

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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***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 VIII – Planning as Consultation

This module will explore how planners can begin accommodating the priorities of indigenous communities into planning processes. In simple terms, the pre-contact indigenous traditions and the common law English traditions interacted to produce treaties with the Crown. Later constitutional developments have reaffirmed those treaties but later common law developments have also framed statutes. The trick for planners is to not get caught on the horns of this constitutional challenge.

The starting point is to:

- Recognise the prior Aboriginal occupation of the land
- Respect the relationship between the wider society and the original inhabitants of this land
- Understand that the legal obligations arising from the constitutional and statutory levels though different, are related
- Be willing to engage the consultation process

Role of Third Parties

Though the courts have made it clear that third parties have no duty to consult, they have extended the obligations to municipalities and private interest under certain circumstances. Though the substantive requirements are undefined and vary depending on the strength of evidence for title and the degree of infringement, the intent is to give native groups a meaningful role in decision-making. Thus:

- all necessary information is given to the First Nation,
- it is given in a timely manner,
- the First Nation has an opportunity to express their interests and concerns,
- their responses are seriously considered,
- and wherever possible, are shown to be integrated into the proposal. ⁱ

NGOs. The implications for advocacy and non-profit groups are intriguing. One analyst has noted that if “... Aboriginal concerns mesh with environmental groups’ concerns, the duty to consult can become a powerful tool to force government and industry to respond”. ⁱⁱ

Commercial Interests. The Crown may be able to rely on what the industry proponent does in terms of accommodation, to fulfill, in whole or in part, the Crown's duty to consult, and where appropriate, accommodate. However, it cannot compel private interests to do so. ⁱⁱⁱ

None-the-less, proponents can benefit by helping indigenous communities secure their rights. In 2007, a \$300 million, corporate-owned wind energy project, proposed by Epcor Utilities Inc., was put on hold as Saugeen First Nation struggled to review the project as quickly as possible. The Deputy Reeve Neil Rintuol of Ashfield-Colborne-Wawanash Township accused them of claiming ownership of the wind. The Chief of Saugeen First Nation, Randall Kahgee, countered that they had been consulted at the last minute. A similar \$400 million project, by Enbridge Inc., near Kincardine, was not “signed-off” because, by their own admission, they had not properly consulted Saugeen First Nation, and the project was sent to the Ontario Municipal Board. ^{iv}

In the case of *Saugeen First Nation and Chippewas of Nawash Unceded First Nation v. Ontario Minister of Natural Resources and Forestry and T & P Hayes Ltd., 2017* there was lack of consultation for a proposed issuance of a license for a limestone quarry. The level of participation the court required was not only formal notice and

information, but also peer-review funding and accommodation of their concerns. It was noted that the third-party in this instance, the quarry operator, 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. ^v

While the full ramifications for private ventures have by no means been fully articulated, let alone understood, a more open approach to native communities will be needed in order to avoid the opportunity costs of not doing so. ^{vi}

Municipalities. Constitutionally, municipalities are wards of the province, creating uncertainty regarding consultation obligations. In the court case regarding the Seaton Lands within the City of Pickering, Ontario [*Hiawatha First Nation v. Ontario, (Minister of the Environment), 2007 CanLII 3485, (ON SCDC)*] the duty to consult as enshrined in statutes such as the *Environmental Assessment Act*, the *Planning Act*, or the *Cemeteries Act* was firmly upheld. This was in spite of the fact that the constitutional duty to consult had been set aside, due to mitigating circumstances surrounding the interpretation of the *Williams Treaty, 1923*. ^{vii}

In the case of *Neskonlith Indian Band v. Salmon Arm (City), 2012 BCSC 499*, it was made clear that municipalities bear “no independent constitutional duty to consult”. Though municipalities are extensions of provincial jurisdiction, “the honour of the Crown is non-delegable and rests at all times with the province”. However, “procedural aspects of the duty to consult can be delegated to third parties ... (if) the authority... (is) expressly or impliedly conferred by statute”. ^{viii}

None-the-less, the Resort Municipality of Whistler had the update of its Official Community Plan quashed due to a lack of consideration for the Aboriginal interest in economic development on Crown Land within the municipal boundary. The municipality claimed no obligation or ability to consider their concerns since these were “provincial” matters. Faced with non-participation, the Lil’wat Nation and the Squamish Nation launched a court case against both the town and the government because the British Columbia Ministry of Municipal Affairs and Housing approved a municipal plan which had not received sufficient consultation. In 2014, the B.C. Supreme Court agreed. It said that the Province “incorrectly assessed the nature and scope of the consultation” needed. Thus, despite “more than 2,500 hours of citizen and stakeholder time invested over three years” the updated plan was thrown out due to a lack of consultation! ^{ix}

Role of Planning Processes

“After many years of waiting, the changes to the Provincial Policy Statement reminding planners to be conscious of Aboriginal rights should be welcomed as an important first step in ensuring that Aboriginal interests are no longer ignored in planning processes.” ^x

Archaeological Assessment Process. The best current maxim for archaeology is Preservation; not Excavation! To achieve this, the creation of an Archaeological Master Plan (AMP) is essential. The use of Ministry of Culture criteria will be very helpful in creating a plan that is tailored to your municipality. The benefit is that developers will know what's on the land before they dig. The current estimate is that such plans can lower conflict incidents by up to 20%. This is because the mapping tells you when municipal plans need to take care for the preservation of artifacts in situ, such as for Official Plan Amendments, Secondary Plans, plans of subdivision & condominiums, parks, and engineering works. ^{xi}

Official Plan Process. Several well-articulated lists are offered here in terms of the sort of topics that may be of interest regarding Official Plans (OP) in Ontario.

Mississaugas of the Credit First Nation has taken an interest in the land-use decisions that have taken place around them. They are deeply concerned when activity that occurs on their traditional territory affects their life as a community, and has an impact on:

- The “Indian Reserve” itself
- Ancient villages and burial grounds
- Sacred sites and medicine sites
- Summer/winter camps and Trails
- Hunting/fishing/gathering/harvesting areas
- Almost always waterways ^{xii}

Note: *In recent years MCFN has asserted its jurisdiction over all waters, beds of waters, and floodplains, including the Great Lakes, within its jurisdiction.*^{xiii}

Saugeen Ojibway Nation is comprised of the Saugeen First Nation and Chippewas of Nawash Unceded First Nation. Their typical interest in Official Plans includes:

- Archaeology
- Natural Areas Protection
- Mineral Resource Extraction

Emerging interest in Official Plans are topics such as:

- Climate Change
- Developing Consultation Protocols

In addition to their own Consultation Protocol, they would also like to investigate how SON’s *cultural interests* can be included in Official Plans. These may include, but are not limited to:

- A Seven Generations-based vision statement illustrating the desired future for the Traditional Lands that the municipality rests upon.
- Special protection policies for Clan totem species: the Bear, the Crane, the Turtle, and the Deer
- Protection of wildlife used as a food source, that may not be listed as a Species at Risk, i.e.: Lake Whitefish
- Protection of plants used for SON medicinal and ceremonial purposes, and as a food source
- Water – including the protection of all groundwater, streams, wetlands, inland lakes, and the Great Lakes
- Landforms – including Great Lake shorelines, and karst geological features ^{xiv}

Bkejwanong Territory is the traditional territory of Walpole Island First Nation. They claim it as Aboriginal Title Territory, and thus under the Walpole Island First Nation Consultation and Accommodation Protocol. An example of an OP response comes from the Township of Pelee:

It makes specific reference to:

- Traditional Territory of Walpole Island
- Rights and interests in that territory
- Consultation and Accommodation Protocol
- Using the protocol to review new development applications

Sec 8.11 specifically refers to First Nation Consultation and Participation regarding:

- Natural spaces and adjacent lands
 - Natural Environment Designation
 - Environmental Review & Protection
 - Aboriginal Significance
- Archaeological Studies and AMP
- Aggregate Licenses re OP
- Secondary Plans ^{xv}

Official Plan Partners

A more inspirational development has arisen in recent years, with the advent of the Community Economic Development Initiative (CEDI). It is the outcome of collaboration between the Council for the Advancement of Native Development Officers (CANDO) and the Federation of Canadian Municipalities (FCM). “Since 2012, this initiative has helped neighbouring municipalities and First Nations develop partnerships that establish and support their mutually beneficial economic development... They help coordinate local action to address regional issues and build a more sustainable economy for all.”

As an engagement programme for indigenous-municipal partners, it fosters:

- Sustainable and resilient relationships
- Joint community economic development initiatives and land-use plans
- Building stronger regional economies

This is done with the selection of two joint applicants, a First Nation and a neighbouring municipality. It entails 6-8 joint workshops that focus on relationship building, visioning, and strategic planning. Their mutual commitment is to a three-year process, with the first 6 months dedicated simply getting to know each other. After that priorities are short listed through a facilitated group exercise. Grant funding and two staff are assigned to each project.

CEDI has developed Community Capacity grants, a “Stronger Together” tool kit, a Facebook community of practice, and website: www.fcm.ca/cedi. It encourages practices such as: Council Resolutions, Friendship Accords/Memorandums of Understanding, Terms of Reference for Joint Working Groups, annual work plans, Joint Council Meetings, Legacy Binders, and the use of joint staff. The benefits it hopes to accrue are:

- A stronger, united voice
- Access to funding
- Cost savings
- Local businesses and jobs
- Leveraging unique financial, human, and physical resources
- Co-ordinated planning for land use, land management, environmental and resource protection

To date, fifteen partnerships have successfully gone through the process. The one we will focus on here originally involved Peterborough - the Kawarthas Economic Development (PKED) and the Curve Lake First Nation (CLFN). PKED is a non-profit corporation that provides economic development and tourism services to the City of Peterborough and County of Peterborough. CLFN is one of several First Nations located along the Trent-Severn waterway and thus a host of the Peterborough region. In May of 2017, these two applicants started a difficult dialogue around land issues and planning processes. Of particular annoyance was the habit of sending all information, all the time, on everything. It included the treatment of the First Nations as mere “stakeholders”, only contacting them late in the application process. It involved the

institutionalised lack of comprehension and perceived lack of mandate to understand constitutionally unrelated forms of government. It quickly became apparent that the lower-tier municipality should join the discussion and the Township of Selwyn became a partner. A “sister” community to CLFN, Hiawatha First Nation saw the potential benefits and soon joined, which drew in their municipal neighbour, the Township of Otonabee-South Monaghan. Finally, the County of Peterborough became a partner. All of them now sit on the joint steering committee.

Since planning as consultation had emerged as a priority, a working group was formed around this theme, with a terms of reference and annual work plan. The joint effort on these issues, mediated by a neutral 3rd party helped to overcome the mutual ignorance and mistrust. The tangible results moved well beyond legal requirements:

- A township partner (Selwyn) has begun creating a decision-tree matrix for development applications to streamline the information flow to the First Nation partners (Curve Lake & Hiawatha)
- The County’s geographic information system has been deployed to supplement the much slower Ministry of Tourism, Culture, and Sport’s mapping of archaeological sites that are of significance to the First Nation partners
- The GIS is being used create buffers for waterways that are sensitive for the First Nation partners
- The insistence by the First Nation partners to be involved in the Official Plan review has been met with a formal invitation from the County partner (Peterborough) to sit on the technical advisory committee for the OP review

A side benefit had been the affiliation of First Nations in the area with the City of Peterborough. The City, though not a partner in the CEDI process, has taken notice of the improved working relationships surrounding them. The First Nations were sitting on the city’s OP committee, but felt they had little input. Now the City has begun meeting with all Treaty 20 communities: Curve Lake First Nation, Hiawatha First Nation, Alderville First Nation, and Scugog First Nation. Elders from each community are meeting as a group with the policy writers. A First Nation engagement section has been drafted for the updated City of Peterborough Official Plan.

The intangible results are that the First Nation consultation liaisons and the County planning staff no longer have a relationship based on antagonism, but one based on friendship. There is now mutual understanding, even if there is no agreement on any particular issue. A Friendship Accord has been signed by all six partner communities. Wampum Belts were created by those skilled at crafting them and were exchanged at the signing ceremony in November of 2019. This celebrated a new chapter in the relationship between these First Peoples of this land and these newcomers.^{xvi xvii xviii} Hopefully, it will be an inspiration for the future of planning in Ontario.

ⁱ “Consultation with First Nation Communities”. 2007. *The Ontario Planning Journal*. Vol. 22, # 4: 30-31. Ontario Professional Planners Institute. Toronto, Ontario

ⁱⁱ “Consultation with First Nation Communities”. 2007. *The Ontario Planning Journal*. Vol. 22, # 4: 30-31. Ontario Professional Planners Institute. Toronto, Ontario

ⁱⁱⁱ *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]

^{iv} “Consultation with First Nation Communities”. 2007. *The Ontario Planning Journal*. Vol. 22, # 4: 30-31. Ontario Professional Planners Institute. Toronto, Ontario

^v *Abridged from Maggie Wentz, 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]*

^{vi} “Consultation with First Nation Communities”. 2007. *The Ontario Planning Journal*. Vol. 22, # 4: 30-31. Ontario Professional Planners Institute. Toronto, Ontario

^{vii} “Consultation with First Nation Communities”. 2007. *The Ontario Planning Journal*. Vol. 22, # 4: 30-31. Ontario Professional Planners Institute. Toronto, Ontario

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- viii *Willms & Shier Report, 2012*
- ix *Archeological Services Inc., 26 June 2018*
- x *Heather Dorries. 2014. Aboriginal Rights Brought to the Provincial Table: Ontario's New Provincial Policy Statement. Plan Canada. 54 (2) p. 42-45, Summer 2014. Canadian Institute of Canada. Ottawa, Ontario*
- xi *Ron Williamson, Archeological Services, Inc. 2019*
- xii *Carolyn King, former Chief of MNCFN*
- xiii *Mark LaFome; Director, MCFN Department of Consultation and Accommodation. OPPI Symposium: Healthy Communities & Planning for the Public Realm. Hamilton, Ontario. 6 October 2016*
- xiv *Doran Ritchie, SON; 2 October 2017*
- xv *Township of Pelee Official Plan, 2011*
- xvi *Insights on Indigenous-Municipal Partnership-Building, Shared Path Consultation Initiative. 18 March 2019*
- xvii *Joshua Regnier. Project Officer, First Nations-Municipal Community Economic Development. 28 May 2019*
- xviii *Dr. Julie Kapyrka. Lands and Resources Consultation Liaison, Curve Lake First Nation. 17 July 2019*