Indigenous Developments at the City of Toronto – Reconciliation & Planning for Action

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Reconciliation

- What does this mean?
  - Restoration of friendly relations after a period of conflict
  - Bringing two or more views or beliefs into compatibility with one another
    - Depending on the viewpoint of various stakeholders, both may be seen as apt descriptions.
- "*We will never achieve reconciliation when one side to the dialogue sees it as an act of benevolence and one side sees it as a recognition of rights*"
  - The Honourable Murray Sinclair, CC, MSC.

Reconciliation

- A failure to plan is a plan to fail.
- Reconciliation is not a salve to help people “get over” the past but a process to make a lasting relationship for the future.
  - There has been historically an undervaluing of the opinions, views, rights and interests of Indigenous people by Canadian governmental entitles, including municipalities.
- A beginning of the work of reconciliation must be education on the part of municipalities to ensure that municipal operations are responsive to the views, opinions, interests and rights of Indigenous peoples.
- A framework to build on this understanding must follow.

Education

- Ensure familiarity with the foundation of the relationship
  - Which First Nations comprise the municipality's neighbours, and residents?
  - What other Indigenous groups are residents of the municipality?
    - Which Treaties apply to the municipality?
      - What are the rights established in these treaties?
      - Are there disputes concerning these treaties?
    - Aboriginal rights
    - Aboriginal title
      - Outstanding claims
      - Is the municipality within "unceded lands"?
- Consider how does the municipality intersect with these rights?
  - How does the municipality consider these issues of rights and in its operations?
  - Consider a ban on hunting in parks, but lands covered by treaty right to hunt?

Education

- Reconciliation is about more than “Aboriginal/Treaty Rights”
- Consider “view”, “interests” and “opinions” of Indigenous peoples – does the municipality treat these with the importance of other stakeholder groups?
- Ask yourself, is the municipality aware of these opinions of its residents, and neighbouring communities?
- Does the municipality have a plan to deal with these views and opinions?
  - Are there structural barriers with respect to participation in the City’s processes which adversely impact the ability to receive views and opinions of Indigenous persons?
  - How do Indigenous persons perceive and consider the municipality’s current practices.
    - Consider both the “good” and the “bad”?
    - What is the plan to deal with these issues?
    - Who are you talking to? Is this representative of the community?
  - Are there locations within the municipality that have importance to Indigenous persons?
    - What is the basis of this importance? How does the municipality take this into account?
  - Are there “historical issues” to consider? (Both positive and negative) How does the municipality consider and address these historical issues?

Rights

- S. 35 of the *Constitution Act, 1982*
  - The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- **Aboriginal Rights:** Only "aboriginal peoples" can exercise aboriginal rights. The nature and scope of these rights will frequently be dependant upon membership in a particular group, who have established particular rights in specific localities.
  - S. 35 protects only those rights in existence as of 1982; it does not revive extinguished rights. However, The phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time.
- **Treaty rights:** are the rights established in treaties between the Crown and First nations.
- Although treaty rights are the result of mutual agreement, they may be unilaterally abridged, in a manner similar to Aboriginal rights
  - The onus on establishing "extinguishing" rights falls to the Crown, but the onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

Rights

- "Sparrow test" (*R. v. Sparrow* [1990] 1 SCR 1075) the test concerning balancing the rights guaranteed by S. 35 of the *Constitution Act, 1982* and the ability of a government to infringe the right.
- The Sparrow Test sets out whether governmental action has the effect of interfering with aboriginal/treaty rights, if the interference constitutes "infringement" and if this infringement can be justified in light of the overall circumstances (1. is there a valid legislative objective, and 2. consideration of the special trust relationship and the responsibility of the government *vis-à-vis* the aboriginal people)
  - Was the infringement was as little as was necessary to effect the objective, whether compensation was fair, and whether the aboriginal group was consulted with respect to the measure.
  - The grounds for justifying infringement are not set but must be inclusive to address the situation in question.
- Not all stakeholders will necessarily agree with this approach
  - Some will dispute that aboriginal/treaty rights can be infringed at all
  - Others will suggest consent is required in specific contexts
  - Others will suggest municipal action excluded from this obligation to comply with S.35 of the *Constitution Act, 1982*

Consultation Obligations

- *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 37. Quick Summary: The City after public meetings, and sharing of relevant information with the Neskonlith Indian Band, issued an "Environmentally Hazardous Area Development Permit" required under Salmon Arm's official community plan ("OCP") with respect to the construction of a shopping centre on privately-owned land.
  - The land in question neighboured lands which the Neskonlith regarded as part of their traditional territory, but treaty negotiations for Aboriginal title, or court claim had not been started, at the time. The Salmon River criss-crosses the northwest corner of the lands, and there was a concern re flooding.
  - The municipality did in fact consult with *Neskonlith Indian Band, but not specifically in relation to the strength of specific claims of* Aboriginal title/rights in the area as they felt that this element of the consultation was for the Province to engage in.
    - {Side notes: 1. The Court determined if the Municipality the consultation conducted would have been sufficient. 2. Existing governmental processes can fulfill consultation duties (in whole or in part) if they address the relevant issues. See for example, *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 4}
  - The Court held that: while the Crown has a duty to consult, the municipality was not the Crown and did not have such a duty. The provincial Crown had not expressly delegated consultation obligations to the City of Salmon Arm. The municipality could therefore proceed with the project without consultation.

Consultation Obligations

- Rely on *Neskonlith* at your peril. Why do I say that?
  - 1. *Neskonlith* has been roundly critiqued.
    - Some parties believe that *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 4 indicate that the SCC would find *Neskonlith* wrongly decided and implement a decision that where a Province acts through a municipality, similar to the operations through a regulatory body, the requirement to consult would apply, and that the Crown may rely on the processes of the municipality to partially or completely fulfill its duty to consult.
    - In any event, the result of *Neskonlith* is a "vacuum" – the action is one of a municipality, but the remedy (consultation, actions) will involve the Provincial/Federal Crowns.
  - 2. There has been, subsequently, Provincial legislation mandating consultation by municipalities in various contexts.
  - 3. In some ways, this decision doesn't really "help" a municipality.
    - You are faced with a decision undertaken where an action may "stand" but a "wrong" has been committed (for example, no consultation, when consultation was due).
    - You may be faced with a municipal action being held up in favour of resolutions of the dispute involving other levels of government (and not the municipality).
    - These are your residents and neighbours. The uncertainty of this outcome is not ideal.
    - The municipality is on the "front line" of the dispute – able to act, but also unable to address the outstanding "wrong".

City's RAP – Opportunity for Change

- RAP sets out principles to be adopted by the City in moving forward with reconciliation.
- Establishes education actions so that the City is aware of existing issues and concerns; and sets out a process to ensure education process is responsive to needs of community moving forward.
- Sets out some approaches to address known concerns (Metis apology, for example)
- Allows for a process for the City to review its existing practices and consider changes to ensure rights, interests and opinions of Indigenous persons, and groups are considered and incorporated moving forward.
- Allow for a process for the City to develop agreements with First Nations to consider methods of consultation and interactions between the City and First Nations.
- Allow for a process for the City to develop agreements with First Nations to address issues with respect to City operations.