

Whatever It Takes

Playing by someone else's rules is often worth the effort

BY ERIC FINN, ESQ.

As a practicing litigation lawyer for over 40 years, I have appeared before all levels of court, as well as before various administrative tribunals. For one memorable case, I represented a provincial utility, and was working to acquire the title rights and pay compensation to the Oneida of the Thames First Nation in southwestern Ontario, Canada. Generally, negotiations with the First Nations commence with informal discussions between the acquiring authority and the Federal Government. In its role as fiduciary for First Nations, the Federal Government always makes any agreement subject to their consent. However, all negotiations, particularly those relating to a project's impact on land, will eventually require direct contact with First Nation representatives.

By the time I became involved in discussions with the Oneidas, there had been very little movement toward resolving the issues. The First Nation retained a lawyer, and the utility decided to have its own representation as well. Prolonged correspondence followed with both parties trying to reduce the outstanding items. Eventually, negotiations reached the stage where the lawyer for the First Nation suggested a meeting with the Band Council in southwestern Ontario. Before setting out, the utility representative and I discussed our approach and, more importantly, how we should dress. As neither of us had ever appeared before a Band Council, we imagined it would be similar to a municipal council meeting and opted for suits and ties.

Upon our arrival, we were ushered into a foyer and then escorted into the Council Chamber. What first struck me was the lighting in the room, which had been dimmed to that of a romantic restaurant setting. As our eyes adjusted, we were motioned to sit at a table in the middle of the room. Sitting opposite, sporting a handcrafted sweater and faded jeans, was the lawyer for the First Nation. The Band Council, also dressed casually, was arranged in a U-shape around us. Rather than a typical

court setting, this was more like a theatre in the round. Not only were we overly dressed for the occasion, we were the center of attention. The analogy of a Roman coliseum comes to mind.

With a warm welcome, the Chief asked that we make our submissions to the First Nation lawyer who would then respond. For the next hour, I presented the utility's arguments, all of which had already been aired at great

length in the preceding months, but never in a face-to-face confrontation. Once I finished, the lawyer responded, but oddly, without any comments from the Chief or Council members.

Once we had finished, the Chief gave a closing statement. In contrast to his warm welcome, his message was now peppered with references to "the actions of the Europeans when they first came to North America." At first, I thought the Chief's comments were specifically targeted at the utility and its proposed project. But I later decided that it was probably a prepared statement given to all "Europeans" appearing before the Council. After the Chief's closing remarks, there

was no further discussion. The utility representative and I were taken back to the foyer and after a long wait, the First Nation's lawyer told us that we were no longer needed and that I would hear from him at a later date. More correspondence ultimately followed, and once all of the circumstances were agreeable to both parties, a settlement was finally achieved.

So what purpose did the Band Council meeting serve? Well, even though it represented a very small part of the negotiation process, it did provide an opportunity to meet face-to-face. And while the discussion was only between the lawyers, it was done in the presence of those who would make the ultimate decision. From a lawyer's standpoint, anything that gets a settlement done is worth the effort.



Eric is Senior Litigation Counsel at Barriston LLP, and also serves as IRWA General Counsel.