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### Indigenous-Municipal Legal Relationships: Moving Beyond the Duty to Consult and Accommodate

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## **INDIGENOUS-MUNICIPAL LEGAL RELATIONSHIPS: MOVING BEYOND THE DUTY TO CONSULT AND ACCOMMODATE**

Alexandra Flynn, Allard School of Law<sup>1</sup>

### **Introduction**

Under Canadian law, federal and provincial governments are considered to be the Crown, and have a duty to consult and accommodate when they contemplate conduct that might adversely impact potential or established Aboriginal or Treaty rights.<sup>2</sup> Appeal courts have concluded that the duty does not extend to municipal governments; instead, provinces may delegate procedural aspects of consultation to municipalities through legislation. However, some argue that recent Supreme Court of Canada decisions, coupled with scholarly analysis, mean that the duty to consult and accommodate may in fact apply to local governments. Despite the fact that the duty to consult might seem like a step forward for municipal governments denied the status of Crown, I will argue that municipalities ought not to adopt duty to consult jurisprudence as the principal basis to guide their relationships with First Nations. While the duty to consult has provided an important legal basis to challenge government action, it is an inadequate and problematic framework for long-term relationship building.

This paper examines the path forward for Indigenous-municipal relationships in regard to the land use planning process. While the arguments in the paper apply broadly, I focus on the unique legalities of planning approaches in Ontario. The aim is to argue that municipal planning – using the example of the Ontario planning model more specifically – should not frame its responsibilities with First Nations and Indigenous peoples based on the requirements of the duty to consult, which is a problematic singular framework in grounding a nation-to-nation

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<sup>1</sup> Assistant Professor, Allard School of Law, University of British Columbia. I am grateful to Clara MacCallum Fraser and Mariana Valverde for their feedback on earlier drafts of this paper. Many thanks as well for the excellent suggestions from two anonymous peer reviewers. All errors and omissions are my own.

<sup>2</sup> This paper adopts the following terminology: “Indigenous peoples” include First Nations, “bands” as defined by the *Indian Act*, Inuit, Métis, and other Indigenous peoples affected by municipal planning decisions. “First Nations” refers to Indigenous governments. “Aboriginal” refers to Indigenous peoples and their rights as identified under Canadian law.

relationship.<sup>3</sup> The duty to consult as the basis of Indigenous-settler relationships has not led to sufficient recognition of the role of Indigenous communities in the planning context. While the duty to consult and accommodate has indeed been used to ground some decisions that are positive for First Nations, in the end it is an honour-based duty of the Crown, one that is closer to *noblesse oblige* and falling well short of the ideal of a nation-to-nation relationship.

The paper highlights important initiatives taking place at the municipal level, including the local adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), as evidence of a truth and reconciliation-informed approach to understanding the process of working towards respectful, reciprocal relationships with Indigenous communities. I advance that municipal governments should focus on respectful, reciprocal relationship-building as a legal standard in land-use decision-making, not benevolent colonialism's notion of the duty to consult that is said by the Supreme Court to be rooted in the 'honour of the Crown'. Crucially, Indigenous communities themselves have affirmed the importance of the municipal role in relationship-building, regardless of the Court's pronouncements of the ontology of the Crown.<sup>4</sup>

This paper first outlines the legal obligations of municipalities in relation to the duty to consult and accommodate as it applies to planning decisions in Ontario. I reference, in particular, the limitations related to Crown obligations to engage in consultation, the bifurcated jurisdictions created under Canadian law that require First Nations to respond to multiple governments independently, top-down decision-making that does not treat Indigenous communities as partners, and the uncertain role of municipalities. In the second part of the paper, I note the limitations in the duty to consult and accommodate as a framework for Indigenous-municipal relationships, even though municipalities ought to be bound by the duty. I argue that this approach does not treat Indigenous communities as government partners, nor does it permit collaboration at the law-making stage. In support of this position, the paper focuses on the

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<sup>3</sup> Gordon Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation" (2005) 23 Windsor YB Access Just 17 [Christie]; Taiaiake Alfred, *Peace, Power, Righteousness* (Toronto: University of Toronto Press, 1999); Val Napoleon, "Extinction by Number: Colonialism Made Easy" (2001) 16 CJLS 1 [Napoleon].

<sup>4</sup> RoseAnne Archibald, "Speaking Points at AMO Conference in Ottawa" (21 August 2018), online: *Chiefs of Ontario* <[www.chiefs-of-ontario.org/news\\_item/orc-roseanne-archibald-speaking-points-at-amo-conference-in-ottawa](http://www.chiefs-of-ontario.org/news_item/orc-roseanne-archibald-speaking-points-at-amo-conference-in-ottawa)> [Archibald].

Ontario planning framework, concluding that it neither meaningfully incorporated Indigenous laws or notions of relationships, nor clarified the outstanding confusion on the role of municipalities.<sup>5</sup> Third, I suggest that reciprocal, respectful relationships should be at the foundation of any legal obligations between Indigenous peoples and governments, including municipalities. I provide several examples of municipal reforms, arguing that these initiatives, not the Crown's duty to consult and accommodate, provide a more just approach to planning.

## **Acknowledgement**

Reciprocal, respectful relationships with First Nations and all Indigenous peoples must be at the core of local government decisions in relation to planning. Many scholars have acknowledged the limitations of planning law and practice, including the lack of acknowledgment of Indigenous worldviews and treaty knowledge, the lack of room that is made for differing conceptions of property, and the myopic scope of planning law, which centres on prescribed measures for land use as opposed to a broader conception of planning that includes multi-generational thinking.<sup>6</sup> I acknowledge, too, these and other limitations in my legal education, and personal and professional experiences. I am a non-Indigenous person with a mix of European heritages and grew up in Indigenous communities in Canada, including in Churchill, Manitoba and Iqaluit, Nunavut. I have deep roots in and have benefited enormously from the cultural and institutional foundations of this settler nation, in ways that I continue to learn and recognize. My focus here is on the intersection of law, planning, and Indigenous rights. I see it as my responsibility, but also a privilege and benefit, to understand the Indigenous context of the places I call home, including an “awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behavior.”<sup>7</sup>

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<sup>5</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>6</sup> See e.g. Heather Dorries, *Rejecting the “False Choice”*: *Foregrounding Indigenous Sovereignty in Planning Theory and Practice* (PhD Thesis, Department of Geography, University of Toronto, 2012) [unpublished] [Dorries], and Janice Barry & Libby Porter, “Indigenous Recognition in State-Based Planning Systems: Understanding Textual Mediation in the Contact Zone” (2011) 11:2 *Planning Theory* 170.

<sup>7</sup> Truth and Reconciliation Commission of Canada, *What We Have Learned: Principles of Truth and Reconciliation*, (2015), 113.

As Jeff Hewitt writes, “I reassert my hope that the practice of land acknowledgment continues and expands into more spaces. I also mean that I hope the practice continues with new versions rooted in honour (not obligation or avoidance), and openly question how the institutions (as well as readers) performing the acknowledgment find themselves on that land.”<sup>8</sup> This article was initially drafted in the traditional and ancestral lands of the Mississaugas, Haudenosaunee Confederacy, and the Huron Wendat and Petun Nations, and subject to the Dish With One Spoon Wampum Belt Covenant, a treaty agreement between the Iroquois Confederacy and the Ojibwe and allied nations to peaceably share and care for the resources around the Great Lakes.<sup>9</sup> Later, settler communities called this place Toronto, and over time the city found its place within a province within a federation, with the presence of multiple jurisdictions that continue to apply today.<sup>10</sup> The paper was completed in a place known as Vancouver, the traditional, ancestral, and unceded territories of the x<sup>w</sup>məθk<sup>w</sup>əy̓əm (Musqueam), Skxwú7mesh (Squamish) and səlilwətal (Tseil Waututh) peoples. Colonial laws and jurisdictions have long tried to erase Indigenous presence, laws and claims, including the locations where you are reading from. At this particular nexus of time and space, when the duty to consult remains in flux at the local level, this paper asks what this colonial reality means in considering legal obligations as municipalities move forward in their relationships with First Nations and Indigenous peoples.

### **Canadian governments have a duty to consult and accommodate**

Aboriginal and Treaty rights of First Nations are recognized and affirmed under section 35(1) of the *Constitution Act, 1982* and have been given additional context through the courts.<sup>11</sup> The Canadian constitution recognizes and affirms Aboriginal rights, yet barriers to meaningfully

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<sup>8</sup> Jeffery G. Hewitt, “Land Acknowledgment, Scripting and Julius Caesar” (2019) 88 Sup Ct LRev: Osgoode’s Annual Constitutional Cases Conference 27 at 39.

<sup>9</sup> For more on pre-Confederation agreements amongst First Nations and the Crown, see Michel Morin, “Manger avec la même micoine dans la même gamelle : à propos des traités conclus au Québec avec les Amérindiens (1665-1760)” (2003) 33 *R.G.D.* 93 and Michel Morin, “La dimension juridique des relations entre Samuel de Champlain et les Autochtones de la Nouvelle-France” (2004) 38 *R.J.T.* 389-426.

<sup>10</sup> The Indigenous name “Tkaronto” is increasingly being used to refer to Toronto, and according to Indigenous languages scholar Dr John Steckley, initially comes from the Mohawk name for what is commonly known as the Atherley Narrows, between Lakes Couchiching and Simcoe, where 4000 years ago a fish weir was built. Subsequently, the French mispronounced it as *Toronto* and then used that name for a training camp at the mouth of the Humber River (TEDx Talks, “TEDxHumber College Dr. John Steckley, What if Aboriginal Languages Mattered?” (February 19, 2012), online (video): *YouTube* <[www.youtube.com/watch?v=Q50ZJWc1uyE](http://www.youtube.com/watch?v=Q50ZJWc1uyE)>).

<sup>11</sup> *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida*].

exercising those rights are remain a pressing access to justice issue.<sup>12</sup> Canada's history is replete with examples of what then-Chief Justice Beverley McLachlin of the Supreme Court of Canada (SCC) called the national government's attempted "cultural genocide" towards Indigenous peoples through the creation of reserves and residential schools, as well as by starvation and disease.<sup>13</sup> The federal government could simply refuse to engage in discussions with Indigenous communities over treaty violations and Indigenous claims, mandating legal action to bring the federal government to the negotiating table.<sup>14</sup>

In the *Delgamuukw* case, for the first time, the SCC acknowledged, critically, Canada's decades-long refusal to engage in conversations regarding land claims.<sup>15</sup> *Delgamuukw* represented an critical shift in the Canadian legal landscape. As Paul Tennant wrote, "The ruling is certainly a victory for [A]boriginal peoples. It validates what British Columbia [Indigenous] leaders have believed and claimed ever since colonial settlement began. It recognizes that [A]boriginal title exists, defines it as a right to land, and places it within the guarantee provided by section 35 of the Constitution Act, 1982."<sup>16</sup> Following the decision, in exploring the impact on settler-Indigenous legal relationships, Tennant argued that diplomacy must be "the guiding principle" in relationships amongst First Nations and municipalities, including mutual respect for protocols and a commitment to relationship-building.<sup>17</sup>

Seven years later, in the 2004 *Haida* case, the SCC adopted for the first time the principle of honour of the Crown to argue that the federal government had a legal obligation to consult and,

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<sup>12</sup> Fraser McLeod et al., "Finding Common Ground: A Critical Review of Land Use and Resource Management Policies in Ontario, Canada and their Intersection with First Nations" (2015) 6:1 *International Indigenous Policy Journal* 1; Clara Fraser & Leela Viswanathan, "The Crown Duty to Consult and Ontario Municipal-First Nations Relations: Lessons Learned from the Red Hill Valley Parkway Project" (2013) 22:1 *Canadian Journal of Urban Research* 1.

<sup>13</sup> Rt Hon. Beverley McLachlin, "Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance," Remarks of the Rt. Hon. Beverley McLachlin, P.C. Chief Justice of Canada at the Aga Khan Museum (May 28, 2015), online: < <https://www.aptn.ca/news/wp-content/uploads/sites/4/2015/05/May-28-2015-Global-Centre-for-Pluralism-2.pdf>>. See also Rhoda Howard-Hassmann, "Cultural Genocide of Canada's Aboriginal People" (13 July 2015), online: *Centre for International Governance Innovation* <[www.cigionline.org/articles/cultural-genocide-canadas-aboriginal-people](http://www.cigionline.org/articles/cultural-genocide-canadas-aboriginal-people)>.

<sup>14</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*].

<sup>15</sup> *Ibid.*

<sup>16</sup> Paul Tennant, "Delgamuukw and Diplomacy - First Nations and Municipalities in British Columbia" in Owen Lippert (ed.), *Beyond the Nass Valley - National Implications of the Supreme Court's Delgamuukw Decision*, The Fraser Institute, 2000, 143-155.

<sup>17</sup> *Ibid* at 148.

where necessary, accommodate Indigenous communities when proposed actions could negatively affect as yet unproven Indigenous rights.<sup>18</sup> The honour of the Crown was a consequential legal development that greatly expanded the federal government's responsibilities towards Indigenous communities where, at the time, the concept of a fiduciary duty did not apply, for example where no treaties had been negotiated or where Aboriginal rights and title were claimed, but not yet established.<sup>19</sup> While Crown conduct need not have an immediate impact on Indigenous lands and resources, the conduct must have the potential to adversely impact lands and resources.<sup>20</sup> The Indigenous group must prove a causal relationship between the proposed conduct and a potential adverse impact on the claim.<sup>21</sup> The adverse impact must be "appreciable," and must relate to "the future exercise of the right itself."<sup>22</sup>

Over time, the SCC would decide that the Crown's duty to consult varied from shallow to deep depending on the nature of rights and the possible impact on the Indigenous community.<sup>23</sup> The Supreme Court held in *Haida* that a weak claim to title, minor infringement, or limited Aboriginal right will mean that the Crown duty may be limited to giving notice, disclosing information, and discussing any issues raised in response to the notice.<sup>24</sup> In *Saugeen First Nation v Ontario (MNR)*, the Ontario Superior Court held that the duty to consult jurisprudence is developing five positions on the spectrum: low, low-middle, middle, middle-high, and high, although these are not tight compartments.<sup>25</sup> Indigenous claimants who have a strong *prima facie* claim or a high degree of infringement will be owed "deep consultation, aimed at finding a satisfactory interim solution."<sup>26</sup> Courts also decided that procedural requirements were owed, like giving time for responses and making information available in Indigenous languages.<sup>27</sup> At

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<sup>18</sup> Lindsay Galbraith, "Making Space For Reconciliation in the Planning System" (2014) 15:4 *Planning Theory & Practice* 453.

<sup>19</sup> *Haida*, *supra* note 11 at paras 11, 18 and 27.

<sup>20</sup> *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 32 and 44 [*Rio Tinto*].

<sup>21</sup> *Ibid* at para 45.

<sup>22</sup> *Ibid* at para 46. See also *Squamish Nation v. British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991 at para 51 [*Squamish*].

<sup>23</sup> *Beckman v Little Salmon/Carmacks First Nation* 2010 SCC 53 at para 44.

<sup>24</sup> *Haida*, *supra* note 11 at para 43.

<sup>25</sup> *Saugeen First Nation v. Ontario (MNR)*, 2017 ONSC 3456 at para 139 [*Saugeen*].

<sup>26</sup> *Haida*, *supra* note 11 at paras 43-44.

<sup>27</sup> *Clyde River (Hamlet) v. Petroleum Geo-Services*, 2017 SCC 40 [*Clyde River*]

minimum, the duty will require the Crown to “give notice, disclose information, and discuss any issues raised in response to the notice.”<sup>28</sup>

The legal limits of the duty to consult and accommodate, which is a judicial doctrine, continue to evolve. Some scholars suggest that the duty to consult allows for the exercise of Indigenous sovereignty within Canadian governance structures,<sup>29</sup> thus acting “as a limit on Crown sovereignty and Crown action.”<sup>30</sup> However, the fine details matter when it comes to the exercise of the duty to consult, with continued evolution on who owes a duty and, if so, how and where. For example, the Court applied the honour of the Crown and, hence, the duty to consult and accommodate, to provincial governments and therefore to natural resource companies licensed by the province.<sup>31</sup> This decision de facto extended the duty to planning: if the federal government were still the only level of government to owe a duty to Indigenous peoples, then planning law would be quite outside the purview of the duty to consult and accommodate. In addition, in 2017, the SCC affirmed that even though federal and provincial governments are responsible for upholding the honour of the Crown, administrative agencies such as the National Energy Board are able to trigger and discharge the Crown’s duty to consult.<sup>32</sup> This continued judicial evolution matters as government actions are assessed on the basis of fact-specific events that relate to particular laws on a case-by-case basis that must be considered individually and contextually.<sup>33</sup> Lorne Sossin notes that the fact-specific and contextual nature of the inquiry makes it difficult to identify consistent principles about when the duty to consult has been fulfilled.<sup>34</sup> The duty is therefore subject to assessment based on individual fact patterns, with courts slowly determining how far the duty extends, rather than clear and proactive commitments to relationship building from settler governments.

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<sup>28</sup> *Haida*, *supra* note 11 at para 43.

<sup>29</sup> Richard Stacey, “Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada’s Sovereignty Deficit?” (2018) 68 UTLJ 405 at 417. See also Alejandro Gonzalez, “The Evolution of the Duty to Consult” (2020) 10:1 Western Journal of Legal Studies 1 at 11 [Gonzalez].

<sup>30</sup> Gonzalez, *supra* note 29 at 11.

<sup>31</sup> *Haida*, *supra* note 11 at paras 10 & 47; *Saugeen*, *supra* note 25 at para 16.

<sup>32</sup> *Chippewas of the Thames First Nation v. Enbridge Pipelines*, 2017 SCC 41 [*Chippewas*].

<sup>33</sup> *Haida*, *supra* note 11 at para 45; *Clyde River*, *supra* note 27 at para 20. See also *Squamish*, *supra* note 22 at para 35; *Saugeen*, *supra* note 25 at para 14.

<sup>34</sup> Lorne Sossin, “The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights” (2010) 23:1 Can J Admin L & Prac 93 at 102.



## Uncertainty over a municipal duty to consult

Under section 92 of the *Constitution Act*, provincial governments are responsible for “municipal institutions” and “matters of a local or private nature,” which include the development of planning policies. As a result of this division of powers, in the duty to consult jurisprudence, provinces (but not municipalities) have been recognized alongside the federal government as the Crown.<sup>35</sup> Municipalities are considered to be administrative bodies, not governments, and their decisions are subject to judicial review.<sup>36</sup> Jean Leclair observes centring the federal Crown as “the sole legitimate interlocutor for Indigenous peoples... delegitimizes all discussions with their closest governmental neighbours, i.e. the municipalities.”<sup>37</sup> Any constitutional changes to municipal authority will need to consider the effects of such changes on First Nations, in particular Aboriginal and Treaty rights under section 35 of the Constitution.<sup>38</sup>

The Crown is understood by the courts to be the federal and provincial governments, and it holds a non-delegable duty to consult and accommodate.<sup>39</sup> The role of municipalities in applying the duty to consult jurisprudence in the sphere of planning law has been only minimally clarified by either courts or legislators. In *Neskonlith Indian Band v. Salmon Arm (City)*, the BC Court of Appeal held that municipalities have no independent constitutional duty to consult First Nations whose treaty and other interests may be affected by municipal decision-making.<sup>40</sup> This case arose when the City of Salmon Arm allowed a permit for development to be issued in a flood plain area located right beside the reserve lands of the Neskonlith. The court held that Salmon Arm did not owe a duty to consult the First Nation on the basis that municipalities do not have the capacity to properly consult, stating, “I consider that the ‘push-down’ of the Crown’s duty to consult, from the Crown to local governments, such that consultation and accommodation would be thrashed out in the context of the mundane decisions regarding licenses, permits, zoning

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<sup>35</sup> *Grassy Narrows First Nation v. Ontario (Natural Resources)* [2014] SCC 48.

<sup>36</sup> Alexandra Flynn, “Operative Subsidiarity and Municipal Authority: The Case of Toronto’s Ward Boundary Review” (2019) 56:2 *Osgoode Hall Law Journal* 271-300.

<sup>37</sup> Jean Leclair, “Envisaging Canada in a Disenchanted World: Reflections on Federalism, Nationalism, and Distinctive Indigenous Identity” (2016) 25:1 *Constitutional Forum* 15 at 23.

<sup>38</sup> Alexandra Flynn, “With Great(er) Power Comes Great(er) Responsibility: Indigenous Rights and Municipal Autonomy” (2021) 34 *Journal of Law and Social Policy* 111-127.

<sup>39</sup> *Haida*, *supra* note 11.

<sup>40</sup> Shin Imai & Ashley Stacey, “Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on *Neskonlith Indian Band v. Salmon Arm (City)*” (2014) 47:1 *UBC L Rev* 293 [Imai & Stacey].

restrictions and local bylaws, would be completely impractical... Daily life would be seriously bogged down if consultation – including the required “strength of claim” assessment – became necessary whenever a right or interest of a First Nation “might be” affected. In the end, I doubt that it would be in the interests of First Nations, the Crown or the ultimate goal of reconciliation for the duty to consult to be ground down into such small particles, obscuring the larger “upstream” objectives described in *Haida*.<sup>41</sup> Few other cases have considered the possible scope of a municipal duty to consult.<sup>42</sup>

Two other decisions made by the SCC in 2017 add further ambiguity to the municipal role. The SCC had previously decided that the procedural aspects of the duty could be delegated to third parties.<sup>43</sup> In *Chippewas of the Thames* and *Clyde River*, the SCC held that the Crown may rely on administrative bodies (in these cases, the National Energy Board) to satisfy the duty to consult. The courts note that the Crown must supplement consultation processes where necessary to ensure that the duty to consult is adequate.<sup>44</sup> An administrative agency may also assess the adequacy of its consultation process, unless the authority to do so is explicitly removed by statute.<sup>45</sup> In such cases, the body is understood as representing the Crown in regard to consultation. Some academics have argued that these decisions establish that a municipality can represent the Crown and that the province may rely on the administration of municipal planning processes in discharging its duty.<sup>46</sup>

While the SCC has yet to consider the issue directly, a number of legal academics have analyzed whether or not municipalities ought to or do in fact hold that duty. Kaitlin Ritchie suggests that, were municipalities to take on that duty, it would water down the nation-to-nation relationship, thereby undermining the treaty and other relationships established between the Crown and Indigenous nations.<sup>47</sup> Felix Hoehn and Michael Stevens argue that, given the evolution of

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<sup>41</sup> *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379 [*Neskonlith*] at 72.

<sup>42</sup> See eg *Morgan v. Sun Peaks Resort Corporation* [2013] BCSC 1668; *Squamish* *supra* note 22; *Cardinal v Windmill Green Fund LPV*, 2016 ONSC 3456 [*Cardinal*].

<sup>43</sup> *Clyde River*, *supra* note 27; *Chippewas*, *supra* note 32; *Haida Nation*, *supra* note 11.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Felix Hoehn & Michael Stevens, “Local Governments and the Crown’s Duty to Consult” (2018) 55:4 *Alta L Rev* 971; Imai & Stacey, *supra* note 40.

<sup>47</sup> Kaitlin Ritchie, “Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation” (2013) 46:2 *UBC L Rev* 397.

municipal autonomy, and given the fact that third parties have been put into positions where they are in effect an arm of the Crown, municipalities do in fact hold the duty to consult and accommodate. Angela D'Elia Decembrini and Shin Imai advance that local governments must consult with Indigenous peoples impacted by development decisions and, if they do not, the Province must step in.<sup>48</sup> In practical terms they state that, “the municipality cannot proceed with a project until the duty to consult has been fulfilled.”<sup>49</sup> They observe that in Ontario and British Columbia, for example, municipalities are expected to consult and the provinces rely on municipalities to do so, and that municipalities and First Nations have long held agreements with one another.<sup>50</sup>

Decembrini and Imai’s analysis points to the fact that provinces have a duty. In relation to planning laws, specific legislation is enacted at the provincial level, but power is generally delegated to local and regional municipalities with differing degrees of oversight. Despite the fact that municipalities have delegated planning responsibility, few provinces have clarified how local governments are meant to conduct consultations with First Nations and Indigenous communities.<sup>51</sup> The Province of Ontario sets out the specific rules that define the obligations of municipalities, the purposes of guiding planning documents, such as official plans, and the requirements for public consultation.<sup>52</sup> While the purported position of Ontario’s Ministry of Municipal Affairs and Housing is that “municipalities have a duty to consult in some circumstances,”<sup>53</sup> little information is provided to these local governments regarding the scope of the duty, the roles of municipal, regional and provincial bodies, and how local governments should engage with Indigenous communities.

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<sup>48</sup> Angela D'Elia Decembrini & Shin Imai, “Supreme Court of Canada Cases Strengthen Argument for Municipal Obligation to Discharge Duty to Consult: Time to Put Neskonalith to Rest” (2019) 56:3 *Alta L Rev* 935.

<sup>49</sup> *Ibid* at 945.

<sup>50</sup> *Ibid*; Imai & Stacey, *supra* note 40.

<sup>51</sup> Dorries, *supra* note 6; “Discussions at Evergreen Mid-Sized Cities Researcher & Practitioner Roundtable” (16 May 2018), online: *Evergreen* <[www.evergreen.ca/tools-publications/mid-sized-cities-researcher-practitioner-roundtable-presentations](http://www.evergreen.ca/tools-publications/mid-sized-cities-researcher-practitioner-roundtable-presentations)>; Leela Viswanathan et al., “Are We There Yet? Making Inroads to Decolonize Planning Knowledge and Practices in Southern Ontario” (2013) 53:2 *Plan Canada* 20; David J. Sinson & P. Leigh Whyte, “Update on the Duty to Consult” (2016) 31:1 *Ontario Planning Journal* 22.

<sup>52</sup> *Planning Act*, RSO 1990, c. P.13.

<sup>53</sup> Ontario Ministry of Municipal Affairs and Housing, “Municipal-Aboriginal Relationships: Case Studies” (29 June 2018), online: <[www.mah.gov.on.ca/Page6054.aspx](http://www.mah.gov.on.ca/Page6054.aspx)>.

In 2020, the Province of Ontario released an updated version of the Provincial Policy Statement (PPS), a document that addresses land-use planning policies and decision-making abilities.<sup>54</sup> A PPS is a policy akin to a recommendation or guideline, with less weight than a law, but having considerable weight in local planning policies as well as particular decisions. The PPS states that it “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*.”<sup>55</sup> In addition, PPS section 1.2.2 states that “Planning authorities shall engage with Indigenous communities and coordinate on land use planning matters.”<sup>56</sup> Section 2.6.5 more specifically addresses heritage by stating: “Planning authorities shall engage with Indigenous communities and consider their interests when identifying, protecting and managing cultural heritage and archaeological resources.”<sup>57</sup> These bromides do not provide much guidance, nor a regulatory scheme to guide implementation. Since the PPS only includes vague generalities about planning with First Nations, it is not surprising that the province has provided limited guidance or training and few resources to instruct municipal planners in how to respectfully engage Indigenous governments and peoples. Moreover, the PPS does not explicitly state that municipalities have a procedural duty to consult and accommodate. There are no oversight mechanisms for ensuring that the PPS is used, appeal processes if it is not, nor information on how municipalities have interpreted provisions.

In addition, the legal and procedural aspects of the duty to consult are distinguished within jurisprudence. The legal duty rests with the Crown, which may delegate procedural requirements to other parties, determine the appropriate structure of the consultation process, and the manner in which it will fulfill its duty to consult.<sup>58</sup> Canadian provinces, including Ontario, are not always clear on when procedural requirements of the duty are delegated to municipalities and, if so, what steps local governments are expected to take to satisfy obligations. For example,

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<sup>54</sup> *Ontario Provincial Policy Statement*, OC 229/2020 (*Planning Act*) [PPS].

<sup>55</sup> PPS, *supra* note 54 at s. 4.3.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Gitxaala Nation v Canadam*, 2016 FCA 187 (CanLII), [2016] 4 FCR 418 at para 203. See also *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 (CanLII), [2019] 2 FCR 3 at para 516 [*Tsleil-Waututh*]; *Cold Lake First Nations v Alberta*, 2013 ABCA 446 at para 39 [*Cold Lake*].

Saskatchewan policy suggests a legal duty in some circumstances and a procedural duty in others, with little guidance in corresponding legislation.<sup>59</sup> The policy reads:

Municipalities are established by provincial legislation and exercise powers delegated by the Provincial Government. Municipalities may have a duty to consult whenever they independently exercise their legal authority in a way that might adversely impact the exercise of Treaty and Aboriginal rights and/or traditional uses on unoccupied Crown land or other lands to which First Nations and Métis have a right of access. In cases where the municipality is the proponent of a development, the Government can assign procedural aspects of the consultation to the municipality, as it may with any other proponent.<sup>60</sup>

Unlike Ontario, assistance and policy guidance is available to local governments in Saskatchewan in exercising the duty.<sup>61</sup>

The lack of provincial direction is meaningful. According to the courts, where there is a duty, “it must be approached systemically and comprehensively.”<sup>62</sup> Planning legislation and provincial planning statements in general set out consultation obligations, including notice, public meeting requirements, dissemination of required materials, and opportunities for public comment.<sup>63</sup> The Crown may rely on regulatory bodies and tribunals to partially or completely fulfill the duty to consult, but the Crown remains ultimately responsible for ensuring that the duty is fulfilled.<sup>64</sup> Even where a regulatory body, such as the National Energy Board, has been found to have the necessary procedural and remedial powers to consult and accommodate Indigenous nations, the

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<sup>59</sup> Government of Saskatchewan, “First Nation and Métis Consultation Policy Framework” (2010), online: <[publications.gov.sk.ca/documents/313/98187-Consultation%20Policy%20Framework.pdf](http://publications.gov.sk.ca/documents/313/98187-Consultation%20Policy%20Framework.pdf)> [Government of Saskatchewan].

<sup>60</sup> Government of Saskatchewan, *supra* note 59 at 8.

<sup>61</sup> Association of Municipalities of Ontario, “Municipal Governments and the Crown’s ‘Duty to Consult’” (2019), online: <[www.amo.on.ca/AMO-PDFs/Reports/2019/AMO-Discussion-Paper-Municipal-Governments-and-the.aspx](http://www.amo.on.ca/AMO-PDFs/Reports/2019/AMO-Discussion-Paper-Municipal-Governments-and-the.aspx)> at 14-15 [AMO].

<sup>62</sup> *Saugeen*, *supra* note 25.

<sup>63</sup> AMO, *supra* note 61 at 10.

<sup>64</sup> *Haida*, *supra* note 11 at paras 51 and 53; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 40; *Rio Tinto*, *supra* note 20 at para 56; *Clyde River*, *supra* note 27 at paras 1 and 21.

Crown cannot delegate its ultimate responsibility to fulfill the duty, and cannot “rely unwaveringly upon the Board’s findings and recommended conditions.”<sup>65</sup> If the body in question has insufficient statutory powers to fulfill the duty, or has not provided adequate consultation and accommodation, the Crown must take additional steps to do so, either by “filling any gaps on a case-by-case basis or more systematically through legislative or regulatory amendments.”<sup>66</sup>

It remains unclear how this jurisprudence applies to municipal decisions in areas like planning, where local governments have been delegated significant responsibility, but have been granted little guidance on how to fulfil the duty. Courts are clear that, where regulatory bodies are involved in consultation, the Crown must inform implicated Indigenous groups about the nature of the process in order for Indigenous groups to meaningfully engage in consultation.<sup>67</sup> The Crown is expected to approach the duty systematically, and should “not simply adopt an unstructured administrative regime” to fulfill the duty.<sup>68</sup> In *Brantford v Montour*, the Ontario Superior Court of Justice confirmed that Ontario’s municipal governments can carry out procedural aspects of the duty to consult, but that the responsibility of the process and funding remains with the province.<sup>69</sup>

The result of this legislative and judicial uncertainty are mixed messages from municipalities. A provincial advocacy body called the Association of Municipalities of Ontario (AMO) has released an official report stating that municipalities do not have a legal duty to consult and procedural requirements are imprecise.<sup>70</sup> Communications from municipalities now include legal disclaimers stating that the municipality does not have a duty to consult, but that they are doing some consultations to be proactive.<sup>71</sup> Some municipalities in Ontario have decided that they do

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<sup>65</sup> *Clyde River*, *supra* note 27 at para 34. See also *Tsleil-Waututh*, *supra* note 58 at paras 491 and 493; *Haida*, *supra* note 11 at para 53.

<sup>66</sup> *Clyde River*, *supra* note 27 at paras 22-23; *Chippewas*, *supra* note 32 at paras 32 and 44; *Tsleil-Waututh*, *supra* note 54 at para 517.

<sup>67</sup> *Clyde River*, *supra* note 27 at para 23; *Chippewas*, *supra* note 32 at para 44.

<sup>68</sup> *Haida*, *supra* note 11 at para 51. See also *Saugeen*, *supra* note 23 at para 20.

<sup>69</sup> *City of Brantford v. Montour et al*, 2010 ONSC 6253.

<sup>70</sup> AMO, *supra* note 61.

<sup>71</sup> Carolyn King, Former Chief of the Mississaugas of the New Credit First Nation, Personal Conversation (March 2018).

have a duty to consult.<sup>72</sup> Indigenous communities are caught in the shuffle of the cat-and-mouse game of who must exercise the duty.

In Ontario, quasi-judicial decisions have not adequately clarified the legal landscape. The Ontario Municipal Board (OMB), which became known as the Local Planning Appeals Tribunal (LPAT) in 2017, is a quasi-judicial body first created in 1906 that has sweeping power to oversee the planning practices of local governments in the areas of municipal conduct and railways and, ultimately, to challenge municipal planning decisions.<sup>73</sup> For years, municipalities objected to the OMB – it was widely seen as a vehicle to overrule municipal planning decisions.

Problematically, given the province’s position as Crown, the restructuring and renaming of the OMB in 2017 did not provide robust consultation for Indigenous communities, despite the many changes that impact Indigenous communities.<sup>74</sup> This quasi-judicial body has made a number of decisions concerning municipal consultation of Indigenous communities, including the question of whether consultation was adequate,<sup>75</sup> whether the manner and form of consultation and the scope of the duty may vary,<sup>76</sup> and whether the duty to consult requires a separate process. On this latter point, the LPAT has determined that the consultation of Indigenous peoples may be adequate if regular community consultations include Indigenous participants.<sup>77</sup> While some Indigenous communities have found success at the LPAT, overall it is an expensive, time-consuming process that is ill-suited to replace meaningful consultation.<sup>78</sup> If Indigenous peoples/communities are being treated as if they were garden variety neighbours—whose voices

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<sup>72</sup> Town of Midland (Ontario), “First Nations, Indigenous and Aboriginal Consultation: Town of Midland Official Plan Review Interim Report” (2016), online: <[www.midland.ca/Shared%20Documents/OPR%20-%20FIRST%20NATIONS%20Consultation%20Report%2016-12-16%20FINAL.pdf](http://www.midland.ca/Shared%20Documents/OPR%20-%20FIRST%20NATIONS%20Consultation%20Report%2016-12-16%20FINAL.pdf)> [Town of Midland].

<sup>73</sup> While the LPAT will be housed, staffed and directed in the same way as the OMB, the legislation introduced changes that result in more deference to city council decisions. Please note that at the time of writing, the Province of Ontario released proposed legislation suggested a return to OMB rules. This proposed bill also did not make any reference to municipal consultation with First Nations.

<sup>74</sup> Note e.g. those who object to municipal council decisions must establish a record of dissent very early in the process since the LPAT will conduct its reviews based on documentary evidence and in the absence of witnesses.

<sup>75</sup> *Elliot Lake Development Corporation v The Serpent River First Nation*, 2011 ON OMB PL110021.

<sup>76</sup> *Burleigh Bay Corporation v North Kawartha (Township)*, 2015 CanLII 63200 (ON LPAT).

<sup>77</sup> *Cardinal*, *supra* note 42.

<sup>78</sup> Nancy Kleer, Lorraine Land & Judith Rae, “Bearing and Sharing the Duty to Consult and Accommodate in the Grey Areas in Consultation: Municipalities, Crown Corporations and Agents, Commissions, and the Like,” Report (Toronto: Olthuis, Kleer, Townshend LLP, 2011) at 20, online: <[oktlaw.com/drive/uploads/2016/10/njkGreyAreas.pdf](http://oktlaw.com/drive/uploads/2016/10/njkGreyAreas.pdf)>. See also *Kimvar Enterprises Inc. v Simcoe (County)*, [2007] OMBD No 842; *Re Town of Saugeen Shores Official Plan; Amendment No. 13*, 58 OMBR 257; *Ontario (MTO) v Garden River First Nation*, 50 OMBR 44, 58; *Ontario Heritage Act*, RSO 1990, c 0.18. On licensing, see O Reg 8/06.

are respectfully heard by the LPAT but their demands/suggestions most often go unheard—then that’s a problem, constitutionally.

### **Problems with the duty to consult in land use planning context**

The legal landscape of the duty to consult and its application to municipalities is murky at best, but in any case, it is an inadequate tool in urging governments to model a nation-to-nation relationship between Indigenous peoples and the Crown. Fundamentally, the duty to consult and accommodate is particularly ill-suited to municipalities given the Indigenous populations that live within and adjacent to municipalities.

The city as we know it is rooted in Western notions of property law and governance.<sup>79</sup> Colonial cities are sites of displacement, often originating as Indigenous communities with their rich access to resources and mobility.<sup>80</sup> Systematic campaigns by colonial powers pushed Indigenous nations from urban centres, with land and rights eradicated. Indigenous boundaries do not map along municipal ones and particular localities may hold political, spiritual, and economic meaning to Indigenous communities.<sup>81</sup> Many First Nations were pushed outside of cities in the creation of colonial cities, with the result that there may or may not be treaty relationships and Indigenous claims within and adjacent to cities.<sup>82</sup> About half of all Indigenous peoples live within cities across Canada and there are a broad and diverse range of Indigenous peoples who may or may not have connections with the adjacent First Nations.<sup>83</sup> Moreover, First Nations have treaty and land interests such as reserves, urban reserves, and fee simple title at the urban scale,

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<sup>79</sup> Sarem Nejad et al., “‘This is an Indigenous city; why don’t we see it?’ Indigenous urbanism and spatial production in Winnipeg” (2019) 63:3 *The Canadian Geographer* 413.

<sup>80</sup> Victoria Jane Freeman, *‘Toronto Has No History!’ Indigeneity, Settler Colonialism and Historical Memory in Canada’s Largest City* (Toronto: University of Toronto, 2010) [unpublished].

<sup>81</sup> S. Yvonne Prusack, Ryan Walker & Robert Innes, “Toward Indigenous Planning? First Nation Community Planning in Saskatchewan, Canada” (2015) 21:3 *Journal of Planning Education and Research* 1.

<sup>82</sup> Dorries, *supra* note 6; Christopher Alcantara & Jen Nelles, *A Quiet Evolution : The Emergence of Indigenous-Local Intergovernmental Partnerships in Canada* (Toronto: University of Toronto Press, 2016).

<sup>83</sup> “Report of the Royal Commission on Aboriginal Peoples, Volume 2: Restructuring the Relationship” (1996), online: <data2.archives.ca/e/e448/e011188230-02.pdf> at 263 [“RCAP”]. The RCAP defines ‘urban community of interest’ as a collectivity that emerges in an urban setting, includes people of diverse Aboriginal origins, and ‘creates itself’ through voluntary association.



both within and adjacent to municipalities.<sup>84</sup> In some cities, Indigenous-led organizations have statutory mandates in the areas, such as in child welfare and education.<sup>85</sup> As such, there is no uniform reality for Indigenous-municipal relationships across Canada as each legal space is unique.

The duty to consult's insistence on mapping the strength of a claim along a spectrum of weak to strong and then overlaying the strength of the duty owed makes little sense in the context of a municipality. For a strong claim to apply under the duty to consult, ongoing use or occupation by Indigenous peoples must be established, which ignores situations where First Nations were forcibly removed decades or centuries ago and municipal planning processes were introduced that led to private ownership, creation of parks, and other initiatives.<sup>86</sup> The duty to consult also assumes a singular First Nation that can make decisions on behalf of a particular group of people.<sup>87</sup> The duty may not consider urban Indigenous populations as self-organized, self-determining that have political communities distinct from on-reserve Indigenous governments.<sup>88</sup> In short, the duty to consult and accommodate does not account for the urban Indigenous reality.

Outside of the municipal context, there are numerous criticisms of the duty to consult that lay question to its suitability as a framework to guide Indigenous-settler relations, even though it has been beneficial for First Nations in some respects.<sup>89</sup> First, the courts have stated that the goal of the duty to consult and accommodate is to achieve "reconciliation."<sup>90</sup> However the term has not been given a definable legal meaning.<sup>91</sup> What this term means, and to whom, is only vaguely

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<sup>84</sup> Mary Jane Norris, Stewart Clatworthy & Evelyn Peters, "The Urbanization of Aboriginal Populations in Canada: A Half Century in Review" in Evelyn Peters and Christopher Anderson, eds, *Indigenous in the City: Contemporary Identities and Cultural Innovation* (Vancouver: UBC Press, 2013) [*Indigenous in the City*].

<sup>85</sup> Y. D. Belanger, "Breaching Reserve Boundaries: *Canada v. Misquadis* and the Legal Creation of the Urban Aboriginal Community," E. J. Peters & C. Anderson (eds.), *Indigenous in the City: Contemporary Identities and Cultural Innovation* (Vancouver: UBC Press, 2013), pp. 69-87 [Belanger].

<sup>86</sup> Sir Wildred Laurier, "Indian Act Amendment." Canada, Parliament, *House of Commons Debate*, 101. 11th Parliament, 3rd Session (1911, April 10).

<sup>87</sup> Belanger, *supra* note 85.

<sup>88</sup> *Ibid.*

<sup>89</sup> See e.g. Dwight G. Newman, *Revising the Duty to Consult Aboriginal Peoples* (Purich Publishing: 2014); Rachel Ariss, Clara MacCallum Fraser & Diba Somani, "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?" (2017) 13:1 MJSDL 1; Felix Hoehn & Michael Stevens, "Local Governments and the Crown's Duty to Consult" (2018) 55:4 *Alta L Rev* 971.

<sup>90</sup> *Chippewas*, *supra* note 32.

<sup>91</sup> *R v. Van der Peet*, [1996] 2 S.C.R. 507.

explored and, to many Indigenous peoples, leaves out the acknowledgement of the colonialism that underpins our legal system. Mariana Valverde and Adriel Weaver write that reconciliation is “purged of its potential to challenge colonial violence” and is instead “a statement whose logical corollary, apparently, is that the Crown must act decently not because of international human rights norms but because of its internal, self-imposed honour.”<sup>92</sup> The judicial understanding of reconciliation is measured by settler colonial courts of appeal through judges, not the Crown, with judges as auditors or evaluators. Similarly, Robert Hamilton and Joshua Nichols observe that if the Supreme Court acknowledged that the relationship between the parties is indeed nation-to-nation, the appropriate doctrine would no longer be a duty to consult and accommodate.<sup>93</sup>

Second, the duty to consult does not apply to the law-making process, from the development of legislation to its enactment.<sup>94</sup> In *Mikisew Cree*, decided in 2018, the SCC decided in a fractured decision that duty to consult and accommodate does not require governments to consult with Indigenous communities in the law-making process.<sup>95</sup> The duty as it is understood allows for Crown legislation to be instituted without any engagement with Indigenous peoples, evidenced by the legislative changes that resulted in LPAT similarly point to an absence of consideration of Indigenous peoples. The Province’s recent reforms to planning adjudication could have been an opportunity to meaningfully and respectfully engage with Indigenous communities and to clarify the role of municipalities. *Mikisew Cree* poses serious questions about the strength of the duty to consult and accommodate as the basis of the nation-to-nation relationship.<sup>96</sup> This oversight exemplifies John Borrows’ analysis that “First Nations must comply with provincial laws which they have no real role in crafting or administering.”<sup>97</sup> It is meaningful that New Zealand’s

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<sup>92</sup> Mariana Valverde & Adriel Weaver, “The Crown Wears Many Hats’: The Blackboxing of Sovereignty in Canadian Aboriginal Law” in Kyle McGee, ed, *Latour and the Passage of Law* (Edinburgh: Edinburgh University Press, 2015) at 108.

<sup>93</sup> Robert Hamilton & Joshua Nichols, “The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult” (2019) 56:3 *Alta L Rev* 729.

<sup>94</sup> *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 51 [*Mikisew Cree*].

<sup>95</sup> *Ibid.*

<sup>96</sup> *Rio Tinto*, *supra* note 20. See also *Port Colborne v Nyon Oil Inc.*, 2010 ONSC 3693 at para. 6: “The Ontario Municipal Board has authority to hear and determine all questions of law or fact within its jurisdiction”.

<sup>97</sup> John Borrows, “Canada’s Colonial Constitution” in John Borrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) [Borrows & Coyle].

Supreme Court rejected this approach, holding that any challenges involving identifiable Māori rights are justiciable before courts, including legislative development.<sup>98</sup>

Interestingly, the majority in *Mikisew Cree* carved out an important exception for subordinate legislation, regulations and rules, stating that such conduct is “clearly executive rather than parliamentary.”<sup>99</sup> To date, there is no case law on what this exception means in relation to municipalities and their engagement with First Nations and Indigenous peoples. However, in his analysis of this exception, Nigel Bankes, cited in *Mikisew Cree*, observed that the lack of applicability of the duty to consult to law-making “does *not* speak more generally and inclusively to that category of decisions known as delegated legislative decisions, i.e. rule-making whether in the form of regulations, rules, adoption of land use plans etc.”<sup>100</sup> Bankes states, “Such decisions cannot benefit from arguments of parliamentary privilege and such decisions are in principle subject to judicial review in the ordinary course.”<sup>101</sup> Since municipalities are considered to be administrative bodies under Canadian law, provinces may delegate a procedural requirement to consult in respect of their bylaws or land use plans, while retaining, as Crown, the legal duty. Any recognition of municipalities as having a legal duty to consult would need to answer whether bylaws would be considered regulations or rules, or legislation.

Third, the duty to consult does not acknowledge the existence and operation of Indigenous laws or planning approaches. Borrows distinguishes between Indigenous law, which consists of legal orders that are rooted in Indigenous societies, and Aboriginal law, which is “a body of law made by the courts and legislatures that largely deals with the unique constitutional rights of Aboriginal peoples and the relationship between Aboriginal peoples and the Crown” and that is largely found in colonial instruments. Indigenous law may include relationships to land, stories, customs, deliberation processes, and codes of conduct, although “care must be taken to not oversimplify Indigenous societies by presenting each group’s laws as completely isolated and self-contained. Law, like culture, is not frozen.”<sup>102</sup> Canadian law, as expressed through

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<sup>98</sup> *Ngāti Whātua Ōrakei Trust v Attorney General* [2018] NZSC 84.

<sup>99</sup> *Mikisew Cree*, *supra* note 94.

<sup>100</sup> N. Bankes, “The Duty to Consult and the Legislative Process: But What About Reconciliation?” (2016) (online), at p. 5, cited at *Mikisew Cree*, *ibid* at para 51.

<sup>101</sup> *Ibid*.

<sup>102</sup> John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 9.

legislation, reinforces the colonial oppression of Indigenous peoples by omitting Indigenous law and cultural frameworks.<sup>103</sup> Indigenous approaches fundamentally differ from the existing top-down practices of consultation and accommodation.<sup>104</sup> As Marie Battiste and James Youngblood Henderson explain, Indigenous law challenges the construction of knowledge that is oversimplified, is imposed on a broad range of peoples, or is codified into a definition.<sup>105</sup> As Borrows states, processes must incorporate the principles of co-existence, co-operation, and respect, rather than competition or dominance.<sup>106</sup> Instead, the duty to consult is exercised as top-down, with itemized checklists as opposed to engagement with Indigenous laws and planning approaches.

Fourth, the duty to consult does not incorporate the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>107</sup> UNDRIP enshrines the principle of “free, prior and informed consent,”<sup>108</sup> and requires states to establish and implement “a fair, independent, impartial, open and transparent process...to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources...”<sup>109</sup> As former UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya states, “the idea that consultation is only required on lands recognized as Indigenous lands under domestic law is misplaced, since commensurate with the right to self-determination and democratic principles, and because of the typically vulnerable conditions of Indigenous peoples, the duty to consult with them arises whenever their particular interests are at stake, even when those interests do not correspond to a recognized right to land or

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<sup>103</sup> Christie, *supra* note 3; Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough, ON: Broadview Press, 2005); Napoleon, *supra* note 3; Patricia A Monture-Okanee & Mary Ellen Turpel, “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice” (1992) 26 UBC L Rev 239.

<sup>104</sup> Rosie Simms et al., “Navigating the Tensions in Collaborative Watershed Governance: Water Governance and Indigenous Communities in British Columbia, Canada” (2016) 73 *Geoforum* 6.

<sup>105</sup> Marie Battiste & James Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich, 2000); John Borrows, “With or Without You: First Nations Law (in Canada)” (1995-1996) 41 *McGill L J* 629.

<sup>106</sup> John Borrows, “Living Between Water and Rocks: First Nations, Environmental Planning and Democracy” (1997) 47:4 *U of T L J* 417; Deborah McGregor, “Coming Full Circle: Indigenous Knowledge, the Environment, and Our Future” (2004) 28 *American Indian Quarterly* 385; Leanne Simpson, “Anticolonial Strategies for the Recovery and Maintenance of Indigenous Knowledge” (2004) 28:3 *American Indian Quarterly* 373; Deborah McGregor, “Linking Tradition Knowledge and Environmental Practice In Ontario” (2009) 43 *Journal of Canadian Studies* 69.

<sup>107</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) at 15 [“UNDRIP”].

<sup>108</sup> UNDRIP, *supra* note 107 at art 19. See also Gonzalez, *supra* note 29 at 16.

<sup>109</sup> UNDRIP, *supra* note 107 at art 27.

other legal entitlement.”<sup>110</sup> Michael Coyle argues that attention to the dialogic framework within which Indigenous concerns are addressed during consultations, and particularly to Indigenous peoples’ participation in developing that framework, is key to managing those conflicts effectively and to reconciling current Canadian law and practice with the principles of the U.N. Declaration.<sup>111</sup>

UNDRIP is meaningful more broadly. Current Canadian law on remedies for violations of Indigenous peoples’ rights is quite limited.<sup>112</sup> It is limited in part because, under Canadian law, the protection of Indigenous rights is limited. The ability of governments to justifiably limit these rights means that, even if a claimant successfully proves an interference with a right, it often seems as though the courts defer to the government’s arguments on the need to limit the right, undermining the goal of constitutionally entrenching these rights. In contrast to domestic jurisprudence, international human rights bodies have ordered fairly robust remedies that both vindicate rights and are meant to deter government from engaging in activities that further violate Indigenous peoples’ rights.

Of all of the federal and provincial governments in Canada, British Columbia is the only one that has implemented UNDRIP.<sup>113</sup> However, UNDRIP only applies at the provincial level, and it is unclear as yet if or how this will bind the provincial Crown in the duty to consult processes or extend to municipalities.<sup>114</sup> As is explored next, many Canadian local governments have endorsed UNDRIP, suggesting an alternative framework for relationships with Indigenous peoples and communities at the municipal level.

### **Indigenous-municipal relationships as the foundation of local planning frameworks**

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<sup>110</sup> James Anaya, *Report to the Human Rights Council, A/HRC/12/34* (14 July 2009) at 21.

<sup>111</sup> Michael Coyle, “From Consultation to Consent: Squaring the Circle?” (2016) 67 UNBLJ 235. See also Sarah Morales, “Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult” in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws Special Report* (Centre for International Governance Innovation, Waterloo: 2017).

<sup>112</sup> Brenda Gunn, “Remedies for Violations of Indigenous Peoples’ Human Rights” (2019) 69 UTLJ 150.

<sup>113</sup> “B.C. Declaration on the Rights of Indigenous Peoples Act,” online: *British Columbia* <[www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples](http://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples)>.

<sup>114</sup> Gonzalez, *supra* note 29 at 16.

Much of the discussion around Indigenous–municipal relations since the Supreme Court of Canada decision, *Haida*, has revolved around the legal concept of consultation—specifically, the duty of the Crown to consult and accommodate Indigenous communities when a decision or action will have a real or potential impact on that community’s Aboriginal or treaty rights.<sup>115</sup>

Before *Haida* was decided, the 1996 Report of the Royal Commission on Aboriginal Peoples (RCAP) acknowledged the significant number of Indigenous residents and agencies in large cities, as well as the emergence of community of interest governments representing Indigenous peoples within urban areas. The RCAP defines ‘urban community of interest’ as a collectivity that emerges in an urban setting, includes people of diverse Indigenous origin that ‘creates itself through voluntary association. RCAP envisaged urban government reform to take better account of Indigenous perspectives and interests through means such as ensuring Indigenous representation on decision-making bodies, establishing Indigenous Affairs Committees, and ensuring co-management of urban initiatives.<sup>116</sup> RCAP reported that municipal agencies rely on Indigenous agencies focused on social services and housing to deliver services to Indigenous peoples, however these agencies are often underfunded.<sup>117</sup> In some cities, Indigenous-led organizations have statutory mandates in some areas, such as child welfare and education.<sup>118</sup> These entities are delivering services and are not formal governments, although courts have recognized their importance in representing the interests of urban Indigenous peoples.<sup>119</sup>

Municipalities across Canada have introduced governance changes, largely after 2010, such as the introduction of Indigenous affairs offices at a senior level within a municipal bureaucracy; the existence of Indigenous advisory councils to offer advice on city policy and initiatives; mandatory training on Indigenous cultural competency; the endorsement or passage of UNDRIP; action plans to address the Calls to Action of the Truth and Reconciliation Commission (TRC); and initiatives to co-manage or include place-naming in parks. Some Canadian cities have also

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<sup>115</sup> Borrows & Coyle, *supra* note 91.

<sup>116</sup> RCAP, *supra* note 83 at 439.

<sup>117</sup> Joanne Heritz, “Urban Aboriginal Peoples in Canada: Beyond Statistics,” CPSA Conference 1-3 June 2010), online: <<https://www.cpsa-acsp.ca/papers-2010/Heritz.pdf>>.

<sup>118</sup> Belanger, *supra* note 85.

<sup>119</sup> *Ibid.*

decided that they have a duty to consult.<sup>120</sup> Others have agreed to sit in ceremony to resolve the challenges of bylaws and policies that infringe on ceremonies.<sup>121</sup> It is unclear whether the duty to consult has led to the introduction of these initiatives or whether other forces, such as RCAP, TRC, the advocacy of Indigenous peoples and governments, or court decisions such as *Canada v. Misquadis*, prompted change.

Although not Crown governments, municipal governments in Ontario have introduced a number of measures to focus on relationship-building. The City of Toronto, for example, has increasingly included Indigenous perspectives in its governance model and started to build relationships with Indigenous communities.<sup>122</sup> In 2010, the City affirmed recognition and respect for the unique status and cultural diversity among the Aboriginal communities of Toronto, including recognition of their inherent rights under the Constitution.<sup>123</sup> In 2014, Toronto City Council endorsed the 94 Calls to Action from the TRC Report and requested the development by staff of concrete actions to fully implement the calls to action that explicitly recognize the role of municipal governments.<sup>124</sup> These measures included the adoption of cultural competency training for the Toronto civil service, a 10-year capital project to incorporate Indigenous place-making in Toronto parks, and a roadmap and report card regarding the implementation of plaques to commemorate Indigenous places. In addition, City Council has adopted an ongoing ceremony at its meetings and approved a public campaign to educate residents of the Year of Truth and Reconciliation Proclamation.<sup>125</sup>

While challenges remain and a nation-to-nation relationship is far from having been created, the City of Toronto has gone beyond provincial requirements in an important way by adopting

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<sup>120</sup> See e.g. Town of Midland, *supra* note 72.

<sup>121</sup> Doug Anderson & Alexandra Flynn, “Rethinking ‘Duty’: The City of Toronto, a Stretch of the Humber River, and Indigenous-Municipal Relationships” (forthcoming in (2020) 58:1 *Alta L Rev*).

<sup>122</sup> City Council, *Development of an Urban Aboriginal Strategy for Toronto* (5 August 2009).

<sup>123</sup> City Council, *Draft City of Toronto Statement of Commitment to Aboriginal Communities in Toronto: Building Strong Relationships, Achieving Equitable Outcomes* (27 May 2010).

<sup>124</sup> See e.g. City Manager, “Fulfilling Calls to Action from Truth and Reconciliation Commission Report” (1 April 2016), online: <[www.toronto.ca/legdocs/mmis/2016/ex/bgrd/backgroundfile-91816.pdf](http://www.toronto.ca/legdocs/mmis/2016/ex/bgrd/backgroundfile-91816.pdf)> [“Fulfilling Calls”]; City Council, “Implementing Indigenous Cultural Competency Training in the Toronto Public Service” (24 May 2017), available online: <[www.toronto.ca/legdocs/mmis/2017/mm/bgrd/backgroundfile-103955.pdf](http://www.toronto.ca/legdocs/mmis/2017/mm/bgrd/backgroundfile-103955.pdf)>.

<sup>125</sup> City Council, *Aboriginal Year of Truth and Reconciliation and Establishment of Aboriginal Office* (March 19, 2014).

UNDRIP in 2013.<sup>126</sup> UNDRIP is widely seen by Indigenous activists, scholars, and lawyers as a best practice, and has not yet been approved by the Province of Ontario. Toronto's actions are noteworthy for two reasons. First, UNDRIP goes well beyond the duty to consult in its recognition of Indigenous rights, most importantly in relation to the requirement of FPIC, which means that Indigenous peoples have the right to say no to a project proposal. While the City of Toronto has not specifically set out how and when FPIC applies to project approval, the adoption of UNDRIP remains an important step in signaling the City's desire to build respectful reciprocal relationships with Indigenous communities. Second, following the release of the TRC report, the City of Toronto acknowledged Article 11 of UNDRIP.<sup>127</sup> Importantly, the City noted "staff's legal duty to consult," particularly in relation to environmental assessments and heritage.<sup>128</sup> The City has taken an important step by asserting an obligation on itself that arguably only the province or a court could impose. Toronto's commitments haven't yet been judicially tested.

Toronto, like a number of other municipalities in Ontario and elsewhere, has created an Indigenous Affairs Office meant to oversee place-based relationship building with Indigenous communities.<sup>129</sup> The Indigenous Affairs Office helps to guide the municipal government in its relationships with Indigenous peoples, including urban Indigenous communities, neighbouring First Nations and Métis Nation of Ontario, and Indigenous organizations.<sup>130</sup> While this does not replace the need for the City's planning department to engage in its own relationship-building work with the Indigenous communities and nations that ought to be consulted with on planning projects, what it does do is start to build a corporate knowledge and awareness about the

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<sup>126</sup> Fulfilling Calls, *supra* note 124.

<sup>127</sup> UNDRIP, *supra* note 107. Article 11 states that: (1) Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature; and (2) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

<sup>128</sup> Fulfilling Calls, *supra* note 124.

<sup>129</sup> See e.g. Thunder Bay's Aboriginal Liaison Office, and their Vision: Maamawe – All Together, online: <[www.thunderbay.ca/en/city-hall/aboriginal-relations.aspx](http://www.thunderbay.ca/en/city-hall/aboriginal-relations.aspx)>.

<sup>130</sup> See e.g. Fulfilling Calls, *supra* note 110; City Council, "Implementing Indigenous Cultural Competency Training in the Toronto Public Service" (24 May 2017), online: <[www.toronto.ca/legdocs/mmis/2017/mm/bgrd/backgroundfile-103955.pdf](http://www.toronto.ca/legdocs/mmis/2017/mm/bgrd/backgroundfile-103955.pdf)>; and City Council, "Proposed Aboriginal Office for the City of Toronto" (3 November 2017), online: <[app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.EX26.25](http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.EX26.25)>.



important relationships that are to be cared for by the City. The City of Toronto is at the early stages of developing an awareness of its history, of the Indigenous peoples who live, work, and have connections to the space, of agreements made in order for settlers to live here, as well as when and how it has overstepped its bounds and neglected to uphold its responsibilities.

### **Moving forward in Indigenous-municipal legal relationships**

The fact that Indigenous communities and municipalities are examining how they can move forward in relationship-building beyond the duty to consult does not sidestep the role of provinces, who can constitutionally obligate, or at minimum urge, local governments in moving towards respectful, reciprocal relationships. For example, the Province of British Columbia has initiated a full review of planning processes across the province to modernize them in a manner that both ensures collaboration with Indigenous governments informed by UNDRIP and the Truth and Reconciliation Commission Calls to Action, and involves local governments.<sup>131</sup> The goal is “to ensure consistency and co-ordination between local government and provincial-First Nations-led land use planning.”<sup>132</sup> The Government of British Columbia and the Union of British Columbia Municipalities (UBCM), which represents local governments in the province, signed a Memorandum of Understanding in 2018 that commits to “sincere and honest engagement” and notes that local governments are “key partners in achieving true, lasting reconciliation with Indigenous peoples.”<sup>133</sup> Further to this objective, UBCM provides support to local governments, First Nations, and Indigenous communities seeking sustained relationship-building, including workshops that provide opportunities for local governments to respond to the Calls to Action delivered by the TRC’s Report in 2013.

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<sup>131</sup> British Columbia Ministry of Forest, Lands, Natural Resource Operations and Rural Development, “Modernizing Land Use Planning in British Columbia: Working with Communities” (19 February 2020), online: <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/factsheets/mlup\\_working\\_with\\_communities\\_factsheet\\_mar2020.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/factsheets/mlup_working_with_communities_factsheet_mar2020.pdf)>.

<sup>132</sup> *Ibid.*

<sup>133</sup> “Memorandum of Understanding Between the Province of British Columbia and the Union of British Columbia Municipalities on Engagement with UBCM and Local Governments on Treaty Agreements, Non-Treaty Agreement and Indigenous Initiatives” (10 September 2018), online: <[https://www.ubcm.ca/assets/Resolutions~and~Policy/Policy/First~Nations~Relations/2018\\_ubcm\\_mou\\_signed.pdf](https://www.ubcm.ca/assets/Resolutions~and~Policy/Policy/First~Nations~Relations/2018_ubcm_mou_signed.pdf)>.

Unfortunately, there are few resources aimed at the development of relationships between Indigenous and municipal communities. This includes funding for joint economic development planning and the inclusion of staff and advisory boards at the municipal level to develop and track relationship-building. The foundational knowledge required to build such relationships – knowledge of Indigenous law – must be fostered within local government frameworks and are needed to prevent continued colonization.<sup>134</sup> Various organizations across Canada are engaging in proactive work to facilitate and support relationship-building between municipalities and Indigenous communities. The Federation of Canadian Municipalities (FCM), in partnership with the Council for the Advancement of Native Development Officers (Cando), runs the Community Economic Development Initiative (CEDI) as well as the Community Infrastructure Partnership Project (CIPP). Through multi-year partnerships, both programs enable formalized relationships between Indigenous communities, municipalities, and relevant stakeholders to be established and to flourish. In Ontario, a charitable organization called the Shared Path Consultation Initiative launched the Indigenous-Municipal Engagement Program, a pilot program to provide similar opportunities for formalized relationship-building. The Shared Path’s work focuses on creating opportunities for Indigenous and non-Indigenous communities to gather in order to examine, discuss, and deliberate about current policies around land use and relationships, as well as the changing legal landscape of consultation. These efforts move beyond the duty to consult and accommodate to a framework of relationship-building.

## **Conclusion**

Ontario’s 2020 PPS states that municipal planning decisions “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*.”<sup>135</sup> It is unclear what that means for municipalities in this policy or in supporting legislation. The argument that the duty to consult and accommodate ought to remain with the Crown given the nature of the nation-to-nation relationship between the Crown and Indigenous nations is compelling. Yet, there is much work to be done to consider

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<sup>134</sup> Madeleine Koch and Janice Barry, “Treaty Principles are Planning Principles: Learning from the Experiences of Manitoban Planning Practitioners” (2016) 56:4 *Plan Canada* 22.

<sup>135</sup> PPS, *supra* note 54 at section 4.3.

First Nations and Indigenous peoples in municipal planning process. I suggest that the duty to consult and accommodate is an incomplete framework to guide the work that needs to be done between First Nations and local governments; conversations regarding the obligations of municipal governments should not be framed in terms of whether or not they hold a duty to consult. Instead, I urge that a deeper commitment to reciprocal, respectful relationships, not simply a duty to consult and accommodate, be used to guide municipal and planning decisions, affirming Chief Archibald's statement that "across Canada, municipal governments and neighbouring First Nations are developing stronger relationships."<sup>136</sup> These relationships, aimed at "long-term prosperity and peace" are built through "lasting friendships, relationships and partnerships on the principles of truth and reconciliation."<sup>137</sup>

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<sup>136</sup> Archibald, *supra* note 4.

<sup>137</sup> *Ibid.*