNER Management and the associated Management Fee will decrease over the term of the Agreement.
 - (g) JV PARTNER Management shall assume all legal liability in relation to the work performed by the Business caused by the failure, neglect or wilful misconduct of JV PARTNER Management, and shall maintain appropriate insurance coverage for such work, and shall indemnify NEWCO Inc., NEWCO Limited Partnership, JV PARTNER Inc. and FNLP with respect to all of the foregoing and any consequent costs and expenses in the event of any mishap in the Business. JV PARTNER Management shall be fully liable to NEWCO Inc. for any and all deviations from approvals granted by the Business should such deviations have any negative impact.
 - (h) JV PARTNER Management shall be responsible to report all financial and business results as well as update a 12 month projection, on a monthly basis, to the Board of Directors of NEWCO Inc.
 - (i) Either Party may request renegotiation of the method for calculating the Management Fee upon thirty (30) days' written notice.
- 5.7 The Board of Directors for NEWCO Inc. shall consist of two (2) persons appointed by JV PARTNER and two (2) persons appointed by FNLP, and such number of non-voting directors as the Shareholders may determine appropriate from time to time, initially set at one nominee for each Shareholder, to provide advice and guidance on technical and other issues. The Board shall meet annually (and more often if required) and agree to an operations budget and cash flow projections, which contain adequate details so as to clearly establish operational parameters.
- 5.8 Two Voting Directors, one of whom shall be a nominee of FNLP and one of whom shall be a nominee of JV PARTNER, shall constitute a quorum for a meeting of the board of NEWCO Inc. All decisions of the Board shall require the unanimous consent of all Voting Directors present at the meeting.

5.9 Until amended by a resolution of the directors of NEWCO Inc, the officers of that corporation shall be as follows:

President:	_____
Vice-President:	_____
Secretary:	_____
Treasurer:	_____

5.10 The quorum for any meeting of the holders of the Shares carrying voting rights shall be all of the Shareholders, represented in person or by proxy.

5.11 All decisions of the Shareholders shall require the unanimous consent of the Shareholders.

6.0 DEFINITIVE AGREEMENTS

6.1 The Agreements will be concluded as soon as possible. The Agreements will describe, among other things, the nature of ownership, the details of cost and revenue sharing, the appointment of management, and the development of policies for the Business.

6.2 Either Party may appoint another entity as its representative for the Agreements, provided that the appointing Party controls such representative, that the appointing Party is otherwise not in default of any terms or provisions of this MOU, and that the other Party approves the representative, which approval shall not be unreasonably withheld.

6.3 This MOU shall be superseded by the Agreements.

6.4 The Agreements shall be executed between the Parties prior to the Parties entering into a contract with ♦ in respect of the Work.

7.0 FIRST NATION BUSINESS DEFINITION

7.1 The Parties agree that the ownership, profit sharing and management provisions of this Agreement provide a framework for the Business to qualify as a First Nation Business pursuant to section ♦ of the Impacts and Benefits Agreement.

7.2 Notwithstanding section ♦ of the Impacts and Benefits Agreement, the parties shall make any amendments to the structure of the Business that may be deemed necessary in order to ensure that the Business is established in a manner which qualifies it as a First Nation Business.

8.0 EXCLUSIONS AND EXCLUSIVITY

8.1 The Parties shall work together on an exclusive basis in the pursuit and performance of the Work. The Parties agree not to compete and shall cause their affiliates not to compete with each other for the Work and not to engage in activities in conflict with their joint pursuit and performance of the Work.

9.0 COSTS

- 9.1 JV PARTNER shall be responsible for all expenses in establishing the Business and shall pay to FNLP \$◆ upon signing this MOU, FNLP's costs in respect of this MOU.
- 9.2 Following its establishment, the costs of maintaining the Business shall be borne by the Business.

10.0 CONFIDENTIALITY

- 10.1 The Parties acknowledge that in order to carry out the activities contemplated in this MOU, they may exchange and create information which is confidential to their respective affairs ("Confidential Information"). The Parties agree that Confidential Information shall not be disclosed by either of them to third parties or used for purposes unassociated with the activities contemplated hereunder without the consent of the other Party. The Parties acknowledge the Confidential Information may be shared on a "need to know" basis with a parent or affiliate and lenders on the condition that the disclosing Party undertakes reasonable measures to ensure that unauthorized disclosure to third parties does not occur. Information shall not be deemed to be Confidential Information where it is:
- (a) part of the public domain prior to or at the time of disclosure;
 - (b) already possessed by a Party at the time of its generation or disclosure;
 - (c) obtained from a third party having a lawful right to disclosure;
 - (d) part of the public domain, after disclosure, through no fault of the recipient Party;
or
 - (e) required to be disclosed under applicable law, including governmental or regulatory bodies with proper authority to demand the information.
- 10.2 Each Party acknowledges and understands that the other makes no representations or warranty in relation to the Confidential Information it discloses, its adequacy, accuracy, or suitability for any purpose and shall not be liable for any loss or damage arising from the use thereof howsoever caused.
- 10.3 In the event of termination of this MOU, the Parties agree, upon the request of the disclosing Party in writing, to return all Confidential Information in its possession or, with the approval of the disclosing Party, confirm in writing that it has destroyed such Confidential Information save and except such Confidential Information required to be kept for purposes of law or corporate governance.
- 10.4 The obligations of confidentiality described herein will continue in force and effect for a term of one year beyond the termination of this MOU.
- 10.5 The Parties agree that releases to the media in respect of the activities contemplated herein shall occur only with the mutual agreement of the Parties.

PRESENTATION EXAMPLE:
Not intended for legal advice

McDonald & Company
Barristers and Solicitors

11.0 CO-OPERATION

11.1 The Parties will co-operate with each other in the form of regular communication and the exchange of ideas and advice with a view to the success and continued operation of the Business.

12.0 TERMINATION

12.1 This MOU will remain in force and effect unless one of the following events occurs:

- (a) if the contract for the Work is awarded to a party other than NEWCO Limited Partnership;
- (b) the Parties agree unanimously to cancel this MOU;
- (c) this MOU is superseded by the Agreements;
- (d) the Business is unsuccessful in establishing viable operations in respect of the Work within ♦ years of the date of this MOU; or
- (e) the Business ceases to carry on active business operations for any period of ♦ consecutive months.

13.0 NO AUTHORITY

13.1 Neither Party shall use the name of the other Party or have any authority to bind the other Party in any manner without the express written permission of the other Party.

14.0 NON-ASSIGNMENT

14.1 Subject to section 6.2 herein, this MOU is not assignable by either Party in whole or in part without the prior written consent of the other Party.

15.0 DISPUTE RESOLUTION

15.1 In the event of any dispute between the Parties in relation to the Business, the Parties shall exhaust every effort to settle or dispose of such dispute through private amicable discussion and negotiation.

15.2 In the event that the Parties are unable to amicably settle any dispute concerning the interpretation of this Agreement or any part thereof, either Party may give notice in writing to the other Party of its desire to seek mediation of any unresolved matters (the "Mediation Notice"). Both Parties shall then forthwith submit to a single mediator the substance of their dispute in writing, including evidence to support any claims made therein.

15.3 In the event that the Parties are unable to agree on a single mediator within 10 days of the Mediation Notice or settle any dispute pursuant to mediation under section 14.2 within 20

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Barristers and Solicitors**

days of submission to the mediation panel, the dispute or disagreement shall be settled by binding arbitration in accordance with the provisions of the Arbitration Act, Ontario. The Parties shall seek to jointly select a mutually agreeable arbitrator to settle the dispute or question. In the event that the Parties cannot agree on such a mutually agreeable person within five (5) days of the end of the foregoing and applicable ten (10) or twenty (20) day periods, the Party who provided to the other a notice for binding arbitration shall provide forthwith a second notice appointing an arbitrator on behalf of such Party and the other Party shall appoint by a similar notice an arbitrator within fifteen (15) days of receipt of the said notice. The two arbitrators shall then appoint a third arbitrator within a further period of thirty (30) days, failing which, either Party may apply to a court to appoint such arbitrator. The arbitrator or arbitrators so appointed shall then determine the dispute or question at issue. In the event that the Party to whom notice is given as aforesaid fails to appoint an arbitrator on its behalf then the arbitrator appointed by the Party so given notice shall act as sole arbitrator. The Parties agree that the decision of any board of arbitration appointed thereunder shall be final and binding upon them and no appeal taken therefrom. Such decision shall be enforceable and may be entered for enforcement in any court of competent jurisdiction.

15.4 The costs of mediation or arbitration shall be borne by the Parties equally.

15.5 During the course of the preceding for any mediation or arbitration hereunder, the Parties agree that the Work shall be continued diligently by the Business, without interruption. However, in the event that any matter in dispute involves activities which are alleged to cause irreparable harm to the local environment or to the local Cree way of life, the Parties agree to suspend those activities having such impact in order to pursue alternatives which may allow them to avoid such irreparable harm.

16.0 JURISDICTION

16.1 The applicable law governing this MOU shall be the laws of the Province of ♦ and the laws of Canada applicable therein and shall be interpreted and applied in an appropriate manner recognizing the processes and traditions of the ♦.

17.0 SUCCESSORS AND ASSIGNS

17.1 This MOU shall enure to the benefit of, and be binding upon, the Parties and their representatives, including their successors and permissible assigns.

18.0 NO DEROGATION

18.1 Nothing in this MOU shall be construed so as to confer, recognize, abrogate or derogate from any aboriginal, treaty, constitutional or other rights, benefits, claims and privileges which may be claimed by any Party. This MOU is made without prejudice to the positions taken by any Party in any other forum.

19.0 AMENDMENTS

19.1 This MOU may be amended or supplemented only by mutual written agreement of the Parties.

IN WITNESS WHEREOF the Parties hereto have executed this MOU on the date first above written:

JV PARTNER INC.

By: _____
Name:
Title:

FIRST NATION LIMITED PARTNERSHIP

By: _____
Name:
Title: