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GUIDE

FIVE NEGOTIATION TIPS FOR MINING COMPANIES

BY CHUCK HIGGINS

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Founder and managing principal at Pilot Law LLP, Chuck is also the editor of, and contributor to The Canadian Law of Mining published by the Rocky Mountain Mineral Law Foundation. His expertise has been recognized in Chambers Global, Who's Who Legal, the Canadian Legal Lexpert Directory and Best Lawyers in Canada. He taught "Negotiation Skills" for several years at the Ontario Bar Admission Course.

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INDEX

04 Pay as much attention to plan B as to plan A

07 Don't bid against yourself

10 Don't hesitate to put in the first offer

13 Go to the other side's office

18 Get all of the issues on the table

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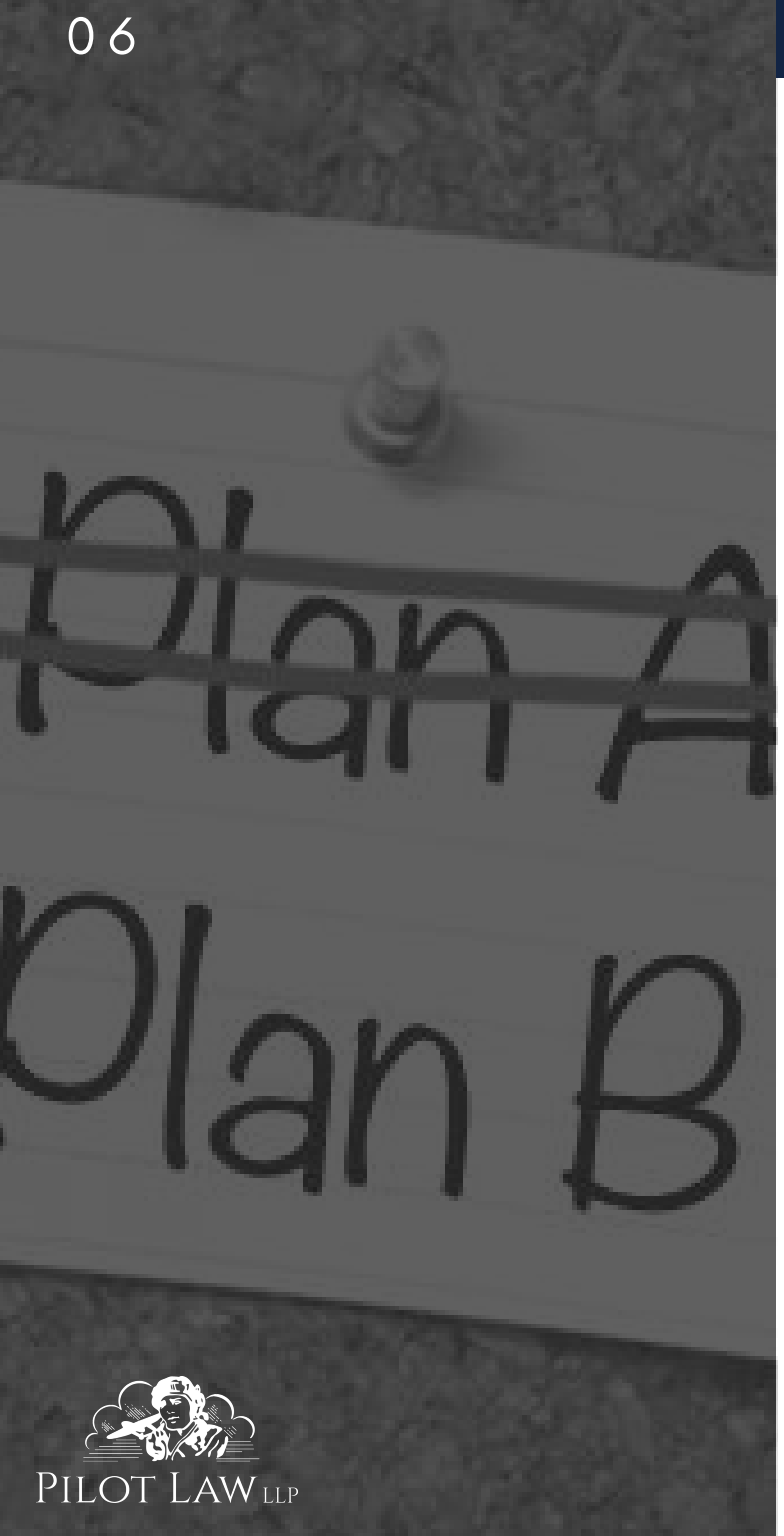
#1

PAY AS MUCH ATTENTION
TO PLAN B AS TO PLAN A

#1 PAY AS MUCH ATTENTION TO PLAN B AS TO PLAN A

It may sound obvious, but sometimes negotiations in the mining industry are not worth pursuing once it becomes apparent that there is a better alternative to the proposal being negotiated.

I remember once when I was working on a financing for a mining company, the term sheet which seemed very attractive at first became less and less so as negotiations continued. The client's advisors were unanimous in advising that the financing offer was unworkable and would be worse for the client than doing nothing. In the end, the advice was not taken, the financing proceeded, and the company ultimately became insolvent.



#1 PAY AS MUCH ATTENTION TO PLAN B AS TO PLAN A

In the seminal book by Roger Fisher, William Ury, and Bruce Patton *Getting to Yes: Negotiating Agreement Without Giving In*, the authors explored the concept of a "Best Alternative to a Negotiated Agreement" or "BATNA"; I'd call it Plan B.

Simply put, going into a deal negotiation, you should always analyze what your alternative is to failed negotiations — for example, another deal, litigation or status quo. There is always a Plan B and it should always be forefront in your negotiating strategy. Failure to recognize this can result in protracted and ultimately unproductive negotiations. In the worst case, it can end in an agreement that is suboptimal.

I'd say, pay as much attention to Plan B as to Plan A.

The stronger your Plan B, the better your starting point in negotiations since you never have to settle for anything less than your Plan B. That only can help you in negotiating the best possible Plan A.

#2

DON’T BID AGAINST YOURSELF

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One of the fundamental mistakes made in negotiation is "bidding against yourself". That is, putting an offer on the table, and then improving it, without receiving a counter-proposal from the other side. This mistake is particularly prevalent where there is an imbalance of power in the negotiation. For example, where a junior mining company is across the negotiating table from a major producer.

Bidding against yourself has the effect of:

- Showing undue eagerness to make a deal (junior mining companies can be especially susceptible to this)
- Encouraging your opponent to step back and let you continue bidding
- Demonstrating poor negotiation technique

"NOT GOOD ENOUGH"

Conversely, if you are faced with a counter-party who is improving on their offer before you make a counter-proposal, why would you stop that process? You can just say "not good enough" until the process runs its course.

AVOID GIVING A CONCESSION ON ONE POINT

When there are multiple issues on the table, it may not always be apparent that you are bidding against yourself. Avoid giving a concession on one point, without receiving a concession from the other side on another issue. That would have the same effect as bidding against yourself.

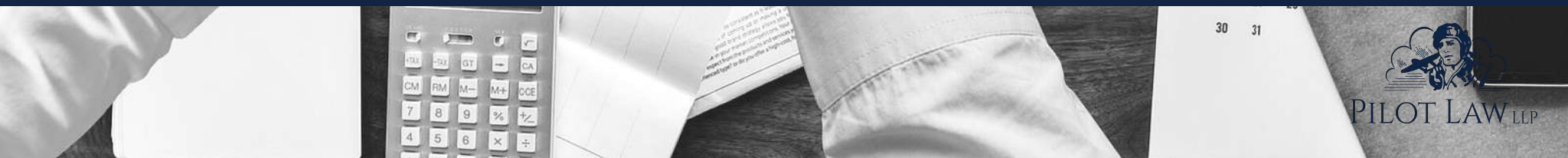
Buying a used car is a classic example where the process is designed to make you bid against yourself. The salesperson says – I'll take your offer to my manager and try really hard to get it accepted. He or she then comes back and says – we'll need just a bit more, and it may get the deal done. And so on. Once you make an offer you should not improve on it until you get a counter-proposal. And you may have to be prepared to walk away to achieve that. But that will inevitably be preferable to bidding against yourself.

3

DON’T HESITATE TO PUT IN THE FIRST OFFER

Often parties to a negotiation—not only mining companies, but they too—are very reluctant to put in the first offer and prefer to wait to see what the other side proposes, but there are good reasons that you might be better off making the opening offer. Here are some:

- Putting in the first offer allows you to "anchor" the negotiation. In addition to framing the principal terms and issues, you can also establish the timing, location of meetings and suggested participants
- Putting in the first offer means you will likely be more prepared than your counterparty, as putting the offer together will require some thought and planning
- Instead of waiting for the other side, you can get the negotiation started and save time in reaching a deal. You can also more quickly establish if there is a deal to be made at all



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The Harvard Law School Programme on Negotiation reports on a study where MBA students were asked to negotiate a single-issue price deal and recorded who made the first offer, the amount of the offer, and the deal outcome. Subjects then were asked questions about their emotional state, such as whether they felt anxious during negotiation scenarios and whether they were satisfied with the outcome. The negotiators who made first offers felt more anxiety than those who did not – and, as a result, were less satisfied with their outcomes. Yet, backing up prior bargaining studies, those who made first offers did better in economic terms than those who did not.

So, don't be nervous – put in the first offer and you are likely to do better than waiting for the other side!

#4

GO TO THE OTHER SIDE'S OFFICE

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Often parties to a negotiation think that is a sign of weakness to agree to meet at the other party's office, instead of a neutral place, or ideally their own office. I disagree.

BY MEETING AT YOUR COUNTER-PARTY'S OFFICE YOU:

01

DEMONSTRATE

a willingness to get a deal done. Remember, you are more than meeting your counter-party halfway—you're meeting them on their turf

02

INCREASE

your chances of getting a decision maker to the meeting (it's always better to deal with the organ grinder than the monkey)

03

"STORM OUT"

Are able to "storm out" if needed

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On this last point, I have experience. As a junior lawyer representing a client, which was definitely in an unequal bargaining position with a much larger entity (a common situation in the mining industry), we went to their lawyers' office for the first meeting. My client tabled the first offer (see Negotiation Tip #3!) which was admittedly a little aggressive. The other lawyer, a senior partner of his firm was outraged at our offer and stated that it was completely unacceptable and stormed out of his boardroom. Unfortunately, his client did not follow him and the two clients continued to negotiate, with only my client having the benefit of legal counsel. After about an hour, a junior partner was sent in to assess the damage, which was considerable.

The upshot is

YOU CAN'T STORM OUT OF YOUR OWN OFFICE, BUT YOU CAN EASILY LEAVE THE OTHER SIDE'S OFFICE IF NEEDED.

#5

GET ALL OF THE ISSUES ON THE TABLE

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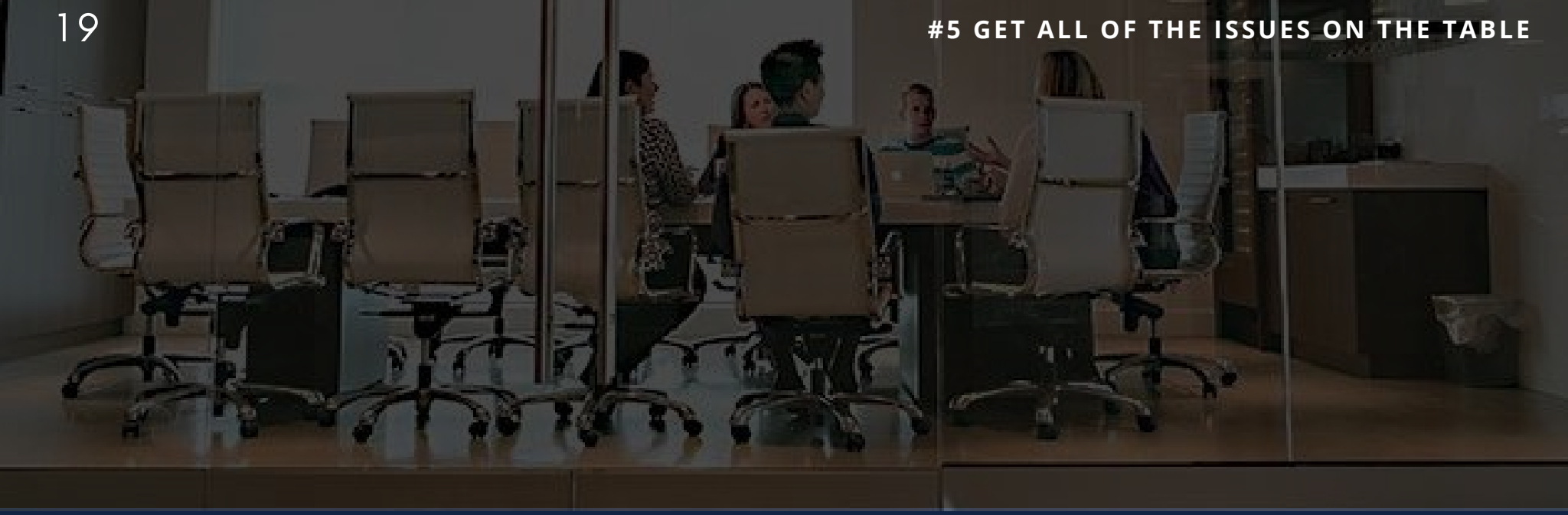
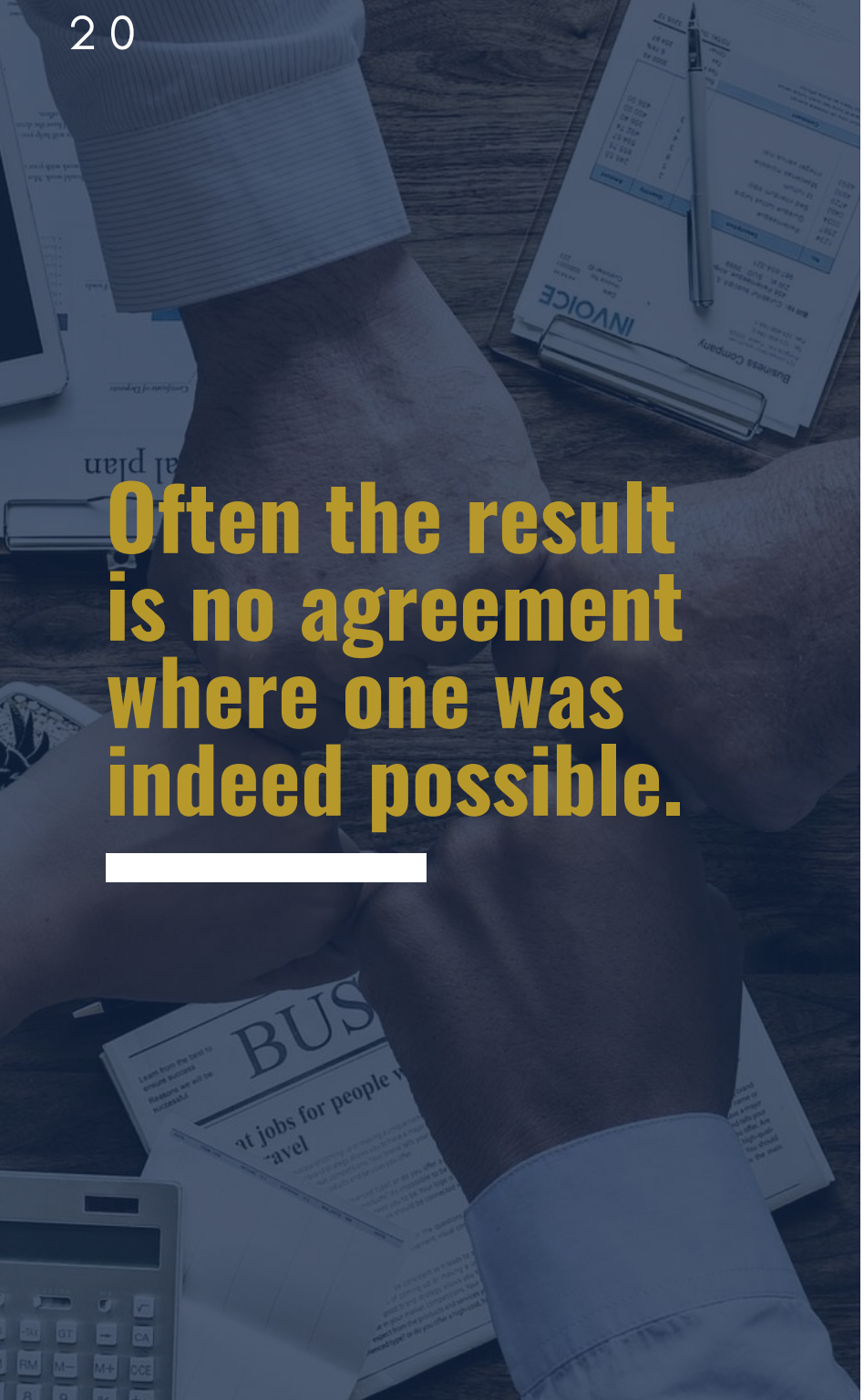


For a mining company, going into a negotiation there are often multiple issues to resolve. It is important to get all of them on the table before you start.

Nothing can derail a negotiation faster than raising new issues at the last minute. Besides suggesting bad faith, it can often put parties back to square one and put all previously resolved issues back in play.



AN EXAMPLE:

A junior mining company is negotiating an option and joint venture with a major. The usual issues are payments, work commitments and term. But look at the other issues that could be raised:

- Area of mutual interest
- Royalty and royalty buy down rights
- Dilution formula
- Land relinquishment and right to reacquire such lands
- Property access
- Access to technical information
- Assignment rights

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Raising these issues at the beginning not only demonstrates that you know your business, but lets you give on less important issues in order to reach an agreement on the more important ones. Even if you raise issues which may be beneficial to the other side (royalty buy down, for instance), you can get the first offer in and improve the final result (see Negotiation Tip No 3!).

And finally, looking at all of the issues lets parties assess what their interests are, before taking positions that may be hard to change. Remembering that the order should be issues then interests then positions, will help you get to a win/win deal as quickly as possible.

LET'S TALK!

CALL US (416) 521-7200

/COMPANY/PILOT-LAW-LLP/ PILOTLAW.CA EMAIL US INFO@PILOTLAW.CA

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