The Duty to Consult: Opportunities for Indigenous Engagement in Municipal Land Use Planning

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September 25, 2024

Introduction

Municipal land use planning is both a highly prescriptive process and simultaneously responsive to the whims of the market, the ever-changing demography of a local population, and the overall attitudes of its' various communities. Questions about how land is organized, where to locate densities, and how settlement patterns should respond to the priorities of the day, all presuppose that municipalities are located on neutral space onto which a shared vision for how to grow and maintain it can be grafted.

Land, however, is not neutral. The lands on which municipalities across Canada plan for, are saturated in a history of dispossession, framing cities as spaces defined by exclusions, zones, and an array of ownership models.

Walking a tightrope between overseeing the daily management of a city and fulfilling its statutory obligations, the planning process is a petri dish for discerning how municipalities may already be engaged or are learning, through trial and error, how to engage with Indigenous communities. Treading landscapes of uncertainty, municipalities are contending with what obligations may be owed to Indigenous peoples, if not as a legal requirement, then in consideration of overlapping interests, as a matter of necessity.[2]

Throughout this paper, I explore the concept of the Duty to Consult, as one tool, amongst others, working toward the goal of reconciliation.[3] How can municipalities make use of this framework and why should municipalities care to do so? What is it? How did it come to be? Why is it important? What role and obligations, if any, do municipalities hold?

Legally, it is important to understand the development of this principle, and specifically how courts grapple with balancing various interests within a rights-based system. It is also important, however, to consider that even if no formal independent legal obligation exists for municipalities, the nature of municipal decision-making, particularly in the land use planning realm, renders consultation a practical reality—maybe even, a necessity.

More than half of all Indigenous peoples live in cities.4 While there is no straightforward answer to the question of whether municipalities owe an independent duty to consult, this paper suggests,

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1 The views expressed in this paper are entirely my own, and not reflective of the views, policies or direction of my employer, the City of Vaughan.

2 Section 35(2) of the *Constitution Act, 1982* refers to "Indian, Inuit and Métis peoples" collectively as the "[A]boriginal peoples of Canada." While I may sparingly use the legal term, "Aboriginal," I mostly use the term "Indigenous" as it is inclusive of First Nations, Inuit, or Métis, and it is also used internationally.

3 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*] describes the duty to consult and accommodate as part of a process of fair dealing and reconciliation at paragraph 32.

4 Statistics Canada, "Indigenous Populations continue to grow and is much younger than the non-Indigenous population, although the pace of growth has slowed." September 21, 2022 online at: < The Daily — Indigenous

in the spirit of reconciliation, that municipalities look past common law doctrines that may yet take years to develop, and explore existing capacities, grounded in respectful and reciprocal relationships.

Part 1 of this paper will briefly explore some of the historical underpinnings of land use planning in Canada, extending back to the *Royal Proclamation of 1763*, and its impact on Indigenous communities. This section is intended to provide a high-level degree of context for how the Supreme Court of Canada may have come to the model of the duty to consult.

Part 2 will provide an overview of the duty to consult. Within this section, the paper is further organized into four subsections: (1) what is the duty? (2) who owes the duty? (3) how is the duty triggered? and (4) what is the scope of the duty? A fifth subsection is included at the end to explore how the duty to consult could meet the goal of reconciliation. This may be the densest part of the paper as there are a number of lengthy Supreme Court decisions that have, over the last few years, made significant strides in creating a framework to clarify and give tangible effect to concepts like the "Honour of the Crown," "reconciliation," and "fiduciary duties" owed to Indigenous communities. Throughout this section, the paper will also attempt to contextualize and apply the case law to municipalities.

Finally, part 3 will outline two examples between Ontario and British Columbia of how municipalities are already engaging with Indigenous communities and conclude that while the local context matters to the question of scope (e.g.: size, resource availability, nature and strength of claims), there are opportunities for municipalities to leverage existing processes and frameworks to help integrate engagement or consultation into its land use planning practice.

Ultimately, the thesis of this paper is that regardless of whether municipalities owe an independent duty to consult, collaborative and transparent approaches to engage Indigenous communities is in the interests of all. While the case law continues to evolve on whether a municipality has a positive obligation to consult with Indigenous communities—municipalities can nonetheless take steps (and in fact, many do) beyond a rights-based approach to consider the practical realities that exist when municipalities are making land-use planning decisions.

Part 1: A History of Dispossession.

> *Land use planning was central to early colonizing efforts.*[5]

The *Royal Proclamation of 1763* was established in part out of necessity by the British Crown during their war with the French, to create allies out of Indigenous peoples, and in part as a means to articulate the boundaries between "Indian" lands and European settlements.[6] With the British Crown asserting itself as the sovereign, the *Royal Proclamation* and the plethora of treaties and agreements that followed dealing with the location of reserves, land tenure, use, and resource

population continues to grow and is much younger than the non-Indigenous population, although the pace of growth has slowed (statcan.gc.ca)>.

5 Alexandra Flynn, "Parks as Persons: Legal Innovation or Colonial Appropriation?" (2022) Fordham Urban Law Journal, 50:1, at page 11.

6 George R, Proclamation, 7 October 1763, reprinted in RSC 1985 App II, No 1 ["Royal Proclamation]. Clara MacCallum Fraser and Leela Viswanathan, "The Crown Duty to Consult and Ontario Municipal First Nations Relations: Lessons Learned from the Red Hill Valley Parkway Project," (2008) Canadian Journal of Urban Research, 22:1 at page 4, citing Flanagan et al., "Beyond the Indian Act: Restoring Aboriginal Property Rights."

rights could be considered the founding "policy statement" in modern-day Canada, shaping how land and resources were used and by whom.[7]

Notwithstanding the *Royal Proclamation* explicitly forbidding any purchases, settlements, or taking of lands reserved for Indigenous communities, the principles expressed in early treaties of delineating land boundaries and uses between settlers and Indigenous communities were subject, over centuries, to a continuous campaign of disregard and settlement expansion as settlements grew and morphed into larger urban sites.

For instance, Stanley Park, is located on the unceded traditional territory of one of the largest settlements of the Musquem, Squamish, and Tsleil-Waututh First Nations along the Pacific Northwest (Coast Salish Peoples).[8] It is owned by the federal government and subject to a renewable lease to the City of Vancouver. The dispossession of the Coast Salish Peoples of lands on which they lived for centuries to make way for what is presently considered the "top park in the entire world," began as early as 1887. This was achieved systematically through the destruction of village sites, removal of Indigenous families to make way for road and infrastructure development, the gradual expropriation of lands, and ultimately, a successful legal action where, in 1926, the federal government and City of Vancouver were successful in evicting the remaining Indigenous inhabitants, as trespassers.[9]

> *Local land use planning continues to impact and be impacted by ongoing title and treaty claims.*

The process of settler colonization is most tangibly experienced in a local context. Settler colonization is not necessarily a by-gone experience of the past for which acknowledgements and accommodations should be made—but rather, in the urban context, it can be experienced as an ongoing process of structural dispossession taking the form of private property rights and the privatization of resources, at odds with most Indigenous legal traditions and conceptions of land and space.[10]

At the expense of, and without consulting local Indigenous communities, local urban settlement expansion and uses increased the likelihood of confrontation, both legal and physical.[11] The Oka

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7 Clara MacCallum Fraser and Leela Viswanathan, *supra* note 6 at page 5.

8 Alexandra Flynn, *supra* note 5 at page 2.

9 *Ibid*, at pages 2 – 7. See Canada (attorney General) v Cummings [1926] 1 DLR 52 (SCC 1926) at para 53.

10 The Ipperwash Inquiry of 2007 was mandated to investigate the death of Dudley George, an Aboriginal person killed in a land rights dispute on September 6, 1995. In Volume 2 of the Ipperwash Inquiry, Justice Linden explored the reason for Indigenous peoples' occupation of lands and road blockades, finding that they largely occurred due to: land claims, natural resources regulatory regimes and the desecration of Aboriginal burial grounds. Ipperwash Inquiry (Ont.) 2007. Report of the Ipperwash Inquiry. Volume 2 Toronto: Published by Ministry of the Attorney General, Queen's Printer for Ontario at page 21 [Ipperwash Inquiry]. Also see: Julie Tomiak, "Contested Entitlement: The Kapyong Barrack, Treaty Rights, and Settler Colonialism in Winnipeg," Chapter 4 at page 97-98 and 101 in Heather Dorries et al., "Settler City Limits: Indigenous Resurgence and Colonial Violence in the Urban Prairie West," University of Manitoba Press, Winnipeg (2019).

11 From the report of the Royal Commission on Aboriginal Peoples, the Commission noted, "Aboriginal people were fighting court battles and engaging in acts of civil disobedience. Canadians came to know the Gitksan and Wet'suwet'en, who were fighting in court to affirm ownership and jurisdiction over their traditional lands; the Haida, who were standing in the path of logging machines about to clear-cut their ancient forests; the Lubicon, who were blocking access to their lands by resource developers; and the Innu, who invaded a NATO air base to protest low-level fighter jet training over their lands and its impact on their hunting economy." Volume 1: Looking Forward,

Crisis of 1990, for instance, is known to have been a 78-day confrontation between the Mohawks of Kahnawake, and the Canadian armed forces, when a roadblock was set up in protest of a townhouse complex and golf course expansion proposed by the Town of Oka, Quebec, on land with sacred burial sites and historically claimed by the Kahnawake Mohawks.[12] The lands, making up approximately 400 square kilometers, known as the "Lake of Two Mountains," had been actively in dispute since the early 1700s.

The federal government purchased portions of the lands in dispute to quell the concerns over the golf course expansion, conveying a portion to the Kahnawake Mohawks for a burial site expansion; however, the majority of the land claim issue remains unresolved.[13] The Oka Crisis led to the creation of the Royal Commission on Aboriginal Peoples, which culminated in the publishing of a five-volume report in 1996, documenting historical grievances and, "…proposing solutions to the challenges affecting the relationship between Aboriginal peoples, the Canadian government, and Canadian society as a whole."[14]

The Oka Crisis, as it concerns local governments, and the impacts land use planning decisions may have on Indigenous claims, is not unique. Municipal land use approvals remain areas of active dissent and protest. The Grand River Land Dispute of 2006 and the1492 Land Back Lane of 2020, both involve disputes over separate municipally approved developments, impacting existing land claims along what is known as the Haldimand Tract, in Caledonia, Ontario. Both matters culminated in occupations and blockades of the sites in question, the involvement of police, and court ordered injunctions.[15]

Indigenous lands and interests, may be tangible in nature, involving lands with title claims, treaty rights that may guarantee certain uses such as hunting or fishing, and interests may arise in the event of discovered archaeological remains. Other interest may be intangible in nature, involving sites that may be spiritually significant to a particular Indigenous community. Municipal boundaries across Canada overlap with and often bifurcate traditional Indigenous lands, interests and uses.[16] A municipality's decision-making capacity may interfere and subsequently set off a chain of unanticipated events if the municipality is focused exclusively on its defined areas of jurisdiction, to the exclusion of other potential interests that may impact it.

Looking Back (1996) at page 194, online: < Report of the Royal Commission on Aboriginal Peoples - Library and Archives Canada (bac-lac.gc.ca)

12 *Ibid* at page 198.

13 Melinda Meng, "Bloody Blockades: The Legacy of the Oka Crisis," Harvard International Review (June 30, 2020), online: <Bloody Blockades: The Legacy of the Oka Crisis (harvard.edu)>.

14 Chapter 7 of Volume 4 of the Royal Commission on Aboriginal Peoples report offers a wide range of recommendations for municipal governments to consider including the creation of an Aboriginal affairs committee to advise City Council, creating a designated position for Aboriginal representatives on local agencies and board, and working proactively to identify barriers of mistrust and systemic discrimination to foster relationships of support. Royal Commission on Aboriginal Peoples, *supra* note 12 Volume 4: Perspectives and Realities (1996) at pages 439 – 460.

15 J.P. Antonacci, "A guide to understanding the land issues in Caledonia," Hamilton Spectator (October 29, 2020), online: < A guide to understanding the land issues in Caledonia (thespec.com)>.

16 Clara MacCallum Fraser and Leela Viswanathan, *supra* note 6 at page 7. Native-Land.ca is an interesting visual resource to explore how urban boundaries and Indigenous land boundaries overlap, using GIS mapping to reflect where Indigenous nations have historically or continue to live. It can be accessed online: <Native-Land.ca | Our home on native land>.

The Oka Crisis was a culmination of over two centuries of disengagement with the Kahnawake Mohawks who attempted over several occasions with the British Crown, and later with the federal government to petition for their title claim, while simultaneously bearing witness to the shrinking of their lands for settlement expansions.[17] The Oka Crisis, the Grand River Land Dispute and the 1492 Land Back Lane are some of the more known examples of land occupations and the impacts they could have when local-level approvals are rendered before substantive claims are meaningfully engaged.[18]

Part 2: Overview of the Duty to Consult and Reconciliation.

A. What is the Duty to Consult?

The Duty to Consult is grounded in the "Honour of the Crown."

While the Duty to Consult is not, by inception, a legislative principle; it is grounded in and built from the constitutional recognition of Aboriginal and Treaty rights that are protected through section 35(1) of the *Constitution Act, 1982*.[19]

The principle has been and continues to be developed through the common law, rooted historically in a concept known as the *Honour of the Crown*. This concept emerges from commitments provided for in the *Royal Proclamation*, in which the British Crown committed to protect Indigenous peoples inhabiting North America, from exploitation by non-Aboriginal peoples.[20] The *Honour of the Crown* is embedded in section 35(1) of the *Constitution* as a constitutional principle and a "core precept."[21] It is not an aspirational goal, but rather, a "high standard of honourable dealing" that gives rise to specific duties, depending on the context in which Indigenous peoples may be engaged.[22]

For instance, the *Honour of the Crown* may give rise to a duty to consult when the Crown contemplates actions that *may* affect Indigenous title.[23] In another context the *Honour of the Crown* may impose a fiduciary obligation towards Indigenous peoples where the Crown exercises control over Indigenous interests.[24] Ultimately, the *Honour of the Crown* recognizes that

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17 Royal Commission on Aboriginal Peoples, *supra* note 12.

18 In the Ipperwash Inquiry, *supra* note 11, Justice Linden lists at lists 24 major occupations having occurred between 1974-2006—there have since been many more.

19 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Constitution*] section 35(1). Also see: *Taku River Tlingit First Nation v British Columbia (Project Assessment Driector)*, 2004 SCC 74 [Taku *River*] at paragraph 24 and *Haida Nation*, *supra* note 2 at paragraphs 16 and 32.

20 The commitments are clearly articulated in the language of the Royal Proclamation, *supra* note 6. Also described by the Supreme Court of Canada in: *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paragraph 42.

21 *Haida Nation*, *supra* note 3 at paragraphs 16 and 18.

22 *Taku River*, *supra* note 20 at paragraph 25.

23 *Haida Nation*, *supra* note 3 at paragraph 35.

24 *Southwind v Canada,* 2021 SCC 29 paragraph 62, cited in *Ontario (Attorney General) v Restoule*, 2024 SCC 227 at paragraphs 241 - 243.

Indigenous peoples are not conquered peoples, to which obligations arise by virtue of the Crown's parallel declaration of sovereignty over historically Indigenous lands.[25]

Consultation carries with it a commitment to engage in good faith dialogue and agents of the Crown are expected to act with integrity in fulfilment of the Crown's duty to reconcile pre-existing Indigenous sovereignty with the Crown's asserted sovereignty.[26]

> *The Crown's asserted sovereignty creates an obligation to ensure fair and honourable dealings with Indigenous peoples.*

Notwithstanding the affirmation of Aboriginal and Treaty rights through the *Constitution* as a means of advancing reconciliation, ensuring that there existed a process through which Indigenous communities could invoke and ascertain a right and subsequently find recourse for violations of a claimed right continued to be the subject of litigation for many years.[27]

The principles of the *Honour of the Crown* and of reconciliation bear within them a delicate tension. There is, on the one hand, an expectation that the Crown hold and protect the interests of Indigenous communities while on the other hand, this is juxtaposed against the reality that the Crown itself asserts parallel (and sometimes, competing) sovereignty claims over Indigenous lands and resources. Even in matters where there are established treaty rights, the Crown may still authorize land uses that infringe upon the Indigenous right.[28] This is itself a contradiction, in which the framework of the duty to consult is intended, in the spirit of reconciliation, to alleviate, by bringing together both the Crown and an impacted Indigenous community to reconcile their interests.[29]

> *The Duty to Consult is not limited to established treaty rights or claims.*

In 2000, the Haida Nation launched a lawsuit against the British Columbia Ministry of Forestry for transferring tree farming licenses to a logging company, which would permit tree cutting on the Haida Nations' ancestral lands located on the islands of Haida Gwaii. The provincial government had previously issued licenses to harvest trees on the lands, composed, in certain pockets, of old growth forests, vital to the economy and culture of the Haida peoples.

While the British Columbia government held legal title to the lands in question, the Haida Nation also claimed title to the lands and were in the process of proving their claim. On this basis, they argued British Columbia was in breach of their fiduciary duty to protect an Indigenous interest. This raised the issue of whether the British Columbia government owed a duty to consult *and* accommodate the Haida people with respect to its decisions on forest harvesting and the issuing of permits. By contrast to previous matters that had appeared before the Supreme Court of

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25 *Haida Nation*, *supra* note 3 at paragraph 53.

26 *Ibid,* at paragraphs 17, 18, 20, and 22

27 For instance, in *R v Sparrow* (1990), the Supreme Court provided a detailed word-by-word definition for section 35(1) of the *Constitution Act, 1982*, establishing that Aboriginal peoples had 'inherent' rights which could not be infringed without justification. In *Delgamuukw v British Columbia*, 1997, the Supreme Court outlined the process by which title could be established, noting that there must be sufficient, continuous and exclusive evidence of territorial occupation. In *R v Van der Peet*, 2 SCR 507 the Supreme Court noted that "reconciliation" is one of the fundamental purposes of protecting Aboriginal rights. Reconciliation drives the fiduciary duty owed by the Crown. Consultation and accommodation are mechanisms/tools used to work towards reconciliation.

28 *Mikisew Cree*, 2005 SCC 69 at paragraph 19 [*Mikisew Cree*].

29 *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at paragraph 34 [*Carrier Sekani*].

Canada, wherein Indigenous groups may be seeking to enforce established and uncontested treaty rights, the Haida Nation's context was unique because they claimed they had a right to have been consulted without yet having established title over the lands.[30]

Leaning on the principle of the *Honour of the Crown*, then Chief Justice McLachlin determined that even potential rights, seriously pursued, are protected by section 35 of the *Constitution*, and the *Honour of the Crown* requires that in parallel to rights being, "determined, recognized, and protected," the Crown may still be required to consult and accommodate Indigenous interests.[31] The duty to consult, therefore, is not limited to established claims.

B. Who owes the duty to consult?

The duty to consult is the obligation of the Crown.

The Supreme Court in *Haida Nation* determined that the *Honour of the Crown* and the duty to consult could not be delegated to third parties—ultimately the legal responsibility rests with the Crown.[32] In practical terms, this means the executive branch of the federal and provincial governments.[33]

Notwithstanding this requirement, there exists two caveats:

1. *Haida Nation* briefly touched upon the possibility that legislatures could empower regulatory bodies to play a role in fulfilling the Crown's obligations.[34] In *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, the Supreme Court parsed this out in detail, affirming that administrative tribunals or statutory bodies could fulfill the Crown's obligation to consult, provided the Crown explicitly confers, through legislation, the necessary power and authority to do so.[35]

2. The Crown may also delegate certain procedural aspects of a consultation process to third parties.[36] In such a circumstance; however, the Crown is not relieved of the legal obligation to ensure consultation is fulfilled.[37]

While municipalities are limited to the powers conferred to them by their enacting legislation, courts are deferential to the municipality's local expertise.

In *Carrier Sekani*, the Supreme Court found that administrative tribunals or statutory bodies could fulfill the Crown's obligation to consult if such a body was given the power to do so via legislation;

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30 *Haida Nation*, *supra* note 3 at paragraph 6.

31 *Ibid*, at paragraph 25.

32 *Ibid*, at paragraph 53.

33 *Clyde River (Hamlet) v Petroleum Geo-Services Inc*., 2017 SCC 40 at paragraph 28 [*Clyde River*].

34 *Haida Nation*, *supra* note 3 at paragraph 51.

35 *Carrier Sekani, supra* note 30 paragraph 60.

36 *Haida Nation*, *supra* note 3 at paragraphs 51 and 53. Procedural aspects of consultation may include a project proponent seeking an environmental approval being responsible for collecting information, answering technical questions, and engaging in discussions with Aboriginal communities—as outlined in *Clyde River* fact scenario, *supra* note 34.

37 *Haida Nation*, *supra* note 3 at paragraph 53.

however, the Supreme Court was also mindful that in order to be meaningful, the ability to undertake consultation had to include having the "remedial powers" necessary to give effect to any remedies that may arise out of consultation.[38]

A municipality's legal status is prescriptive.

A municipality is not the Crown, it is a creature of statute. Its powers are limited to those conferred upon it through legislation.[39] Section 92(8) of the *Constitution Act*, *1867* relegates municipalities within the exclusive authority of provinces.[40] Municipalities are not a protected order of government, instead, municipal powers are limited to their enacting statutes (hence the term, "creatures of statute"), and decisions can be challenged on the basis that they were made outside of its defined legislative powers. [41]

The concept that municipalities are given life by virtue of the legislation that endows it with certain distinctive authorities is a double-edged sword. On the one hand, being a "creature of statute" provides clarity on what a municipality can and cannot do, inadvertently serving as a shield from obligations that may exceed its authority for which a municipality does not have either the resources or the authority to address.

On the other hand, the reality is that municipalities are the level of government that most tangibly impact an individual, and by extension, their community's daily life. Services like road maintenance, property taxes, parking bylaws, how communities are shaped and developed, preserving local history and delivering local transportation services are some of the areas in which the average person is likely to be impacted by in their day-to-day life.

Legally, municipalities may not owe an independent duty to consult.

Notwithstanding a municipality's local expertise, *Neskonlith Indian Band v Salmon Arm (City)*, is a case in which the British Columbia Court of Appeal found that municipalities do not owe a duty to consult.[42] The Court of Appeal denied the Neskonlith First Nation Band their appeal against municipal approval of a permit for a shopping mall development in a flood plain beside their reserve. The Court noted the practical challenges facing municipalities if a duty to consult was added to the milieu of the "…day to day operational decisions that are the diet of local governments."[43] The Court also noted that the "push-down" of the Crown's duty to consult to local governments would be impractical considering the volume of day-to-day decisions municipalities are required to undertake.[44]

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38 *Carrier Sekani*, *supra* note 30 at paragraphs 55 and 60.

39 *East York v Ontario (Attorney General),* (1997), 34 OR (3d) 789 as cited in Alexandra Flynn, "With Great(er) Power Comes Great(er) Responsibility: Indigenous Rights and Municipal Autonomy," Osgoode Journal of Law and Social Policy 34:6 at pages 114-115.

40 *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No. 5. Online: < THE CONSTITUTION ACTS 1867 to 1982 (justice.gc.ca)>.

41 *East York v Ontario (Attorney General,)* (1997), 34 OR (3d) 789 as cited in Alexandra Flynn, "With Greater Power comes Greater Responsibility: Indigenous Rights and Municipal Autonomy," Alexandra Flynn (2021) at page 113 - 114.

42 *Neskonlith* Indian *Band v Salmon Arm (City)*, 2012 BBCA 379 [*Neskonlith*].

43 *Ibid*, at paragraph 70.

44 *Ibid*, paragraphs 70 - 72.

To make a finding in favour of municipalities having the obligation to consult would risk watering down the broader nation-to-nation reconciliation objectives expressed in *Haida Nation*, and the Court observed that it would result in a parsing out of the duty to consult into "such small particles" that it may be rendered meaningless.[45]

Considering this, where the municipality possesses local knowledge but may lack the practical resources and expertise to navigate the constitutional processes foundational to consultation, how does it navigate the tension of its limited resources against the challenges that arise in its day-to-day functions?

Neskonlith was decided in 2012, and while this case is not binding in other provinces, several lower courts have adopted its reasoning, rendering the legal question of whether a duty to consult is owed by municipalities, an evolving question.

Procedurally, the duty to consult can be delegated.

The companion appeals of *Chippewas of the Thames First Nation v Enbridge Pipelines* Inc and *Clyde River (Hamlet) v Petroleum Geo-Services Inc* in 2017 continue to add further layers to the analysis in a way that can be made analogous to municipalities.[46]

In both cases, the Supreme Court considered the impact of a regulatory body's decisions, when providing approvals for projects that could impact Indigenous rights and concluded:

- The Crown ultimately bears the responsibility for the adequacy of the consultation;[47]
- Regulatory processes can partially or completely fulfill the duty only if the delegated body has the procedural and remedial powers to consult and if needed, accommodate;[48] and,
- If the Crown is delegating the consultation to an administrative or statutory body, the Crown must also provide adequate notice of same.[49]

In *Chippewas*, the National Energy Board which is a federal administrative tribunal and regulatory agency, approved a proposal from Enbridge to reverse the flow of a pipeline crossing through the Chippewas of the Thames' traditional territory. The pipeline was initially built in 1976, without consultation, but the appeal and subsequent Supreme Court decision was focused on the then-present Enbridge proposal. In *Clyde River*, the National Energy Board approved a proposal for a proponent to conduct offshore seismic testing in an area adjacent to where the Clyde River Inuit had treaty rights to harvest marine mammals.

While the Supreme Court noted that the Crown may rely on regulatory processes to fulfill consultation obligations either in whole or in part, ultimately the Crown bears the responsibility for ensuring the consultation is adequate.[50]

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45 *Ibid*.

46 *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*., 2017 SCC 41 [*Chippewas*], and *Clyde River*, *supra* note 33.

47 *Clyde River*, *supra* note 34 at paragraph 22.

48 *Ibid*, at paragraph 30; *Chippewas*, *supra* note 47 at paragraph 32.

49 *Clyde River*, *supra* note 34 at paragraphs 28 - 29.

50 *Ibid*, at paragraphs 21 - 22.

However, whether the Crown is directly engaged in a regulatory process can be distinguished from Crown "action." Specifically, once a regulatory agency is made to exist by the legislature to exercise executive power, its actions and Crown actions are, in effect, indistinguishable.[51] Actions taken by a regulatory agency or statutory body, to further powers explicitly conferred upon it via statute, constitute Crown action—though the Crown (being the executive branch of the provincial or federal branches of government) remains legally responsible for owing the duty to consult and/or ensuring it had been properly discharged.[52]

In this regard, while a municipality is not the Crown, the effect of a municipality's decisions, made within the confines of its statutory powers, could be considered an extension of Crown decisions. The duty is therefore still owed by the Crown, but *Clyde River* and *Chippewas* essentially make the point that the operation of said duty could extend to delegated bodies.

C. When is the duty to consult triggered?

In the context of a regulatory agency, in *Clyde River*, the Supreme Court noted that the National Energy Board approval process itself was the Crown action that triggered the duty to consult.[53]

Haida Nation articulated that the duty to consult is engaged when the Crown has, "…knowledge, real or constructive, of the potential existence of the Indigenous right or title and contemplates conduct that might adversely affect it."[54]

Carrier Sekani, further elaborated on this test, organizing it into three distinct elements:

1. First, the Crown must have actual or constructive knowledge of a claim to the resource or land. The distinction between "actual" and "constructive" is to make space for claims that are both subject to formal negotiations with the Crown or pursued through a court action alongside general knowledge that lands may be known to have been traditionally occupied or there are reasonable suspicions that a right may be claimed.[55] As noted earlier, a right does not need to have been established or proven for the duty to arise.[56]

2. Second, the Crown must be contemplating a certain conduct or decision that engages a potential Indigenous right.[57] This could include the approval of a development application, as was the case with the residential development approval, subject of the 2006 Grand River Land Dispute in Caledonia.

3. Third, the Crown's decision or action must have the potential to adversely affect an Indigenous claim or right. In *Chippewas*, the Supreme Court limited the assessment of impacts to the decision in question, noting that while the historical context is important to frame cumulative consequences, the assessment is limited

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51 *Ibid*, at paragraph 29.

52 *Ibid*, at paragraphs 28 - 29.

53 *Ibid*, at paragraphs 29 and 31.

54 *Haida Nation*, *supra* note 3 at paragraph 35.

55 *Carrier Sekani, supra* note 30 paragraph 40.

56 *Haida Nation*, *supra* note 3 at paragraphs 28 - 31.

57 *Carrier Sekani, supra* note 30 paragraph 42.

to the impacts flowing from the current decision.[58] In *Clyde River*, for example, the Supreme Court found that the risks posed to the Inuit's treaty rights to harvest marine mammals was high. It noted the landscape of high food costs and how the Inuit community relied on their treaty rights to sustain their communities.[59] The proposed seismic testing was found to risk marine mammal life, cause permanent hearing damage, and impact marine mammal migration patterns.[60]

D. The scope and content of the duty to consult.

Consultation must be meaningful.

In *Haida Nation*, the Supreme Court noted that the obligation to act in good faith entailed substantially addressing concerns through meaningful consultation.[61]

The extent of the duty is fact specific, which lends itself to the "spectrum" analysis introduced in *Haida Nation*.[62] The scope of consultation required depends on two factors:

1. The strength of the claim; and

2. The potentially adverse effects visited on the claim or right.[63]

Where the strength of a claim may be weak or the impacts on an asserted right may be low, the duty owed may be limited to providing notice, disclosing information and discussing the issues raised.[64] For instance, in *Chippewas*, the Supreme Court found the impact of reversing the flow of an existing pipeline was low, given no additional lands were required, conditions were imposed on Enbridge to report on continuing consultations with the Chippewas of the Thames, to the National Energy Board and the Chippewas of the Thames had the opportunity to participate substantively in the regulatory proceedings.[65]

Where there exists a strong prima facie case for an asserted right or title, or the impacts are non-compensable, then the scope of the duty owed may be higher. This may include formal participation in decision-making, written reasons for a decision, and opportunities to make submissions to the impacted Indigenous community.[66] By contrast to *Chippewas*, in *Clyde River*, the Supreme Court found the impact of seismic testing would be significant to the Inuit's treaty rights to harvest marine mammals, and that even minimum consultation procedures, such as answering questions about the proposal, were not met.[67]

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58 *Chippewas*, *supra* note 47 at paragraphs 40 - 42.

59 *Clyde River*, *supra* note 34 paragraphs 43 - 44.

60 *Ibid.*

61 *Haida Nation*, *supra* note 3 at paragraph 42.

62 *Ibid*, at paragraph 43.

63 *Ibid*, at paragraph 39. *Carrier Sekani*, *supra* note 30 at paragraph 36.

64 *Haida Nation*, *supra* note 3 at paragraph 43.

65 *Chippewas*, *supra* note 47 at paragraphs 52 - 58.

66 *Haida Nation*, *supra* note 3 paragraph 44. *Chippewas*, *supra* note 47 at paragraph 47.

67 *Clyde River*, *supra* note 34 at paragraph 44.

Consultation may include accommodation.

While the Supreme Court noted that in order to delegate the duty to consult effectively, the administrative or statutory body must also have remedial powers; consultation does not always result in a requirement to accommodate.[68] The Supreme Court consistently affirmed the need to balance the requirements arising from the duty to consult against public interests, noting that consultation does not include a "veto" over Crown decisions.[69] Where a duty to consult is found, so long as the Crown engages meaningfully, the duty could be met—what 'meaningfully' means will vary depending on the circumstance.

E. The duty to consult and the goal of reconciliation.

In *R v Van der Peet*, the Supreme Court noted section 35(1) of the *Constitution* provided the constitutional framework for reconciliation.[70] In this case, the Supreme Court specifically linked the act of reconciliation to reconciling the, "…pre-existence of distinctive aboriginal societies occupying the land with Crown sovereignty."[71] Essentially, the substance of reconciliation is tangible in that it is tied to reconciling interests in land and Indigenous perspectives must balance against the legal rights-based system in Canada.[72]

The 1996 Report of the Royal Commission on Aboriginal Peoples recognized the limitations in which the judicial system exercised its decisions. While the Supreme Court in *Van der Peet* conditioned reconciliation against existing legal norms and precedents, the Report of the Royal Commission on Aboriginal Peoples noted that common law concepts of land and title is at "sharp variance" with Indigenous spiritual beliefs and relations to land.[73]

The duty to consult may be a tool towards achieving reconciliation, but one important component to consider is whether reconciliation can be achieved through the parsing of rights, boundaries, claims, and acknowledgements? Alexandra Flynn and Doug Andrews contend that reconciliation is grounded in friendship, which is founded on a deeper, mutual understanding of one another that gives life to reciprocal actions.[74] Such an understanding moves away from models of exclusion and emphasizes mutual responsibilities to one another and our environments.[75]

In 2015, the Truth and Reconciliation Commission of Canada (TRCA) published a report with ninety-four calls to action to, "redress the legacy of residential schools and advance the process of reconciliation."[76] The Truth and Reconciliation Commission defined reconciliation as being

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68 *Ibid*, at paragraph 41.

69 *Haida Nation*, *supra* note 3 at paragraph 48.

70 *R v Van der Peet*, *supra* note 28 at paragraph 42.

71 *Ibid*.

72 *Ibid*, at paragraphs 49 - 50.

73 Royal Commission on Aboriginal Peoples, *supra* note 12, at page 9.

74 Alexandra Flynn and Doug Anderson, "Rethinking 'Duty': The City of Toronto, a Stretch of the Humber River, and Indigenous-Municipal Relationships." (2020) 50:81 Alberta Law Review at pages 17-19.

75 *Ibid*.

76 Truth and Reconciliation Commission of Canada: Calls to Action (2012), online: < Calls_to_Action_English2.pdf (exactdn.com)>.

about, "…establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples."[77]

Call to action number forty-seven reads:

> 47. We call upon federal, provincial, territorial, and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and terra nullius, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts.

While municipalities are not a protected order of government, the Supreme Court affirmed the principle that municipal powers must, "be given a generous interpretation," as result of the proximity between the decisions municipalities render and its communities who experience the outcome of those decisions.[78] Principles such as "cooperative federalism" and "subsidiarity" have also been adopted, in recognition that different levels of government may have different roles—where higher levels of government are better positioned to provide resources in support of the operational decision-making of lower levels of government.[79] While the conclusion that municipalities do not owe a duty to consult in *Neskonlith* was focused on the division of jurisdiction and powers, municipalities do have an opportunity to leverage existing processes in pursuit of reconciliation.[80]

Part 3: Land Use Planning and the Duty to Consult.

Ontario municipalities and their decision-making authority.

In Ontario, the *Municipal Act, 2001* recognizes municipalities in Ontario as "responsible and accountable" levels of government with respect to matters within their jurisdiction.[81] A municipality's powers are intended to be interpreted broadly in order to enable municipalities to "…govern its affairs as it considers appropriate to enhance the municipality's abilities to respond to municipal issues."[82] The *Municipal Act* also recognizes that powers are provided to municipalities through other acts.

One of the acts in which municipalities are given certain powers includes the *Planning Act*—a robust legislative regime, tasked with setting the overarching framework of rules for land use planning.[83] Section 1.1(f) notes one of the purposes of the *Planning Act* is to recognize the, "…decision-making authority and accountability of municipal councils in planning."[84]

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77 Truth and Reconciliation Commission of Canada, "What We Have Learned: Principles of Truth and Reconciliation," (2015) at page 113, online: <Principles_English_Web.pdf (exactdn.com)>.

78 *R v Guignard*, 2002 SCC 14 at paragraph 17, as cited in Alexandra Flynn, *supra* note 39.

79 Alexandra Flynn, *supra* note 40 at page 114 citing *Canadian Western Bank v Alberta,* 2007 SCC 22 at paragraphs 42 - 43, 45.

80 Alexandra Flynn and Doug Anderson, *supra* note 75 at page 21.

81 *Municipal Act*, 2001, SO 2001, c 25 section 2 [*Municipal Act*].

82 *Ibid*, section 8(1).

83 *Planning Act*, R.S.O. 1990, c. P.13.

84 *Ibid*, section 1.1(f).

Section 2 notes that in the carrying out responsibilities under the *Planning Act*, municipalities (among others), "…shall have regard to […] matters of provincial interests," which include:

> (m) the coordination of planning activities of public bodies; [and]
>
> (n) the resolution of planning conflicts involving public and private interests.[85]

Cascading down from the *Planning Act* is a labyrinthine set of policies ranking in increasing detail, the obligations and standards, guiding decision-making authorities (of which the municipality is one), on land use decisions.

Section 3(1) of the *Planning Act* refers to a policy statement that may be issued by the Minister on "matters relating to municipal planning."[86] Any decision by a municipal council, in exercise of their authority under the *Planning Act*, is required to be consistent with this policy statement.[87]

Ontario Planning Act delegation of the Duty to Consult.

The Supreme Court in *Clyde River* recognized the flexible nature of the duty to consult, stating that the Crown could rely on pre-existing processes designed for a different purpose to fulfill consultation obligations, so long as it provides an appropriate level of consultation.[88] The term, 'appropriate,' is fact-specific and can vary from case to case.[89]

While the *Planning Act* does not include explicit direction to municipalities on whether to engage with Indigenous communities, the province articulated a form of engagement in the Provincial Policy Statement, published in 2014. This was updated in 2020, and now, a newer version will come into force on October 20, 2024.[90] For instance, section 4.3 of the 2014 and 2020 Provincial Policy Statement and section 6.1.3 of the 2024 Provincial Planning Statement all note the following:

> The Provincial [Policy/Planning] Statement shall be implemented in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the Constitution Act, 1982.

This section has existed across all three iterations, to-date. Other sections in the Provincial Policy/Planning Statement have changed between 2014 to 2024. For instance, consider the difference in the section below:

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85 *Ibid*, section 2(m) and (n).

86 *Ibid*, section 3(1).

87 *Ibid*, section 3(5)(a).

88 *Clyde River*, *supra* note 34 at paragraph 31.

89 *Ibid*, at paragraph 42.

90 Ontario Provincial Policy Statement, 2014, online: < Archived - Provincial Policy Statement, 2014 | ontario.ca>. Ontario Provincial Policy Statement 2020, online: < Provincial Policy Statement, 2020 | ontario.ca>. The new 2024 version is now called the Provincial Planning Statement, 2024, online: < Provincial Planning Statement, 2024 | ontario.ca>.

2014 PPS – Policy 1.2.2	2020 PPS – Policy 1.2.2	2024 PPS – Policy 6.2.2
Planning authorities **are encouraged** to coordinate planning matters with Aboriginal communities.	Planning authorities **shall engage** with Indigenous communities **and coordinate** on land use planning matters.	Planning authorities shall undertake early engagement with Indigenous communities and coordinate on land use planning matters to **[1]** facilitate knowledge-sharing, **[2]** support consideration of Indigenous interests in land use decision-making and **[3]** support the identification of potential impacts of decisions on the exercise of Aboriginal or treaty rights.

***Emphasis added.**

In 2014, planning authorities were "encouraged" to coordinate planning matters with Indigenous communities. The language was enabling but not directive. In 2020, through use of the word, "shall" planning authorities were required to engage and coordinate with Indigenous communities on land use planning matters. The requirement to coordinate alongside the requirement to "engage," may have implied that engagement with Indigenous communities was to be pro-active, before the planning authority (including the municipality) was to render a decision. In 2024, the language coming into force explicitly requires planning authorities to undertake "early engagement" and coordination on land use planning matters. It also explicitly describes the scope of such engagement and coordination, outlining three distinct actions planning authorities must take.

While over time, there is traction in the policy language leaning towards a delegation of greater responsibility to municipalities as the planning authority—there has been limited uptake in both the courts and the quasi-judicial tribunals in going beyond the express language of the Provincial Policy Statement.

Ontario common law is cautious to tread.

For instance, in *Cardinal v Windmill Green Fund LPV*, the Ontario Superior Court of Justice granted leave to appeal from the Ontario Municipal Board's decision to dismiss an appeal related to the redevelopment of lands within the Ottawa River.[91] The City of Ottawa received a proposal for a mixed-use redevelopment project on islands used for industrial purposes for approximately 200 years, and in parallel, considered sacred to the Algonquin peoples.[92] The Appellants specifically raised the issue that the proposed redevelopment did not conform with policy 4.3 of the Provincial Policy Statement.

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91 *Cardinal v Windmill Green Fund LPV*, 2016 ONSC 3456 [*Cardinal*]

92 *Ibid,* at paragraph 2. Also see: Natasha Bakht and Lynda Collins, "The Earth is our Mother": Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada," (2017) 62:3 McGill LJ 777 at page 795.

Upon review of the planning process the Ottawa undertook, the Court agreed with the Ontario Municipal Board that the Ottawa properly engaged with the concerns of the Algonquin on the following basis:

- Ottawa's Official Plan commits to an engagement, in particular, with the Algonquins of Ontario;
- Ottawa followed its process in its Official Plan, in identifying the Algonquins of Ontario as the appropriate stakeholder to engage;
- Ottawa contacted the Algonquins of Ontario to formally engage on the applications;
- The consultation undertaken was consistent with the Provincial Policy Statement, 2014; and
- The outcome of the consultations were revised plans that required the incorporation of elements and features, in recognition of the Algonquin history and culture.[93]

While one of the questions in issue was the application of policy 4.3, the interpretation of that policy would have to be done within the context of the Provincial Policy Statement, as a whole, balancing policy 4.3 against other policies. In 2016, when *Cardinal* was decided, section 1.2.2 of the Provincial Policy Statement simply "encouraged" planning authorities to coordinate with Indigenous communities. Within this context, the Ontario Superior Court of Justice and the Ontario Municipal Board found the steps that Ottawa had taken, fulfilled the ambiguous scope of delegation provided by the Province.

The cases in Ontario continue to develop in a somewhat cautious fashion. In *Burleigh Bay Corporation v North Kawartha (Township)*, the Ontario Municipal Board determined, in line with direction from *Clyde River* and *Chippewas*, that the Board's own adjudicative process was included to fulfill the scope of meaningful consultation.[94]

In 2020, the Local Planning Appeals Tribunal heard the matter of *Brothers Real Estate Ltd v Ottawa (City)*, in which the Tribunal noted that notwithstanding the distinct rights and interests of Indigenous communities, where Indigenous interests may be similar to other groups, consultations do not need to be distinct from a municipality's broader consultation efforts made under the *Planning Act*.[95]

Municipalities in Ontario contend with sparse guidance on the duty to consult.[96] Policy 1.2.2 (now 6.2.2) of the 2024 version of the Provincial Planning Statement is more directive in nature and includes a defined scope of engagement; however, the province does not provide municipalities with systematic detail on best practices, how to identify stakeholders, how to engage respectfully, how to assess the strength of a claim, or what kind of accommodations may be required based

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93 *Cardinal*, *supra* note 92 at paragraph 26.

94 *Burleigh Bay Corporation v North Kawartha (Township)*, 2017 CarswellOnt 15629 at paragraph 259 [*Burleigh Bay*].

95 *Brothers Real Estate v Ottawa* 2020 CanLII 41841 paragraphs 332 and 420. Also see *Cardinal, supra* note 91 at paragraph 42.

96 Alexandra Flynn, "Indigenous-Municipal Legal Relationships: Moving Beyond the Duty to Consult and Accommodate," (2020) at pages 190-191. Also see some limited forms of direction by the province on Ontario: "Municipal-Aboriginal Relations: An Ontario Perspective" (2009) from the Ministry of Municipal Affairs and Housing by Alia Hanif et al., and also see: Ontario Ministry of Municipal Affairs and Housing, Municipal-Aboriginal Relationships: Case Studies (Toronto: Queen's Printer for Ontario, 2009), cited in Nancy Kleer et al., "Bearing and Sharing the Duty to Consult and Accommodate in the Grey Areas in Consultation: Municipalities, Crown Corporations and Agents, Commissions and the Like," Canadian Institute Conference (February 24, 2011) online: <Blank (oktlaw.com) >.

on the claim asserted. Notwithstanding the duty to consult can be delegated, the Crown retains the ultimate responsibility to ensure consultation obligations are fulfilled. In that respect, the province maintains the responsibility to ensure that entities to which it delegates the procedural aspects of consultation are adequately funded and comprehensively informed.[97]

Even if the Crown maintains the legal obligation to consult, this does not mean that municipalities do not face risks. The practical challenges expressed by the British Columbia Court of Appeal in *Neskonlith* ring true, especially for smaller municipalities and townships who may have limited resources and, apart from policy 6.2.2 (and other statements in the Provincial Planning Statement), no systematic guidance from the province. Legally however, future Tribunal and Court decisions in Ontario will need to contend with measuring municipal actions against the combination of directive language and a defined scope of engagement listed in Policy 6.2.2.

Municipalities are forging new paths ahead.

In *Clyde River*, the Supreme Court noted that, "true reconciliation is rarely, if ever achieved in courtrooms."[98] True to this statement and irrespective of the common law trajectory, most municipalities, both in Ontario and across Canada are proactively engaging with Indigenous communities in an ethic of consultation and collaboration.[99]

Vancouver and the Jericho Land Policy Statement, British Columbia.

British Columbia posts detailed guides for municipalities on how to write land use plans and effective stakeholder management for land use planning applications. In its guide on best practices for writing land use plans, the province notes that local plans must account for requirements such as:[100]

- Provincial statutes, such as the *Rights of Indigenous Peoples Act*;[101]
- Indigenous laws, which must have the same weight and authority as provincial statute; and
- Provincial policies, such as the *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples* or the *Tsilhqo'tin Mining Policy*.

In 2019, British Columbia enacted the *Declaration on the Rights of Indigenous Peoples Act*, which establishes the United Nations Declaration on the Rights of Indigenous Peoples as the province's framework for reconciliation. UNDRIP is a 46 article non-binding resolution, ratified by the United Nations recognizing the human rights and rights to self-determination of Indigenous peoples, everywhere.[102] One of the key areas of British Columbia's legislation is a mandate to the

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97 *Brantford v Montour*, 2010 ONSC 6253.

98 *Clyde River*, *supra* note 34 at paragraph 24.

99 Alexandra Flynn and Doug Anderson, *supra* note 75 at page 13.

100 British Columbia Ministry of Forests, Lands, Natural Resource Operations and Rural Development, "Modernized Land Use Planning: Best Practices for Writing Plan Content – Goals, Objectives, and Strategies." (July 2021) pages 22 -23, online: <MLUP Best Practices for Writing Plan Content (2021) (gov.bc.ca)>.

101 *Declaration on the Right of Indigenous Peoples Act*, SBC 2019, c 44.

102 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution adopted by the General Assembly, 2 October 2007, A/RES/61/295 [UNDRIP] online: < United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly | Refworld>. British Columbia was the first province to formally adopt UNDRIP. The federal government adopted UNDRIP on June 21, 2021 through *The United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14. The Northwest Territories

government to bring provincial laws into alignment with UNDRIP through the establishment of the Declaration Act Secretariat in 2022.[103]

UNDRIP preserves the principles of "free, prior, and informed consent."[104] It includes provisions barring Indigenous peoples from being forcibly removed from their lands; a right to participate in decision-making on matters that affect their rights; to be consulted with in good faith on legislation or administrative decisions that impact them; to be actively involved in development and determining development priorities; and rights to control, use, own, and develop lands and resources traditionally used.[105]

The City of Vancouver adopted UNDRIP several years earlier, wherein, it announced 2014 as the "Year of Reconciliation," being the first municipality in Canada to declare its support for UNDRIP.[106] On June 3, 2024, Vancouver adopted the UNDRIP Action Plan 2024 – 2028, co-developed between the City and the Musquem, Squamish and Tsleil-Waututh Nations.[107] The Action Plan outlines priorities across a number of areas including supporting the affordable housing needs and development plans of Indigenous communities both on reserve and within the urban boundary.[108]

For instance, the Jericho Lands Policy Statement is intended to guide the future development of the 90-acre Jericho Lands located in Vancouver's West Point Grey neighbourhood, developed as a partnership between the Musquem, Squamish, Tsleil-Waututh and the Canada Lands Company.[109]

The Jericho Policy is intended to facilitate a "generational opportunity" for the development of future mix of uses, parks and open spaces, neighbourhoods and community facilities on lands historically used as sites for recreation, hunting, and habitation by the Musquem, Squamish and Tsleil-Waututh before a military reserve was established in 1859.[110]

Foundational to the Jericho Policy is the "Cultural Whorl", created from the stories, knowledge and input from the Musquem, Squamish and Tsleil-Waututh Nations, which inspired the cultural design and site planning of the lands. The principles that guided the policies included, among

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adopted UNDRIP in 2023 through the *United Declaration on the Rights of Indigenous Peoples Implementation Act*, SNWT 2023, c 36.

103 British Columbia, Declaration Act Secretariat, online: <Declaration Act Secretariat - Province of British Columbia (gov.bc.ca)>.

104 Alexandra Flynn, *supra* note 97 at page 198.

105 UNDRIP, supra note 103, Articles: 10, 18, 19, 23, and 26.

106 Alexndra Flynn, *supra* note 5 at page 12. Also see: <City of Reconciliation | City of Vancouver>.

107 City of Vancouver Council Minutes, "City of Vancouver UNDRIP Action Plan, May 31, 2024," (June 25, 2024) at page 6 online: <Council meeting Minutes - June 25, 2024 (vancouver.ca)>. City of Vancouver Council Report, "City of Vancouver UNDRIP Action Plan" (May 31, 2024) [UNDRIP Action Plan] online: <Report - City of Vancouver UNDRIP Action Plan, June 25, 2024>.

108 *Ibid*, UNDRIP Action Plan at page 19 (page 26 of PDF).

109 City of Vancouver, "Jericho Lands Policy Statement" (2024) [Jericho Policy] online: <Jericho lands policy statement (vancouver.ca)>.

110 *Ibid*.

others, designing to live with Nature, recognizing water as Life Giver, stewardship of trees and canopies, and placemaking with the spirit of the Longhouse.

The combination between detailed guidelines on provincial expectations, legislation and policy requirements, and the municipality's own efforts to work with its Indigenous communities resulted in a transcendence of the question on whether municipalities have a duty to consult. Instead, the development of the Jericho Policy puts words and intentions into tangible and actionable reconciliation efforts.

York Region and the Huron-Wendat ossuary at Teston Road, Ontario.

Ontario is known to have been settled for at least 11,000 years, the post-contact European presence is a little over 400 years.[111] The vast majority of Ontario's archaeological heritage is Indigenous, and the likelihood that most Indigenous burial grounds exist outside of reserve lands, within urban boundaries, is quite high.

In 1995, Dudley George was shot by Ontario Provincial Police and died of his injuries during a land claim occupation at Ipperwash Provincial Park. While the history surrounding the Kettle and Stony Point First Nation Reserve land claim is extensive, part of the reason for why members of the reserve occupied the park included concerns to protect sacred burial sites from the risk of desecration by the Canadian military.[112]

Indigenous burial sites are not as recognizable as convention burial sites where a headstone clearly marks the location of the deceased. Many Indigenous burial sites had been discovered, in some cases by chance, and often, in the context of development.[113] The desecration of Indigenous burial sites has been at the centre of many protests and occupations in Ontario and beyond—it was what triggered the Oka Crisis.[114]

Early and appropriate consultation of unmarked sites can be identified before burial sites are disturbed. Over the years, Ontario has developed a legislative and policy network to bolster archaeological investigations. The 2014 Ontario Provincial Policy Statement was the first version to introduce requiring planning authorities to consider the interests of Indigenous communities related to cultural heritage and archeological resources, which read as follows:

> Policy 2.6.5: Planning authorities shall consider the interests of Aboriginal communities in conserving cultural heritage and archaeological resources.[115]

Other legislative provisions may be triggered in the context of a discovery of archaeological resources or cultural heritage including general provisions under *Ontario Heritage Act*, requiring the submission of archaeological reports to the province and the *Funeral, Burial and Cremation*

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111 Ipperwash Inquiry, *supra* note 10 at page 134.

112 *Ibid*, Volume 1 at page 195.

113 *Ibid*, Volume 2 at page 134.

114 *Ibid.*

115 Provincial Policy Statement, 2014, *supra* note 90 at Policy 2.6.5. The Provincial Policy Statement, 2024 includes stronger language under Policy 4.6.5: Planning authorities **shall engage early** with Indigenous communities **and ensure** their interests are considered when **identifying, protecting and managing** archaeological resources, built heritage resources and cultural heritage landscapes [emphasis added].

Services Act, outlining the process for when remains may be found.[116] The province also published guidelines to provide systematic technical and process standards for conducting archeological fieldwork.[117]

In 2005, approximately ten years following the Ipperwash Provincial Park occupation, excavation for the widening of Teston Road in York Region revealed an ossuary with human remains below the original road pavement.[118] York Region contacted the Mississaugas of the Scugog First Nation, the Huron-Wendat Nation and the Six Nations of the Grand River and commissioned an archeological investigation where a 450-year-old First Nations settlement was discovered.

This occurred shortly after *Haida Nation* set out the broad framework for consultation. The Ontario Provincial Policy Statement would not include the above-noted requirement for at least another nine years. The York Region Official Plan, in force at the time was dated 1994, and did not yet include policies directing or encouraging consultation with local Indigenous groups.[119] Finally, the province's guideline document for archaeological matters available at the time was dated from 1993 and titled the Archaeological Assessment Technical Guidelines.[120]

Considering this backdrop, York Region engaged in discussions with the Huron-Wendat, the Six Nations of the Grand River and the Mississaugas of the Scugog. The site was determined to be historically and culturally significant, and York Region agreed that the alignment of Teston Road would be redesigned.

The disturbed portion where the remains were found was restored, and in 2007, the Indigenous communities held a ceremony to bury the displaced remains.

The 2007 Ipperwash Inquiry, though unrelated to the ossuary at Teston Road, found a systematic level of destruction of archaeological sites throughout the province, much of which may have been accidental, but nonetheless avoidable. One of Justice Linden's recommendations was for the province to, "…encourage municipalities to develop and use archaeological master plans."[121]

In 2010 York Region released a new Official Plan which included an updated Cultural Heritage Policy, recognizing the historical Indigenous presence throughout the Region and including policies related to archaeological resources with enabling language to encourage consultation with Indigenous communities.[122] In 2014, York Region also released an Archaeological Management Plan intended to reduce the risk of unforeseen discoveries during development,

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116 Ontario Heritage Act, R.S.O. 1990, c. O.18 [OHA]. Funeral, Burial, and Cremation Services Act, 2002, SO 2002, c 33 at section 95.

117 One such document is the Ministry of Tourism and Culture, Standards and Guidelines for Consultant Archeologist (2011), online: <Standards and Guidelines for Consultant Archaeologists (ontario.ca)>.

118 Ontario Ministry of Municipal Affairs and Housing, Municipal-Aboriginal Relationships: Case Studies (Toronto: Queen's Printer for Ontario, 2009). Ipperwash Inquiry, *supra* note 10 at Volume 2, page 137.

119 York Region Official Plan, 1993 Policy 4.2: Cultural Heritage.

120 This guideline is no longer available online, and at the time of the submission of this paper, I had not yet received a copy of this document to confirm whether it included any guidelines to consultant archaeologists related to Indigenous consultation or engagement. Given it was published in 1993, it likely did not contain such provisions, but this is speculative.

121 Ipperwash Inquiry, *supra* note 10 at Volume 2, page 147.

122 York Region Official Plan, 2010 policies 3.4, 3.4.12, 3.4.17, and 3.4.18, online: < yropConsolidation2019Chapter3 (6).pdf>. York Region has since released an updated Official Plan, in 2022.

develop a comprehensive inventory of archaeological sites, and policies at the Regional level to aid local policy development with respect to the integration of archaeological assessments in the development process.[123]

The introduction of policy 2.6.5 to the Provincial Policy Statement (noted above), now required planning authorities to ensure the interests of Indigenous became part of the administrative processing of development applications that interfaced with *Ontario Heritage Act* approvals or implications.

As a compliment, the province also updated its 1993 Archaeological Assessment Technical Guidelines to a comprehensive 168-page Standards and Guidelines for Consultant Archaeologists.[124] Within the Standards and Guidelines for Consultant Archaeologists, there are four technical bulletins which includes one titled, "Engaging Aboriginal Communities in Archaeology."[125] This technical bulletin provides detailed information on what engagement means and how to engage Indigenous communities at each stage of an archaeological project.

While in 2005, a framework for York Region did not exist where it could rely on either common law, legislative, or policy guidance, common sense, communication, and the willingness of all parties to engage resulted in a process that led to the resolution of what was a sensitive situation.

Conclusion: What is next for municipalities?

While this paper largely focused the discussion on the parameters and content surrounding the duty to consult, the latter portion of the paper explored the practical considerations municipalities need to contend with. These include the impact of being a creature of statute, and at the practical level in provinces like Ontario, a lack of clarity both at the common law and in policy as to the exact scope of duties, if any, municipality's may need to consider in their decision-making roles within land use planning.

Given the constraints noted, if the duty to consult remains an imperfect tool for municipalities to navigate addressing reconciliation, the TRCA calls to action in conjunction with UNDRIP, could lay a parallel route for municipalities to draw upon in their consultation and accommodation efforts with Indigenous communities.[126]

Municipalities across Canada have adopted UNDRIP and developed plans to address the TRCA calls to action.[127] One of the recommendations published by the 1996 Royal Commission on Aboriginal Peoples report, of which the City of Toronto has enacted, is the creation of an Aboriginal Affairs Committee, guided by a defined term of reference, to advise City Council on

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[123] York Region, "Planning for Conservation of Archaeological Resources in York Region," (2014), online: < 19141_archaeologicalMgmtPlan2014UpdateNov2019.pdf>.

[124] *Supra,* note 112.

[125] Ontario, "Engaging Aboriginal Communities in Archaeology: a draft technical bulletin for consultant archaeologists in Ontario," online: <Engaging aboriginal communities in archaeology: a draft technical bulletin for consultant archaeologists in Ontario | ontario.ca>.

[126] Alexandra Flynn, *supra* note 96 at page 200.

[127] Alexandra Flynn and Doug Anderson, *supra* note 74, see Table 1 at page 15.

issues in which Indigenous communities have an interest.[128] Other municipalities have entered memorandums of understanding with their local Indigenous communities to explore capacity and relationship building, co-management of resources, and overlapping jurisdictional boundaries.[129]

Notwithstanding the optimism, the concerns expressed in *Neskonlith* continue to reverberate, as the task before municipalities, as local decision-makers is not simple. Practically, the foundational step a municipality can take is to begin understanding the history on the lands in which its' boundaries are located. Understanding who your neighbours are and what their interests may be, can help frame the extent and scope of work a municipality could then plan for, and decide to undertake.

But why should municipalities care enough to add more to their growing repertoire of responsibilities than required? In part, it may be the practical realities of risk management. Observing the trajectory of the common law, one can conclude that the case law is slowly moving towards the imposition of positive obligations on administrative decision-making authorities.

Neskonlith explicitly dealt with the question of whether municipalities had an independent duty to consult, and it was decided in the negative. Five years later, the Supreme Court laid out a comprehensive framework for how the duty to consult could be delegated to statutory and administrative bodies in *Clyde River* and *Chippewas*. Imai and Decembrini contend that the right question to ask, is not whether a municipality has an independent duty to consult, Rather, courts should be asking whether the duty has been discharged.[130] If not, then a project cannot proceed until it has been discharged adequately.[131] In this reframing, the focus shifts from a question of: "who is responsible?" to the substance of the matter: "was it done properly?"

The other reason why municipalities may want to consider a framework to guide some form of engagement or consultation, is that slowly, municipalities are beginning to realize mutual understanding and reciprocity helps to drive conversations and projects forward. Approving development applications without an understanding of the lands in question and the tangible or intangible interests in those lands, risks both significant monetary and resource loss. More importantly, the reputational cost and the distrust that grows within a community when leaders do

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128 Royal Commission on Aboriginal Peoples, *supra* note 11 Volume 4: Perspectives and Realities at page 440. Also see, City of Toronto, "Aboriginal Affairs Advisory Committee Terms of Reference 2022 – 2026," online: <Attachment 1 - Aboriginal Affairs Advisory Committee (toronto.ca)>.

129 Christopher Alcantara and Jenn Nelles, "Strengthening the Ties that Bind? An Analysis of Aboriginal-Municipal Inter-governmental Agreements in British Columbia" (2011) Canadian Public Administration 54:3. This article comprehensively describes the range of inter-governmental relations cropping up between Canadian municipalities and Aboriginal communities in. For instance, they describe: fire protection agreements between City of Kamloops and the Kamloops Indian Band for fire protection services on reserve lands; the Ditidaht/ Pacheedaht Proposed Partnership between the Ditidaht Nation and Ladysmith: Developing Capacity for Self-Government in which the Town of Ladysmith would assist the Ditidaht First Nations to develop their own system of government, policies and procedures; and a memorandum of understanding signed by the five governments of the Ktunaxa Nation and eleven neighbouring local governments in which parties commit to "develop strong, committed and fair working relationships between their respective governments by ensuring respectful and open communication" on all issues of mutual interest including economic development, land use planning and infrastructure.

130 Angela D'Elia Decembrini and Shin Imai, "Supreme Court of Canada Cases Strengthen Argument for Municipal Obligation to Discharge Duty to Consult: Time to put Neskonlith to Rest," Alberta Law Review (2019) 56:3 at page 937.

131 *Ibid*.

not proactively facilitate early, respectful, and informed engagement is harder to salvage and repair.

The road ahead is semi-paved as municipalities continue to navigate legal obligations and risk management against a growing legal and social disposition to work with and alongside Indigenous communities. The framework of reconciliation continues to be conceptualized horizontally across the country, and vertically through different levels of government. Municipalities will continue to shape and be shaped by their history. The task for municipalities is to consider how to substantively address, in their local capacity, the impacts of colonialism, premised on principles of friendship, nation-to-nation relationships, and expanding the conception of city-building to encompass not only a right to live near or in a city, but also the right to actively shape and produce the city.[132]

[132] Julie Tomiak, *supra* note 11 at page 111.