

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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Module V – Consultation Principles

This module attempts to articulate the principles that may be applied to the “Duty to Consult & Accommodate”. There is no implication that they are definitive, authoritative, or comprehensive; simply that they have been derived from the experience, study, and background of the authors. It is our understanding that the heart of cultural self-definition for indigenous peoples is their deep and abiding connection with the land. In the same vein, the culture of planning contains a strong and enduring concern over how land is used. It is our hope that this common interest in land will help Aboriginal Communities and the Planning Profession find common cause regarding the “common ground” we must all share.

Consultation Humour. What is consultation? As the animated version of this cartoon indicates ¹, the notion of consultation has gone through some “tough-times”. In the context we are discussing here, even the word has been taken as an epithet for its opposite. Hopefully, we can improve on this!

Essential Principles

Mainstream cultures the world over are struggling to engaged Indigenous cultures. Acknowledgement of their traditional roles can be a hollow gesture without appropriate consultation and accommodation of their interests. Some of these principles are the following...

Friendship. Planners should approach Aboriginal communities as equals, and as potential partners. Treaties can only be signed by equals, not by a dominant and subservient party. An attitude of domination, bullying, implied threat, or overt hostility is never acceptable. The history in Canada is that the treaty process with First Nations was based on friendship, sharing the land, and consulting when mutual interests were affected. Among the indignities suffered since contact, it is the lack of love, friendship, and understanding that has been the most destructive of established trust. Why; because of the assumption that Treaties were about making a deal, rather than building a relationship.

Sharing the Land. There isn't one piece of North America that does not, at least in the broadest sense of the phrase, “belong to someone else”. By-and-large Indigenous peoples are not seeking “to get it back”. They seek an understanding of the fact that as Turtle Island slowly became North America, the land would still be shared. It is important for planners not to get caught up in constitutional conundrums over title, or legal arguments over ownership, or even social notions of possession. What is important is the cultural concept of sharing. Each profession that tries to address this issue: politicians, lawyers, engineers, accountants, etc. will have its own take on the topic. However, what planners need to understand is that Treaties rest on the tacit assumption that we will talk about how to share the land.

Respect for Difference. As a planner you will not always know the history, culture, customs, and habits of an Aboriginal community. Knowledge of these is helpful, but not necessary. What is necessary is respect for those things that are done differently than how you may deal with them in other contexts. They will know that you do not know everything about them; this is fine. On the other hand, they will also know when you are patronising them; this is not fine...

Acceptance of Similarity. Planners should recognise that while many differences do exist between the larger society and an Aboriginal community, many of the issues that they must face are very similar; clean water, good roads, a roof over one's head, an education for one's children, jobs that at least pay the bills, a

sense of identity, etc. Land issues are no different: how can land be developed properly, when is it enough, is the process adequate, what if I don't like it, etc.

Dignity of Uniqueness. No matter how much one may learn about a particular community, the next one will be different. Even when communities share language, lineage, culture, political affiliation, organisational structure, or a common landscape, they still see themselves as entirely unique. This gets confusing when treaty areas overlap, alliances between groups are unknown, or rivalries are poorly understood. Planners must avoid the mistake of treating separate communities as equivalents.

Land as Kin. Planners should never assume that “the Land” will be looked at the way an official land-use document views it. The need to manage how land is used is usually evident, and economic development opportunities are often sought. However, even when land is bought or sold, it is rarely seen as merely a commodity in Aboriginal societies. Europeans probably shared this view at one time, but indigenous peoples have never stopped seeing the land as an entity unto itself. In some ways it is a living, breathing person and, as such, the proper relationship to it is one of kinship. Such a perspective may foreshadow a time of greater fairness, but the power differential that currently exists between indigenous and mainstream cultures is not easily overcome. Thus, it is important not to rationalise such notions as quaint, or on the other hand slip into politically-correct nostalgia for a by-gone era. What planners can do is to increase their depth of understanding through the recognition of the subtle layers of perception about land.

Patience. Planners must realise that though most First Nations are proud of the acknowledgment of their jurisdiction provided by the Duty to Consult, their capacity of response will vary widely. First, they will be preoccupied by their own internal administrative matters, as often as not without adequate resources. Though important, issues stemming from the Duty to Consult may be seen as an external annoyance. Occasionally, it may create political division within a community. Sometimes there is little interest, as the historic trickle of information rarely rose above zero. When it did, it often involved minor matters or irrelevancies. Some communities are now being overwhelmed by being notified about *Everything*. There is, of course, the perpetual problem of government ill-allocation of budget, time, and training to cope with this new recognition of an old relationship. Despite all of this, many communities have risen to the occasion and are responding to such requests. *However, it must be remembered that it will probably not be according to the planner's timetable.* The depth of response may change as capacity improves. The approach of planners must be one of patience, understanding, and honesty when an accommodation cannot be reached.

Framework of Principles

As we have seen, the Duty to Consult can be implemented by a set of moral principles. But its underlying purpose, has also been informed by the Canadian constitutional and legislative framework.

Honour of the Crown. Honour = “Respect”

“The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples.”ⁱⁱ

“The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of “sharp dealing.”^{iii iv}

Duty to Consult. Consult = “to seek advice”

The Government of Canada consults with First Nation, Métis and Inuit people for many reasons, including: statutory and contractual; policy and good governance; and the common law duty to consult. The Supreme Court of Canada affirmed, in a number of landmark decisions, such as *Haida* (2004), *Taku River* (2004) and *Mikisew Cree* (2005) that the Crown has a duty to consult when three elements are present:

1. Contemplated Crown conduct;
2. Potential adverse impact; and
3. Potential or established Aboriginal or Treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*.^v

Duty to Accommodate. Accommodate = “to make fit”

The courts have said that consultation would be meaningless if, from the outset, it excluded any consideration of the potential need to accommodate the concerns raised by Aboriginal groups. Consultation may reveal a need to accommodate. Accommodation may take many forms.

The primary goal of accommodation is to avoid, eliminate, or minimize the adverse impacts on potential or established Aboriginal or Treaty rights, and when this is not possible, to compensate the Aboriginal community for those adverse impacts. In some circumstances, appropriate accommodation may be a decision not to proceed with the proposed activity. 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.^{vi}

Future of Principles: Humility

It has been said that Humility is a deep awareness of one’s own ignorance. It is perhaps this quality of humility which may become most important to planning practice. We are, after all, presuming to plan for land which is not our own. According to recent estimates, less than 1% of the members of the Canadian Institute of Planners are of indigenous background. This becomes interesting when one realises that every piece of this continent is the traditional territory of someone, and it has been so long before the Planning Act existed. Yet in 2016, Canada announced that it will join the rest of the civilised world and remove its permanent objector status to the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration contains Articles that include a relationship with and access to the lands and resources traditional to these communities. In 2018, Cree lawyer, **Roméo Saganash**, NDP Member of Parliament for Abitibi—Baie-James—Nunavik—Eeyou tabled a private member’s bill to ensure consistency of government policy with UNDRIP. It was delayed, though, by Conservative Senators and died on the order table with the 2019 election. As of 2020, the government announced the reintroduction of UNDRIP principles via its own legislation. None-the-less, the assertion that “**free, prior and informed consent**” is now part of our constitutional obligations remains to be tested.^{vii} But as an essential skill, the Duty to Consult may become even more important in the near future.^{viii ix}

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- ⁱ “Dilbert” comic strip by Scott Adams, 24 August 1998: <http://www.reoh.com/watch/v17985963M3xMwAK&?h1=Dilbert%3A+Consult+Video>
- ⁱⁱ *Haida Nation v. B.C. (Minister of Forests)*, 2004 SCC 73, para. 16
- ⁱⁱⁱ *Haida Nation*, para. 19
- ^{iv} 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
- ^v *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
- ^{vi} *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] 10 February 2017
- ^{vii} CBC. *The Current with Matt Galloway. Interview with Hayden King and Bob Joseph: What it will take to align Canadian law with the United Nations Declaration on the Rights of Indigenous People* [<https://www.cbc.ca/listen/live-radio/1-63-the-current/clip/15812474-what-take-align-canadian-law-united-nations-declaration>] 4 December 2020
- ^{viii} Adapted from an article submitted by David J. Stinson to the Ontario Professional Planners Institute
- ^{ix} Janice Berry and Joelle McNeil/Cassidy. 2019. *Indigenous rights and planning: from recognition to meaningful coexistence?* Plan Canada, Canadian Institute of Planners. Ottawa, Ontario