Building Relationships with Indigenous Peoples and Aboriginal Communities:

What the Duty to Consult and Accommodate means for Ontario Planners

Preface

The following set of learning modules 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 [v]

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

- Aboriginal People***s*** 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-31which 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.

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[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*

Module II – Tips for Building Relationships

Improving the relationship between the First Peoples and new-comers will be based on Friendship, even for municipalities. The "how" part may be more of a mystery, even a source of fear. One's natural prejudices easily arise in the face of fear. What this module offers as an antidote, is knowledge. The following are some suggestions to increase one's indigenous knowledge both personally and officially. All of them do not have to be undertaken and certainly not all at once! Our suggestion is to try one or two, that you and the partner community feel comfortable with and as the opportunity presents itself. Then see how it goes! Don't be discouraged if it doesn't work out; keep trying until you find something that does.

What I can do personally?

- Enjoy Media and Art that is produced by Native peoples. Watch APTN, the Aboriginal Peoples Television Network, for its regular programming. Notice "big news" stories in the regular media, then watch APTNs coverage. Listen to First Nation run radio stations if you have the chance, either through broadcast, cable, or on-line. Attend public art exhibits or watch documentaries that focus on indigenous themes. You do not have to accept the perspective being presented. But you should be prepared to think, to feel, to compare, to contrast, and most of all to learn.
- Attend a cultural festival that is open to the public, such as a pow-wow. Relax; go with no agenda other than enjoying yourself. They have the atmosphere of a county fair; plenty of food and art & crafts for sale. Be respectful when asked, i.e., to stand during the Grand Entrance, to give way for folks wearing full regalia, to applaud the performers.
- "Play golf"… look for opportunities for Chiefs and Mayors to socialise: tournaments, banquets, hobbies, service clubs. It's easier to deal with issues that come up when you already know someone. The same can apply to consultation liaisons and planners, though a lunch or refreshment may suit their working schedules better.
- Find someone to talk to. Start the consultation process with someone you have met, know, and trust within the community. Contact the First Nation administration via their web site, e-mail, or phone. Then follow the chain of suggestions until you get to the right person.

Which Communities?

The community of concern for municipal officials are those that are the hosts to your municipality. They are the ones upon whose traditional territory your municipality rests. These are layered, based on the history between contact and the era of settlement, resource extraction, and land-clearing. In Southern Ontario, the Huron-Wendat are now extirpated from this landscape, but are still very much interested in the remains of their ancestors. The First Nations that are the closest to you are likely to be the ones that have the most interest in your activities. They will have rights based on Aboriginal interests or Treaties. There are the Métis whose communities are less obvious, and in Ontario, have no specific boundaries. Then there are the urban-Aboriginal populations. They can come from across the country. An example, are the Inuit who live in Ottawa, the largest community outside of Nunavut. On one hand they are guests on the traditional territory of the host community. On the other, they also have Aboriginal rights, even if they do not live within their Treaty or Settlement Agreement areas.

What we can do officially?

- Do your homework: know the name of the community, where it is located, who the current Chief is, what Treaty is hosting your municipality, etc. Use the community's website and the community profiles available from the federal government. It is fine to call to verify information. Do not send generic self-survey forms to be filled out at their leisure.
- Adjust mapping to delineate First Nation Reserve boundaries and Métis Community locations. Include First Nation/Métis Traditional Territories as a base-map underlay, not as additional overlay. List them as Hosts to your municipality.
- Investigate the development of an indigenous-relations office in your Municipality. Develop a formal welcoming protocol that recognizes Treaty area and the traditional peoples of the territory.
- Create street tourism banners that recognize Traditional territory that hosts them.
- When you swear in a new Mayor & Council, request an Elder from a neighbouring community to assist. Remember to not interrupt the Elder during any presentation they may give. Be sure to offer a gift of tobacco for the request and provide an honorarium if appropriate. This is an implicit recognition of the community as your Host.
- If you open your meetings with a prayer, ask clergy of all denominations to take turns doing it, and include Elders on that list. Remember that this is not about the imposition of beliefs, but about opening the heart and clearing of the mind of peripheral issues so that the important matters at hand can be dealt with.
- Invite members of Chief & Council and staff to visit you for such things as Council meetings, Planning meetings, Chamber of Commerce meetings, etc., and on YOUR dime!
- Send a member of Mayor & Council and planner to visit the neighbouring First Nation and Métis community. Get on the Chief & Council agenda, shortly after municipal or community election, and before issues arise. Chat about upcoming planning initiatives, OP reviews, major projects. At least once during the mandate is good; less often is fine after a relationship is established.
- Exchange flags between the municipality & First Nation/Metis community. Do it in a ceremony, ask citizens, community members, and the media to attend, and then fly it!
- Include each other in each other's' parades. In Mission, BC the Pow-wow and county fair is held the same day. There is one parade that both communities participate in. At the end of the street they go their separate ways to the pow-wow grounds and the fairgrounds to open the two events. Later, folks start to visit each other's event. Other public rituals may also be occasions for collaboration such as Remembrance Day, where Native Veterans are honoured or indigenous leaders partake in the ceremonies.
- Engage with the Share Path Consultation Initiative. We can help support formal opportunities for city staff and council to learn from the First Nations and urban indigenous communities, and design strategies to help municipality understand the effects of policy decisions on indigenous communities.
- Commemoration in the form of public plaques can also be appropriate. Remember that the First Nation or Metis community being honoured should be part of the preparation, research and placement. A unique effort in Ontario of a similar type is the Moccasin Identifier Project…

Words of Wisdom… it takes someone who cares enough to do something, ask one more question, get one more perspective, and take action and be a catalyst for making something good happen.

Module III – History & Consultation: pre-Confederation

For this module, the discussion that follows is an attempt to situate the issue of the "Duty to Consult" in an historic context. Though prepared for an Ontario audience, the details have been selected from the narrative of Western Civilisation across the continent to show how the relationship between it and the Indigenous Civilisations continues to develop. No attempt has been made to be definitive, authoritative, or comprehensive. This story is simply presented to illustrate why the imperative for meaningful consultation arose.

Contact

Early Relationships between the "New World" and the "Old World" were built through trade and military alliances, religious and family ties, exploration and settlement efforts ... but how did this place go from being what native peoples have called Turtle Island to becoming North America? This is what we will explore next.

Note: *to provide a sense of history, an attempt has been made to contrast original given names, family names, and place names with those in common use today.*

Spain: 1492. It has been more than 525 years (12 October 1492) since a Genoese mariner named Christoffa Corombo *(Genoese: Christopher Columbus)* landed on the Caribbean Island of Guanahani. We know that others such as Viking settlers and Basque fishermen were visitors, but 1492 represents the date of sustained interest by Europe in what was for them a "New World". Columbus renamed that island San Salvador, claiming it for Spain.

His early interactions with the indigenous Carib populations were at times peaceful and at other times hostile, taking prisoners in an effort to find gold, and to put on display in Europe. Evidence suggests that his later colonisation efforts were accompanied by slavery, sexual exploitation, and brutal repression of uprisings. Only small remnants of the Carib culture survive in the Caribbean today.

England: 1497. Five years later in 1497, another Genoese-born mariner, Zuan Chabotto *(Venitian: Giovanni Caboto; Italian: John Cabot)*, claimed the island of Ktaqmkuk in the North Atlantic Ocean. Though a Venetian citizen at the time, he claimed this "New-found-land" for England. John Cabot is thought to have landed at Bonavista, but the exact route is unknown. Evidence of human occupation was found, but no contact occurred with the indigenous Beothuk.

In August 1583, Sir Humphrey Gilbert took formal possession of the island for Queen Elizabeth I. The Beothuk were a cautious people and resisted active contact once colonisation began in 1610. It is thought that increasing competition for resources from other groups and the growing European population, disease, and perhaps occasional hostility led to their disappearance as a distinct cultural group. The last Beothuk woman, named Shanawdithit, died in 1829.

France: 1534. Breton-born Jakez Karter *(Breton: Jacques Cartier)*, sailed into the Gulf of St. Lawrence in 1534. He had brief trading encounters with the Mi'kmaq and then the Laurentian peoples, but the latter were disturbed when he planted a cross on the Kespe'kewaq *(Mi'kmaq: Gaspé)* Peninsula, claiming it for France. Leaving gifts, he took two men, Domagaya and Taignoagny, back to France. On the second voyage they

piloted him to the Laurentian Iroquois settlement of Stadacona *(Quebec City)* where he met Chief Donnacona. He then ventured further west to the village of Hochelega *(Montreal)*. The expedition overwintered in Stadacona, where they survived scurvy through the use of an indigenous medicinal made from white cedar. Donnacona, Domagaya, and Taignoagny, along with seven others were kidnapped and taken back to France to verify the riches of "Kanata" *(Laurentian: village; possible derivative for the word "Canada")*. They were apparently treated well, but all died there. A third voyage of settlement was undertaken, but the colony failed due to bad weather, disease, and deteriorating relationships with the native population. The Laurentian Iroquois culture itself soon disappeared, possibly from warfare with neighbouring groups.

Acadia: 1604. Like Cartier before him, François Gravé Du Pont, was born in St. Malo on the Brittany coast. He may have begun trading for fur as early as the 1580s. But in 1599, he and his protestant partner, Pierre de Chauvin, obtained a fur trade monopoly for Canada. In 1600, he was a ship's captain on Chauvin's voyage to established a post at Totouskak *(Montagnais: Tadoussac)*, a traditional location for summer trading among the indigenous Montagnais *(French: Innu)*, and a stopping point for European whalers and fishermen for the previous half century. Sixteen men were left to overwinter; only five survived, with the aid of the native population.

Chauvin died in 1603, but another fur-trading expedition was mounted by Du Pont to further explore the Saint Lawrence River. He was accompanied by two Innu men, along with Samuel de Champlain. He again visited the colony at Tadoussac; making a strong alliance with the Innu Chief's Begourat and Anadabijou.

The next year in 1604, both Champlain and Du Pont accompanied Pierre du Gua de Monts to colonise Passamaquoddy Bay *(Île Ste-Croix)*, near the present border between New Brunswick and Maine. Pierre du Gua, though protestant-born, had been granted the fur trade monopoly in Acadia. Du Pont departed for France before the harsh winter set in and returned in the spring of 1605 with fresh supplies. This aided the resettlement of the colony to Habitation de Port-Royal in present day Nova Scotia. But Du Pont also brought news that the fur trade monopoly was under threat, forcing du Gua return to France that same year. However, the colony thrived in this more fertile location, along with assistance from the Mi'kmaq under Chief Membertou and the social gatherings known as the "Order of Good Cheer". Pierre du Gua's monopoly was rescinded in 1607, and the Habitation was left in the care of Membertou and a few colonists. It was reoccupied in 1610, under catholic auspices, but the English attacked and looted the place in 1613. The colonists survived by staying with their Mi'kmaq neighbours and due to a grist-mill that escaped destruction. Port-Royal was finally lost to the British in 1710.

New France: 1608. Samuel de Champlain explored the Atlantic coast and the St. Lawrence valley, founding what is now Quebec City in 1608. Born into a family of navigators, he was also a cartographer who produced the early maps of the northeastern part of the continent. He is recognised as founder of New France, its administrator, and diplomat to the surrounding First Nations such as the Montagnais, Algonquin, Malecite, Mi'kmaq, Wendat, and Odawa peoples. He fought with them against their Haudenosaunee *(Iroquois)* rivals and adopted three Montagnais girls named: Faith, Hope, and Charity.

Early Relationships

Huronia: 1615. It is possible that Champlain may have been born a Huguenot *(French Calvinist)*, but he deftly negotiated the protestant/catholic tensions of his day. By 1615, when his travels brought him into the Wendake *(Huron-Wendat: le pays des Hurons; French: the country of the Huron)* region of present-day Ontario, he brought Recollet missionaries with him. It has been over 400 years since he celebrated Mass at the Wendat

village of Carhagouha. This site is located between the present-day French community of Lafontaine, Ontario and the present-day Chippewa community of Beausoleil First Nation (Chimnissing).

British America: 1607. Despite earlier tentative attempts at colonisation (by Sir Humphrey Gilbert in Newfoundland, 1583; by Sir Walter Raleigh in Roanoke Island, 1585), Virginia was the first English settlement to survive. However, the relationship with the Powhatan Confederacy was tenuous at best. It led to the popular legends of Pocahontas and John Smith, but also to the "Starving Time" and possible cannibalism. None-the-less, the establishment of Jamestown in 1607 by the **Virginia Company of London** sparked the tobacco trade, and led to the British domination of the continent.

Hudson's Bay Company: 1670. The Governor and Company of Adventurers of England trading into Hudson's Bay was granted a royal charter in 1670, under the restored monarchy of Charles II. It conveyed a trading monopoly over the entire Hudson's Bay watershed. Named after the first Governor, the king's cousin Prince Rupert of the Rhine, this vast territory was one of the world's largest land-holdings and covered 40% of modern Canada (close to 3.9 million km^2 or 1.5 million square mi.). It functioned as a de facto government with the authority to raise armies and navies, dispense justice, etc. However, its main function was trading manufactured goods for furs with the Aboriginal peoples of this region.

Since its beginnings, New France had also traded for fur with the Indigenous peoples throughout the St. Lawrence basin. After 1731, the explorer La Vérendrye extended the trade past Lake Winnipeg out onto the prairies. By 1770, Scottish and English merchants in Montreal had begun to discuss how to effectively compete with the Hudson's Bay Company. In 1779, the **Northwest Company** was formed. Their approach followed earlier practices of travelling by canoe to their Native trading partners rather than waiting patiently "by the Bay". Company explorers like Alexander Mackenzie and David Thompson pushed through to the Arctic and Pacific oceans, laying the basis for commercial relationships with the Aboriginal peoples they visited.

However, intense competition between the two companies exploited the fur supply below sustainable levels, leading to reduced profits and occasional armed conflict. This was exacerbated when the HBC granted an agricultural colony along the major NWC trade route in the Red River Valley. It raised tensions by banning the Métis from hunting buffalo. This was the main ingredient in pemmican, a major food source for the NWC voyageurs. The harvesting of timber started to supplant fur as Britain's navy lost its New England & Baltic lumber supply due to the Napoleonic Wars of the early 19th century. The fur trade was further strained by the American destruction of the pivotal Northwest Company post at Sault St. Marie during the War of 1812, also disrupting the lucrative trading relationships with Native communities below the border, as well as some that straddled it. Fur-trade regulations were reformed by the British government, who ordered the two companies to stop fighting. Thus, they merged in 1821, expanding the HBC into the Athabasca and Oregon regions.

In 1849, **Pierre Guillaume Sayer** and three other Métis were brought to trial in the Red River Colony for selling furs to independent traders. The charges where eventually dropped, but the HBC monopoly was effectively broken. They began to evolve into a retail business catering to householders. By the end of 20th century it was no longer in the fur trade. In 1870, the Dominion of Canada obtained all the lands of the HBC when it signed the Deed of Surrender for its vast territory. The HBC flag is perhaps the basis of Canada's original "Red Ensign" flag design.

Great Peace: 1701. In 1701, the village of Montreal doubled in size when 1,300 representatives from 39 First Nations arrived for peace negotiations. They included representatives from: the Haudenosaunee (Onondaga, Seneca, Oneida, Cayuga, and Mohawk), Amikwa (Beaver People), Cree, Meskwaki (the Foxes or Outagamis), Les Gens des terres (Inlanders), Petun (Tionontati), Illinois Confederation (Kaskaskia, Peoria, Tamaroa, Maroa, Coiracoentantanons, Moingwena), Kickapoo, Mascouten, Menominee, Miami (of the St. Joseph River, Piankeshaw, Wea or Ouiatenon), Mississaugas, Nippissing, Odawa (Sable, Kiskakons, Sinago, Nassawaketons), Ojibwe, Potawatomi, Sauk, Timiskamings, Ho-Chunk (Otchagras, Winnebago, Puants), Algonquians, Wabanaki Confederacy (Mi'kmaq, Maliseet, Passamaquoddy, Abenaki, and Penobscot).

It was hosted by Louis-Hector de Callière, Governor of New France, and represented the culmination of several years of diplomatic effort by French emissaries in the hinterland led by Augustin Le Gardeur de Courtemanche. An initial entente had been signed the previous year, but a wider settlement was desired. The eventual agreement, La Grande Paix de Montréal *(French: The Great Peace of Montréal)* ended close to a century of hostilities between the Haudenosaunee (Iroquois) Confederacy and New France, along with its First Nation allies such as the Huron-Wendat, Anishnaabe, Innu and Abenaki. Thirty-one groups signed the Treaty, which placed France as a mediator of disputes arising between First Nations and assured the neutrality of the Haudenosaunee in the event of a conflict with England.

The Settlement was crafted during a brief, 5-year pause in European conflict wedged between the Nine Year's War and the War of Spanish Succession, but the Peace between the French and the First Peoples lasted for 16 years. Amongst the First Nations involved, the "Peace" is still considered to be in force. Though overwhelmed by historical forces, the notion of co-operation between the indigenous and colonial populations is a lingering legacy.

Seven Year's War: 1756. The British and French empires contested for control over the eastern portions of what native peoples have called Turtle Island, for over a century and a half, through increasing immigration, military skirmishes, and commercial ventures such as the Hudson Bay Company. It came to a head in the world-wide conflict known as the Seven Year's War (**1756-1763**). In the Canadian battle on the Plains of Abraham, the French General Montcalm was defeated by British General Wolfe in 1759. Both Generals perished from battle wounds. In the end, France lost virtually all of its territorial claims on North America, except for the islands of St. Pierre & Miquelon with their attendant fishing rights on the Grand Banks.

The Royal Proclamation: 1763. In order to reorganise all of the territory Britain now possessed, King George III, declared The Royal Proclamation of 1763; in part to stabilise its relationship with the native populations, many of whom were previously allied with the French. It established the principle that any surrender of native land must be done to the Crown, not to private purchasers, and that non-native settlement was forbidden. In this sense, it is one of the first planning documents. [i]

Though not a treaty, it is taken in some circles as a type of "Magna Carta" for Aboriginal peoples, and is the foundation for the ongoing relationship with the Canadian Monarchy, the legal justification for Aboriginal self-government, and the basis for land claims. It is specifically recognised in section 25 of the Canadian Charter of Rights and Freedoms.

Treaty of Niagara: 1764. The next summer, British Superintendent of Indian Affairs, Sir William Johnson received approximately 2,000 First Nation Chiefs at Niagara Falls. It was one of the most comprehensive gatherings of native leadership to date. It included more than 24 Nations from "… as far east as Nova

Scotia, and as far west as Mississippi, and as far north as Hudson Bay… some records indicate that the Cree and Lakota (Sioux) nations were also present…" Some from as far away as the Blackfoot territory near the foothills of the Rockies, may have attended. "Aboriginal people throughout the Great Lakes and northern, eastern, and western colonial regions had travelled for weeks and months…" to participate in the ceremony. The signing of the implementing Treaty was accompanied by speeches and the exchanges of Wampum belts which solemnised the Proclamation of the previous year. The wampum used the "two-row" motif symbolic of the two streams the signing parties would "sail"; ship and canoe, side by side, each with its own customs and laws, never trying to steer the other. A vast Indian Reserve was created to the west with a line drawn along the height of land of the Appalachian Mountains to separate it from the 13 Atlantic Colonies. [ii]

American Revolution: 1776. The Royal Proclamation alienated speculators and irritated those who had received land grants in the territory, and were part of the grievances that sparked the American Revolution (**1775-1783**). The reorganisation also expanded the boundaries of Quebec westward to the Ohio and Mississippi Rivers, though this land was lost during the Revolution. But, the British relationship with the native peoples there, remained; annoying American settlers and helped to spark another conflict, the War of 1812.

During the Revolution, Loyalists to the British cause were from English, Dutch, German, Black, and Indigenous communities, including Chief Thayendanegea (Joseph Brant) and his sister Konwatsi'tsiaienni (Molly Brant; wife of Sir William Johnson, British Superintendent of Indian Affairs) who helped to secure support amongst the Haudenosaunee of the Mohawk, Seneca, Onondaga, and Cayuga Nations.

British North America: 1783. The American Revolution touched off a century of uprising against the "l'ancien régimes" by more liberal notions of economic, religious, and political order. Britain was not immune to this, but managed to survive due to its own unique form of "mixed government" (combining monarchy, aristocracy, and democracy to avoid the excesses of any one, i.e., tyranny, oligarchy, and anarchy). In the land we now call Canada that "mix" also entailed the relationship between native and non-native peoples. This trust was built over 250 years of mutually beneficial military alliances, commercial trade, and extensive intermarriage. Indeed, the author John Ralston Saul proffered the thesis that the polite and kind society that Canada believes itself to be came from this cooperation between the European and the Indigenous cultures. In this sense our constitution does not merely stem from patriation efforts of the early 1980s, but of every Treaty signed by the Crown since contact. [iii]

Note: *the issue of who has Treaty Rights is a bit of a trick question. Treaties can only be signed by equals. In the modern context, we would say "nation to nation". Thus, anyone who is a Canadian citizen has Treaty Rights: the right to live here, the right to make a livelihood, the right to purchase land, the right to develop it… instantiating a need for planning. For anyone who is an Indigenous-Canadian citizen having Treaty Rights has turned out to be far less substantial and far less secure… instantiating a need for consultation.*

War of 1812. During the War of (**1812-1815**), some Native peoples fought alongside the Americans. However, it is estimated that more than two dozen Nations supported Britain, including the Shawnee, Potawatomi, Ojibwa, Muscogee Creek, Seminole, Choctaw, Cherokee, Chickasaw, as well as Iroquois settled north of the border. Prominent leaders included Chief John Norton of the Mohawks, and the Shawnee War Chief Tecumseh, who, along with his brother Tenskatawa (the Prophet), formed a large inter-tribal confederacy to halt the westward expansion of American settlement.

While it has been over 200 years since the end of the war, Americans, Canadians, and British still quibble over who won. However, most scholars agree that it was the Native peoples who lost the war. During the Treaty of Ghent negotiations, the Indigenous interests of protecting land from settlement were dropped to achieve the peace. The economic interests of ending the war were conceded to re-establish trade. Britain was no longer in a position to stop the expansion of settlement. However, as occurred after the Revolution, allied First Nations were offered succour north of the border.

"Civilisation Programme"[iv]: 1828. With the end to hostilities, military allies were no longer needed. Thus, the British Treasury and Colonial Office began to question the military's need for an Indian Department, while others felt that it should become a civil agency tasked with "civilising" Native peoples. This aligned with the era of "philanthropic liberalism", created by the social conditions of Britain's rapid industrialisation. Many humanitarian movements arose, such as those opposed to slavery, or those supporting Christian missionary work, and included the formation of the Aborigines Protection Society. In 1828, Major General H.C. Darling reported to the Colonial Secretary, Sir George Murray, his recommendations that their former allies be settled on farms, provided livestock and implements rather than the typical annuities, and receive educational & religious instruction. Though not the only policy review, his report is taken to be "the founding document of the whole civilization programme".

Murray conferred with the Governor General of Lower Canada, Sir James Kempt, and the Lieutenant Governor of Upper Canada, Sir John Colborne. Their recommendations largely concurred. They reinforced the idea of gathering nomadic peoples into villages, and suggested support for the construction of homes. Colborne also critiqued previous waste and proposed the lease or sale of Native lands to pay for future efforts, so that selected U.S. successes might be replicated here. Oxford professor of political economy and eventual Under-secretary of State for the Colonies, Herman Merivale, proffered liberal policy options that ranged from extermination through slavery through insulation to amalgamation. However, his opinion was more in line with the social sentiments of the time, which saw an "insulation leading eventually to amalgamation" approach as the most cost-effective. This ethos helped to implement the Indian reserve system, along with a proselytizing for material progress, which is still in effect to this day.

Several agricultural experiments were initiated, two in Upper Canada at Sarnia and Coldwater, and another in Rivière Verte in Lower Canada. But pressures to cut costs made the next Colonial Secretary, Lord Glenelg seek advice once again. The Governor General in Lower Canada, the Earl of Gosford, had a bureaucratic response prepared in keeping with the rationale of the Colonial Office, encouraging agriculture and education on reserves set up near white settlements. On the other hand, the Lieutenant Governor of Upper Canada, Sir Francis Bond Head, embarked on a programme of extirpation of all Indians in the colony to Manitoulin Island. It was based on his travels through Argentina, precedents from the U.S., and visits to most Native communities under his jurisdiction. The Aborigines Protection Society in Britain released a public report denouncing the policy. In Canada, Methodist missionaries were incensed and reported much disquiet in Native communities. Reverend Robert Alder, name-sake of Alderville First Nation, lobbied Glenelg directly.

As a result of the mounting political pressure Glenelg reversed his previous endorsement of Bond Head's plans. With the appointment of a new Governor General, Lord Durham, and a Lieutenant Governor, Sir George Arthur, he recapitulated previous settlement and instructional practices, the security of reserve-land title from speculators and creditors, and instructed them "to protect and cherish this helpless Race… and raise them in the Scale of Humanity." This sparked another round of policy assessment, but these were overwhelmed by the events and aftermath of the Rebellions in the two colonies.

Note: *for those who are up on their planning theory, they will recognise the military origins of tools such as "strategies", or "setting objectives", or the development of "policy options", etc. What was missing from the "Civilisation Programme" was humility. While its altruism was noble enough for the age, these efforts also express a paternalism that saw little need for consultation.*

United Province of Canada: 1841. During the early 19th century, in what is now Ontario and Quebec, the common people began to chaff at the economic, religious, and social control of colonial life by the local oligarchies: respectively the Family Compact and the Chateau Clique. Crop failures and the resultant bank collapses, led to an international recession that exacerbated these conditions. This led to the Rebellions of 1837-1838. In the wake of these uprisings, Lord Durham recommended that Upper Canada and Lower Canada be united into a new colony, the Province of Canada, which occurred in 1841.

Its second Governor General, Sir Charles Bagot, came to office in 1842, and was far more diplomatic than his autocratic predecessor. As an Ambassador he had influenced many events such as the creation of Belgium with the Kingdom of the Netherlands, the settling of spheres of influence in Alaska with the Russian Empire, and the demilitarisation of the Great Lakes and Lake Champlain, as well as the delineation of the western border between the U.S. and British North America with the Republic of the United States. Though instructed to resist responsible government, he allowed a ministry to be formed by Louis-Hippolyte La Fontaine and Robert Baldwin due to the majority of seats their party won in the provincial parliament and worked with them to restructure local governance. Controversially, he presided over the first extradition of a run-away slave back to the U.S., on grounds that the fugitive had committed crimes in order to flee.

He also commissioned yet another study on the management of Native peoples in the colony. Though Bagot died before the assessment was finalised in 1844, the subsequent: Report on the affairs of the Indians in Canada set the stage for future policy. [v] It was a seminal review of the justification and organisational structure of the "civilisation programme" to date. According to John Leslie, the commissioners upheld the duty of the Crown towards indigenous peoples beyond the views of "insensitive local authorities". Thus, something as radical as Bond Head's proposal was seen to be in violation of "faith of the crown and every principle of justice". Nonetheless, hunting and gathering seemed less viable in the face of increasing settlement, and thus the report also included socio-economic "statistical data on the Indian and half-breed populations, reserve acreage, agricultural advancement, health, schools, claims and grievances, temperance, and religious conversion."[vi] The essential recommendations were a centralised administration, boarding schools for children outside the influence of community life, the promotion of private enterprise, and personal tenure of land through a separate reserve registry system.[vii]

Responsible Government: 1848. With the rise of democratic agitation across Europe and the outbreak of republican revolutions in 1848, Britain began appointing governors that were "responsible" to the colonial parliaments rather than the imperial government. In 1848, Britain granted Responsible Government to the Colony of Nova Scotia and the United Province of Canada. This was followed in 1851 by the Colony of Prince Edward Island, then the Colony of New Brunswick in 1854, and the Colony of Newfoundland in1855.

The Governor General of the united Province, Sir Charles Metcalfe, was given authority to implement the recommendations of the Bagot Commission in 1845. By 1850, the Indian Department had been shifted from military to civil control, bolstered by supporting legislation and policies.[viii]

Municipal Government: 1849. In 1849, the legislature of the recently united Province of Canada passed the Baldwin Act. It became the basis for municipal government in present day Ontario, and the structure upon

which modern land development would rest. This period of the 19th century saw a growing modernity and a budding capitalism which increasingly assumed that the "value" of land came from its monetary worth. Land was seen less and less as a place to be in kinship with, and more and more as something to buy and sell. This notion was undergirded by the ideal of progress that applied to everyone regardless of race or class. But it also undermined the traditional assumptions of cooperation. Treaties with the Indigenous inhabitants of this land were increasingly interpreted as land deals, rather than the basis of sharing from its largess. Thus, the *Gradual Civilisation Act* was passed by the Province of Canada in 1857 to enfranchise native people, but only if they gave up their Aboriginal and Treaty rights.

Note: *At this time, the concepts of planning were only in their infancy. Though ideas such as Patrick Geddes, "place", "folk", and "work" directly paralleled Indigenous thinking on such matters, the profession would only be established in the 20th century. By then, planning would be grafted onto existing patterns of land clearing, resource extraction, and municipal growth.*

Confederation: 1867. The idea of a Union amongst the colonies was floated in 1857 and proposed to Brittan in 1859. By 1864, the Province of Canada was proving to be dysfunctional and asked to join talks on Maritime union at a Conference in Charlottetown that September. The discussions proved fruitful enough to prompt a follow-up Conference in Quebec City in October. While Prince Edward Island and Newfoundland opted out, Canada, New Brunswick, and Nova Scotia passed resolutions supporting union. This led to a Conference in London in December, 1866 where the terms of Confederation were finalised. It was quickly passed by the British Parliament and given Royal Ascent in March 1867. Formal union was set for the first of July.

It is important to note that indigenous representatives were not invited to be part of the discussions that created the British North America Act of 1867. Any previous notions of self-government for Aboriginal communities and of the traditional territories they relied on economically were simply assumed to no longer be viable. Indians and lands reserved for them were consigned to a federal department. The vast majority of lands, the natural resources they represent, as well as municipal government were assigned to the newly created Provinces. Treaties between the Crown and the First Peoples became the responsibility of the Dominion Government.

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[i] *planning student: Clara MacCallum Fraser, 2016*

[ii] *John Borrows. Wampum at Niagara: Royal Proclamation, Canadian Legal History, and Self-government. [www.sfu.ca/~palys/Borrows-WampumAtNiagara.pdf]*

[iii] *John Ralston Saul. A Fair Country: Telling Truths about Canada. 2008*

[iv] *Leslie, J. 1982. The Bagot Commission: Developing a Corporate Memory for the Indian Department. Historical Papers / Communications historiques, 17 (1), 31–52. https://doi.org/10.7202/030883ar*

[v] *[https://en.wikipedia.org/wiki/Charles_Bagot] 24 December 2020*

[vi] *Leslie, J. 1982. The Bagot Commission: Developing a Corporate Memory for the Indian Department. Historical Papers / Communications historiques, 17 (1), 31–52. https://doi.org/10.7202/030883ar*

[vii] *Bob Joseph. 2018. 21 Things You May Not Know About the Indian Act. Indigenous Relations Press. Port Coquitlam, B.C.*

[viii] *Leslie, J. 1982. The Bagot Commission: Developing a Corporate Memory for the Indian Department. Historical Papers / Communications historiques, 17 (1), 31–52. https://doi.org/10.7202/030883ar*

Module IV – History & Consultation: post-Confederation

Dominion of Canada: 1867. After Confederation, the new Dominion of Canada consolidated all existing legislation regarding First Nations into the *Indian Act, 1876* without consulting the people whose lives and lands it now presumed to regulate. It did protect what remained of native lands as reserves, but also reduced the status of the people to that of wards of the state. Eventually Inuit were included under the Act, but not Métis. For more than a century the implementing assumptions of the Act have been assimilationist, including the sad legacy of the American-style Indian school system.

In this module, we will examine the results of those strained relationships of the early and mid-nineteenth century, particularly as they played out in the late-nineteenth, early-twentieth, and mid-twentieth centuries. This will be done through the "lens" of our prime ministers and the changes they oversaw, switching in the late-twentieth and early twenty-first century to those court cases brought by indigenous communities to alter the direction of those changes. For decades, these communities were not allowed to put money towards the legal research of land issues, and lawyers were prohibited from working for communities on such cases. At one point, the government even proposed the abolition of the Indian Act and the abrogation of all land claims. Despite this impact, what has kept native culture alive over the last 150 years is the connection to land. Acknowledgement of this has been slow. But it is now officially enshrined in our constitution, affirming an enduring Aboriginal relationship to the land and their ongoing contribution to the building of the country.

Note: *the following discussion begins with a brief examination of the role of Sir John A. Macdonald. There are those who take exception to the "homo magna" (great man theory) approach to history, preferring a "homo vulgaris" (common man) theory of history from below. Without denying either context, authors such as Richard Gwyn have asserted that Canada's emergence as a nation-state was very unlikely without, as he puts it: "The Man Who Made Us". This is certainly true for the topic at hand. The approach of Canada's first Prime Minister towards the First Peoples has set a tone that lingers to this day, for better and for worse.*

Sir John A. Macdonald: 1815 - 1891. According to author Richard Gwyn, our first Prime Minster "knew more about Indian policy and the Indians themselves than any of his predecessors, or any of his successors until Jean Chrétien and Paul Martin a century later." His "attitudes" and "prescriptions" seem to have come from both his personal relationship with individual Aboriginal people and British Indian Policy. This policy was built on securing military allies, first against the French, then the Americans, who were coveting Native lands. However, its aims were contradictory, seeking to both protect indigenous peoples from the corrosive effects of the wider civilisation while at the same time seeking to "civilise" them. Macdonald was never able to overcome this paradox. [i]

Colonial Politician. As a colonial politician (1843-1867), his attitudes towards Native people were shaped by his personal relationships with them. As a lawyer, he defended individuals from local First Nations in court. As a vocalist, he sang in a Mohawk choir. As a guardian, he sent his granddaughter Daisy to a school run by Métisse **Abby Maria Harmon**. He was friends with **Kahkewaquonaby** (Reverend Peter Jones), **John Cuthbertson**, and **Oronhyatekha** (Peter Martin, who was a M.D. and established the Canadian branch of the Independent Order of Foresters). [ii]

Prime Minister. As Prime Minister (1867-1873, 1878-1891), his policy prescriptions reveal an attempt to integrate pre-existing populations, with pre-existing rights, into a newly created society; one whose constitutional framework was created almost singlehandedly by himself. His first attempts were to grant voting rights in exchange for Aboriginal & Treaty Rights in the pre-confederation 1857 *Gradual Civilisation Act* and post-confederation with the *Gradual Enfranchisement Act* in 1869. These, by and large, failed. In order to expand the size of the new Dominion, Rupert's Land was purchased from the HBC in 1869. The Aboriginal communities, whose lands were being obtained, were not consulted; which led to the Red River Rebellion of 1869-1870. This was only resolved by the creation of the Province of Manitoba in 1870. The United Colony of British Columbia joined Confederation in 1871, with a promise to be connected by rail to Ontario within ten years. The effort to build a transcontinental rail link also opened the southern prairies to agriculture, as the HBC shifted its fur-trading operation to the North, and secured the border with the U.S. from American incursions from the South. To facilitate this, the government began negotiating the so-called numbered Treaties No. 1 - 7 between 1871 and 1877. Also, during this era, the first Aboriginal (Métis) Members of Parliament, **Pierre Delorme** & **Angus McKay** were elected in 1871, as members of Macdonald's party.

The attitudes of Canadians were kindly, if on occasion paternal, towards the Native peoples. They widely viewed their government's policy as superior to that of Americans. Indeed, the early parts of our history, particularly in the East, were based on peaceful, even co-operative relationships. But as the fur trade declined and the effort to colonise the West increased, the pace of change outstripped the ability of people to adapt and was done without consultation. Macdonald understood this. In 1880, he told the Commons that … "We must remember that they are the original owners of the soil, of which they have been dispossessed by the covetousness or ambition of our ancestors. Perhaps if Columbus had not discovered this continent – had left them alone – they would have worked out a tolerable civilisation of their own… the Indians have been the great sufferers by the discovery of America and the transfer to it of a large white population." It should be pointed out, of course, that these communities were functional societies before contact and strove continually to remain so after contact. This understanding, as Gwyn concedes, "was not translated into effective action". [iii]

Superintendent General of Indian Affairs. After the U.S. Civil War, Americans began to push westward. They found vast herds of bison, alongside the peoples who used them for sustenance. As tanning technology improved, the demand for buffalo hides increased. This led to the mass-slaughter of the species and the collapse of bison herds of the Great Plains between the mid-1870s and the mid-1880s. But over-hunting was also known to directly undermine those already there, preparing the way for settlement, agriculture and ranching. On the Canadian side of the border those lifestyles adapted to the seasonal demands of hunting & gathering and the mercantilist demands of the fur-trade were deeply affected by the near-extinction of bison and led to a Great Famine on the prairies.

In this context, Macdonald assumed the Interior Ministry portfolio and became the Superintendent General of Indian Affairs between 1879 and 1887. His policies regarding what he referred to as the "Indian Question" were contradictory. On one hand, the approach was to feed people and thus avoid conflict. On the other, food was sometimes withheld to force former nomads into a settled life of agriculture. In 1883, the government funded three Indian Industrial Schools. They were modelled on those created in the United States, and laid the basis for what became the Indian School System. [iv] [v] [vi]

Enfranchisement Effort. However, Macdonald also introduced the *Franchise Act* in 1885. Amongst other things, it guaranteed voting rights to Native men without the loss of Aboriginal & Treaty Rights. He argued

that escaped slaves had gained the vote, without opposition, once arriving here. Yet those who had once "owned the whole of this country, were prevented from sitting in the House and from voting for men to represent their interests there." The bill was passed, but he was never able to fully implement its provisions once violence broke out on the Prairies. Voting rights where rescinded by a subsequent government. His obsession during this period was the construction of the Canadian Pacific Railway from 1881 to 1885. As the implications of impending settlement became obvious, the unresolved grievances of Aboriginal peoples, particularly the Métis, led to the North-West Rebellion in 1885. Louis Riel & seven other native leaders were executed in that same year. None-the-less, he appoints **Richard Charles Hardisty** as the first Métis Senator in 1888.

Legacy. Sir John was an advocate of patience in dealing with indigenous peoples and realised that four generations might pass before inclusion into the larger society was possible. He always insisted that the Treaties be honoured, but stated that: "The execution of Riel and of the Indians will, I hope, have a good effect on the Métis and convince the Indians that the white man governs". [vii] As resistance to this "governance" arose, the attitudes of Canadians soured, when violence erupted, it hardened. Propping up the notion of history rising up from below, Macdonald's policy approach in the end may not have been so much his own, "… as it was a policy of the Canadian people." [viii]

As Gwyn concludes:

"After the rebellion, all Indians ceased to be treated as independent people who had signed treaties with the government and were reduced progressively to mere wards of the state. For the better part of a century, the old ideals of protecting and civilizing Canada's Indians were replaced by the practicalities of administration and control."

On his single trip to the West, Macdonald met with Isapo-Muxika (Crowfoot), the Chief of the Blackfoot who remained loyal during the uprising and had been honoured and feted in Ottawa by the Governor General. **Isapo-Muxika** complained about the grass-fires caused by cinders from train engines, Macdonald lectured about the necessity of learning to farm. Crowfoot "…died in 1890 a deeply disappointed man, wholly uncertain whether his policy of accommodation had been the right one for his people." [ix]

Administration and Control

Alexander Mackenzie: 1873. He was a Liberal Prime Minister from 1873 to 1878. During his tenure the *Indian Act* was passed in 1876. Under this Act, what is left of Native lands are consolidated into Indian Reserves controlled by Indian Agents. The assimilation project shifts focus from enfranchisement to marriage rights. Native women who married non-native men lost their status as "Indians". So did all her descendants. However, no similar provision applied to native men. In fact, any non-native wife gained status as an "Indian". He also appoints David Mills as Minister of the Interior.

David Mills: 1876. A Liberal Politician from 1867-1882 and 1884-1896. He was the son of a pioneer family and an author & poet. He was Minister of the Interior and Superintendent General of Indian Affairs from 1876-1878, a Senator and Minister of Justice from 1896-1902, and a puisne judge of Supreme Court from 1902-1903. During the *Franchise Act* debates he quizzed Sir John A. Macdonald as to whether Indians from Manitoba and British Columbia would have the vote. They would. Militant leaders such as Poundmaker and Big Bear, would they have the vote? They would. At this point he accuses the Prime Minister of bringing "… a scalping party to the polls". At another time, he castigated Macdonald for frustrating "the doctrine of

the survival of the fittest" by providing food to those suffering from the Great Famine. Gwyn notes that the operation of this "doctrine" on those First Nations who successfully adapted to agriculture was a restriction of their efforts by the government to that of subsistence farming, so as not to compete with newcomers in "the market".

Note: *after 134 years, the federal government overturned the treason-felony conviction of Cree Chief Poundmaker in 2019. During the Riel Rebellion in present day Saskatchewan, he is credited with stopping the slaughter of Canadian troops at the Battle of Cut Knife on the 2nd of May 1885. He was however, accused, convicted, and imprisoned for inciting belligerence. He was released before his death in 1886 of tuberculosis, to avoid the embarrassment of his perishing in prison. The community was forbidden from having another chief until 1919.*

Sir Wilfred Laurier: 1896. A Liberal Politician from 1874-1919; Prime Minister from 1896-1911. In 1896, Laurier appoints Clifford Sifton as Minister of the Interior, who creates an immigration scheme to boost the number of people settling the Prairies. It involved incentives such as free homesteads, premiums for European immigration agents, and the explicit violation of Treaties to make more land available for agriculture. Sifton travels the world seeking immigrants from Great Britain, United States, Poland, Russia, the Ukraine, Germany, Italy, China, Japan and Finland. From 1897 to 1914, Canada's population increased by 60%, greatly enhancing farm production.

In 1898, all Indians are dis-enfranchised. One Liberal claimed that it had been an insult to white voters to be on the same level as "pagan and barbarian Indians". Between in 1899 and 1921 the numbered-treaty process started up again for the remaining lands of the Northwest Territories to secure and facilitate access to its natural resources. The provinces of Alberta and Saskatchewan are carved out of the NWT in 1905. Laurier appoints David Mills to the Supreme Court in 1902, and creates the Commission for the Conservation of Natural Resources in 1909. [x] [xi]

Clifford Sifton: 1896. He was a lawyer from Winnipeg and Liberal Politician from 1888-1911. He was appointed Minister of the Interior in 1896 and as Superintendent General of Indian Affairs was responsible for the removal of territory protected under Treaty for mass immigration to the Canadian West. He oversaw the creation of Alberta and Saskatchewan as provinces, with his older brother, Arthur, becoming Premier of Alberta. He was made the chairman of the Commission for the Conservation of Natural Resources in 1909.

Commission on Conservation: 1909. According to Gerald Hodge, the Commission for the Conservation of Natural Resources (1909-1918) was established to follow the example of the U.S. and Britain. Its mandate was to examine and make recommendations on: lands, forests, minerals, fisheries, game and fur-bearing animals, waters, waterpower, as well as human health. This explicitly meant improvements in housing and community planning.

Britain had already passed its *Housing and Town Planning Act* in 1909 and in 1912 four Canadian provinces: New Brunswick, Nova Scotia, Ontario, and Alberta enact similar legislation. The Commission followed suit in 1914, proposing a "Town Planning Act for Canada". That same year it hosted the 6th convention of North American and European planners in Toronto for the National City Planning Conference. It also hired Thomas Adams to act as its Town Planning Advisor.

Adams was a planner deeply involved in Britain's Garden City Movement. He founds the Town Planning Institute of Canada (Canadian Institute of Planners) in 1919. The Commission lasted until 1921, but the city of Kitchener adopts the American technique of zoning in 1924. By 1925 all provinces have enabling

legislation for planning, except Quebec. British Columbia's statute is the first to instantiate zoning bylaws. [xii] [xiii]

Duncan Campbell Scott: 1913. He was a federal civil servant from 1879-1932. He served as Deputy Superintendent of Indian Affairs under four Prime Ministers: Sir Robert Borden, Arthur Meighen, William Lyon Mackenzie King, R.B. Bennett, in six governments, over nineteen years (1913-1932). He was a poet & author, but was also the Treaty Commissioner present at the 1905 negotiation of Treaty No. 9 in Northern Ontario. He oversaw the 1920 attempt at assimilation, via the amendments of Bill 14 to the *Indian Act* and is reported to have said:

> "I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone… Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill."

The Bill made it mandatory for all native children between the ages of seven and fifteen to attend school though no type of school was specified. It is estimated that approximately 150,000 Aboriginal children were compelled to attend the educational system set up for them, which were largely day-schools in or near their communities. However, Scott felt that removing children from their communities would increase the assimilation of Aboriginal peoples into the wider society. If a residential school was the only one available, children were then required to go there. In these isolated circumstances, children were often forbidden from speaking their languages or practicing their rituals. Sexual assault was also known to occur. As many as 6,000 children[xiv] may not have survived. His attempt at assimilation was praised as it was in keeping with the thinking during that era. It is now recognised as cultural genocide. [xv]

In the 1920s, the government began to purchase the boarding schools as they fell into disrepair, while the churches continued to run them. By the 1930s, the residential school system was failing both financially and as an assimilation strategy. Between 1945 and 1955, the day school system run by Indian Affairs was expanded, along with agreements between governments to integrate Aboriginal children into provincial and territorial school systems.[xvi]

Note: *these arrangements still left First Nations participating under duress. Over time, the number of students, teachers, even School Board Trustees have increased. However, where the will exists, where the funding and resources are available, and where the numbers warrant, communities often opt for their own schools.*

Louis St. Laurent: 1948. He was a Liberal Politician from 1942 to 1957, and Prime Minister from 1948 to 1957. Significant amendments were made to the Indian Act in 1951. One was the establishment of agreements to allow the education of Aboriginal children in provincial and territorial schools systems, based on the notion that integration would provide a better education than one based on assimilation. However, it also allowed the application of provincial laws On-reserve, if no federal law was in place. This included child welfare, which once again led to the removal of native children from their communities. It is commonly referred to as the "Sixties Scoop" (~1960-1990) where eleven to twenty thousand children may have been taken. The other assimilationist amendment, was the insertion of a "double-mother" clause that deprived native men of Indian Status if both their mother and grandmother were not "Indians". [xvii]

John Diefenbaker: 1957. He was a Conservative Politician from 1940 to 1979, and Prime Minister from 1957 to 1963. He appoints the first Status Indian to the Canadian Senate in 1958. The newly minted senator, **Akay-na-muka** (James Gladstone) begins to push for Aboriginal re-enfranchisement. Federal voting rights are finally restored to Aboriginal citizens in 1960. [xviii]

Note: *Métis had always been allowed to vote federally and provincially, if they met age, gender, and property requirements. The Inuit were federally enfranchised in 1950, but ballot boxes only arrived in their communities in 1962. Status Indians were disenfranchised in all provinces/territories except N.S. & Nfld. These voting rights were eventually restored: B.C. (1949), Man. (1952), Ont. (1954), Sask., the N.W.T. & Yk. (1960), N.B. & P.E.I. (1963), Alta. (1965), P.Q. (1969).*[xix]

Pierre Elliot Trudeau: 1969. He was a Liberal Politician from 1965 to 1984, and Prime Minister from 1969 through 1978 and from 1980 to 1984. In 1969, his government produced a "white paper" proposing the elimination of special status for Indians, the abolition of the Indian Act, and the abrogation of all land claims and inherent rights. This spurred the Indigenous Rights movement in Canada. In the same year the government took sole control over the residential schools. The last one, the Gordon Indian Residential School, Saskatchewan, was closed in 1996.

In 1971, he accepted an invitation by B.C. Premier W.A.C. Bennett to discuss constitutional patriation with the other premiers. The talks resulted in the "Victoria Charter". The proposal was eventually dropped due Quebec's opposition, but it is important to note that no Native organisations such as: the National Indian Brotherhood (now the Assembly of First Nations), or the Inuit Tapirisat of Canada (now the Inuit Tapiriit Kanatami), or the Native Council of Canada (now the Congress of Aboriginal Peoples), or the Métis National Council were invited to participate. [xx] [xxi] [xxii]

Formal multi-culturalism was also instituted in 1971. However, even as we revived our accommodationist roots, "Indians" resisted becoming just another ethnic group. They increasingly begin to assert their rights as Nations.

Evolving Relationships

Calder Case: 1973. The Nisga'a peoples had long asserted that title to their traditional lands of the Nass River Valley in northwestern British Columbia had never been ceded. They had met with the Premier in 1887, formed a Land committee in 1890, and petitioned the British Privy Council in 1913 for a treaty. In 1949, Nisga'a hereditary **Chief Frank Calder**, became the first Status Indian elected to the BC legislature (the 1st in any Canadian legislature), and soon began pursuing a land claim with the Province. He continued this work in 1955, as President of the Nisga'a Tribal Council, and later became BC's first Aboriginal cabinet minister (1972). Along with a group of like-minded elders, he asked lawyer Thomas Berger to sue the government of British Columbia in 1967. Both the BC Supreme Court and the Court of Appeal dismissed the case. It was appealed to the Supreme Court of Canada.

Though thrown out on a technicality (they had not asked the BC Attorney General for permission), *Calder v. Attorney-General of British Columbia, 1973* became a turning point in the recognition of Aboriginal title. Since it had existed at the time of the Royal Proclamation of 1763, it was independent to, and not simply derivative of, the Canadian legal system.

In August of that year, the federal government immediately released a policy on comprehensive land claims, and started negotiations with the Nisga'a Tribal Council in 1976. By 1989, they had a framework agreement, which the Province joined in 1990. An agreement-in-principle was reached in 1996, and signed by 1999. The

Canadian and British Columbia governments passed the appropriate legislation ratifying the Treaty, with the Nisga'a finally achieving self-government over 2,000 km^2 of their ancestral home in 2000.

The significance of this case is that the Nisga'a Treaty now serves as a model for modern treaties and self-government agreements. It has initiated the co-management of lands and their resources along with the opportunity for First Nations to participate in the creation of land-use plans. It has become a precedent for subsequent land claims and court cases, and is even cited in other commonwealth countries such as Australia and New Zealand. [xxiii] [xxiv][xxv] [xxvi]

James Bay Agreement: 1975. Before the foundation of Canada, the lands of northern Quebec had been a part of Rupert's Land - the territory administered by the HBC. In 1870, all of Rupert's Land was ceded to Canada, and in 1895 the region between the province of Quebec and the Hudson Strait became the District of Ungava of the Northwest Territories. In 1898, the border of Quebec was extended north to the Eastmain River. Quebec continued to claim the remaining District of Ungava, north of the Eastmain River, and in 1912 the area was transferred to Quebec, subject to the condition that a treaty be negotiated with the native peoples of the region recognising their cultural rights and surrendering their title to the land to Quebec and Canada. There was at the time no pre-existing treaty covering that area. The government of Quebec did not immediately undertake such negotiations.

In the 1960s, Quebec began developing potential hydroelectric resources in the north, and in 1971 created the James Bay Development Corporation to pursue the development of mining, forestry and other potential resources starting with the James Bay Hydroelectric Project. This massive undertaking, which had been directed by an increasingly assertive government of Quebec without consulting native people, was opposed by most of northern Quebec's Cree and Inuit. The Quebec Association of Indians - an ad hoc representative body of native northern Quebecers - sued the government and, on the 15th of November 1973, won an injunction in the Quebec Superior Court blocking hydroelectric development until the province had negotiated an agreement with the people of the region. The judgment was overruled by the Quebec Court of Appeal seven days later, after the government's efforts to quickly negotiate an agreement failed. Construction continued, but the legal requirement that Quebec negotiate a Treaty covering the territory had not been overturned.

Negotiations proceeded and on the 15th of November 1974 – exactly a year after the Superior Court decision – an agreement-in-principle was signed between the governments of Canada, Quebec, publicly owned Hydro-Québec, the Grand Council of the Crees, headed by **Billy Diamond**, and the Northern Quebec Inuit Association. The final accord - the James Bay and Northern Quebec Agreement - was signed on the 11th of November 1975. This convention originally only covered claims made by the Quebec Cree and Inuit, however, on the 31st of January 1978; the Naskapi Indians of Quebec signed a parallel agreement - the Northeastern Quebec Agreement - and joined the institutions established under the 1975 accord.

It has been modified by 20 additional accords affecting details of the original agreement and its implementation, as well as expanding their provisions. Furthermore, the *Constitution Act, 1982* entrenched in the Constitution of Canada all the rights granted in Treaties and land claims agreements enacted before 1982, giving the rights outlined in the original agreement the status of constitutional rights. The planning provisions covering ᐃᔨᔫ ᐊᔅᒌ / ᐃᓅ ᐊᔅᒌ *(pronounced Eeyou Istchee; Cree: The People's Land)* give the Cree exclusive control over their settlements, extensive control over family harvesting areas, and consultation and impact benefit rights in the rest of their traditional territory. [xxvii]

Berger Inquiry: 1977. As early as the 1950s, both natural gas and oil deposits were discovered in the Beaufort Sea. By the 1970s, pipelines were being considered to ship natural gas to the South through several routes in the Yukon and the Northwest Territories. On the 21st of March 1974, the Government of Canada commissioned the Mackenzie Valley Pipeline Inquiry (1974-1977), to investigate the social, environmental, and economic impacts of such a pipeline.

It was also known as the Berger Inquiry after its head, **Justice Thomas Berger** of the British Columbia Supreme Court. To prepare for the hearings, he travelled throughout the North, consulting with the Dene, Inuit, and Métis peoples, as well as non-aboriginal residents. The commission held hearings in cities across the country including Yellowknife. But the commission is also notable for its community hearings held across the Yukon and the Northwest Territories, including all 35 communities of the Mackenzie River Valley.

He heard testimony from fourteen different groups, who all became full participants in the inquiry. It gave particular voice to the Aboriginal peoples whose traditional territory would be affected. The commission produced 283 volumes, with over 40,000 pages of text and evidence. The commission recommended that no pipeline be built through the northern Yukon and that a pipeline through the Mackenzie Valley should be delayed for 10 years, while land claims were settled and treaties signed. [xxviii] The Inquiry is considered both unprecedented and unduplicated in terms of its extensive process of consultation with Aboriginal communities. [xxix]

Canada Act: 1982. In 1931, the British government offered sovereignty to the Dominions of Australia, New Zealand, Newfoundland, the Irish Free State, the Union of South Africa, and Canada via the Statute of Westminster. However, the federal and provincial governments in Canada disagreed on how to amend the various British North America Acts (twenty from 1867 to 1975), excluding them from application of the Statute for fifty years. The "breakthrough" came during the constitutional patriation negotiations of the early 1980s, though Quebec refused and still remains a non-signatory to the constitution. None-the-less, the British Parliament passed the *Canada Act*, with the Queen signing the Proclamation of the *Constitution Act* at Parliament Hill on the 17th of April 1982.

The Statute of Westminster was finally adopted by embedding the *Canada Act* in Section 52(2) (a) of the *Constitution Act*. Though, sections 4, excepting it from applying to the BNA acts, and 7(1), ending Westminster's power to amend Canada's constitution upon request, were repealed by the Canadian parliament. It ended appeals to the Judicial Committee of the British Privy Council or automatic acceptance of British changes of the succession to the throne. [xxx]

Constitution Act: 1982. There were several constitutional conferences called, in order to finally take advantage of the Statute of Westminster. The one that achieved patriation was called by the federal government in May 1980, after the first referendum on Quebec separation was defeated. However, the National Indian Brotherhood (NIB) had been denied access to negotiating a constitutional framework with the first ministers, and left for London to petition for a direct meeting with the Queen. Though she was advised by the federal government not to meet with them, the Master of the Rolls and Records of the Chancery of England, Britain's second highest judge, did legitimise this direct relationship via the Treaty-making process. In response, the NIB was allowed to speak at subsequent meetings with the Premiers.

The acknowledgement of relationships with the Crown and the assertion of rights based on those relationships was not intended by the negotiators at the patriation table, nor made unequivocal in the early versions of the text. In October of 1980, what eventually became Section 26 simply said that the Charter

could not be interpreted to deny the existence of non-Charter rights, e.g., Aboriginal, or Treaty, or etc. The weakness of this provision led to fears that patriation would lead to an even further erosion of constitutional rights, than had already been experienced since Confederation. Protests ensued. Native leaders successfully advocated for stronger protections that were eventually noted in Section 25, as well as enshrined in Section 35 of the *Constitution Act, 1982*. [xxxi] [xxxii] [xxxiii]

Charter of Rights: 1982. Included in the constitutional package was a Canadian Charter of Rights and Freedoms, which occupied the first 34 sections. Though not appearing in the original text, Section 25 under the "General" heading, now states, that aboriginal, treaty, or other rights or freedoms are not abrogated or derogated by the Charter. It also makes specific reference to the Royal Proclamation of October 7, 1763 with a vague reference to existing or future land claims agreements. [xxxiv] [xxxv]

Existing Aboriginal and Treaty Rights: 1982. Section 35 of the *Constitution Act, 1982* is a more robust assertion of rights for First Peoples than that found in Section 25. It explicitly recognized and affirmed:

- the "aboriginal peoples of Canada", namely: Indians, Inuit, and Métis
- the "treaty rights" that exist now by way of land claims agreements, or may be so acquired
- and that they are guaranteed equally to male and female persons [xxxvi]

Sparrow Case: 1990. The *1990 R. v. Sparrow* case proved seminal in asserting the rights of First Nations, and was ranked among the 20 most significant legal events nationally over the last 100 years by the Canadian Bar Association's National magazine. In 1984, **Ron Sparrow** defied the Department of Fisheries and Oceans by fishing the Fraser River with a net almost double the legal length. When caught, his defence was that he was exercising his Aboriginal right to fish, protected under the Constitution. The **Musqueam** Band member's case was eventually heard by the Supreme Court of Canada, which ruled Aboriginal fishing rights take priority over commercial and sport fishing.

Since then, the courts have been attempting to define Aboriginal rights to land. In the 1990 *R. v. Sparrow* case, the Supreme Court affirmed that our constitution protects Aboriginal title and that it can only be infringed in very specific ways. The government must, among other things, be acting in the **best interests of society**, it must **maintain its fiduciary** obligation towards native communities, and it **must consult** with them. [xxxvii]

Oka Crisis: 1990. The Mohawks have requested recognition of their claims to land near Oka, Quebec by authorities since the 1700s. Despite this, the municipality built a nine-hole golf course in "the Pines" in 1961. This land was used by the Mohawk community of Kanesatake as a commons area and burial ground. In 1989, the mayor of Oka, Jean Ouellette, announced the further expansion of its municipal golf course onto Mohawk territory. The development involved extending the links to 18 holes and the construction of 60 luxury condominiums in the Pines. Even though community members from Kanesatake began to protest and both the Québec Ministers for the Environment and Native Affairs expressed qualms, the municipality approved the project.

The Mohawk community of Kanesatake then blockaded the road to the golf links. When the Sûreté du Québec confronted the protestors, violence erupted, leading to the death of one police officer. As more

protestors joined the blockade, the SQ erected their own near Oka and Kanesatake. In response, Mohawk from the nearby Kahnawake reserve blockaded the Mercier Bridge in Montréal. The SQ requested assistance from the Royal Canadian Mounted Police and the Quebec government asked the Federal government to mobilise the Canadian army. The military moved in and began to surround and isolate those on the frontline. Negotiations led to the reopening of the bridge. After 78 days the armed standoff was resolved when the last of the protestors surrendered. Though purchased by the federal government, the actual land issue languished for decades. [xxxviii]

In July 2019, the current developer offered to transfer his interest in the land to Kanesatake via a programme of Environment and Climate Change Canada. However, Oka Mayor Pascal Quevillon expressed qualms about being surrounded by smoke & pot shacks that would lower property values, calling for public consultations by the federal government. But three Oka Councillors distanced themselves from his comments. Grand Chief of Kanesatake **Serge Simon** was incensed by the characterisation of community members as criminals, and the notion that the issue would plunge the region into another crisis. He demanded and eventually received an apology. He publicly shook hands with the mayor stating that the two had agreed to "start talking again… and reset the relationship…"[xxxix] [xl]

MNO: 1993. In 1993, representatives from historic Métis communities and of Métis people across the province met to establish the Métis Nation of Ontario. They created a Métis-specific governance structure to implement the inherent right to self-government, establishing an identification system for Métis people, foster collective 'nation building', assert rights as a distinct Aboriginal people within Ontario, preserve the distinct culture of the Métis Nation, as well as improve the social well-being of Métis families and economic opportunities for Métis communities throughout the province. [xli]

Sewell Commission: 1993. The government of Bob Rae established a commission to reform planning in Ontario. They took the time to consult with First Nations concerned about the role of Aboriginal interests in the planning process. They recommended that:

- First Nations be treated as governments, not "a special-interest group, stakeholders, or third parties"
- Development of a process for consultation
- Protocols for mutual dialogue between First nations and municipalities
- Joint Planning processes

During the 1994 public hearings, First Nations made deputations calling for official standing in the new *Planning Act* and the right to appeal municipal decisions. None of this was incorporated into Ontario's planning framework. [xlii]

Ipperwash Crisis: 1995. In 1936, Ontario creates Ipperwash Provincial Park on 56 hectares of land claimed by Kettle and Stoney Point First Nation. The next year, the community begins petitioning the government to protect a burial site on the grounds. In 1942, the Canadian government expropriates more of their land for an army training base. The residents were offered compensation for the homes that are removed and a promise that the land would be returned after the war (1939-1945). Cadet training continues until 1995.

In an effort to end the Second World War, the Stoney Point Ojibway began protesting the military occupation in July of 1990 and reoccupied the base in 1993. The Canadian Forces withdrew in 1995. Protestors occupy the Provincial Park that summer. The government of Premier Michael Harris responded

by sending in an Ontario Provincial Police tactical unit, who kill community member **Dudley George**. [xliii] [xliv] [xlv] [xlvi]

RCAP: 1996. Born of conflict, the Royal Commission on Aboriginal Peoples was established shortly after a 78-day armed standoff — known as the Oka Crisis — between the Mohawk community of Kanesatake, the Sûreté du Québec, and the Canadian army. The commission was meant to "help restore justice to the relationship between aboriginal and non-aboriginal people in Canada, and to propose practical solutions to stubborn problems," according to the final report.

In 1996, when the commission released its final five-volume, 4,000-page report, it contained recommendations for dealing with a breadth of issues, including self-governance, Treaties, health, housing, the north, economic development and education.

After 20 years:

- "There is a very powerful lesson there, which is that today still, I don't think it's changed much," [xlvii]

- "[The TRC] was really one of the biggest recommendations that came out [of RCAP] and I was happy to see that it was carried out." [xlviii] [xlix]

Delgamuukw: 1997. In the 1997 *Delgamuukw v. British Columbia* case, Aboriginal interest in the use being made of traditional territory was legitimised, provided the community could demonstrate a substantive and ongoing relationship with that territory. If it can, then infringement of Aboriginal title is not justified without consultation, since the "Honour of the Crown" is at stake. The assertion of British sovereignty created "a protectorate relationship with indigenous peoples" because **they were not conquered**.

"In 1984, the Gitxsan and Wet'suwet'en peoples of northwest British Columbia launched a claim for their traditional territories that is now generally known simply as Delgamuukw… In its 1997 decision overruling the original decision, the Supreme Court not only held that the traditional knowledge of the Gitxsan and Wet'suwet'en should have been given greater weight, but established as a general principle that in similar cases oral evidence should be given the same weight as written… to the consternation of the (original) trial judge, **Mary Johnson**, chief Antgulilibix of the Firewood clan, *sang* part of the oral tradition known as the *adaawk*…" [l] [li]

Nunavut: 1999. The Arctic Archipelago became part of Canada in 1880. William Wakeham, co-chairman of the international boundary commission planted a flag in 1897, at the whaling station on Kekerten Island in Cumberland Sound. Active administration only began in 1921, with the creation of the territorial council. It was composed of appointed civil servants, all based in Ottawa. In 1933, the Nunavut Land Settlement Agreement was signed. It was the largest land claim in Canadian history and the basis for the eventual creation of a new jurisdiction out of the old Northwest Territories. Inuit finally became "**aboriginal citizens**" with the 1939 *Re: Eskimos* case, wherein the Supreme Court determined that they were a federal,

not provincial, responsibility. "… [h]owever, Inuit were not directly consulted about the governance of their lands and communities until the late fifties."

Abraham Okpik was the first Inuk appointed to the territorial council, in 1965. Elected seats were added in 1966, with **Simonie Michael** being the first elected Inuk. While the council evolved into a representative body, the Inuit also organised themselves into the Inuit Tapirisat of Canada (ITC) to preserve their culture and advance their interests in the 1970s.

Nunavut *(Inuktitut: Our Land)* is the eastern Artic, composed of Baffin Island, the surrounding islands, and the areas adjacent to Hudson's Bay. It was formally proposed by the ITC in 1976. It was to be a public, rather than an aboriginal government, with the Inuit majority holding sway. Political negotiations over the next decade and a half led to the recommendations of the Nunavut Implementation Commission headed by **John Amagoalik**, "father" of the new territory. **Jack Anawak**, former MP, was appointed to implement the recommendations that lead to the founding of Nunavut in 1999. [lii]

Other parts of the Arctic have been set aside for other groups of Inuit, such as:

Inuvialuit Nunangit Sannaiqtuaq *(Inuvialuktun: Inuvialuit Settlement Region)* composed of the western Arctic islands and mainland to the Alaska border. It was created in 1984 through the Inuvialuit Final Agreement (IFA). The Inuvialuit Regional Corporation (IRC) was established at that time to manage the settlement outlined in the IFA. In 1996 the IRC, along with the Gwich'in Tribal Council, began negotiating self-government agreements. These talks eventually broke down, but 2006 the IRC began negotiating separately. An agreement-in-principle was reach in 2015, with the details currently being finalised. [liii] [liv]

Nunavik *(Inuktitut: Great Land)* occupying the northern third of Quebec. In the 2000s, negotiations began to resolve outstanding land claims and determine the level of regional autonomy. They are still under way. A financial settlement and apology regarding the forced relocation of people in the 1950s, from Nunavik to the high Arctic to substantiate Canadian sovereignty claims, was finalised in 2010. [lv]

Nunatsiavut *(Inuttitut: Our Beautiful Land)* carved out of eastern Labrador. The original land claim was made in 1977; the Labrador Inuit Lands Claims Agreement was signed in 2005. It is a self-government Treaty involving control over culture, health, education, lands, and economic development. It also contained compensation of forced relocations during the 1950s. [lvi]

Powley: 2003. The Métis were **affirmed as Aboriginal people** by the Supreme Court of Canada in September 2003 by *R. v. Powley,* [2003] 2 S.C.R. 207. The case revolved around the harvesting rights of the Métis community in the Sault Ste. Marie region of Ontario. The court ruled that they have existing Aboriginal rights equal to that of First Nations under Section 35 of the *Constitution Act, 1982*.

Base on this acknowledgement, the Métis Nation of Ontario and the Ministry of Natural Resources entered into an interim Métis harvesting agreement in July 2004. This accommodation is based on harvesting claims throughout the province within traditional territories identified by MNO. In July 2007, the Ontario Court of Justice in the *R. v. Laurin, Lemieux and Lemieux*, [2007] O.J. No. 2344 (O.C.J.) case upholds "the MNO-Ontario harvesting agreement as legally defensible and highly principled in light of the Haida Nation and Taku River decisions."

"Troika" cases: 2004-2005. The federal government often references three main cases from early in the new millennium in its discussions and guidelines for the "Duty to Consult". In the 2004 *Haida Nation v. British Columbia* case, the relationship with the Crown was found to have been violated because the First Nation was

not consulted. In similar landmark decisions, such as the *Taku River Tlingit First Nation v. British Columbia, 2004 and* the *Mikisew Cree First Nation v. Canada, 2005 the* Supreme Court affirmed that the Crown has a duty to consult when it **contemplates doing something**, that may have an **adverse impact**, and there are potential or established **Aboriginal or Treaty rights**. These three cases are now taken to be definitive of the Crown's obligations regarding consultation. [lvii]

Caledonia Land Dispute: 2006. In 2006, Haldimand County grants approval to begin construction of houses on a 40-hectare property in the town of Caledonia. Protestors from the nearby native community occupy the site claiming it as part of the Haldimand Tract granted to Six Nations by the Crown in 1784. The Ontario Provincial Police are sent to patrol and monitor, but no tactical unit is sent in. In an effort to learn from the Oka debacle, the Ontario government of Premier Dalton McGinty purchases the property to resolve the crisis. As of 2020, the actual issue of the land has not been resolved. In 2007, a one-day protest ended peacefully in Deseronto, but for similar reasons. Proposed construction of a housing project was to take place on land claimed as Tyendinaga Mohawk Territory.

Hiawatha: 2007. The seven Williams Treaty First Nations, of Hiawatha, Alderville, Beausoleil, Georgia Island, Rama, Curve Lake, and Scugog Island went to court over the Seaton Lands development in the Hiawatha *First Nation v. Ontario, 2007* case. The court set aside the duty to consult due to mitigating circumstances. However, they firmly upheld that duty as enshrined in statutes such as the *Environmental Assessment Act*, the *Planning Act*, or the *Cemeteries Act*. [lviii]

Ipperwash Inquiry: 2007. A new Ontario government led by Premier Dalton McGinty, holds a public inquiry into the Ipperwash Crisis. Former Premier Harris is called to testify. The result was a four-volume, 1,533-page report that found the Ontario Provincial Police, the provincial government led by Premier Mike Harris, and the federal government all bore responsibility for the events that led to George's death. Many of the 98 recommendations were implemented, including the return of Camp Ipperwash–along with compensation–to the Kettle and Stony Point First Nation, the creation of the Ministry of Aboriginal Affairs (then the Ministry of Indigenous Relations and Reconciliation, now Ministry of Indigenous Affairs) out of the Ontario Native Affairs Secretariat, and the development of the "New Relationship Fund" that paid for consultation liaisons in the communities. Ipperwash Provincial Park was surrendered to the federal government, in order to transfer it to the First Nation. All lands were eventually returned, with a final settlement on the 14th of April 2016. [lix] [lx] [lxi] [lxii]

PPS: 2014. In 2014, the Ontario government of Premier Kathleen Wynn releases the ***Provincial Policy Statement*** under the *Planning Act*. It encourages municipalities to co-ordinate planning with Aboriginal communities, and to consider interests of aboriginal communities in conserving cultural; heritage and archeological resources. It also insists that implementation of the PPS be consistent with Sec. 35 *Constitution Act, 1982*. In short; it requests that municipalities be aware of their Aboriginal neighbours, but without any legislation or regulations to back it up. [lxiii] [lxiv]

TFN: 2014. In the 26th of June 2014, *Tsilhqot'in Nation v British Columbia* decision of the Supreme Court of Canada (2014 SCC44), land title for the Tsilhqot'in First Nation was established. The immediate significance is that the province of British Columbia could no longer claim a right to clear-cut logging on these lands without approval from the Tsilhqot'in. The wider significance is that First Nation title was recognised in a non-treaty area. The implications of this decision for planners could be wide-ranging…

LN & SN: 2014. Two First Nations, the Lil'wat Nation and the Squamish Nation, were apparently solicited regarding an update of the Official Community Plan for the Resort Municipality of Whistler. Despite pursuing consultation in good faith, they were told that the municipality had no obligation or ability to consider their concerns. The town felt that the First Nation's issues were "provincial" matters. Faced with this non-participation, the communities then launched a court case against both Whistler and the B.C. government because the British Colombia Ministry of Municipal Affairs and Housing approved a plan which had not received sufficient consultation. The B.C. Supreme Court agreed. Without the full participation of the First Nations, the municipality had to revert to its pre-update plan. [lxv]

TRC: 2015. On the 2nd of June 2015, Archbishop Fred Hiltz read an ecumenical response on behalf of Anglican, Presbyterian, Roman Catholic and United church leaders "Acknowledging that their apologies for harms done at Indian residential schools 'are not enough,'… [and] welcomed the recommendations of the Truth and Reconciliation Commission (TRC), which they say will offer direction to their 'continuing commitment to reconciliation' with Indigenous peoples."… Recommendation #52 of the TRCs "Call to Action" asks governments… and the courts to accept Aboriginal title over land once a "claimant has established occupation over a particular territory at a particular point in time" and that the burden of proving any limitations on these rights shifts to those who assert that such limitations exist.

The implementation of this recommendation would have a profound affect. Not only would it be a step in healing the wounded relationship between our larger society and its Indigenous peoples, it would profoundly change Planning across every jurisdiction in the country, including both Ontario and its municipalities… [lxvi]

Métis and non-status Indians are 'Indians': 2016. In 1999, Métis leader **Harry Daniels** and the Congress of Aboriginal Peoples filed a court case claiming that:

- the Métis and non-status Indians were "Indians" under section 91(24) of the *Constitution Act, 1867*
- the federal government has a fiduciary duty towards them
- the federal government has an obligation to negotiate and consult on their rights

Though Daniels died in 2004, the case eventually went to trial in 2011. It went to the Supreme Court in 2015. The court agreed with the first point, in effect creating approximately 600,000 new "Indians". The other two points where laid aside since those have already been settled. Justice Rosalie Abella stated that: "There is no consensus on who is considered Metis or a non-status Indian, nor need there be. Culture and ethnic labels do not lend themselves to neat boundaries." [lxvii]

UNDRIP: 2016. On Thursday, 13 September 2007, the General Assembly of the United Nations adopted the United Nations Declaration on the Rights of Indigenous Peoples by a majority of 144 states in favour. The Declaration contains Articles that include a relationship with and access to the lands and resources traditional to their communities. Actions taken regarding those lands and resources must involve **"free, prior and informed consent"**. Four voted against: Australia, Canada, New Zealand, and the United States. Eleven countries abstained (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine). Australia and New Zealand eventually endorsed it in 2009, then the United States in 2010, and ***lastly*** Canada in 2016. [lxviii]

Minister of Indigenous and Northern Affairs (INAC), Carolyn Bennett stated: "Today's announcement that Canada is now a full supporter of the Declaration, without qualification, is an important step in the vital work

of reconciliation. Adopting and implementing the Declaration means that we will be breathing life into Section 35 of Canada's Constitution, which provides a full box of rights for Indigenous peoples."

INAC hailed this announcement as confirming "…Canada's commitment to a renewed, nation-to-nation relationship… based on recognition of rights, respect, co-operation and partnership." None-the-less, the government does not feel this should extend to the development of legislation that affects First Nations. On the day of the 2018 OPPI Planning Symposium (11th of October) the Supreme Court of Canada released its decision in *Mikisew Cree First Nation v Canada (Governor General in Council),* stating that the duty to consult is not triggered by the development of legislation. While this may have legal (judicial vs legislative) justification, it probably does not respect the "Nation to Nation" relationship. [lxix]

SON: 2017. The Saugeen Ojibway Nation went to court over a quarry license in the *Saugeen First Nation and Chippewas of Nawash Unceded First Nation v. Ontario Minister of Natural Resources and Forestry and T & P Hayes Ltd., 2017*. The Saugeen First Nation and Chippewas of Nawash Unceded First Nation collectively comprise SON, and were subject to a half-hearted and bungled consultation from the Ontario Ministry of Natural Resources and Forestry (MNRF) who issued a private company a licence to mine limestone in SON's traditional territory. MNRF waffled regarding who, when, and how much consultation was needed, as well as possible funding for SON's consultation response. The court, however, ruled that **formal notice, information, peer-review funding,** and **accommodation of SON's concerns** was required. Though the government had encouraged the firm to engage SON in consultation, the court said that the third party was not required to do so. However, it noted that the company risked delaying its own project, by its refusal to participate. Further, that even without a statutory requirement to consider cumulative effects, it is a proper subject of consultation. The court concluded that the **"Crown should not reasonably expect SON to absorb consultation costs from SON's general resources"**.

MMIWG: 2019. By 2004, numerous cases of homicide and disappearances of native women rose to the attention of Amnesty International who published a report entitled: Stolen Sisters. In 2005, the Native Women's Association of Canada began conducting research and keeping statistics regarding such crimes. By 2014, a Legal Strategy Coalition on Violence against Indigenous Women is formed to support an inquiry. [lxx] That same year, the RCMP release a study reporting 1181 cases of missing and murdered Indigenous women across all police jurisdictions in Canada between 1980 and 2012. Of those, 225 cases were unsolved. Though controversy existed about the actual number of cases, the ethnicity of perpetrators, and their relationship to victims, statistically, 67% of the cases were murders, 20% went missing, 4% were suspicious deaths, and 9% were unknown. Though the actual number of murders for Aboriginal females is low, the call for an inquiry was based on the rate of murder which runs 5-6 times the rate for non-Aboriginal females.

During the 2015 federal election campaign, Justin Trudeau promised to set up an inquiry which was launched in 2016. It was plagued by its mandate, resignations of commissioners and key staff, apparent lack of transparency, poor data management, truncated timelines, and frustrated families angered by inadequate opportunities to tell their story. None-the-less, the report raised issues surrounding the accuracy of information about or numbers of the missing and murdered, the lack of resources for remote communities, inadequate communication by the police with families, communities, and other service providers, and a lack of trust in the police due to attitudes of indifference or bigotry. [lxxi] [lxxii]

Métis self-government: 2019. The Métis Nation of Alberta, the Métis Nation of Saskatchewan, and the Métis Nation of Ontario sign self-government agreements with the federal government. It is regarded as a correction of an historic lack of recognition of Métis as distinct peoples with Aboriginal rights. The Manitoba

Metis Federation (land-claims pending) and the Metis Nation of British Columbia were not part of these proceedings, but may choose to sign their own agreements in the future. However, extemporaneous groups claiming Métis status from Eastern and Atlantic Canada were rebuffed by Crown Indigenous Relations Minister Carolyn Bennett. It appears that the Powley case will be the test for evaluating such claims.

It would constitute a third level of government equivalent to First Nations. They would have the right to represent their citizens, draft constitutions, and pass laws. They would be able to control education, child welfare, medical services, and the preservation of their language and culture. It would also involve the protection of their lands, hunting and fishing rights, the negotiation of land claims, and consultation over resources. [lxxiii] [lxxiv]

Peel: 2019. In 2005, the Yukon government set up the Peel Watershed Planning Commission to create a land-use plan for this region of the Territory. The Commission spent 5 years using both consultation & accommodation principles and ecosystem-based planning principles to establish a developable land base level of 20%. However, after the 2011 election the government rejected the recommendations of its own commission, and arbitrarily reassigned the development level to 70%. The First Nations and conservation groups took the government to court over this alteration to the plan in *The First Nation of Nacho Nyak Dun v. Yukon, 2014*. On the 2nd of December 2014, the Yukon Supreme Court found that the government's modifications of the Peel Watershed Plan did not respect the land-use planning process set out in the Territory's final agreements with First Nations. Their right to be consulted and be full participants in land management was recognised.

The Yukon government's response was less than enthusiastic, forcing the First Nations and environmental groups to seek clarification of government commitments through an appeal to the Supreme Court of Canada. On the 1st of December 2017, they unanimously ruled in favour of the Tr'ondëk Hwëch'in, Na-Cho Nyäk Dün, and Vuntut Gwitchin First Nations, Canadian Parks and Wilderness Society, and the Yukon Conservation Society. They also found that the changes made by the government "did not respect the Chapter 11 process" of the Territory's Agreement. The significance of this is that the planning area included traditional territories of First Nations within non-settlement areas. The government was ordered to respect the planning expertise of an independent commission and consider the final recommendation it submitted.

The struggle regarding such a large-scale regional plan came down to a simple principle: could years of planning work be undone when, as both courts noted, the actions of Yukon Territorial Government were **"not becoming of the honour of the Crown".** [lxxv] The revived process led to a renewed plan that was signed on the 22nd of August 2019 in Mayo, Yukon by the Territorial government, the three First Nations, as well as the Gwich'in Tribal Council of the Northwest Territories. In reference to this approximately 68,000 km² area, covering 16% of the Territory, Tr'ondëk Hwëch'in **Chief Roberta Joseph** said "… I am so pleased the pristine nature of this landscape will exist for our citizens yet to come." Of the Plan, it "… completes our journey to defend the integrity of our agreements." Na-cho Nyäk Dun **Chief Simon Mervyn** exclaimed that it was "… truly a great day… but… the real work was just beginning." Of the process, "… we have confirmed… the rights of our people to sit at the decision-making table when the fate of our ancestral lands is determined."

The implications of these decisions for the planning profession could be wide-ranging…

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[ii] *Richard Gwyn. 2011. Nation Maker: Sir John A. Macdonald. Random House, Canada*

[iii] *Richard Gwyn. 2011. Nation Maker: Sir John A. Macdonald. Random House, Canada*

[iv] *Richard Gwyn. 2011. Nation Maker: Sir John A. Macdonald. Randon House, Canada*

[v] *[https://en.wikipedia.org/wiki/Canadian_Indian_residential_school_system] 17 April 2019*

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[xvii] *[https://en.wikipedia.org/wiki/Canadian_Indian_residential_school_system] 17 April 2019*

[xviii] *[https://en.wikipedia.org/wiki/James_Gladstone] 17 April 2019*

[xix] *[https://www.thecanadianencyclopedia.ca/en/article/indigenous-suffrage] 6 January 2020*

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[xxi] *[https://en.wikipedia.org/wiki/Pierre_Trudeau] 27 May 2019*

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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 [i], 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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[ii] *Haida Nation v. B.C. (Minister of Forests), 2004 SCC 73, para. 16*

[iii] *Haida Nation, para. 19*

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[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*

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.[i] 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/cle/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*

Module VII – Consultation as Planning

During the inaugural address of the LaFontaine-Baldwin symposium in 2000, author John Ralston Saul stated that "The first measure of any citizen-based culture must not be its rhetoric or myths or leaders or laws but how few of its own citizens it kills." He asserted that "we have killed in political strife among ourselves less than a hundred citizens – most of them on a single day at Batoche", in what is present-day Saskatchewan during the 1885 Riel Rebellion. [i] Historian Walter Hildebrandt stated that: "Twenty-five Canadians — whites, Indians and Métis — died there between 9 and 12 May 1885. Over a thousand men fought on the usually peaceful Canadian prairie in the largest and longest battle ever to take place in the North-West." [ii]

This is reassuring in one sense, but in the context we are discussing here it must be pointed out, that the citizens killed by the young Dominion were Métis and their First Nation allies. The new order threatened their way of life. They had taken up arms against the government, because it instituted many land-use practices that they had not been consulted on.

This module examines the mixed history of consultation as a planning skill in Ontario. It reached a watershed moment with the tragedy at Ipperwash and the death of native protestor Dudley George. In the conclusion to the Ipperwash Inquiry report, former Chief Judge of the Ontario Court of Justice, Sidney B. Linden states that "Mr. George was the first Aboriginal person to be killed in a land-rights dispute in Canada since the 19th century" … reveal[ing] a deep schism in Canada's relationship with its Aboriginal peoples and was symbolic of a long and sad history of government policy that harmed their long-term interests… The Aboriginal occupation at Caledonia proves that Ipperwash was not an isolated event… There can be no reconciliation without truth. The truth must come out so that Aboriginal and non-Aboriginal Ontarians can move forward together to our collective future."

Teaching Moments for Ontario

Ipperwash Crisis. The basis for this common future goes back to the "1763 *Royal Proclamation* [which] established an "Indian country" … protected from encroachment or settlement… unless it was voluntarily ceded to the Crown… [the intent] was to impose the Crown between the settlers and the Indians in order to avoid exploitation. The fundamental commitment of the *Royal Proclamation* of 1763 was that First Nations were to be treated with honour and justice… Sir William Johnson [British Superintendent of Indian Affairs] … consummated the alliance with the Anishnabek by presenting two magnificent wampum belts, which embodied the promises contained in the Proclamation."

Unfortunately, the negotiations for the 1827 Huron Tract Treaty did not live up to this standard, leaving the First Nations inadequately compensated for the value of their lands. They retained only 1% of their original territory in the form of four small reserves. Even these parcels came under pressure. By 1912, federal Indian agents were pushing the communities to surrender more. Under the possible influence of bribery and fraud, part of the Kettle Point beachfront was lost in 1927, and all of the Stony Point beachfront was taken in 1928. Most of the land was sold off for three times what the communities received, with some reserved for public use. "Ipperwash Provincial Park was created out of these lands in 1936 after local residents agitated for an accessible beachfront… In 1942, the federal government appropriates the entire Stoney Point reserve in a manner unprecedented in Canadian history. The appropriation was contrary to the expressed wishes of the

Kettle and Stoney Point Band. It also contravened the treaty obligations of the Crown and the procedures and principles the Crown was required to observe in its dealings with Aboriginal lands".

"First Nation soldiers from Stoney Point, returning from the War, were shocked to see their community destroyed. They were devastated to learn that the Canadian government had appropriated the reserve land, that their community no longer existed and the Stoney Point cemetery had been desecrated."

Though promised that the land would be returned when the government no longer needed it for military purposes, they held onto it for half a century. In the early 1970s, Minister of Indian Affairs, Jean Chrétien, attempted to return the land but the Department of National Defense would not budge. In 1990, however, they did allow a community member to be buried in the cemetery. By July of that year, active political protests began at Camp Ipperwash. "In 1993, exasperated with their failed attempts to have their reserve returned, people from Stoney Point decided to occupy the military range a Camp Ipperwash", and by 1995 had taken over the military barracks. At this point, DND withdrew its personnel and equipment to Base Borden. "For [the protestors], the occupation of Ipperwash Provincial Park in September 1995 was the natural next step…" [iii] [iv]

Unarmed, they reclaimed the Park on the 4th of September 1995. By the 5th, tactical units of the Ontario Provincial Police marched in. By the 6th, "One activist was shot and wounded, one was beaten until his heart stopped, and Anthony "Dudley" George was shot dead." [v]

The newly-elected government of Mike Harris adopted a wait-and-see stance during the summer. "However, although they were aware that there was the potential for an occupation, provincial government officials did not make sufficient efforts during this period to… defuse the growing tension and try to prevent the occupation in the first place. The provincial government could have appointed a mediator or tried to understand the historic grievances of the Stoney Point people, including the claims of an Aboriginal burial site in the park. It could have reached out to Stoney Point people, learned more about the dynamics within the community, or proactively identified potential mediators or facilitators."

Note: *What the Honourable Sidney Linden is proffering here are classic elements of "consultation"*

Once the protestors entered the Park, the government reacted swiftly. "Premier Harris believed that the occupation was a law enforcement issue, not a First Nation's matter… that the park belonged to the province… that the occupiers were trespassing… [t]he OPP's wish to pursue a go-slow approach contrasted with the government's desire for a quick end to the occupation… [t]he provincial government's priorities reflected its larger concerns about the potential *implications* of Ipperwash: … establishing a precedent for Oka-like occupations in the future… prov[ing] that it was tough on "lawbreakers" and that Aboriginal peoples would be treated the same as everyone else… not want[ing] a prolonged occupation to deflect it from its larger agenda." [vi]

Ipperwash Inquiry. "Questions surrounding Dudley's death and police actions rose almost immediately…", but an inquiry was only called in November of 2003, after the election of a new government, under Dalton McGinty. The commission began hearings in 2005, and spends "two years listening to 139 witnesses, 229 days of testimony and was presented with 23,000 documents." [vii] [viii]

The choice of a provincial judge was precedent setting, as typically a federal judge is selected for such inquiries. None-the-less, Linden rose to the occasion with remarkable wisdom. He ensured that all 27 parties to the hearing were treated with respect. Their testimony was heard, not only in the inquiry chambers, but through a live webcast of the proceedings. As a demonstration of fairness, he integrated the symbolic display of "the provincial coat of arms and ceremonial flags [which] were very obvious and visible… [with] a number of aboriginal symbols and customs as well, such as smudging, drums, eagle feathers, talking sticks, elder prayers, and other ceremonies to which all of the parties were invited." [ix]

Commissioner Linden ended the inquiry with "an eloquent half-hour speech that all sides believed to be fair and reasonable." The report was tabled on the 30th of May 2007. He "found that the OPP, the provincial government led by Premier Mike Harris, and the federal government all bore responsibility for the events that led to George's death." [x]

It revealed signs of racial bigotry amongst police, systemic procrastination on the land file by the federal government, and a deficit of accountability from the provincial government; and made recommendations on how authorities could avoid future violence against Aboriginal activists. [xi]

Ipperwash Recommendations. Commissioner Linden stated that: "Aboriginal occupations and protests are not inevitable, nor are they inevitably violent." To prevent future violence, he felt that "[t]he provincial government and other institutions must redouble their efforts to build successful peaceful relations with Aboriginal peoples in Ontario so that we can all live together peacefully and productively… [w]e must move beyond conflict resolution by crisis management… inaction will only increase the considerable tensions that already exist between Aboriginal and non-Aboriginal citizens in this province."

At the time of the report's release, he felt that his research indicated that "flashpoints" were "very likely as intense today as they were during Ipperwash, Oka, Burnt Church, or Gustafesn Lake." For those of us who are professionally committed to land-use planning, Linden instructed that though "… the immediate catalyst for most major occupations and protests is a dispute over a land claim, a burial site, resource development, or harvesting, hunting, and fishing rights. The fundamental conflict, however, is about land… the control, use, and ownership of land." [xii]

The final report made 98 recommendations. Among them was an apology by the federal government, the return of Camp Ipperwash, compensation to the Kettle and Stoney Point First Nation, and that they should generally assume responsibility for negotiations when land claims are at stake.

For Ontario, there was a more extensive list. Many had to do with policing matters, peacekeeping during protests, dealing with cultural insensitivity, ministerial accountability, public education and community information about significant Aboriginal protests, development of First Nation police forces, etc. Some of the more salient suggestions for our current discussion are as follows:

- a Treaty Commission
- respect and understanding of the duty to consult and accommodate within relevant provincial agencies and Ontario municipalities
- develop co-management arrangements and resource-sharing initiatives
- acknowledge the uniqueness of Aboriginal burial and heritage sites
- clarify the meaning of "Aboriginal values" in all Class EA documents
- encourage municipalities to develop and use archaeological master plans

- promote general public education about treaties in Ontario
- promote more Aboriginal perspectives and content in the elementary and secondary school curricula
- create a Ministry of Aboriginal Affairs
- establish the Ontario Aboriginal Reconciliation Fund
- create mechanisms for obtaining input from Aboriginal communities on planning, policy, legislation, and programs affecting Aboriginal interests

These benchmarks for the development of a renewed relationship, between the original peoples of Ontario and its newcomers, place planning at the heart of this revitalisation. [xiii] [xiv] [xv] [xvi] [xvii] [xviii] [xix] [xx]

Caledonia Land Dispute. Even while the Ipperwash Inquiry was in full swing, a municipal planning decision set the stage for further conflict. The property involved was the subject of a land claim, as it was part of the Haldimand Tract granted to Six Nations by the Crown in 1784. In 2006, Haldimand County grants approval for the construction of homes on a 40-hectare property in the town of Caledonia. "Tension around the development began when a group of women from the First Nation sought to bring attention to the issue by occupying the development site and reclaiming the land." [xxi]

Caledonia Outcome. In an effort to learn from the Ipperwash Crisis, the OPP are deployed to patrol and monitor, but no tactical unit is sent in. In an effort to learn from the Oka debacle, the Ontario government of Premier Dalton McGinty purchases the property to resolve the crisis. However, as of 2020, the actual issue of the land has not been resolved. "This event is remembered for clashes between protestors, Caledonia residents, and the police… [t]he media portray[ing] such conflict as symptomatic of a problem of law and order…" Yet what is overlooked are "the ways that government action, including planning processes, might have contributed to creating such situations." [xxii]

Hiawatha Case. During this same time period the relative peace of a court case brought clarity, if not closure, to this issue. The seven Williams Treaty First Nations: Hiawatha, Alderville, Beausoleil, Georgia Island, Rama, Curve Lake, and Scugog Island went to court over the Seaton Lands development in the Hiawatha *First Nation v. Ontario, 2007* case. It was triggered by the transfer of environmentally sensitive areas of the Oak Ridges Moraine for developable parcels of the Seaton lands near Pickering. It dealt with respect for burial sites, an Aboriginal right. Since Iroquois, Huron-Wendat, and Anishnaabeg had all occupied this territory there was concern whether all possible First Nations were properly consulted. The court used Aboriginal, historical, legislative, and constitutional evidence and ruled that the Crown was not obliged to consult with the appellant Anishnaabeg communities due to the fact, among others, that these First Nations surrender these lands in the Williams Treaty of 1923.

However, the court did elaborate on the statutory "duty to consult". It left firmly in place legal obligations, as found in such legislation as:

- the Environmental Assessment Act
- the Planning Act
- the Cemeteries Act [xxiii] [xxiv]

At the time of this case, these communities had been in long-standing negotiations with the federal and provincial governments over the injustice of this Treaty. The inadequacy of its provisions reflected the notion that Aboriginal identity was unimportant, making consultation moot. Court cases often instantiate

legal principles; they do not always layout courses of action. This one underscored the issues that erupted at Caledonia while undergirding the recommendations of Ipperwash.

Note: *in 2018 the Williams Treaty Claims Settlement was signed by the Nations and the Crown in view of provincial and municipal officials. Built on formal apologies from both the feds and province, they contributed $1.1 billion in compensation.* [xxv]

Ontario Guidelines

The policy vacuum created by court cases that insist the Honour of the Crown be upheld through Consultation and Accommodation can be challenging for those tasked with doing it. An example is the *Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal and Treaty Rights (Ontario Guidelines)* released in June 2006. "The Métis Nation and First Nations had not been consulted on the *Ontario Guidelines* prior to their release. Consequently, Métis and First Nation groups rejected the *Ontario Guidelines* largely based on the absolute discretion they put into the hands of individual ministries to determine the Crown's obligations owing to Aboriginal groups. In May 2007, in the Ipperwash Inquiry Report, Justice Sidney B. Linden echoed similar concerns with respect to the *Ontario Guidelines*: 'My concern is that the draft guidelines appear to direct government ministries to decide, unilaterally, whether a particular project might have an impact on Aboriginal or treaty rights and thus trigger the duty to consult'…" [xxvi]

Saugeen Ojibway Nation. Though the Ontario Guidelines were withdrawn to be rewritten in collaboration with the Métis Nation of Ontario and Chiefs of Ontario, they still exist in draft form. Their inadequacy was revealed when the Saugeen First Nation and Chippewas of Nawash Unceded First Nation (collectively – SON) went to court over a quarry license in the *Saugeen First Nation and Chippewas of Nawash Unceded First Nation v. Ontario Minister of Natural Resources and Forestry and T & P Hayes Ltd., 2017* case. The government (MNRF) had predetermined its response to SON and ignored their consultation requirements when issuing a private company, a licence to mine limestone in SON's traditional territory.

The Court addressed several matters vital to First Nations who seek to protect their rights to be adequately consulted and accommodated:

- There needs to be a clear and coherent process
- First Nations often receive countless requests for consultation, and the demands of participating can strain its ability to provide other necessary community services
- Third parties have no obligation to consult, but they risk delays if they don't
- First Nations should not have to pay for the Crown to fulfil its constitutional obligations
- Funding from the Crown &/or proponent is reasonable when a project does not benefit the First Nation financially
- Cumulative effects are the purview of consultation, even without a statutory requirement
- Therefore, **capacity** and **funding** to **participate in consultation** may be necessary, including legal costs and peer reviews [xxvii]

"With the growing number of court decisions enforcing the duty, and the uncertainty, regulatory delays and economic costs that ignoring the duty can have… all levels of government in Canada have increasingly been trying to come to grips with… its constitutional, legal, procedural and on-the-ground implications. Some of this work has been done in collaboration with Aboriginal peoples. However, in many situations, this work has been done in isolation by governments… with the justification that, since it is the Crown which has the duty, it is the Crown's responsibility to decide how it will discharge its duty. This type of government response flies in the face of the very purpose of the duty as a means to promote negotiations, settlements, accommodations and reconciliation." [xxviii]

Ontario Legislation

The land-use regime in Ontario has increasingly cited Section 35 of the *Constitution Act, 1982*. Statutory references can be found in such legislation "… as the *Mining Act* (1990), the *Clean Energy Act* (2006), the *Endangered Species Act* (2007), and the *Provincial Parks and Conservation Reserves Act* (2007), and the *Far North Act* (2010) …" By doing so, they "acknowledge that existing Treaty and Indigenous rights… cannot be infringed upon or abolished in the interpretation or implementation of said policies." [xxix] [xxx]

Far North Act. The *Far North Act, 2010* presents a transitional study in contrasts. On one hand it both recognises Section 35 and "provides for First Nations approval of land use planning". On the other, it was universally opposed by affected First Nations on the grounds of inadequate: consultation, resourcing, power-sharing, recognition of jurisdiction, and protection of inherent rights from land-use planning. [xxxi] [xxxii]

Planning Act. By contrast is the *Planning Act, 1990*, which neither admits Section 35 rights "… to inform and contribute to decision-making that impacts… traditional territories", nor concedes approval authority beyond "… that [of] municipalities… notify[ing] First Nations of development occurring within 1 km of a reserve." It does list them as "a 'public body' similar to other public actors including municipalities, departments, commissions, and officials of the province and federal government." However, by leaving the content, method, and timing of engagement to the discretion of the Minister, it demeans their position from that of a rights-holder to that of a mere stakeholder. [xxxiii] [xxxiv]

Ontario Planning Reform. In 1993, the government of Bob Rae established a commission to reform planning in Ontario. They took the time to consult with First Nations concerned about the role of Aboriginal interests in the planning process. They made several recommendations, perhaps the most significant of which, was that First Nations be treated as governments; not "a special-interest group, stakeholders, or third parties". They advised that a process for consultation should be developed, as well as the creation of protocols for mutual dialogue between First nations and municipalities. The commission also felt that Joint Planning processes were to be initiated. None of this was incorporated into Ontario's planning framework.[xxxv]

Provincial Policy Statement

2005. Though superseded twice, this version of the policy statement is the most widely cited in Ontario official plans. Thirty-four percent refer to it, while only thirty-two percent refer to the 2014 rendition. The 2005 PPS makes no mention of Aboriginal Communities, Indigenous Rights, or Native Perspectives.[xxxvi]

2014. Where Ontario has recognised Section 35, *Constitution Act, 1982,* is in the ***Provincial Policy Statement***. The revised the PPS was unveiled by the government of Premier Kathleen Wynn on the 30th of April 2014. This concession was granted at the behest of representatives from Walpole Island First Nation (Jared Macbeth) and Mississaugas of the New Credit First Nation (Carolyn King) in meetings with the Ministry of Municipal Affairs and Housing during the mandated 5-year review of the PPS. They were part of a University (Queens & Waterloo) research team that also made deputations to the public review hearings. The new policy, for the first time, encouraged municipalities to co-ordinate planning with Aboriginal communities, and to consider their interests in conserving cultural, heritage, and archeological resources. [xxxvii] [xxxviii]

According to Heather Dorries, the PPS did not create a new set of rights. "Rather, it directs planners to take already existing rights into consideration in the planning process. For too long, acknowledgement of the

existence of Aboriginal peoples or the fact that Ontario occupies the traditional territories of Aboriginal peoples has been absent from Ontario's planning framework. The introduction of language on Aboriginal and treaty rights is a reminder of the treaties which are the basis for relationships between Aboriginal peoples and Canada, and which outline the obligations of the government towards Aboriginal peoples." [xxxix] Though released under the *Planning Act,* it is not itself a piece of legislation and therefore has no regulations to back it up. In short, it requests that municipalities be aware of their Aboriginal neighbours. [xl]

But as such, it is a vital early step. The participants who pushed for these initial word changes were not merely seeking the protection of "rights and interests" but were also hoping for an "… increasing awareness among planners regarding the need for and the benefits of building positive relationships… that it is good policy and practice, not simply a duty, to do so." [xli]

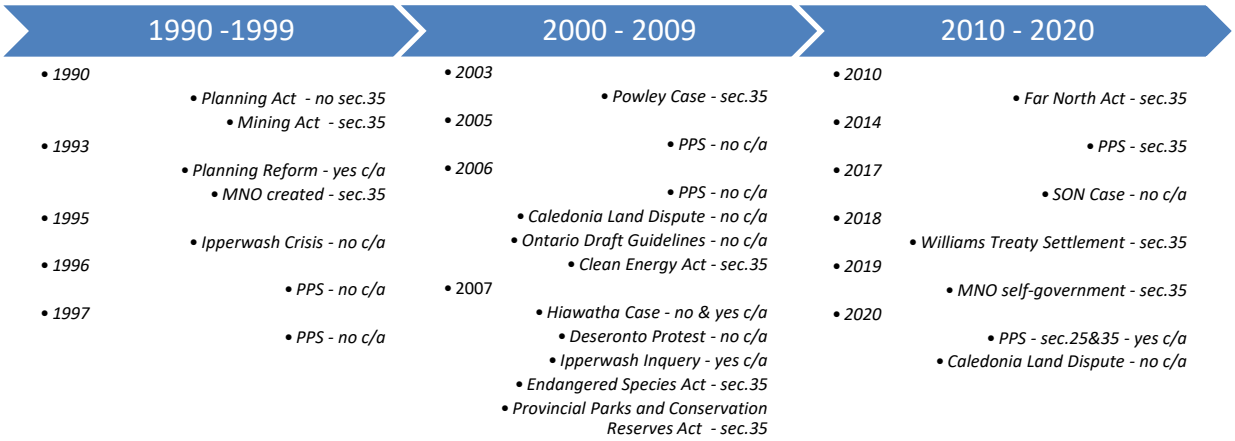
2020. The new ***Provincial Policy Statement***, released by the Doug Ford government on the 1st of May 2020, goes even further. The language is much more imperative, and envisions a unique role in land-use planning for indigenous perspectives and the traditional knowledge of Aboriginal communities. Planners are encouraged to facilitate a sharing of knowledge that will inform their decision-making about land *(Part IV: Vision).* They are specifically instructed to co-ordinate land use matters through the proper engagement of indigenous communities *(1.2 Coordination).* The directive to build constructive and co-operative relationships is significant given the Policy's acknowledgement that protecting the province's natural heritage & biodiversity, water & Great lakes, agricultural, mineral, and cultural heritage & archaeological resources, is vital for the economic, environmental, and social health of all Ontarians, regardless of who they are *(2.0 Wise Use).* Engagement is also stipulated for the identification, protection, and management of cultural heritage and archaeological resources *(2.6 Cultural Heritage and Archaeology).* The *PPS, 2020* references both Section 25 & Section 35 of the *Constitution Act, 1982* and insists on long-term, comprehensive, up-to-date official plans that integrate with Environmental Assessment processes. Planners will also have to monitor and report on their PPS implementation efforts. These will be according to evaluation criteria consulted upon with municipalities, public bodies, stakeholders, and Indigenous Communities *(4.0 Implementation).* [xlii]

Note: *Though the advancements of the new PPS are to be welcomed, they do represent a challenge for both First Nations and their municipal neighbours. Taking steps to fulfill its vision and implement its objectives place a burden on municipalities. But this is already the case for Aboriginal communities. Creating the capacity needed to adequately address issues of consultation and accommodation is a long-standing issue. Its efficacy still varies widely. The collaboration implied in the PPS will stretch this capacity even further. This challenge will encompass a need for training, which will require both time and funding for everyone involved.*[xliii]

First 30 Years of C&A. The first substantiation of the Duty to Consult was the court case brought by Ron Sparrow of the B.C. Musqueam Indian Band in 1990, where his fishing rights had been quashed without consultation. It was over shadowed though by the Oka Crisis in Quebec, sparked by a municipal expansion of a golf course onto a commons area and burial ground used by the Mohawk community of Kanesatake. That same year, the Ontario government revamped the Planning Act. It made no mention of the constitutional rights of Aboriginal Peoples (Sec. 35), though the Mining Act of that year did. Subsequent Ontario legislation has continued to do so. Substantive planning reforms were soon proposed to align Ontario's planning interests with those of Aboriginal communities via consultation. These were never implemented. Shortly thereafter, the Ipperwash Crisis occurred over the failure to return land confiscated

from the Kettle and Stony Point First Nation. The resulting Inquiry called for better consultation. Even still, successive Provincial Policy Statements made no reference to the need for consultation, let alone accommodation. The Caledonia Land Dispute was an inevitable outcome due to a proposed housing development on land claimed by members of the Six Nations. Government guidelines on consultation were drawn up, but without any consultation, and thus rejected by the communities. The Hiawatha court case highlighted the weaknesses of the Williams Treaty when it was used to quashed the Duty to Consult with regards to the development of environmentally sensitive areas near burial sites on the Oak Ridges Moraine. None-the-less, the legislative obligations to consult were upheld. The previous version of the PPS finally acknowledged the constitutional rights of Aboriginal communities and suggested cooperation with them, but the Saugeen Ojibway Nation court case over a quarry license showed how tenuous this could be. The recent PPS has finally given full recognition of constitutional rights (Sec. 25 & 35) and directives to engage with indigenous communities. Over this time period, Métis rights in Ontario have also slowly evolved to the point of official policy recognition and self-governance. Most recently, the federal government has promised to embed the principles of the United Nations Declaration of the Rights of Indigenous Peoples into Canadian law. The past thirty years have seen fits and starts, with occasional regressions into violence. However, the trajectory has led to a modest recognition of a priori rights. Hopefully, this will be a basis for an increased understanding and the rebuilding of relationships over the next thirty years.

Ontario's Record:



c/a = consultation & accommodation; sec.35 = rights enshrined in Section 35 of the Constitution Act, 1982

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[i] *His Excellency John Ralston Saul. Inaugural LaFontaine-Baldwin Lecture. Royal Ontario Museum, Toronto, Ontario. Thursday, March 23, 2000 [https://archive.gg.ca/media/doc.asp?lang=e&DocID=1374] 19 June 2020*

[ii] *Walter Hildebrandt. 1985. The Battle of Batoche: British Small Warfare and the Entrenched Métis. Canadian Parks Service, Environment Canada, Minister of Supply and Services Canada. Ottawa, Ontario.*

[iii] *Honourable Sidney B. Linden. 2007. Ipperwash Inquiry. Government of Ontario*

[iv] *Ontario Court of Justice: A History, final draft as of October 2, 2015 [http://www.ontariocourts.ca/ocjhistory/wp-content/uploads/history-project-book.pdf] 9 July 2019*

[v] *Dudley George and the Ipperwash Activists. APTN National News. [https://aptnnews.ca/aboriginal-history-month/dudley-george-and-the-ipperwash-activists/] 10 July 2019*

[vi] *Honourable Sidney B. Linden. 2007. Ipperwash Inquiry. Government of Ontario*

[vii] *Ontario Court of Justice: A History, final draft as of October 2, 2015 [http://www.ontariocourts.ca/ocjhistory/wp-content/uploads/history-project-book.pdf] 9 July 2019*

[viii] *Dudley George and the Ipperwash Activists. APTN National News. [https://aptnnews.ca/aboriginal-history-month/dudley-george-and-the-ipperwash-activists/] 10 July 2019*

[ix] *Ontario Court of Justice: A History, final draft as of October 2, 2015 [http://www.ontariocourts.ca/ocjhistory/wp-content/uploads/history-project-book.pdf] 9 July 2019*

[x] *Ontario Court of Justice: A History, final draft as of October 2, 2015 [http://www.ontariocourts.ca/ocjhistory/wp-content/uploads/history-project-book.pdf] 9 July 2019*

[xi] *Dudley George and the Ipperwash Activists. APTN National News. [https://aptnnews.ca/aboriginal-history-month/dudley-george-and-the-ipperwash-activists/] 10 July 2019*

[xii] *Honourable Sidney B. Linden. 2007. Ipperwash Inquiry. Government of Ontario*

[xiii] *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*

[xiv] *Ipperwash Inquiry. RECOMMENDATIONS: VOLUME 2 [https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_4/pdf/E_Vol_4_B_Policy.pdf] 11 July 2019*

[xv] *[https://en.wikipedia.org/wiki/Ipperwash_Crisis] 30 May 2019*

[xvi] *[https://en.wikipedia.org/wiki/Ipperwash_Inquiry] 30 May 2019*

[xvii] *[https://en.wikipedia.org/wiki/Ipperwash_Provincial_Park] 30 May 2019*

[xviii] *Honourable Sidney B. Linden. 2007. Ipperwash Inquiry. Government of Ontario*

[xix] *Ontario Court of Justice: A History, final draft as of October 2, 2015 [http://www.ontariocourts.ca/ocjhistory/wp-content/uploads/history-project-book.pdf] 9 July 2019*

[xx] *Dudley George and the Ipperwash Activists. APTN National News. [https://aptnnews.ca/aboriginal-history-month/dudley-george-and-the-ipperwash-activists/] 10 July 2019*

[xxi] *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*

[xxii] *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*

[xxiii] *Cowan, Jeff. 2007. "Duty to Consult". First Nation Consultation and Archaeology seminar. 16 February 2007. Ontario Professional Planners Institute. Barrie, Ontario*

[xxiv] *Pardu, J., J. Hoilett and J. Ground. 2007. Hiawatha First Nation v. Ontario (Minister of the Environment). Ontario Superior Court of Justice, Divisional Court. 12 February 2007: 286/06. CanLII 3485 (ON S.C.D.C.). [http://www.canlii.org/on/cas/onscdc/2007/2007onscdc10025.html]. 8 March 2007*

[xxv] *[https://www.orilliamatters.com/local-news/historic-11-b-williams-treaty-signed-in-rama-1126023] 7 January 2020*

[xxvi] *Métis Nation of Ontario. 2008. Towards a Consultation Framework for Ontario Métis -- 2007/08 Community Consultations What We Heard Report*

[xxvii] *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]*

[xxviii] *Métis Nation of Ontario. 2008. Towards a Consultation Framework for Ontario Métis -- 2007/08 Community Consultations What We Heard Report*

[xxix] *Leela Viswanathan, Fraser McLeod, Carolyn King, Jared Macbeth and Erin Alexiuk. 2013. Are We There Yet? : Making inroads to decolonise planning knowledge and practices in Southern Ontario. Plan Canada. 53 (2) p. 20-23. Fall 2013. Canadian Institute of Planners. Ottawa, Canada*

[xxx] *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*

[xxxi] *Leela Viswanathan, Fraser McLeod, Carolyn King, Jared Macbeth and Erin Alexiuk. 2013. Are We There Yet? : Making inroads to decolonise planning knowledge and practices in Southern Ontario. Plan Canada. 53 (2) p. 20-23. Fall 2013. Canadian Institute of Planners. Ottawa, Canada*

[xxxii] *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*

[xxxiii] *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*

[xxxiv] *Leela Viswanathan, Fraser McLeod, Carolyn King, Jared Macbeth and Erin Alexiuk. 2013. Are We There Yet? : Making inroads to decolonise planning knowledge and practices in Southern Ontario. Plan Canada. 53 (2) p. 20-23. Fall 2013. Canadian Institute of Planners. Ottawa, Canada.*

[xxxv] *https://archive.org/details/newplanningforon00comm/mode/2up*

[xxxvi] *Charlie Caldwell, Joanna Ilunga-Kapinga, Marissa Irene Uli, Pragya Priyadarshini. Mapping Collaboration: An Evaluation Framework to Assess Municipal Government Responses to PPS 2020. A Report for Shared Path Consultation Initiative. Final Report - 8 December 2020 PLA1106: Workshop in Planning Practice. Master of Science in Planning Program, Department of Geography and Planning, University of Toronto.*

[xxxvii] *Leela Viswanathan, Fraser McLeod, Carolyn King, Jared Macbeth and Erin Alexiuk. 2013. Are We There Yet? : Making inroads to decolonise planning knowledge and practices in Southern Ontario. Plan Canada. 53 (2) p. 20-23. Fall 2013. Canadian Institute of Planners. Ottawa, Canada*

[xxxviii] *Jody Johnson & Scott Stoll, Aird & Berlis LLP, AMCTO Annual Conference and Professional Development Institute, June 2015*

[xxxix] *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*

[xl] *Heather Dorries; Walter Gordon Symposium, 23 March 2016*

[xli] *Leela Viswanathan, Fraser McLeod, Carolyn King, Jared Macbeth and Erin Alexiuk. 2013. Are We There Yet? : Making inroads to decolonise planning knowledge and practices in Southern Ontario. Plan Canada. 53 (2) p. 20-23. Fall 2013. Canadian Institute of Planners. Ottawa, Canada*

[xlii] *Provincial Policy Statement, 2020: under the Planning Act [https://files.ontario.ca/mmah-provincial-policy-statement-2020-accessible-final-en-2020-02-14.pdf]*

[xliii] *Julie Kapyrka; Lands Resource Consultation Liaison, Curve Lake First Nation. Colette Isaac; Administrator, Moose Deer Point First Nation.*

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 Colombia 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.

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[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 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]*

[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*

[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, Archaeological 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*

Conclusion

Commissioner Linden ended Volume 1 of the Ipperwash Inquiry report by referencing Chief Justice Lamer in the *Delgamuukw v. British Columbia* case: "let us face it, we are all here to stay". He adds his own hope "… that not only we face this reality; we will embrace it in the original spirit and intent of the treaties… [which] envisioned Aboriginal peoples and settlers sharing the wealth and stewardship of this great land. Since we are all here to stay, we must continue to build relationships of trust, mutual respect and support. The road to reconciliation may be long and difficult, but it is a road that all peoples, Aboriginal and non-Aboriginal, must walk together." [i]

Further Links:

- Aboriginal Television: *www.aptn.ca*
- City of Calgary's Aboriginal policy and framework - they've done the work: *www.calgary.ca – Aboriginal Committee*
- First Nations: *www.mncfn.ca*; *www.sixnations.ca*; etc., etc.
- Indigenous Services Canada: *https://www.canada.ca/en/indigenous-services-canada.html*
- Crown-Indigenous Relations and Northern Affairs Canada: *https://www.canada.ca/en/crown-indigenous-relations-northern-affairs.html*
- New Credit Pow-Wow: *www.newcredcc.ca*
- Newswire service: *www.nationtalk.ca*
- Mocassin identifier: *www.mtc.gov.on.ca/en/ontarioplace/park_trails.shtml*
- Tourism: *www.attc.ca*
- Treaties: several official sites to guide you: *https://www.ontario.ca/page/treaties*
- Shared Path Consultation Initiative: *https://sharedpath.ca/*
- Incite Planning: *www.inciteplanning.com*

- *"Planning with the Duty to Consult"*. 2018. CIP Professional Learning Hub – Canadian Institute of Planners. 27 June 2018 | Posted by CIP | Indigenous Planning Post Contributed by Carolyn King and David J. Stinson, RPP, MCIP, P.Ag.: *[https://www.cip-icu.ca/Learning-Hub?tagname=Indigenous+Planning&groupid=0#]*

- *"Does Planning have a Role in Truth and Reconciliation?"*. 2016. Planning Exchange Blog – Ontario Professional Planners Institute. 3 October 2016 | Posted by OPPI | Post Contributed by David Stinson, RPP: *[http://ontarioplanners.ca/Blog/Planning-Exchange/October-2016]*

- *"Duty to Consult: A Conversation in Contrasts"*. 2016. OPPI Symposium: Healthy Communities & Planning for the Public Realm. Hamilton, Ontario. 6 October 2016 | Videoed by OPPI | Interview with Mark LaFome and P. Leigh White: *[https://youtu.be/kd39Q9IUM6o]*

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[i] *Honourable Sidney B. Linden. 2007. Ipperwash Inquiry. Government of Ontario*