

Building Relationships with Indigenous Peoples and Aboriginal Communities: What the Duty to Consult and Accommodate means for Ontario Planners

Preface

The following learning module was developed from the work of Carolyn King* and David J. Stinson**. They have been collaborating since 2015 to educate land use planners and economic development officers on the necessity of consultation and accommodation. They were asked by the Ontario Professional Planners Institute (OPPI) to prepare a Continuous Professional Learning (CPL) course for the professional development of its members.

In this Continuous Professional Learning course, we will explore some of the worldviews, perspectives, communities and territories that belong to the First Peoples of this Land. This will provide a context for understanding the meaning of planning in the multi-jurisdictional place we call Canada and role of planners in the Duty to Consult and Accommodate.

In our live presentations, we start with a Welcome from an Elder. Like most meetings in most societies, gatherings of any significance start with a welcome. In the contexts we are studying here, that welcome often consists of a prayer, or ritual, or ceremony. The intention is to clear the mind and open the heart of personal concerns so that the important matters at hand can be dealt with in peace. It is not about the imposition of belief, but rather an invitation to participation. You are free to participate to whatever degree you are comfortable, without prejudice.

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Introduction

It is worth noting as Canadians, that we were a multi-cultural **society** before we became a modern **nation-state**. This development usually unfolds in the reverse order. It has created a unique circumstance for Canada, and may yet turn out to be a distinct advantage. Long before European's arrived, many cultures had arisen on this landscape, with time-honoured societies as the result. None-the-less, the early interaction between Indigenous, French, and British peoples helped to create a place where no unified culture or religion or nation could be assumed, but where peace and prosperity were still a possibility.ⁱ We have welcomed many different races and ethnicities which, by virtue of Canada's French and English character, have had to adopt one of these narratives to live under. But as dialogue between the two major-language groups became strained, it virtually disappeared between them and native peoples. This perhaps set a pattern, as meaningful dialogue between indigenous peoples and immigrant populations has not occurred either. It is worth noting as Planners, that while newcomers often end up in cities, currently half of Aboriginal populations also live in cities. However, this fact has not facilitated that discussion.ⁱⁱ Adding to the complexity is the fact that all cities lie on the traditional territory of one or more host communities. The vast majority of citizens, Aboriginal and non-Aboriginal alike, are the guests of those particular host communities.

Module I - Distinct Societies & Unique Cultures

So, who are Native Peoples? What is an Aboriginal community? Which perspectives are indigenous? This module will explore these questions. We will start with several general-orienting assumptions. Next, we will take a look at both the accommodation and assimilation streams within our culture, then a brief exploration of the less-than-clear, sometimes confusing terminology, followed by a more thorough presentation entitled "Indian 101".

Assumptions

In our voyage through the complex world of Consultation and Accommodation, we will navigate by certain beacons. The first is that Aboriginal communities have a deep and abiding connection with the land. Second is that they also have a deep and abiding history with Europeans. Third, they see both the connection to land and the history with Europeans, as a matter of relationship, based on mutual obligation and trust. Fourth, the complexity of these relationships created a society accommodating of diversity. Fifth, that the subsequent building of a new nation demanded the assimilation of that diversity, particularly for Aboriginal communities. Sixth, that this modern nation was formally constituted in a way that disrupted these traditional relationships. Seventh, that the articulation and practice of consultation and accommodation can begin to heal some of these broken relationships.

Accommodation vs Assimilation

These assumptions are set against the background of a Canada that perceives itself as multi-cultural, and that is increasingly insistent of inclusion. In the current post-modern context, it is essential to recall that after the fall of New France that Quebec society was diversified by the conversion of German-speaking Hessian mercenaries to Catholicism. Later, other Catholics came over; Highland Scots followed those fleeing the Irish Potato Famine. After the American revolution Loyalist refugees were not only English. In the future Upper

Canada (Ontario), almost half were Aboriginal, 40% were German-speaking religious minorities, 20% were Gaelic-speaking Scots, along with Blacks, Jews, and Irish (Catholic & Protestant). Loyalists in the Maritimes were German, Gaelic, and Black. Of all Loyalist emigration into the Maritimes, Quebec, and Ontario, 10% were Black. ⁱⁱⁱ

Despite this, the **assimilationist** assumptions of modernity have often attempted to make us all standardised “Canadians”. This was particularly true for Aboriginal Peoples. Our **constitutional** arrangements have further complicated matters through its division of powers. The fiduciary obligation issues related to native peoples have been assigned to the federal government while the economic issues related to land have been assigned to the provinces. For our First Peoples, their primary legal relationship is with the highest representatives of the Crown while their fundamental relationship with the land is at the heart of their cultural self-definition. Thus, if assimilated, the land would no longer be encumbered by their claims.

However, even as we revived our **accommodationist** roots with formal multi-culturalism; Native-Canadians still suffered our insistence on the modernist “one-size-fits-all” model. It is vital to remember that “indigenous” is not just another ethnic grouping. It involves the **rights** of actual Nations; First Nations to be clear. The question for Canada has been whether it could recognise multiple jurisdictions, i.e., Nations, within its borders even as it became part of an increasingly multi-lateral planet. ^{iv}

Terminology

What is the “best” word to use: Aboriginal, First Nation, Native, Indian... ? A short video by Bob Joseph from Indigenous Corporate Training, Inc. helps to clarify this with brevity and wit:

Nation Talk - Featured Video of the Day: Aboriginal Peoples Terminology

The umbrella terms that the wider society has used are not necessarily wrong, but they are not necessarily right either. So, generally:

- Aboriginal Peoples have constitutional rights that are collectively held
- The **“s”** on the end denotes this
- Use the word they call themselves

The best phrase to use is the one that the individual, group, organisation, or community uses to call itself. Obviously, that word will change depending on the individual, group, organisation, or community one is engaged with.

When discussing issues of Consultation and Accommodation, fundamental concerns are often raised regarding health, the environment, Aboriginal and Treaty rights. The following definitions are provided to assist that discussion:

Health refers to anything affecting the **physical and mental well-being** of members of an Aboriginal community, along with the physical, social, economic, cultural, aesthetic, and spiritual conditions that ensure community members not only survive, but thrive.

Environment refers to the **land, the water, and the air**. It includes all the plants, animals and human beings that rely on it, as well as sites of physical or cultural heritage. It also encompasses the ecological relationships between all of these things.

Note: Many do not make as clear a distinction between “Health” and “Environment”, as has been delineated above. Indigenous worldviews often consider these types of things from a much more interconnected perspective.

Aboriginal Rights refers to **inherent privilege**. It includes protecting the Environment that supports community survival, and those areas of cultural significance that sustain its connection to the land. It encompasses hunting, fishing, trapping, and harvesting medicinal and food plants. It honours burial and other sacred sites, and strengthens the community’s spiritual relationship with the land. This also refers to the community’s ability to govern itself, and participate in all governance and operational decisions about the management of resources and the use of land.

Treaty Rights refers to the **sovereignty privilege** granted by every Treaty to which a First Nation is a signatory to. By extension, it may include Modern Treaties, Settlement Agreements, Self-government agreements, etc. with any Aboriginal community. ^{vi}

Note: the concept of “privilege” here refers to a fundamental right, not a superfluous advantage.

“Indian 101”

The Aboriginal population of Canada are legislated Peoples that have Aboriginal rights. The Constitution defines Aboriginal as: Indians, Métis and Inuit.

Inuit means “the People”. They have a land base with boundaries in the Northern areas of Canada. They have a distinct language, culture, and traditions. Though they have access to government programmes and services they are required to pay taxes. They have been placed under and removed from the *Indian Act* several times. All of their lands are now under Comprehensive Land Claim negotiations or agreements. While most are self-government agreements, the largest area, Nunavut, opted for a public government.

Métis refers to a distinct population who are of mixed ancestry. Originally, it only referred to those from the Red River Colony in Manitoba. Louis Riel, a Métis from that settlement, is now recognized as one of the Fathers of Confederation. Today, Métis can also mean individuals who have Aboriginal status, but in the past were not eligible to be a Status Indian. However, a recent court case has challenged this. Generally they have no land base, though there are some Métis settlements in the West. In Ontario, communities of significant Métis population^{vii} exist in areas along the Rainy River and Lake of the Woods, the north shore of Lake Superior, and Abitibi Lake, in and around the towns of Sault Ste. Marie, Killarney, Midland-Penetanguishene, and Southampton, as well as along the Mattawa and Ottawa rivers. They have developed several distinct languages, cultures, and traditions. Though they have access to government programmes and services they are required to pay taxes.

After many years of attempting to gain recognition under the *Indian Act*, the Métis received a favourable decision from the Supreme Court in 2012. The government appealed, but in 2016 the Supreme Court ruled that they are now “Indians”... with self-government accords currently being worked out.

Indians are those who have status under the *Indian Act*. They have a land base with boundaries called Indian Reserves. These are federally legislated lands, “set apart” for the sole use and benefit of the respective Indian band and provincial laws do not apply. They have distinct languages (50+), cultures, and traditions. They have access to government programmes and services, but are not required to pay taxes for income earned on

Reserve or good & services if one resides there. This is the only place where there are “no taxes”. Other benefits are spelled out by Treaties or outlined in the *Indian Act*.

First Nation is a self-defined synonym for Indian band or Reserve. It was first used in the 1980 Declaration of the First Nations by a gathering of chiefs in Ottawa. By 1982, the National Indian Brotherhood became the Assembly of First Nations, as a vehicle of political advocacy. The term First Nations, places these communities on a primary, yet equal, footing with the French and English as founding nations of Canada. It reflects their sovereignty and journey towards self-government.^{viii}

Indian Reserve is a land base “reserved” for Status Indians as defined by the Indian Act. The land is held in trust by the Crown, and is thus not owned by the community. It can be used in the pursuit of a livelihood, and willed or sold to another First Nation member or to the First Nation Council – “band-owned”. Though held in common by some communities, most Reserves allow First Nation members to hold land through a Certificate of Possession. None-the-less, the land or buildings on it cannot be used as security to get a mortgage, to buy a house, or start a business, as in the case of a normal asset. Due to these land tenure circumstances, a status Indian living on an Indian Reserve must access alternative programmes to build a house, start a business, and sometimes, even to buy goods and services.

There are 634 Indian Reserves across Canada; the Six Nations of the Grand River has the largest population. In Ontario, there are 134 First Nations, but only 126 receive core funding from the government.

Aboriginal Population according to the latest census, is younger than the non-Aboriginal population by about ten years (32 vs 42) and it is growing. There are more than seventy languages, but only thirty-six have more than 500 speakers. They represent approximately 5% of Canada’s residents at 1,674,785 people. The Inuit inhabitants equaled 65,025, seventy-three percent of whom live in their traditional homeland. The next largest group were Métis. Thirty-four percent of the 587,585 lived in Canada’s eight largest cities. The First Nation population was 977,230, three-quarters of which were registered as Status Indians. Of that, forty-four percent live On-Reserve.^{ix}

Many members live off-Reserve due to job opportunities, available housing or marriage to a non-native. Prior to 1985, the *Indian Act* contained sex-based discrimination which removed a native woman from the membership list if she married a non-native, but adding a non-native (no blood-line) woman if she married a native. This was challenged in court and those clauses were struck down. The government responded with Bill C-31 which was passed in April 1985. Native women who had lost their status were able to be re-instated to their respective First Nation and have access to all the rights and benefits of a Status Indian. As a result, membership lists soared, though not everyone who regained status returned to their respective Reserve. The numbers, in some cases doubled, making it seem like there were more “off-reserve” individuals. There was no mass exodus from the Reserve, the new law simply created new members.

For those Reserves that did receive new members, those who returned often brought their non-native spouse and children, who may or may not be eligible for status under the *Indian Act*. Smaller reserves were sometimes stretched in the provision of space and services.

Membership is in the hands of individual First Nations, but most use Indian Status enrollment numbers, i.e., all the individuals who are registered to that respective First Nation. This system is currently under review.

Treaties have become a matter of interpretation. They now depend on what side of the table you are on. Native peoples have always understood Treaties to be sharing agreements. In other words, they lost nothing.

Non-native people understood it differently. For them, Treaties were business transactions that made the land theirs. This misunderstanding continues.

Land Claims have been categorised into “comprehensive” and “specific” since 1973. **Comprehensive claims** are based on the Aboriginal Rights of those First Nations, Métis, and Inuit who did not sign treaties regarding the traditional use and occupancy of their lands. These are often referred to as Modern Treaties. **Specific claims** are based on the Treaty Rights of those First Nations whose obligations under historic treaty or the *Indian Act* have been compromised. These may include the inadequate allocation, or unlawful disposition or lease of reserve land, as well as fraud or misadministration of First Nations’ funds or assets by government officials.^x

Today our Nations are developing and want to be able to live as well as anyone else in this country. They want respect for the Treaties they have formed with the wider society, all the rights and benefits that go with them, their culture and traditions, their languages, and their right to manage their existing lands, and to have land returned that they consider rightfully theirs, or be compensated.

ⁱ Richard Gwyn. 2007. *The Man Who Made Us: The Life and Times of John A. Macdonald*. Random House Canada

ⁱⁱ John Ralston Saul. 2008. *A Fair Country: Telling Truths about Canada*. The Penguin Group. Toronto, Ontario

ⁱⁱⁱ John Ralston Saul. 2008. *A Fair Country: Telling Truths about Canada*. The Penguin Group. Toronto, Ontario

^{iv} Richard Gwyn. 2007. *The Man Who Made Us: The Life and Times of John A. Macdonald*. Random House Canada

^v [<http://nationtalk.ca/story/featured-video-of-the-day-aboriginal-peoples-terminology/>] March 17, 2015

^{vi} Beausoleil First Nation, *Consultation and Accommodation Community Guide*, draft 24 April 2017

^{vii} [<http://www.metisnation.org/registry/citizenship/historic-m%C3%A9tis-communities/>] 6 January 2020

^{viii} [<https://www.thecanadianencyclopedia.ca/en/article/first-nations>] 27 March 2019

^{ix} Statistic Canada, 2017 [<https://www150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2017027-eng.htm>] 27 March 2019

^x [<https://www.thecanadianencyclopedia.ca/en/article/land-claims>] 7 January 2020