

# CONVINCING TERMS

***Negotiating a First Nations development deal  
can prove both lucrative and enlightening***



by Leslie C. Smith

his great, big land of ours offers plenty of opportunities for real estate enterprise. In several instances across the country, however, where title to the land remains in dispute with First Nations groups, that pronoun “ours” can prove a bit tricky.

Take the case of the Algonquins of Ontario (AOO), whose outstanding land claim encompasses nine million acres of Crown and privately owned lands, as well as a handful of provincial parks, a traditional territory that cuts a wide swath through what used to be known as Upper Canada and includes a hefty slice of our nation’s capital city. The Algonquins never signed a treaty with the Crown and never ceded a jot of land to anyone. Stranger still, due perhaps to their siding with the French against the British in the Seven Years’ War (1755-63), they never received a reserve of their own, save for Pikwàkanagàn, a small parcel of land in the Ottawa Valley that they were obliged to purchase for themselves. Despite having repeatedly petitioned for official recognition, starting in 1772, the AOO were ignored for well over 200 years until, in 1991, the government finally decided to do something about formalizing their rights.

At the same time, the Feds were busy decommissioning several armed forces bases, one of which happened to be CFB Rockcliffe, situated on a prime piece of Ottawa realty. Because of the claim conflict with the Algonquins, the Government of Canada had the obligation — formally known as the “duty to consult” — to enquire if the AOO were interested in this land parcel. Not surprisingly, they were. But the details were back-burnered while larger issues got sorted out.

After treaty talks between the government and the First Nation stalled in 2001 and then resumed again in 2003, Robert Potts, partner in Toronto’s Blaney McMurtry LLP, began working as principal negotiator for the AOO. Complicating the issue of assigning land rights across the breadth of the territorial claim, he states, were myriad cottage, home and business owners who, understandably, possessed a deep financial and emotional stake in the matter. To accommodate everybody’s concerns, a time-consuming series of public meetings were held, which provided valuable feedback to all parties.

“Never before,” says Potts, “had such a thing been put out to the public at large.”

The upshot? A potential settlement in the form of a 2012 Preliminary Draft Agreement-in-Principle, wherein the Algonquins of Ontario agree to no expropriation of private property and the government pays them \$300 million in capital. Of the nine million acres of land in question, six million acres are already in the hands of private entities and enterprises, and two million acres are in parks, most of it Algonquin Park. One million acres remains as Crown land to which the Algonquins of Ontario would have certain resource and harvesting rights, and some 117,500 acres of that allotment are ceded directly to them.

“A challenging package,” Potts maintains, “to put into a viable land base for generations to come, especially since much

of this land, too, will be retained as parks." If the settlement is accepted by all parties, it will mark the first modern-day signing of a constitutionally protected treaty in Ontario.

### Remaking Rockcliffe

Meanwhile, back at Ottawa's CFB Rockcliffe, after consultations with Aboriginal Affairs and the Ministry of Defence, the site was transferred in 2009 to the Canada Lands Company Limited (CLC) for commercial and residential reformation. CLC, an arms-length, self-financing Crown corporation, acquires surplus federal lands for development, and currently owns and manages a real estate portfolio of approximately 2,400 acres in municipalities across Canada, including Toronto's CN Tower. The prospect of negotiating with an additional stakeholder group on this new project apparently didn't faze them.

Indeed, says Potts, the corporation's attitude and approach to the AOO represents the ideal in First Nations negotiations:

"They demonstrated tremendous sensitivity and a willingness to make this project special and unique, and to enhance [the Algonquins'] presence in the Ottawa Valley. What better place to do that than right in the nation's capital?"

CLC president Robert Howald recalls his prep work for the negotiations was: "the same as for any other party we do a transaction with. You take the time to understand their background and other experiences they may have had, and work within those parameters."

This led, through a series of meetings, to a basic settlement agreement involving three main elements, factors that diverge from an ordinary land deal in that they are all predicated on the AOO's special perspective. One requirement is that aboriginal-owned companies have the opportunity to compete for construction and other service jobs on the project. Another is economic development that goes above and beyond the typical cash-on-closing handshake. Once services go in ground, the AOO will have first refusal on portions of land to develop for themselves, up to a value of \$10 million. Finally, and most important from everyone's viewpoint, is the chance to commemorate Algonquin culture as well as educate the public about this heritage through the development's design and concept. Even though these ideas are still in the germination stage, significant commemoration might include everything from naming the site (the development requires new branding, given that "Rockcliffe" is already a well-known Ottawa neighbourhood) and surrounding roadways to setting aside specific areas identified as important Algonquin touchstones.

Pivotal to this last point is what Howald calls "the ability to have a voice in the development going forward." Regular meetings with elected Algonquin Negotiation Representatives and consultation with AOO elders ensures the First Na-

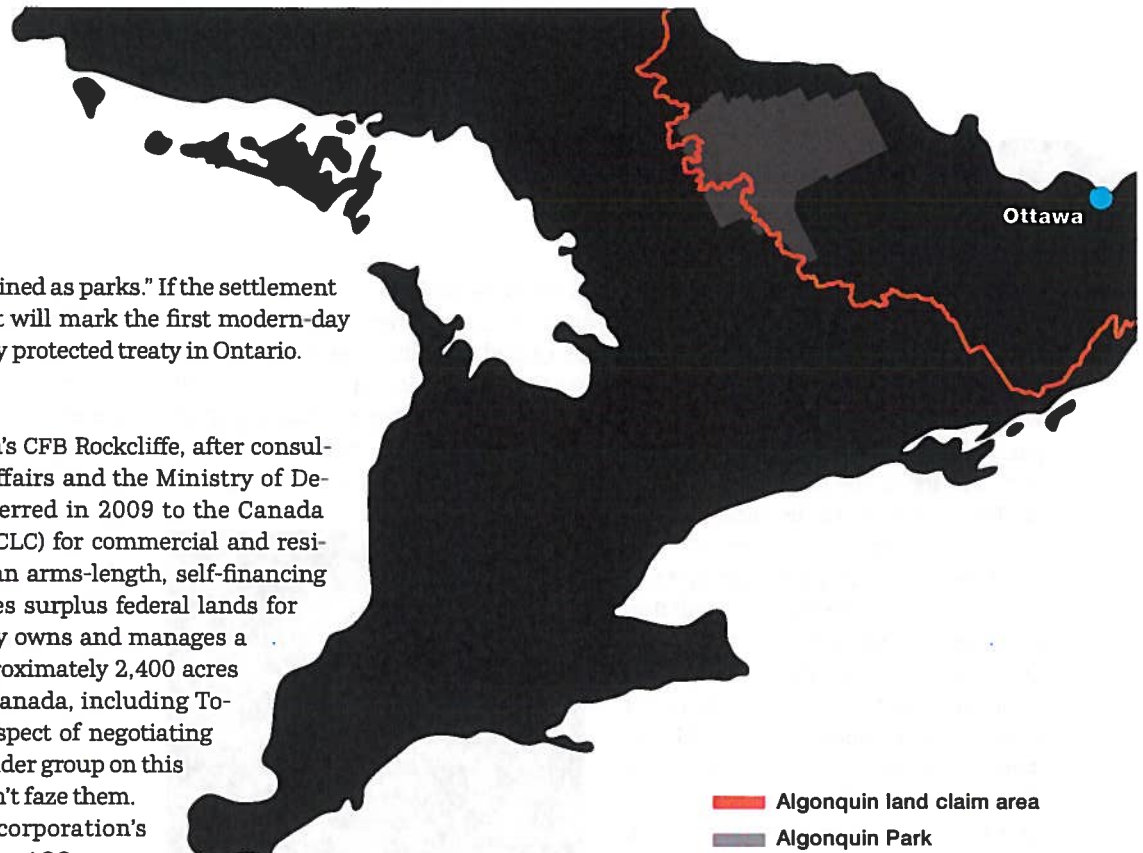
tion's ongoing participation in the project's planning. Don Schultz, CLC's director of real estate at Rockcliffe, says these meetings happen "at least quarterly, but there might be more, if required by the process. Everything's pretty flexible."

As an aside, Schultz says these are "always positive meetings, so we're happy to hold them." Personally, he enjoys learning more about the Algonquin people, from their history and the reality of their mainly assimilated lives in non-native culture – to the point where the majority have lost touch with the language – to their "extraordinary sense of humour." Most of all, as someone who specializes in building communities, he is impressed by their social cohesion: "Despite what could be seen as an erosion of their culture and community, it's still there, it's still strong. The persistence of the community is really quite remarkable."

### Call of Duty

The duty to consult, and the broader duty of all Canadians to form pathways to reconciliation, may strike some developers as a tad onerous. However, as Robert Howald points out, listening, showing respect, and attempting to make sincere accommodation are key to any negotiation. In regards to the Rockcliffe Redevelopment, as well as other dealings his firm has had with First Nations people, he says they've experienced no untoward difficulties: "First Nations are just like any other community that we deal with, including city councils and some companies. Each has their own personality, their own requirements. You'll never be able to absorb or understand all the subtleties ... Just keep an ear open for issues and learn from them."

Shane Freitag, a partner at Borden Ladner Gervais LLP, talks about aboriginal consultations in particular in a recently posted video on [building.ca](http://building.ca): "The duty-consult require-



— Algonquin land claim area  
— Algonquin Park



ment has been a game-changer in terms of developing projects ... Developers often think that if they've signed a participation agreement or a benefits agreement with a First Nation that their duty to consult has ceased to exist, when in fact it continues on. It's important to understand that the complexion of the relationship with First Nations has changed. First Nations are looking for meaningful participation in these projects, not simply employment and jobs. They're looking more for participation in the project itself. So the duty to consult and the relationship with the First Nations are absolutely critical to the success of any new project."

Those who welcome the prospect of partnering with First Nations will find a lot of potentially lucrative sites available to them across Canada. In Ontario alone, says Potts, there are "plenty of development opportunities with the Algonquins. A number of sites can be developed, over 200 land selections, many of them strategically located, and not just in Ottawa."

One main constraint to Native negotiations, at least, seems to have disappeared. A generation ago, First Nations' reverence for the earth, which necessitates a certain delicacy in site development, would have struck many in the business world as ridiculous. Nowadays, though, with the word "green" falling from everyone's lips and developers vying for top LEED accreditation, the idea of being custodians of the land makes perfect sense. Non-native thought, in other words, has finally evolved to become one with aboriginal concepts.

The Algonquins even have a name for it: Ginawaydaganuc. Megan Aikens, Strategic Communications Coordinator for the Algonquins of Ontario Consultation Office in Pembroke, interprets this as meaning: "We are all connected — with the water we drink, the air we breathe, with the food, medicines and gifts the earth provides us, with the animal teachers, with the larger universe, and with each other."

Expressing that thought at the Rockcliffe Redevelopment is a matter best left in the hands of the Algonquins of Ontario elders, explains CLC's Don Schultz, who has met with them twice in 2013. They, in turn, have identified areas significant to the Algonquins, such as the northern

Blaney McMurtry LLP partner Robert Potts has accumulated decades of experience representing and counselling First Nations groups. Like everything else, however, there was a first time. 35 years ago, Potts travelled from Toronto to Sturgeon Lake, in northern Alberta, to present in person advice he had already submitted in writing to First Nations groups in relation to their treaty entitlements:

*In the meeting, I laid out the issues and a series of options, and asked them to make their choice. I was met by a minute-and-a-half of silence. So I did it all over again, after which there were three minutes of silence. Whereupon the chief says to me: "Bob, I think it would be a good idea for you to go outside, walk up the hill, and visit our ancestors in the graveyard." I did this, thinking I was going to be fired.... At the graveyard, two eagles soared overhead. I was told later by the elders that I had been visited by a couple of their ancestors. I came back to the meeting, and all the decisions had been made. Most of them had agreed before the meeting on what needed to be done, but one person had a few difficulties with a couple of points. So they waited, in silence, to allow that person time to come about. They wouldn't force him to make any decision. Only when they were all in agreement did they approve the next steps to be taken.*

*I learned that consensus is very important across the board with any First Nation. The chief explained to me that, in the past, maybe only five or six families would be involved in the decision about which area they would all hunt. The chances of their hunt succeeding would diminish exponentially if one or two families broke off on their own, without everyone heading in same direction. Every negotiation I've done since then, in terms of aboriginal leadership, has been consensus decision-making.*

edge of the site's plateau, overlooking the Ottawa Valley. "What I've learned about Algonquin culture is that it's very inclusive," Schultz says. "They're interested in the idea of all nations coming together because other people used to travel through their territory all the time. They used to collect a toll from other First Nations travellers along here."

"It's very interesting to me, the dovetailing of traditional Algonquin values and modern values," he continues. "Another part of the commemoration is finding a location for a more contemplative place with spiritual meaning. We think we've found a spot in a stand of trees, some very important old-growth forest — centuries-old sugar maples and beeches. This one site has a particular bur oak that's between 200 and 300 years old. It predates Confederation. It's a significant tree, and we're going to celebrate it. Tree preservation is a key part of our development strategy."

Also dovetailed for Schultz is the notion of the Algonquins reconnecting with their own people: "The land claim is about reconciliation and moving forward, at the same time as reconnecting with their past. It's sort of the same thing with Rockcliffe — we're reconnecting this piece of land to the rest of Ottawa. Quite a few military bases were isolated from their surroundings, and this one's been closed for 20 years now. There's an impulse to rebuild, to reconnect this land to the broader Ottawa community that's in keeping with the Algonquin impulse."

Like the government's current treaty process with the Algonquins of Ontario, the Rockcliffe project has passed through its preliminary stages and is on schedule to wrap successfully within a few years' time. But the partnership hammered out between the First Nation and Canada Lands Company has already set the benchmark for Canadians looking to build something of significantly more importance than just another development. **B**