Assembly of First Nations Nuclear Waste Management Traditional Decision-Making Consensus Building – Draft Tool Kit

APM-REP-00611-0003

April 25-26, 2012

Assembly of First Nations

Environmental Stewardship Unit

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Disclaimer:

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DRAFT TOOL KIT

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Introduction

There is a tremendous amount of diversity among and between First Nations. There are 633 First Nations, drawn from over 50 First Nations in Canada, each with distinct cultures, traditions and methods of Traditional governance. The differences in culture and practice between these nations can be as great as the difference between any given First Nation and a provincial or federal government.

The Traditional governance structures of many First Nations communities have evolved over time. In some cases, there are distinctions in Traditional decision-making practices between First Nations which are members of the same indigenous nation. One thing all First Nations have in common is the legacy of the *Indian Act*. Many First Nations are moving beyond specific sections of the *Act*, but federal policy on First Nations issues will remain relevant to all First Nations.

This is an important point and should be expected. For example, consider the amount of change to English and Canadian governance during the post-contact period (1497 to present). As time passes and circumstances change, the forms and procedures of decision-making progress, while remaining grounded in key principles.

As First Nations assert greater autonomy over internal affairs, it has become clear that systems of governance that produce a 'cultural match' between First Nations and their governance structures are much more effective than those that create a mismatch. At the same time, First Nations have always and will always continue to exist in a dynamic environment, where First Nations will need to interface with non-First Nations governments, businesses and individuals in order to achieve and maintain prosperity. The challenge for First Nations is developing Traditional governance and decision-making structures that produce a cultural match for the First Nation, but are sufficiently flexible to generate the confidence of outside governments, businesses and investors.

Community Control

Community control over process and procedure is necessary to ensure the decision-making process is robust and to ensure respect for the First Nation as a government. First Nations status' as governments is the reason why community control over process and procedure is necessary. In many First Nations, a wide range of internal stakeholders have varying roles in the decision-making process. Manipulation of internal processes is disrespectful of First Nations collective decision-making capacity.

Above all, community control over process is about respect. It is vital that First Nations are able to exert governmental authority over matters of import to the community. Most First Nation grievances, both historical and contemporary, are rooted in the failure of First Nations to control vital aspects of their development.

Control over process and procedure is necessary to ensure that First Nations have adequate time to engage in internal consensus-building exercises. Even if consensus cannot be built, many First Nations need considerable time and capacity to communicate the main issues and to identify key points of contention or agreement. Failure to secure adequate time and resource to engage will produce a decision-making process that is not robust.

This toolkit is meant to provide First Nations with the ability to assert inherent jurisdiction through a Traditional decision-making process when engaging outside parties, usually proponents of projects which may impact First Nations lands, territories, resources or rights. The toolkit is organized into the following sections:

Modules:

1. What is Consensus?
2. Traditional Decision-Making and Understanding Consensus
3. Indigenous Rights and Indigenous Decision-making
4. Consultation and Accommodation
5. Before you Start
6. Community Goals, Planning and Politics
7. Protocols
8. Establishing the structure for negotiations
9. Roles of Key People on the Negotiating Team
10. Nominal Group Techniques
11. Mixed Group Process
12. Large Group Process
13. Individual Process

Module 1:

What is Consensus?

The cornerstone of First Nations decision-making processes is consensus. Consensus can mean many different things, but at minimum requires all interested parties to have an opportunity to speak to a decision before that decision is made. Often, consensus requires everyone to come to one mind and agree to a course of action. However, for some, consensus may mean only partial agreement, or alternatively, only complete agreement among certain groups within a community.

For First Nations, consensus is more about process than outcome. It is the process of seeking to bring all parties to one mind before taking a decision to move forward or not. As a result, consensus building requires a great deal of patience, in order to listen to all perspectives. It also requires a dialogue, and in many cases, an ongoing dialogue.

Before engaging on any form of decision-making process, First Nations and project proponents should have a clear idea about what constitutes consensus, both in terms of process and in terms of outcome. Clarity over process will lead to better expectations regarding timelines and the need for respectful dialogue, whereas clarity over outcome will lead to a better idea of when a decision has been reached, as well as the robustness of that decision.

Why Consensus is important

Consensus is important for two reasons, respect and robustness. Respect is a universal principle of effective decision-making processes and important in First Nations decision-making and consensus building processes. Respect is often expressed in very particular and distinct ways in the First Nations context. Failure to know and understand the particularities of demonstrating respect risks giving the appearance of being disrespectful. As a consequence, it is critical to understand First Nations specific protocols, and the reason for those protocols, prior to engaging a First Nation community or person.

Elders, youth and women typically have special and important roles to play in the decision-making process. For this reason, many protocols require special acknowledgement be paid to one or more of these groups.

Form follows function. Research on cultural protocols may provide information on important procedural aspects of demonstrating respect. Adherence to form alone is not enough; however, it is equally important to demonstrate respect for First Nations as governments that are in a nation-to-nation relationship with the federal government. This means First Nations are equal in status and authority to federal and provincial governments and expect to be treated as such.

Robustness means that the decision arrived at is stable, i.e. that it won't be changed easily. This is important because even when First Nations, or other governments, make decisions that appear to be legally-binding, strong opposition to those decisions can result in legal challenges and political advocacy which cast doubt over the stability of the decision.

Going forward, the importance of maintaining relationships charts a clear path to ensuring that consensus is maintained. In other words, the simple act of 'making a decision' is not the end of a consensus driven process. Rather, the need to engage and dialogue with interested parties continues into the future. In fact, failure to maintain relationships with a First Nation community may result in formation of a consensus to overturn a previous agreement.

Commitment to the process

Consensus building requires a commitment from First Nations and from project proponents to a process. Project proponents seeking to engage First Nations Traditional decision-making processes should be patient and prepared for a lengthy process of dialogue. It is rarely adequate to present information in a community meeting, encourage questions and answers, and then expect a decision.

More often, Traditional decision-making will require dialogue on a range of subjects before a more substantive discussion can take place. For example, in developing a proposal, it is common for proponents to be asked why a particular project is needed. Alternatively, it is very common for there to be some discussion and even negotiation over what, precisely, a community is being asked to decide.

Similarly, it is common to engage in discussion and negotiation over how a dialogue will occur. This is important to set and manage expectations, regarding timelines and appropriate and inappropriate conduct, both for proponents and for the community. For example, some First Nations have decision-making processes that contemplate particular roles for Elders, youth or women, whereas there are others with the role of interfacing with outsiders. In this instance, it would be highly improper for a project proponent to directly engage such groups.

Module 2:

Traditional Decision-Making – Understanding Consensus

One of the oldest forms of large group decision-making (particularly among First Nations, of which the Iroquois Confederacy has been used as an example extensively) it attempts to reach a general agreement that all can live with. One of the most powerful cultural matches it makes is it also can be seen in nature from non-humans (i.e. birds, insects and mammals).

Often decisions made in the team still need "buy-in" from the general public in order to implement them. Without having been involved in the decision-making throughout, it can pose a problem of feeling excluded from large-scale decisions and derailing implementation. It is for this reason that many people have since grown critical of the consensus process saying that it leads to *groupthink*, *Tyranny of Majority* or maintaining status quo when change is in order. However, the *Great Law* reminds us that this process must be premised on preserving *the peace that already exists*.

More recently there have been efforts on deciding how to decide, by using decision-making trees like the Vroom-Yetton-Jago Decision Model. This model uses a complex decision-making tree and allows for different styles of leadership and decisions at various levels of a decision. The individual can probe the model to decide at what point each decision-making style can be used to ensure "buy-in" from those affected by its outcome.

From a Traditional ethical First Nations framework, we must often perform a 'sanity- check' in our decisions by looking from a model in the natural world. For this the Conradt-Roper Model Consensus Decision Model reflects more often seen phenomenon in the human world: that consensus decision- making often happens in the natural world and cooperation between the group members in decision-making is likely to be the norm, even when the decision involves significant conflicts if interest. The model distinguishes between the "***consensus decision***: *members of a group choose between two or more mutually exclusive actions with the specific aim of reaching a consensus*" and the "***combined decision***: *members of a group choose individually (but not necessarily independently) between two or more actions. They do not aim for consensus but the combined results of their decisions usually affect the group as a whole*".

Module 3:

Indigenous Rights and Traditional Decision-Making

Any discussion on Traditional decision-making would be incomplete without a discussion of First Nation rights because the two are inexorably intertwined. Often, the prospect that a First Nation community may exert its collective rights to jurisdiction or resources, is the reason that project proponents and governments are induced to a negotiation.

It is important to understand the role of rights in supporting a Traditional decision-making process. Rights may be the reason that governments or industry are seeking to engage a First Nation community. As a consequence, it is critical to understand the obligations of the Crown when discharging its duty to consult and accommodate. It is just as critical to understand that rights do not require a Traditional decision-making process, they only create the space necessary for First Nations to implement one, if desired.

If one of the reasons for starting negotiations is First Nations rights, then it seems reasonable that the negotiation process itself should incorporate Traditional decision-making. This is strongly encouraged under international law and would likely be supported by the domestic law of consultation and accommodation.

Article 32(2) of the United Nations Declaration on the Rights of Indigenous Peoples states that Canada, "shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

The term "free, prior and informed consent" has a very clear meaning. However, the term "consult and cooperate in good faith" is somewhat ambiguous.

The most developed international law on Indigenous consultation arises under International Labour Organization (ILO) Convention 169. Canada is not a party to this treaty and is not bound to the provisions of the treaty, except where those provisions articulate rules of customary international law. However, ILO 169 does provide examples of international best practice.

ILO 169 and established international practice require governments and companies to respect Indigenous self-governance, particularly Indigenous forms of Traditional decision-making. This is articulated in the work of the Expert Mechanism on the Rights of Indigenous Peoples, which states:

- Consultations with indigenous peoples be carried out through institutions that are representative of indigenous peoples. Indigenous peoples should control the process by which representativeness is determined.
- General public hearing processes are not normally regarded as sufficient to meet this procedural standard.
- Consultations be carried out in a climate of mutual trust and transparency.
- Indigenous peoples must be given sufficient time to engage in their own decision-making process, and participate in decisions taken in a manner consistent with their cultural and social practices.

Module 4:

Consultation and Accommodation

Assertion of First Nations rights is a powerful complement to implementation of a Traditional decision-making process. First Nations can and should consider the opportunities for applying Traditional decision-making through consultation frameworks and protocols.

Where First Nations have claimed rights, Canadian law requires the Crown to consult in good faith with First Nations. If a proposed course of Crown conduct will impact on First Nations rights or interests, the Crown is required to accommodate First Nations. Canadian courts have recognized that in very limited cases accommodation may not be possible and the consent of a First Nation community may be required.

Canadian law also allows the Crown to delegate administrative aspects of the consultation process to third parties, usually proponents of projects. The Crown remains responsible for ensuring the consultation process is conducted in good faith and that accommodation measures are proportional to the impact of development on First Nations rights and interests and are appropriate.

Some points to keep in mind about consultation:

- The duty is held by the Crown, although the Crown may delegate administrative aspects of the duty.
- There is only a duty to engage, not a duty to reach agreement.
- There is a duty on First Nations to engage in good faith, the consultation process cannot be used to thwart development.
- Once First Nations communicate their valid concerns and have asserted rights, the Crown must act in good faith to assess and accommodate First Nations rights and interests.

Some First Nations have codified general consultation protocols, which outline processes, procedures and protocols for respectful consultation with First Nations. Developing consultation protocols specific to a particular project proposal, especially where it is suspected that the consultation process will be lengthy and complex, provides an opportunity for First Nations to articulate how Traditional decision-making processes will be applied during the consultation process.

Consultation and accommodation requires good faith from all parties. Failure of the Crown or delegate of the Crown to conform with First Nations Traditional decision-making protocols could be construed as not good faith negotiating. By contrast, it is possible that protocols which are designed to guarantee a certain outcome could be construed as non-good faith negotiating.

Module 5:

Before you Start: First Steps of Traditional Decision-making

To achieve success in Traditional decision-making engagements, First Nations communities must develop and implement broad strategies across a range of issues, including legal, political, media, and communication strategies.   These strategies should be focused both internally on the community itself, and externally on all stakeholders with the capacity to influence the outcome.

In some cases, other strategies such as litigation, direct political action, media campaigns, or political alliances with non-First Nations groups may either be alternatives to negotiation, or act as critical parts of an overall negotiating strategy towards strengthening a First Nation community's position. These strategies may also put pressure on a company to compromise on deadlocked negotiations.

Whatever process (negotiation, litigation or direct action) a First Nation chooses, it should view the process itself as a nation building opportunity. It is important to separate the community's goals in terms of the desired outcome of the process (a successful negotiation outcome or a court 'win') from the community's goals in terms of going through the process itself.

A decision to begin negotiations does not imply community consent to a proposed project or a decision to reach an agreement, since they have the right to at any point, terminate the negotiation process. If the issue is the willingness of a developer to meet the community's conditions, care should be taken to end negotiations in a way that leaves room for them to resume, should the developer involved change its position in fundamental ways or a new developer takes over the proposed project.

Once a decision to negotiate is made, a community and its leaders need to undertake an assessment of their position in relation to the company, the government authorities that will approve or reject the project, and the wider economic and political context. From there, the Traditional decision-making team must identify the overall strategy most likely to achieve a successful outcome.

A good outcome of Traditional decision-making will reflect a range of factors, including:

- The wider context (e.g., legal and regulatory);
- The nature and extent of community involvement;
- The character of the community;
- The strategies and negotiating positions the community develops;
- The way the community structures its negotiating team;
- The legal position of the community in relation to the project; and,
- The nature of the project.

Know Your Partner

Before considering negotiation, litigation or direct action, it is critical to know your partner. A sophisticated negotiator usually does a good deal of research on their negotiation partners. First Nations should anticipate that their negotiation partners have done at least superficial research on the First Nation community if the subject matter of the negotiation is complex or expensive. Superficial research will usually involve looking at its website, for example, but sometimes First Nations might consider going further (interviewing former associates of key players in the partner organization or other First Nations who have worked with this partner organization in the past). Potential questions to be asked include:

- How are they structured (who is in charge of the organization? Who is in charge of the negotiations – do they have a community relations unit, an aboriginal relations unit or do they use contractors?)?
- Who is negotiating and who do they report to?
- How are they financed (Are they a public company? Do they issue bonds? Are they using private financing? Who are their primary investors?)?
- Who are the Directors (if any) and Officers (CEO, COO, etc.)?
- What are their objectives, both with respect to this proposed project, but overall (are they pursuing a particular strategy, are they restructuring, are they growing, etc.)?
- Do they have aboriginal engagement, environmental sustainability or corporate social responsibility policies?

Module 6:

Community Goals, Planning and Politics

The Traditional decision-making and negotiations process should not be separated from the political life of a community, and its wider economic, social and cultural goals. Community negotiators must be constantly mindful of the potential impact of political disunity on negotiations with developers and governments, and the broader goals being pursued by a community to ensure that the result of any decision-making, in fact, contributes to these goals, rather than undermining them.

Two specific factors – a community's clarity regarding its goals, and its ability to stay united and to plan collectively – are the most critical for the success of negotiations. These two factors are also critical for the success of any nation building activity.

If a community has not had an opportunity to establish and articulate its goals, negotiators should insist on a community consultation and planning exercise as part of the preparation for negotiations. Naturally, consultation and planning should continue as the process unfolds. A long process may result in changes to the project, or changes to views and perspectives of the project within the community. Failing to do so might risk outcomes that may contain provisions that are not highly valued by community members, resulting in lost opportunities, and subsequent social tension in the longer term.

Unity within Communities

Communities should build unity before they start negotiations with a developer by working towards a balance of opinions regarding the matters covered in a negotiation and agreement. Often conflict can arise because of tension between local and regional governance structures which spill over into the decision-making and negotiations process. One of the most important ways to avoid internal conflict in the first place is to make sure that community members have access to all the information to ensure informed consent. If conflict continues, or if it crops up during negotiation, people should keep this within the community and work to resolve it away from the developer.

Unity between First Nations

Conflict between groups and internally can be managed by Elders, through visionary leaders, and through the identification of common visions, histories and goals. Another option is to involve a respected outside mediator. At worst, these types of claims will be dealt with in the courts, an approach that is likely to breed more conflict.

Agreements can be forged to settle disputes between First Nations. These can be used, for example, to recognize shared interests, parcel out roles or responsibilities in environmental assessments and other processes, or outline the kinds of roles, benefits and rights that each party will pursue in the Traditional decision-making process with the developer.

Module 7:

Protocols

Protocols are a set of ceremonies that prepare people spiritually and mentally for the work that must be done. They call on the Creator and ancestors to be present in making the discussion productive and meaningful, paying tribute to the power that gives life to all things and passed ancestors who still preside over, and guide us. Protocols also establish rules of conduct and set the tone for any meeting, ensuring that dialogue is respectful, and that decision-making takes into account the interests of the whole community, and future generations. They provide a mechanism where a wide variety of viewpoints can be considered, and therefore facilitate consensus building and conflict resolution.

First Nations communities across Canada, although varying from place to place, behaved as large families, and so Traditional protocols for gatherings originated from protocols within family units. Families themselves must, therefore, rediscover their cultural heritage, history, and spiritualism, from which protocols flow from, by strengthening the linkages within and between families in the community.

Different Nations practiced different protocols according to their local customs, but there were several commonalities:

- Arranging participants in a "talking circle" allowed each member to participate in discussions equally and hear what others had to say. In this circle, a "talking stick" or other items such as an eagle's feather were often passed around, giving the holder the right to speak freely, but being careful not to offend others as they listened respectfully.
- A prayer was always said, normally by an Elder, prior to the commencement, and at the end of the actual meeting to ask for guidance and a respectful and productive dialogue. Sometimes this was given in the form of a song, in which case a small drum (symbolizing that we are all connected and part of one being, that beats one heart) is used.
- Traditionally, a smudge was performed prior to, or during the prayer to prepare and purify a person, place or thing for a time of openness and truth in the presence of the Creator. Medicines (such as tobacco, sage, cedar, sweetgrass, etc.) are always used during smudging, and can be mixed differently, according to the preferences of the Elder.
- Prior to the room being smudged, an eagle's feather is smudged and the bowl (often a large shell) can be passed or carried alongside it, to pass smoke over individuals who want to partake. This cleanses participants and the room of bad energies, and carries prayers up to the Creator.
- The offering of tobacco is also important during these ceremonies when: a person is making a request for teachings and ceremonies; an Elder is asked to bless our feasts, gatherings, or opening/closing prayer; or, when an Elder/person is requested to come and share their knowledge.

It is important that Traditional decision-makers be given the necessary time to reflect on all facts and considerations that must be taken into account, which modern society does not often allow. Participants should also be given considerable notice of upcoming meetings, to reflect on the issue, seek spiritual guidance, and/or prepare speaking points and questions.

The Traditional teachings where protocols come from are passed through generations orally, with the greatest knowledge of these possessed by the Elders. Today however, families in many communities have become disconnected, for a variety of reasons, and have adopted more individualistic mainstream ways of thinking. Healing the family units is therefore crucial for greater communication within and between families in the community, in order to pass Traditional teachings on to others, and bring back those protocols.

Public education is also an important tool to ensuring these protocols are known and respected, as well as understood and ingrained community member's minds. First Nations communities' culture, language, and history should be integrated into the children's basic education, supplementing what they learn from their parents and Elders, or filling that void if there is one.

Module 8:

Establishing the Structure for Negotiations

Whatever protocols that a First Nation community decides to employ and whatever course of action is selected for a dialogue process, the importance of institutions should not be underestimated. An institution provides a focal point for discussion and coordination with respect to the decision-making process. In other words, it ensures that there is a central body which can make key decisions about the process itself. This body should be separate from Chief and Council precisely because it can then focus on process and procedure, rather than outcome.

An institution tasked specifically with managing process is more likely to take ownership of the process. The greater the independence from Chief and Council, the more likely such an institution would be responsible for the process, and the less likely that one (either from within the community or outside it) could credibly suggest the process itself is politicized.

An institution doesn't even need to be costly. For example, consider the experience of the San Carlos Elder's Committee. This committee is a volunteer committee with a volunteer coordinator. It acts in an advisory capacity to Chief and Council on some matters and has lead responsibility for others. Even if a First Nation community would prefer an institution which requires resources, it is possible to establish a cost-recovery system for that institution. For example, a First Nation community could invoice provincial or federal governments annually, based on the number of consultations coordinated. Alternatively, a First Nation community could establish a scale of user fees to be paid on a per-consultation basis (either by proponents or the Crown).

Roles and Structures for Negotiations

Many communities have a steering committee with diverse representation from the community, and then a smaller negotiating team of skilled individuals that acts under the direction of the steering committee. Here, the first group can act as a conduit to the wider community, with a variety of people including Elders, youth and women on the committee(s).

Interest mapping (also known as stakeholder mapping), can be used to identify the range of people interested in the issue and affected by it, and then a leader or representative group from each can be drawn into the community steering committee. Through this method, boundaries are defined by asking questions using a "snowballing" technique where interviewers ask each individual who else they think is potentially affected. Eventually interviewers get to a point where they encounter people whose stakes are so small they do not want to be interviewed, and by that point they have probably interviewed the core of the network.

Negotiating Team Composition

The specific composition of the team will vary, depending on the context and the group, and its members will need to have all the required skills (including cultural competence, communication, and outreach ability). A head or lead negotiator is often chosen to ensure that the team works together, and that there is one channel of communication, minimizing the danger of a company seeking to "divide and rule" the community and its negotiators.

The lead negotiator should be someone who is:

- A proud and strong community person that preferably speaks the indigenous language.
- Confident in their treatment of outsiders, but humble with community members.
- Very skilled in working with the community, particularly in listening to community members and bringing them into discussion and negotiations at appropriate times, in order to present alternatives and facilitate informed choices by the people they represent.

Chief and Council

Perhaps surprisingly, it is sometimes a stronger negotiating team that does not include the Chief. The reason is that if a decision-maker or a perceived decision maker is 'at the table' there may be an expectation that that individual may be able to bind the First Nation community. It also provides the negotiators with the ability to defer important decisions until Chief and Council, and perhaps the community at large are consulted. This is an important consideration because it is highly likely that the proponent of the project will also have limited authority, allowing them to consider potentially contentious issues away from the negotiating table.

Experts

If the subject matter of the negotiations is technical, it will be important to engage independent experts. First Nations should expect that proponents will provide resources for First Nations to retain independent experts. It is critical that the experts retained are independent (they do not work for the proponent, or have not in the past). Some First Nations may prefer experts who are wholly independent of industry (usually academics). In highly specialized and technical fields, First Nations may expect to have to look far and wide for independent experts.

Negotiating Team Selection Process

Every First Nation community will have its own protocols for choosing team leaders and members, but the most important qualification for negotiating team members is community support. Since unity is critical for success in negotiations, leaders who build and maintain unity are ideal. Negotiated agreements that have community-wide support are very hard to undermine, and maintaining unity after negotiations provides community implementation teams with full support to apply pressure to the company (and in some cases, governments) to implement the agreements.

Module 9:

Roles of Key People on the Negotiating Team

There is no formula for assigning specific roles in negotiations. Rather, the available skills must correspond with the various roles that must be performed in a way that is effective for the team. The **Lead Negotiator** will have the role of organizing the team, leading in the negotiations, speaking in sessions, and reporting back to the communities. The **Secretary** will be responsible for keeping records of meetings and channeling communication between the company, the government and other parties. The **Budget Manager** will keep tabs on the expenditures, and ensure sufficient funds are available to support the negotiations to their conclusion.

Role of Experts on the Negotiating Team

The negotiating team will also need to include, or have access to, expert advice on a range of issues that will arise in negotiations (such as a lawyer or consultant). Opinions vary however, about whether the negotiating team should include such professionals, and whether they should play only a supportive or backup role. Regardless, it is important that communities have a mix of critical human resources to achieve a good agreement and solid implementation.

Cost and Value of Outside Experts versus Training In-House Staff

It is important to consider "value for money" in making decisions about hiring and staffing. The quality of the product achieved is critical, and professionals are likely to be able to work much faster than non-experts, so that the real cost of their time is less than it might appear. The question of whether to invest the resources needed to develop in-house staff, such as training and ongoing salary payments, may also be raised.

First Nation and non-First Nation Negotiator Roles

Various models for allocating roles to First Nation and non-First Nation negotiators include:

- Non-First Nation staff members can hold a backroom technical role, and play no part in direct face-to-face negotiations between First Nation team members and the company.
- Non-First Nation people can take the major role in negotiations and refer matters to First Nation leaders for decision.
- A single negotiating team of both First Nation and non-First Nation people with specific roles assigned.
- A two-track system, with non-First Nation staff negotiating with less senior company people on detailed issues, and referring issues on which they can't agree, and or broader technical issues for discussion by First Nation leaders and senior company managers.

The most appropriate model will depend on the community involved. It will be influenced by a range of factors, including the availability of skilled negotiators within the community, the size of the budget, the scale of the project, the number of negotiations happening at any one time, and the way in which the company team organizes its negotiating team.

Negotiating Team's Role with the Community

Finally, the role of the negotiating team and the roles of people within it need to be clearly outlined. It is essential for everyone on the team to have a clear sense of their own role (including any political leaders, technical staff, and outside experts), which will change over time. At the outset, common first tasks will be to:

- Help establish community aspirations and priorities related to impact assessment and negotiated outcomes;
- Work to translate community goals and aspirations into clear goals for negotiations to define what needs to be in the agreement;
- Establish a process for two-way communication throughout the negotiation process- community to team, and team to community; and,
- Work with advisors and political leaders to form the negotiation strategy.

Module 10:

Nominal Group Techniques: Creating a Ranked Priority List process for Consensus

This technique is called "nominal" as it limits the interaction between the group members during the process. Thereby neutralizing the most dominant voices or those with the most authority over the decision-making and give everyone a chance to be heard.

It is a good tool for dealing with controversial or emotional issues or when a group is deadlocked. It is especially useful to reduce the issues for easier handling, as well as helping to rank items in a priority order and to get input from all team members.

The Process:

Part 1 – Generate ideas
In a large team, define the issue as a statement and make it big and visible to all members. Allow clarifications on the statement or define any unfamiliar words but not debate. After allowing clarifications on the statement:

1. Ask each member to take about 5-10 minutes to quickly write down on individual pieces of paper or Post-Its (without conferring with each other) their ideas to address the problem.
2. Collect the ideas by having each team member read aloud one of their ideas to the group. Clarify these ideas or statements to ensure their idea is completely stated.
3. If ideas are the same or similar ask each originator if they can be combined, if they do not agree keep them separate.
4. Sort them into groups or categories if enough of the ideas of a similar theme or course of action. Assign each grouping of ideas a letter or number. If you used Post-Its you can arrange them into groups with the facilitator creating a category heading for each grouping of ideas.

Part 2 – Rank ideas and prioritize them
In the same group, working individually:
5. Ask each member to rank by giving the highest points to each idea they like best. If there are 5 ideas then the best idea receives 5 points and the 2nd best receives until all are covered. You may limit points to reduce the number of ideas if many unrelated ideas are generated.
6. The facilitator then collates the ideas and adds up the numbers across the list.
7. Rewrite the ideas and their display their rankings to the group.
8. Perform a sanity check – read your findings out loud and ask if it makes sense. If you have someone arrive late, have someone explain the plan and ask if it makes sense.

Example:

A First Nations government must decide to become formally involved in a discussion about nuclear waste site that falls within their Traditional lands. A proposal from the adjacent town has offered the First Nation a seat on the Board as a proponent. To date any discussion is met with boycotting of its Council sessions and public meetings or the First Nations business community accuses its government of impeding contracts and transactions that could see them participate in the downstream business opportunities from the nuclear waste site.

A facilitator is engaged and their next meeting is held. The group has several very vocal and opinionated members of its government body and others who are withholding their opinions. The facilitator conducts a part 1 of the Nominal Group Technique that identifies the following issues:

   A. Nuclear waste will harm indefinitely – not a First Nation activity.
   B. Consultation is insufficient/Too little information
   C. Unclear business opportunities
   D. Role of First Nation government on the Board
   E. Lack of feedback on emergency/long-term land use planning.

There were 15+ additional ideas that respondents put forward, stated in a variety of ways but many agreed the basis for many of these ideas were captured by the 5 statements above when the facilitator asked them to clarify their ideas. The facilitator added the numbered results from each member and tallied the resulting data collected in the following way:

Table 1: Using ideas to prioritize 5 issues

Issue	Yellowjacket	McGregor	Langevin	Red Bird	Makatewa	Total	Priority
A	4 +	1 +	5 +	2 +	1	= 13	5
B	5 +	2 +	4 +	1 +	2	= 14	4
C	1 +	5 +	3 +	4 +	3	= 16	2
D	2 +	4 +	2 +	5 +	4	= 17	1
E	3 +	3 +	1 +	3 +	5	= 15	3

The facilitator then restated the findings that the group must address the following issues in order to be able to formally participate in the process formally:

   • The role of the First Nation government on the Board.
   • Unclear business opportunities.
   • The lack of feedback on emergency/long-term land use planning.
   • Consultation is insufficient/too little information.
   • Nuclear waste will harm indefinitely – not a First Nation activity.

Module 11:

Mixed Group Process: Multi-voting Technique for decision-making

A mixed process in this context means there are two stages, as in the nominal group with a more complex issue and more outcomes possible. Multi-voting technique is useful when the ideas generated are numerous to make them more manageable number using a series of structured "votes."   The resulting short list identifies what may be most important to that group.

As in the other methods, this technique relies on the skill of the facilitator to ensure that the brainstorming and multi-voting are seen as equal processes and non-competitive. Prioritizing a large list without creating a competitive idea selling is the goal of this process. All ideas are valuable and useful, so none are discarded but some must simply be seen as more urgent.

Practical Voting Round Tips

- Groups of 0-5 = 2 votes or less should be enough.
- Groups of 6-15 = 3 votes or less should be enough.
- Groups of 15 + = 4 votes or less may be required.

Example:

A Board of Directors for a First Nations organization was concerned that their meetings were not producing enough concrete actions or outcomes. The Chair of the 6-member Board held a whole organization brainstorming session to explore some of their lack of productivity.

The Brainstorming session yielded the following list of issues:

Table 1: List of issues with number of votes per issue – Round 1

A. No agendas ◻ ◻◻	B. Interrupted by phone calls ◻◻◻◻◻
C. No clear objectives ◻◻◻◻	D. Few metrics ◻◻
E. Long stories off-topic ◻◻	F. Interrupted by visitors ◻◻◻◻
G. Vital members missing ◻◻◻◻◻◻◻	H. No administrative support ◻◻◻
I. Not enough preparation ◻◻◻◻◻	J. Meetings always overtime ◻◻◻◻
K. Too many presentations ◻◻◻◻	L. Unclear charts
M. Problems not mentioned ◻	N. Members distracted by emergencies ◻◻◻◻

The facilitator then displayed these issues on a flipchart for all Directors to see and limited their choices by giving them each 8 coloured stickers and gave them 20 minutes to vote by placing their stickers on what they thought the most important reason for their meetings not producing enough results. Only issues with four votes or more were selected for the next round of voting. The members were each given 4 votes in the next round:

Table 2: List of issues with number of votes per issue – Round 2

Meeting Issues	
C. No clear objectives	
G. Vital members missing	☐☐☐☐☐
I. Not enough preparation	☐☐☐☐☐
K. Too many presentations	☐☐☐☐☐
B. Interrupted by phone calls	☐☐☐☐
F. Interrupted by visitors	
J. Meetings always overtime	☐☐
N. Members distracted by emergencies	☐☐☐

As a general rule multi-voting should not be done until only 1 issue remains. In groups of 5 or less 2 votes should eliminate enough items.   In groups of 6-15 members 3 or fewer votes should be eliminate enough items to make long lists manageable. In groups of 15 or more 4 rounds of 4 (or less) voting should be used to reduce the number of issues.

Module 12:

Large Group Process: Brainstorming, Affinity Mapping, Delphi Technique and Open Space Technology

Large group techniques have been much attention recently though they have existed in some for as long as humans have existed. Brainstorming is a process of generating ideas and solutions to various challenges and decision we are faced with daily. We have all done this naturally when faced with decisions as an individual and so organizations can make use of this same process. The key difference is that the size of the group greatly increases the number of ideas generated and they will be stated in numerous different ways. The greatest challenge is framing the question your organization needs an answer to and avoiding "groupthink."

One of the problems with this idea is that quieter or shy participants do not speak up for fear of rejection of their ideas in favour of the groups existing ideas or a lack of confidence in their ideas. This is called "groupthink," which happens in large groups particularly when there is 1 or 2 dominant, opinionated individuals that the group defers to. For this reason many facilitators suggest the use of the "Delphi technique" that has the participants in large groups work individually and write down their ideas and submit anonymous ideas for further development. The facilitator can then post them and look at them as a group and as you do so discuss and organize them into thematic areas in an "affinity map."

This process is a central tool of the Open Space Technology, which is a large group technique to self-manage conferences and meetings for the participants to explore issues and new opportunities and new ways to work together in organizations. It works best in large groups (12 + participants) and is only limited the facility's fire code.

The Process

Gather your large group in a comfortable space. It is nice if they can be seated at tables but it is not absolutely necessary as long as they can find a surface to write on. The following steps are to be followed:

Step 1: The facilitator hands out notepads or Post-It pads to every member and a pen. Then appoints a recorder (helps if you have a flipchart or SmartBoard).

Step 2: Either have participants introduce themselves or conduct an **icebreaker** activity.

Step 4: It must be emphasized that the objective of the activity is to generate as many ideas about the decision as possible. It is usually the facilitator's role to ensure that participants feel that all ideas are valuable and ensure the recorder can capture as many ideas that are expressed as possible. The rules must be set that encourage fair participation and that criticism of individuals and their ideas is not productive to the objective. Above all make sure the session is fun and encourages the enthusiasm that participants often bring to it.

Step 5: Define the decision or problem at-hand as clearly as possible. This means that the statement should be without judgment or as neutral as possible to help generate the most innovative ideas as possible.

Step 6: Allow the participants time individually to write and place their ideas on the board or flipchart in the room. Do as many rounds that you can (allowing for comfort breaks).

Step 7: Look at the ideas as a group and see if groupings of ideas have naturally occurred, i.e. similarities in theme. If there are, can you recognize and agree what theme these group represent? Have a participant (or the facilitator) group the ideas together. Add the key word to the group of ideas.

Example:

A First Nations school decides it would like to better its performance relative to the rest of the schools in its region. The Band Council, the Education department, the parents and other members of the public at large are invited to the meeting. The Director of Education decides to facilitate the meeting, as she has strong opinions and has decided to omit them from the discussion so she can hear from others. On the day of the meeting, so many people show up that they move the meeting outdoors. The resulting ideas for better performance of the First Nations school with the facilitator's suggestions for themes:

Table 1: Ideas for better performance, grouped by themes ($, X, V)

• Incentives for regular attendance by students **$**	• Encourage more parental involvement - **V**
• Enhance afterschool programs in sports and academics - **X**	• Encourage job mentoring with surrounding businesses and institutions -**X**
• Create summer learning sessions -**X**	• Post-secondary recruitment fair
• Expand the school facilities **$**	• Build a library **$**
• Begin fundraisers in surrounding areas	• Parents' homework workshops - **X**
• Hire more First Nations teachers - **X**	• Form afterschool homework and tutoring groups
• Pay teachers better with more benefits **$**	• Rewards for bilingualism **$**
• Expand sports field and outdoor equipment **$**	• Create exchanges with other schools
• Create role-model programs **$**	• Review the curriculum - **V**

Module 13:

Individual Brainstorming: Brainstorming, ethics and values

Too often decisions must be made quickly, sometimes without the benefit of a group to fully explore the options and alternatives with the added perspectives of others. On the other hand, it may also be beneficial to brainstorm on their own at first, particularly if they find themselves blocked by the input of others in larger groups. The way decisions are made and how they are communicated to peers is shaped by culture and personal experiences. Here are a few steps that can be useful to brainstorming:

A. One of the most powerful tools is the same as in the group: define the problem for yourself.
B. How would your opposing side define the same problem?
C. How would you explain how the decision you are faced with came about?
D. To whom are you being loyal to - you or your collective?
E. What is your intention in making this decision?
F. How does your intention compare with the likely results?
G. Does the likely result injury anyone?
H. Would you adjust your description of events to different audiences - why?
I. How long will your stance remain unchanged?
J. Is there any symbolism in the decision you are making?
K. Will there be any exceptions on the decision you are making?

If the alternatives are few and time is short, focus must be placed on internal ethics and values to help guide decisions. Your own values are part of who you are. Examining your own values and evaluating your position in a dilemma may be helpful in determining your reasonable courses of action.

Before any group decision-making process, it is useful to know about the different ways on how you express your values. If you think about your life in terms of what makes you happy, proud and fulfilled, you can then begin to ask yourself why these activities, events or periods make you happy proud and fulfilled. What were the circumstances? Who were you doing these things with or for? What factors contributed to your happy feelings? What desire was fulfilled? Did it give your life a deeper meaning and why? In order to assist with this process, you should attempt to define and prioritize your own values from the following chart:

Step A – What terms describe your values (a very abridged list)?

Accountability	Excitement	Honesty
Accuracy	Fairness	Honor
Achievement	Faith	Humility
Adventurousness	Family-orientedness	Independence
Altruism	Fidelity	Ingenuity
Ambition	Fitness	Inner Harmony
Accuracy	Freedom	Inquisitiveness
Achievement	Fun	Insightfulness

Step B – **Prioritize.** This is the most critical piece is to list your values from the possibilities and see if you can prioritize the. Pick the three at the top of your chart and decide if you had to choose between the three values which one would you choose?

Step C – Sanity check. The purpose is to reaffirm your values. Does the resulting list feel right? Could you use it explain your most recent decisions? Does it match culturally for you?

Example:

The Director General of a Tribal Council must make a decision whether or not to allow a nuclear waste siting presentation to be made before his Board of Directors at their next meeting. The Board of Directors must then decide based on his advice whether or not a future presentation will be made to the Chief and Council. The possibility of the presentation being misunderstood is high and could place his position in jeopardy as result. If he refuses to permit the presentation, he may also be seen as withholding information from the political process. If you found yourself in this situation the following are some questions which might assist with reflecting on your values:

Question #1: Have you defined the question accurately?
Question #2: How would you define the problem from the other side of the fence?
Question #3: How did this situation occur in the first place?
Question #4: To whom and what do you give your loyalties as an individual as a member of the Nation?
Question #5: What is your intention in making this decision?
Question #6: How does this intention compare with the likely results?
Question #7: Could your decision or action injure the First Nation or any individual community?
Question #8: Can you engage the Nation's members and Political Council in a discussion of the problem before you make your decision?
Question #9: Are you confident that your position will be as valid for the next seven generations?
Question #10: Could you disclose without qualms your decision or action to the members of the Political Council, a council of Elders, your community, or the membership in assembly?
Question #11: What is the symbolic potential of your action if understood? If misunderstood?
Question #12: Under what conditions would you allow exceptions to your stand?

Conclusion:

This toolkit provides an overview of consensus and Traditional decision-making, a series of practical considerations for applying Traditional decision-making processes to negotiations and a series of techniques and processes for facilitating the implementation of a Traditional decision-making process. The toolkit has been organized in a series of modules so that First Nations can add or remove materials as needed.

This toolkit is designed to facilitate development of successful First Nations' negotiation processes. The importance of defining consensus and Traditional decision-making is that it allows a First Nations community to define these terms for developers and for external stakeholders, such as federal, provincial and municipal governments. Similarly, it is important to understand and exert rights in the context of implementing a Traditional decision-making process because rights support the application of the process and the process supports further assertion of rights.

Practical issues surrounding process design and development of First Nations community goals involve preparation to commence a Traditional decision-making process in the context of a negotiation. Applying First Nations community protocols and establishing a structure for the negotiations allow First Nations to seize and maintain control of the negotiation process, allowing Traditional decision-making processes to be applied throughout a negotiation.

Finally, the toolkit provides First Nations communities with a range of techniques and a process which may be used to facilitate the decision-making. These techniques are themselves not the product of a Traditional decision-making process, but may be useful in the conduct of meetings, should complex, difficult or contentious issues arise.

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