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WORKING WITH FIRST NATIONS AND OTHER INDIGENOUS COMMUNITIES

EIGHT QUESTIONS THAT YOU NEED TO ANSWER!

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Colleague at Pilot Law LLP (https://pilotlaw.ca), Howard is a native of Fort Frances, Ontario, and his practice centres on First Nations issues as they impact resource development. He provides negotiation and strategic advice to mining, forestry and transportation companies developing projects in traditional First Nations lands. He also advises First Nations on land claims matters. Howie has advised clients and governments in Saskatchewan, Alberta, Ontario and Nunavut.

Howie served Attorney General of Ontario where he oversaw the introduction and passage of the Class Proceedings Act, 1992, and the Family Support Act, 1991.

Howie also served as Minister of Natural Resources of Ontario where he guided the modernization of Ontario's forest management legislation through the development and passage of the Crown Forest Sustainability Act, and the creation of the Forest Renewal Trust Fund, and the Forest Futures Trust Fund. The Act and the Trust Funds continue to be the basis for sustainable forest policy and sustainable forest management to this day.

Howie is the author of Power Public Power: The Fight for Publicly Owned Electricity.

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Whether you are a business, municipality, financial institution, or investor involved in some aspect of **mining, forestry, energy, transportation**, or many other fields and you intend to undertake activities on “Crown Land”, and in some cases, private land—you will need to consider the rights and interests of Indigenous people, and you will need to have a plan for working with their communities.

It is the law in Canada, and it is also the foundation of good business practice. Nevertheless, there are still companies, municipalities, financial institutions and investors that spend significant financial resources on projects without taking into account the rights and interests of the Indigenous people whose “traditional territory” is involved—and then as an “afterthought” ask the question—“What Indigenous communities should we be talking to?”

#1 – What First Nations should you talk to?

First, is to identify those First Nations who may assert that the Crown Land involved is their “traditional territory”. In other words which First Nations can demonstrate that the land area in question is where members of the community would have traditionally hunted, fished, trapped, or otherwise harvested from the land. It is a wider geographical consideration than “where someone lived”, and it is not unusual that more than one First Nation community can demonstrate that a given area of Crown Land was used for harvesting purposes. In Ontario, the Ministries of Northern Development and Mines, Natural Resources and Forests, and Indigenous Affairs and Reconciliation can all be helpful in answering questions re which First Nations should you be talking to.

#2 – Are there Metis or Non-Status communities that can also demonstrate a similar, historical relationship to the land – and you must consider?

Answering the “which First Nations” question is the good first step, but it is followed by other questions that are just as important. For example, are there Metis or Non-Status communities that can also demonstrate a similar, historical relationship to the land? Across much of Northern Ontario, where I grew up, there is a history of Metis and Non-Status communities that lived and harvested from identifiable land areas, and there are even instances of Metis communities holding lands with “reserve status”, so asking the question—“What about Metis and Non-Status communities?” is very important.

#3 – What Treaty governs the Crown Land in question?

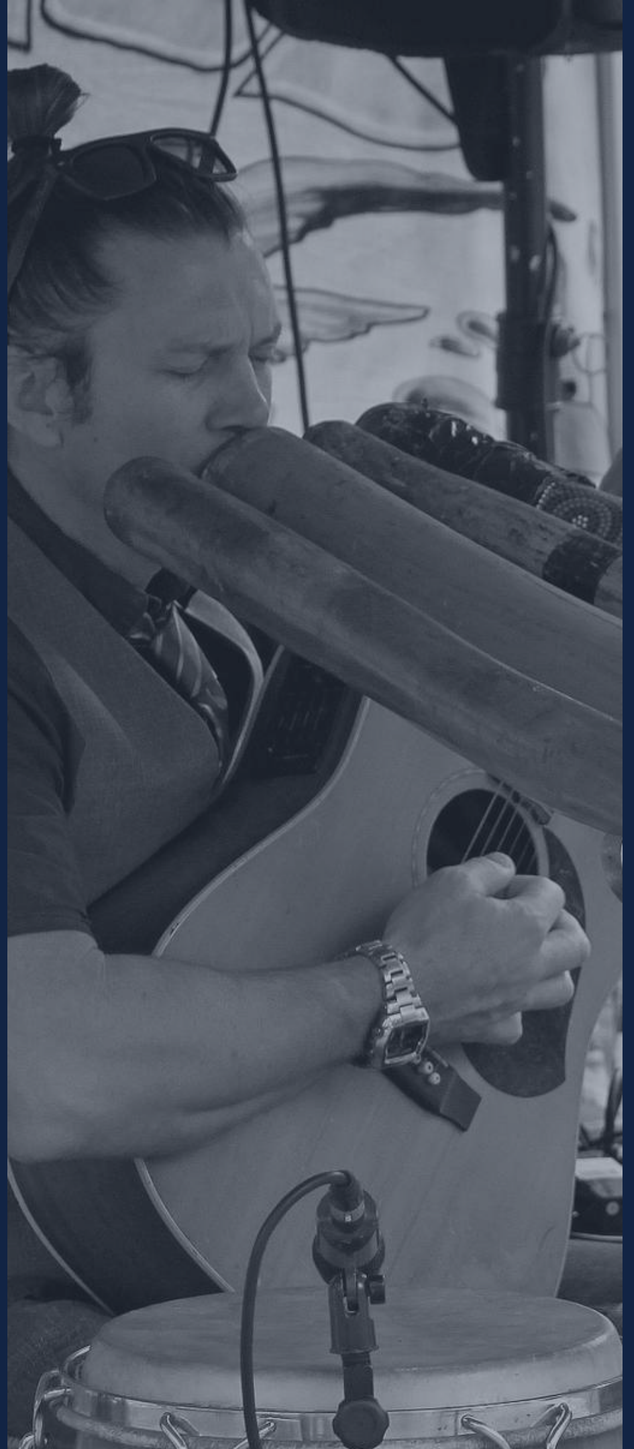
Having identified particular Indigenous communities then leads to the question of what Treaty governs the Crown Lands in question. This is not a simple question because in Ontario, and in the western provinces[except BC] a number of individual treaties were developed between the Crown and the Indigenous people. For example. lands in Northwestern Ontario are covered by 4 separate treaties—Treaty 3, Treaty 5, Treaty 9, and the Robinson-Superior Treaty, and all of the Treaties, while similar, are not the same. Having a working knowledge of the Treaty is just as important as knowing which Indigenous communities, because the Treaty spells out the legal rights and obligations of Canada, Ontario, and the Indigenous communities involved. In some cases, the First Nations that are covered by a given treaty, may have made collective decisions about important questions to do with mining, forestry, hydro development, pipelines, hydro transmission towers, or highway construction, and may have developed a “general statement of principles” regarding these and other issues. So knowing what “Treaty” and what “Treaty organization” you must work with is important.

#4 – Is the First Nation an active member of a “Treaty Organization” or is it an “Independent First Nation”?

Another question which also must be asked is, whether a given First Nation is an active member of a given “Treaty Organization” or is an “Independent First Nation“? For example, the “Treaty Organization” which speaks for Treaty 3 is known as “Grand Council Treaty 3”. Grand Council Treaty 3 has an elected Grand Chief who speaks for the member First Nations on important issues, and the Grand Council has political, governance, and administrative responsibilities for the member First Nations. Meanwhile, there are other First Nations which are covered by Treaty 3, but see themselves as “Independent First Nations”, and actively assert there independence on most, if not all issues of governance, administration, and political decision-making. Clearly it is an important question – “does a particular First Nation work within the Treaty Organization?” – or does it work as an Independent?

#5- Is the First Nation a member of a “Tribal Council”?

It is not unusual that the "Tribal Council" will employ professional staff that provide advice, and administrative services to the tribal council member First Nations. For example, individual First Nations in a given area may not be able to afford to hire a "professional forester", but working collectively through their Tribal Council, they may be able to hire expertise in forestry, mining, and in other areas such as health and education. Clearly, it is important to know if a First Nation or group of First Nations, that you must work with, are part of a Tribal Council. If such is the case, much of your communication and substantive work may be with the Tribal Council, in addition to individual First Nations.



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#6- IS THE FIRST NATION PRIMARILY GUIDED BY ITS "TRADITIONS" IN CONDUCTING ITS AFFAIRS?

Another important consideration is to think about whether a given First Nation is primarily guided by its "traditions" or not in conducting its affairs. This is not an easy question to answer. Two First Nations may be only 100 kilometres apart on a map, but may be very different in how they see themselves and how they make decisions. One First Nation may be primarily guided by “traditional beliefs” in making important decisions. Meanwhile, another First Nation nearly, maybe less influenced by traditional beliefs”, and more influenced by “modern experience”. Knowing how a given First Nation makes important decisions can be complicated.

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#7 - What importance does a First Nation place on the experience, wisdom and knowledge of its “Elders” in making decisions?

Generally, First Nation communities, unlike so-called "modern contemporary society"----place great value in the experience, wisdom, thoughts and ideas of "Elders" in their community. So even though there is an elected Chief and Council, many decisions are guided by the experience and wisdom of community Elders. In other First Nations decision-making primarily rests with the elected Chief and Council. If you want to develop a good working relationship with a given First Nation, it is important to consider the views and ideas of community Elders.

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#8 - What is the "working history" of the Indigenous Communities?

Somewhat related to the concept of "traditions" is the question of what is a First Nation's historical experience with the so-called "commercial world". Just as cities like Hamilton and Ottawa are very different in terms of their "economic and social base", the same is often true of First Nations. Some First Nations have a long history of involvement with the forest sector, or with one of the major railroads, or with commercial fishing----while other First Nations have little or no such experience. Clearly, a company wanting to develop a working relationship with a given First Nation, or group of First Nations, needs to know the "working history" of the communities.

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These are just some of the questions and considerations that must be thought about by companies, municipalities, and financial institutions that need to work with First Nations. There are many more questions, in addition to these examples. Equally, the thought processes that apply to working with First Nations will not always be identical in working with Metis or Non-Status communities. A word of general advice: Before spending significant sums on a given project, take the time to consider how important it is to develop a thoughtful strategy for working with Indigenous people, and what the individual steps will be to building a relationship based on integrity and trust.

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