

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.

**Carolyn is a member and life-long resident of the Mississaugas of the Credit First Nation. She has been an employee of her community, but was also elected as its first female Chief. She has worked tirelessly on behalf of its community & economic development, its public relations, its land-use planning policies & environmental procedures. She has been awarded the Queen Elizabeth II Diamond Jubilee Medal for her support of First Nation history and advancement of the Aboriginal peoples, the recipient of an Eagle Feather from the Council of MCFN in recognition for 20 years of volunteering, and has recently been appointed as a Member of the Order of Canada. She is the creator of the Moccasin Identifier Project and is President of the Shared Path Consultation Initiative.*

***David is a Registered Professional Planner, Member of the Canadian Institute of Planners, and a Professional Agrologist. He has spent several decades working with First Nations and on behalf of land-use issues relevant to Aboriginal communities. He was employed as the Community Planning Advisor for the Ogemawabj Tribal Council. David has served on the Indigenous Community Planning Committee of the Canadian Institute of Planners and on the Indigenous Planning Perspectives Advisory Group for the Ontario Professional Planners Institute. He is a Partner at Incite Planning and serves on the Board of the Shared Path Consultation Initiative.*

Module VI – Consultation as Participation

This module assumes that consultation is a form of participation that indigenous peoples are due in the decisions that affect their lives. Starting in about 1990, Canadian courts have repeatedly declared and reinforced that the Crown has an obligation to consult with the First Peoples of this land. Governments are slowly catching up. This was exemplified in Ontario’s 2014 Provincial Policy Statement, which encouraged planners to co-ordinate with Aboriginal communities.¹ In the 2020 update, planners are now required to engage, as well as co-ordinate with these communities. The question we will consider here is whether such consultation obligations constitute participation in actual decision making. Being aware of your Aboriginal neighbours is considerate, but it is not the same thing as participating with them in making a decision over land.

Ladder of Citizen Power. To this end, it is helpful to have a way of evaluating current and future engagement efforts. The “Ladder of Citizen Power” is one such method. It was devised by Sherry Arnstein in the 1960s while working as the chief adviser on citizen participation for the U.S. Department of Housing, Education, and Welfare (HUD). It assesses the level of participation that citizens have in controlling the decisions that are made *for* them. There are eight levels in this spectrum, which Sherry grouped into three general participation categories: “Non-participation” at the lower end, “Tokenism” in the middle, and “Citizen Power” at the upper end.

Citizen power

- 8 - citizen power
- 7 - delegated power
- 6 - partnership

Tokenism

- 5 - placation
- 4 - consultation
- 3 - informing

Non-participation

- 2 - therapy
- 1 - manipulation

While this scheme is still current in planning school curriculum, it is discouraging how rarely it is used in actual planning practice. And when it is, how unconsciously, or even poorly it is done. One need only think about any public engagement you’ve participated in professionally or personally... as a planning student the author was taught that the best we do in Canada was right about 4 to 5, somewhere between “consultation” and “placation”.

The author was once part of a public process that debated the merit of locating a public facility on top of a toxic waste dump. It started with “don’t trouble your pretty little heads about it, someone better than you

will make the decision”, followed by a few meetings to let folks vent their spleens. Eventually, more actual information was leaked. It ended with a public liaison committee to presumably seek public input, with the implied promise of placating the public if authorities liked a minor suggestion or two... upon reflection it was amusing to see how unintentionally, if clumsily, the process stumbled up 4 to 5 steps on the ladder. ⁱⁱ

The question that arises is whether the Duty to Consult falls under this rubric of participation. Is it participation? Should it be participation? What parameters does it have that lend it to participation? The three elements of participation that Consultation presents are:

- Honour of the Crown = “Respect”
- Duty to Consult = “to seek advice”
- Duty of Accommodate = “to make fit” ^{iii iv}

If we overlap the parameters of consultation with the spectrum of participation, we get a “Scale of Consultation”. While the Honour of the Crown does involve a responsibility to inform, using information to manipulate or “therapize” a community does not fulfill the Honour of the Crown. Consultation moves up the ladder, but often amounts to simply providing information, or only asking for advice, or at best providing a minimal response to addressing concerns. Accommodation starts to be realised when communities are treated as partners, or they are entrusted with actual decision-making, or are even in charge of the process. Here we have a “Ladder of Consultation”:

Examples of Accommodation:

- 8 - citizen power: collaborative planning exercises and Hosting Agreements
- 7 - delegated power: co-management of resources and joint partnerships
- 6 – partnership: Impact/Benefit Agreements

Examples of Consultation:

- 5 - placation: offers to manage risks
- 4 - consultation: “stakeholder” opinion surveys
- 3 - informing: mere notification from government or industry

Examples of Non-Consultation:

- 2 - therapy: gripe sessions regarding inept government regulation, government or industry inaction,
- 1 - manipulation: using community needs to benefit the interests of others ^v

To illustrate these examples, the following are actual experiences of consultation and how they rank.

Non-consultation. For the first example, another step has been added to the ladder: “contempt”, which we can give a “0”. A community became a party to an Ontario Municipal Board hearing due to direct effects from a subdivision proposal. A fellow member of the Ontario Professional Planners Institute called the author and proceeded to describe the supposed problems of the community, that they had better things to do

than protest this proposal, and that the developer did not need a bunch of Yahoos screwing up their project. Yes, they did say Yahoos! In all fairness, they may have meant the municipal staff, they may have meant the author, they may have meant the First Nation, or maybe the lot of us. Needless to say, this ranked as “**non-consultation**”. Another example is the unfortunate practice of restricting consultation efforts to within a kilometre of a community’s boundary.

Consultation. The Saugeen Ojibway Nation (SON) won a 2017 court case against the Ontario government (Ontario Ministry of Natural Resources and Forestry) concerning a quarry license. OMNRF was late informing SON, then denied their right to be consulted, then admitted their right to be consulted, then denied funding, then admitted their right to partial funding, then did not respond to the acceptance of funding, then said SON had no right to be consulted, then said SON had a right to be consulted if the project proponent did it, the proponent said no, MNRF accepted that but did not tell SON, then it informed SON that consultation was complete and offered to exchange funding for invoices for peer reviews that had not happened.

The level of participation the court required was not only formal notice and information (**consultation**), but also peer-review funding and **accommodation** of their concerns. It is worth noting that the third-party in this instance, the quarry proponent, was not obliged to accept the delegation of consultation from the government. However, the court said that their **non-participation** risked delaying their own project. ^{vi}

Accommodation. The Yukon government set up a Planning Commission to create a land-use plan for the Peel Watershed based on the **full participation** of local First Nations and the public. It rejected the recommendations of its own commission and arbitrarily altered the plan. First Nations and conservation groups took the government to the Yukon Supreme Court which found that the government did not respect the land use planning process set out in the territory’s final agreements with First Nations. After 5 years of using ecosystem-based planning principles, First Nation’s right to be consulted and be full participants in land management was recognised.

The case was then taken to the Supreme Court of Canada who unanimously ruled (*1 December 2017*) in favour of Yukon First Nations in their fight to protect the Peel watershed region. The territorial government was not respectful of the Treaty process when it made changes to the plan that included First Nations' traditional territories. In other words, the lack of participation in the changes "was not becoming of the **honour of the Crown.**" ^{vii}

Note: *in the wake of the United Nations Declaration on the Rights of Indigenous Peoples there may be a need for a 9th level, that of “consent”. There is a dearth of good examples for this, largely because “free, prior and informed consent” for actions taken regarding traditional lands and resources are more difficult to achieve thus far.*

Evaluating the PPS. If we take the current and previous Provincial Policy Statements and run them through the “Ladder of Consultation” assessment, we can compare their policy intentions with one another. The method is simply to assign the most appropriate level to each statement or section of each PPS and average the score. As the table shows, there has been improvement from 2014 to 2020, though both are still in the 4-5 range.

2014 PPS	Level	2020 PPS	Level
		Part IV: Vision	6
Encouraged co-ordinating planning with Aboriginal communities	6	1.2 Coordination	6
Consider interests of Aboriginal communities in conserving cultural; heritage and archeological resources	4	2.6.5 Cultural Heritage and Archaeology	5
PPS shall be implemented consistent with Sec. 35 Constitution Act, 1982	3	4.0 Implementation (Sec. 25 & 35 of Constitution)	4
Average:	4.3	Average:	5.25

ⁱ Jody Johnson & Scott Stoll, Aird & Berlis LLP, AMCTO Annual Conference and Professional Development Institute, June 2015

ⁱⁱ Arnstein, Sherry R. 1969. "A Ladder of Citizen Power". p.217. *Journal of the American Institute of Planners*. (July 1969) [<https://www.aacom.org/news-and-events/publications/iome/2015/july-august-2015/Arnstein-bio>] 29 May 2019

ⁱⁱⁱ Justice Ronald S. Veale, Supreme Court of Yukon. *The Duty to Consult and Accommodate: The Crown's duty to consult and accommodate with respect to aboriginal and treaty rights* [http://www.cba.org/cba/de/PDF/ADM09_Veale_slides.pdf] 10 February 2017

^{iv} *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011* [http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675#chp2_1_4] 8 February 2017

^v Adapted from: Arnstein, Sherry R. 1969. "A Ladder of Citizen Power". p.217. *Journal of the American Institute of Planners*. (July 1969). As modified by David J. Stinson, Heather Dorries, Dean Jacobs, Colette Isaac

^{vi} Abridged from Maggie Wente, OKT in [Duty to Consult and Decision to Fund – The View from one Canadian <https://barbkueber.wordpress.com/2017/07/20/duty-to-consult-and-decisi...> 3 of 10 8/13/17, 3:45 PM]

^{vii} [<http://www.cbc.ca/news/canada/north/peel-watershed-supreme-court-canada-decision-1.4426845>] 2 May 2018