

The Crown Duty to Consult and  
Ontario Municipal-First Nations Relations:  
Lessons Learned from the  
Red Hill Valley Parkway Project

Clara MacCallum Fraser  
*Independent Researcher*

Leela Viswanathan  
School of Urban and Regional Planning  
*Queen's University*

*Canadian Journal of Urban Research*, Volume 22, Issue 1, Supplement pages 1-19.  
Copyright © 2013 by the Institute of Urban Studies.  
All rights of reproduction in any form reserved.  
ISSN: 1188-3774

*Résumé*

Cet article examine comment l'Obligation de consulter incombant à la Couronne est mise en œuvre lors des processus d'urbanisme en Ontario. Les auteurs présentent une étude du projet de la promenade Red Hill Valley à Hamilton (Ontario). Dix-sept entrevues semi-structurées servent à examiner le rôle de l'urbanisme municipal vis-à-vis l'obligation de consulter. Les entrevues démontrent que la création de liens entre la municipalité et les Premières nations profitent aux deux partis, même si la législation offre très peu d'encadrement pour ce type de pratique. Pour faire progresser la situation, les urbanistes doivent faire face aux défis et aux opportunités qui découlent de l'instauration de l'obligation de consulter dans les processus d'urbanisme. Les auteurs concluent que la relation municipalité-Premières nations requiert un changement tant législatif que culturel dans la manière dont on pratique l'urbanisme ainsi que dans ce qu'il serait souhaitable d'inclure dans les programmes d'études en urbanisme.

*Mots clés:* consultation, les Premières nations, l'urbanisme municipal, Ontario.

*Abstract*

This paper examines ways in which the Crown Duty to Consult is implemented in Ontario planning processes. The authors present the Red Hill Valley Parkway project in Hamilton, Ontario and draw from seventeen semi-structured interviews to examine the role of municipal planning in relation to the duty to consult. The interviews reveal that engaging in municipal-First Nations relations is a mutually beneficial practice, although legislation offers minimal guidance for this practice. In order to move forward planners must confront the challenges and opportunities for municipalities to implement consultation with First Nations in planning processes. The authors conclude that municipal-First Nations engagement will require both legislative change and a cultural shift in how planning is done and what is included in professional planning curricula.

*Keywords:* consultation, First Nations, municipal planning, Ontario.

## INTRODUCTION

In 2007, the Ipperwash Inquiry resulted in a report that was a watershed moment for defining provincial and First Nation relations<sup>1</sup> in Ontario; it recommended that the province develop new ministries (including the Ministry of Aboriginal Affairs) and encourage municipalities to develop plans specific to the needs and interests of First Nations. Justice Linden wrote in Recommendation 26 of the Ipperwash Inquiry Report that “[t]he provincial government should encourage municipalities to develop and use archaeological master plans across the province” (Ipperwash Inquiry 2007, 2:147). Despite this call for provincial policy and governance shifts, tensions remain between municipalities and First Nations (Peters 2011) since land use developments continue to be approved that would harm First Nations sacred sites located on traditional territories encompassed within municipal boundaries. After all, “Aboriginal rights and entitlements...do not form part of the taken-for-granted governance framework of municipal governments” (Abele et al. 2011, 114). Only the Crown (the federal and provincial governments) owes a legal ‘Duty to Consult’ First Nations when their interests (Aboriginal and Treaty rights) are at stake. Municipalities do not owe a legal duty to consult First Nations since they are “creatures of the Province,” however they do hold statutory obligations since the Crown can delegate its procedural duties to third parties (as noted in the law and interpreted for the most part to be municipalities). While some cities are making inroads in developing urban policy involving First Nations in the process of development and implementation (Peters 2002; Walker, Moore, and Linklater 2011), there appears to be little legislative incentive for municipal governments to put in the financial and personnel resources that are needed to build ongoing working relations with First Nations, and to create a space for positive, proactive engagement (Walker 2008).

Through an examination of the Red Hill Valley Parkway Project, this paper investigates the extent to which the planning process in Ontario as well as legislated policies and consultation protocols ensure that the Crown and municipalities (by virtue of being a third party of the Crown) uphold their legal duty to consult with First Nations. This discussion is important for planners, first, for those working in provincial and federal ministries since consultation with First Nations is a legal obligation of the Crown. Second, in addressing this issue proactively, conflict that may otherwise occur between municipalities and First Nations could be mitigated. Land use is central to how and where First Nations and settler peoples live. Therefore, the consequent processes must be examined continually to ensure that they best serve the needs and rights of the people who are indigenous to, and live on, traditional territories. Although there are other Aboriginal peoples to be considered when examining land use planning and consultation, this paper focuses on First Nations, who are referred to in the *Indian Act* (R. S. C. 1985) as “Indians”; therefore, we will use the more commonly accepted term First Nations.<sup>2</sup>

This paper begins with an exploration of the history of First Nations-Crown relations and early land use planning, followed by the development of the duty to consult and current land use practices in Ontario. This section is followed by a discussion of the Red Hill Valley Parkway Project, drawing from both primary and secondary research sources, and which uses Newman's (2010) framework of analysis, a checklist, to explore how duty to consult practices are made manifest in this specific planning case. The final section of the paper pinpoints challenges to First Nations-municipal relations and presents possibilities for moving forward and making proactive changes to the ways in which Ontario municipalities engage First Nations in planning processes. While our analysis is specific to an Ontario case, we consider it to be a contribution to a larger discourse about the possibilities for partnerships between First Nations and municipalities across Canada in planning and policy making.

## CONTEXT

### *I. First Nations-Crown Relations*

When the British Crown sought to maintain power over the French colonialists, they allied with Indigenous peoples; the *Royal Proclamation of 1763* articulated the protection of "Indian" lands to restrict European settlement and land use (Flanagan et al. 2010). With the *Royal Proclamation*, the British Crown established itself as the ruling government, asserting its sovereignty by assuming land use jurisdiction. At this early stage in the Crown's governance of the land, Flanagan, et al. point out that "[t]here was no attempt at negotiation or even consultation with the natives of North America regarding property rights which the Proclamation attributed to them" (2010, 58). Despite questionable motives and unequal relations, those agreements between the Crown and First Nations peoples were significant as they entailed significant Aboriginal rights (as noted in the law) regarding land tenure, land use, and rights to hunting and fishing, among others (Borrows 2005; Stanger-Ross 2008; Williams 1994).

Since the establishment of the *Royal Proclamation*, treaties and agreements have been struck between First Nations and the Crown, dealing mainly with possession of land and the use of resources (Borrows 2005,10; Miller 2009). This assertion of Crown power over such an integral part of First Nations culture replaced the early egalitarian Crown relations with Indigenous peoples (Williams 1994) with antagonistic relations that would characterize the following era. The *Royal Proclamation* formulated, contained, and implemented policies purporting methods that shaped public space and future land use and settlement in Canada. One method was the creation of Indian reserves, the intention being to set aside land on which First Nations would reside, and which would be restricted from settlers. These borders, however, did not necessarily encompass all of the First Nations' traditional territory, and so their Aboriginal rights extended beyond the borders of reserves. Numerous Supreme

Court of Canada cases have demonstrated that the Crown took further control of that land, Europeans continued to settle on this “protected” land, and promises made to First Nations peoples with respect to land use were undermined and broken (Borrows 2005; Coyle 2005; Harring 1992).

As a result of the Crown’s continued *laissez-faire* attitude toward land use and settlement, settlers took over vast tracts of land in Ontario, including First Nations lands beyond the Indian reserves, that had never been intended for European and other non-First Nation settlement. This settler-occupation of land was legitimized as titles were acquired from the Crown, towns grew, and municipalities formed. The *Royal Proclamation*, with all its complex power dynamics, along with the treaties, represent some of the earliest forms of land use planning, defining where European settlement was allowed and where land was restricted, how resources were to be used, and how First Nations interests were to be protected from alienation and exploitation (Dorries 2012). However, any positive First Nations-Crown relations that had existed were continuously undermined by external interests, setting the stage for potential future conflict.

The mid-twentieth century represented a particularly low point in Indigenous/Aboriginal-Crown relations, as “Aboriginal claims were not even recognized by the federal government as having any legal status” (*R. v. Sparrow*, [1990] 1 S.C.R. 1075). Conflicts between the Crown and First Nations peoples have come to characterize twentieth-century First Nations-Crown relations, and have manifested in sometimes-violent standoffs between First Nations protesters and police forces, litigation, and the very recent protests under the “Idle No More” banner, for instance. Tension between the municipal residents, police forces, and First Nations was demonstrated in 1990 at Oka, when the Quebec municipality planned, without consulting First Nations, to develop a golf course and condominium residence on traditional Mohawk land, which included sacred grounds (Obamsawin 1993). Similarly, though without any deaths, a proposed residential development in 2006 at Caledonia triggered protests from Six Nations due to an outstanding land claim (DeVries 2011). In both cases, the underlying issue was that Aboriginal rights and land claims were being systematically ignored by the planning process; however, the media focused largely on the extremely sensitive public issue of ownership of space, and whose ownership was legitimate (Obamsawin 1993; DeVries 2011). This kind of conflict is not unique, and various cases have been brought to the Supreme Court of Canada, testifying to improper land use by municipal, provincial, and federal governments. These land use conflicts, as well as habitual destruction of First Nations heritage due to municipal growth and construction (Williamson 2010), show how Aboriginal and treaty rights, even in municipal contexts, have been continually undermined and neglected. It was at this point, in the twenty-first century, that the Crown’s duty to consult and accommodate Aboriginal peoples came to the fore in the courts.

## II. Duty to Consult and Accommodate

In 1982, the *Constitution Act* was implemented, within which were entrenched First Nations and treaty rights in Section 35. With this, the law established that these rights could not be violated unless there was sufficient evidence that the Crown was justified (Coyle 2005). But what are these rights that are, ostensibly, being protected? Section 35 articulates that treaty rights are those that “exist by way of land claims agreements or may be so acquired,” and although this legislation indicates that only “existing” rights (or those that “may be so acquired”) are acknowledged, the Supreme Court of Canada has made it clear such rights “will still be considered to exist unless they have been clearly and plainly extinguished by a federal law” (Coyle 2005, 23). Treaty rights upheld by the Courts include activities like fishing for livelihood, as well as practicing traditions and customs among First Nations. According to Coyle, the variety of promises made through treaties in Ontario means that there is broad scope for treaty claims by First Nations in the province (2005, 24). The rights of First Nations enable them to pursue traditional activities containing “an element of practice, custom or tradition which is integral to the distinctive culture of the Aboriginal community claiming the right” (*R. v. Van der Peet*, [1996] 9 W.W.R. 1 (S.C.C), para. 46). Given the number of First Nations that *could* assert their Aboriginal rights, the Courts began to urge negotiation and consultation rather than litigation, in order to address claims and related issues (Coyle 2005; Rowinski 2009).

In 2004, the Supreme Court of Canada established that the Crown owed a duty to consult and, where appropriate, to accommodate Aboriginal rights when there is evidence that the Crown has knowledge that a development will impact these rights. For example, in *Haida Nation v. British Columbia* (2004) the Supreme Court decided that the Crown—in this case, the provincial government—was obliged to consult the Haida Nation prior to issuing a new Tree Farm License. It argued further that the Crown indeed had sufficient knowledge of the “potential Aboriginal rights and title,” which might have been impacted by the province’s “strategic planning for utilization of the resource” (*Haida Nation v. British Columbia*, 2004, para 7).

Dwight G. Newman (2010, 16) articulates five elements that are foundational to understanding the duty to consult; these are:

1. the duty to consult arises prior to proof of an Aboriginal rights or title claim or in the context of uncertain effects on a treaty right;
2. the duty to consult is triggered relatively easily, based on a minimal level of knowledge on the part of the Crown concerning a possible claim with which government action potentially interferes;
3. the strength and scope of the duty to consult in particular circumstances lies along a spectrum of possibilities, with a richer consultation requirement arising from a stronger *prima facie*

- Aboriginal claim and/or a more serious impact on the underlying Aboriginal right or treaty right;
4. within this spectrum, the duty ranges from a minimal notice requirement to a duty to carry out some degree of accommodation of the Aboriginal interests, but it does not include an Aboriginal veto power over any particular decision; and
  5. a failure to meet a duty to consult can lead to a range of remedies, from an injunction against a particular government action altogether (or, in some instance, damages) but more commonly an order to carry out the consultation prior to proceeding.

The kind of consultation required is not simply a matter of addressing First Nations “interests”, but rather, the Crown must consult with First Nations regarding their legal rights. It is necessary to assert that such crucial consultations cannot be lumped into public consultation; First Nations have distinct, constitutional rights, which must be acknowledged on a different plane than the so-called “public interest” (Newman 2010).

### *III. Land Use Planning in Ontario and the Duty to Consult*

There are a number of ways to understand the connection between Ontario land use planning practices and the Crown’s duty to consult. First, the space organized by municipal land use planners in Ontario is quite often of great interest to First Nations for whom the municipal boundaries overlap with their traditional territories. Second, municipal land use activities often trigger certain processes that involve the provincial or federal governments, thereby engaging the Crown. Third, municipal planners are beginning to realize that they need to be made more aware of the role they play practicing and implementing the duty to consult and recognizing the history of First Nations overall. For example, with colonisation, First Nations peoples in Canada were relegated largely to reserve areas, while settler communities resided in increasingly urban areas—a planning process referred to as *municipal colonialism* by Stanger-Ross (2008). However, First Nations are increasingly living in cities (Peters 2011), and with the implementation of the *Municipal Act, 2001*, municipalities are recognized as “responsible and accountable levels of government” and have the ability to “determine the appropriate mechanisms for delivering municipal services to their communities” (Ontario 2012); these urban communities would include First Nations peoples (Walker 2008).

The allocation and organization of land use and settlement patterns—the production of space, the first point of connection between land use planning and the duty to consult—is primarily implemented by municipal planners, overseen by the Province, and guided with a variety of tools that are easily available to planners and the public through the Ministry of Municipal Affairs and Housing website. Simply put, governed by the *Ontario Planning Act, R.S.O. 1990*, municipalities are responsible for

making planning decisions locally that will “determine the future of communities” (Ontario 2010, 3). Regardless of whether these decisions are made within a single-tier municipality such as Toronto, an upper-tier one such as Temiskaming, or a lower-tier municipality such as Bracebridge, such decisions affect individual communities as well as the relations among communities.<sup>3</sup> As a result of provincial policies directing growth, municipal planners focus on concepts such as densification, curbing urban sprawl, and housing availability and affordability. In the formulation and implementation of land use plans and the approval of development applications, planners have “considerable power to influence urban land development” (Dorries 2012, 13). As noted by Barry and Porter (2012) planners have the capacity to create documents that impact actions and behaviours, shaping the growth of the municipalities and regions. Furthermore, planning boards in northern Ontario are given the power, by the Planning Act, to “adopt official plans and pass zoning by-laws for unorganized territory within their planning areas,” (Ontario 2010, 3). Thus, municipalities can impact a wide area of land within the province, it is here where the connection between municipal land use planning and the duty to consult and accommodate can be drawn.

The second demonstration of the connection between municipal planning and the duty to consult is the fact that various planning activities trigger Crown involvement, which may, depending on the situation, include a duty to consult. In spite of the fact that municipal land use planning organizes and impacts significant areas of land in Ontario, often affecting First Nations interest, the province provides municipalities with little guidance on how to conduct land use planning in compliance with this particular facet of the law. How and when this consultation should take place often remains unclear, at least until a municipal development triggers the Crown’s involvement. In such cases, these triggers are most commonly found in the *Environmental Assessment Act* (1990), the *Ontario Planning Act* (2005), and the *Heritage Act* (1990). The *Cemeteries Act* (1990) and the *Water Resources Act* (1990) make mention of the importance of engagement, however the clearest guidance to be found at the moment, remains with the first three acts mentioned.

The third connection between municipal land use planning and the duty to consult is the changes in responsibility held by Ontario municipalities. To begin with, the *Ontario Planning Act*, R.S.O. 1990 states that municipal councils, “shall have regard to, among other matters, matters of provincial interest,” including areas ranging from ecological systems and agricultural resources, to the development of safe communities, for example. Of particular interest are “the co-ordination of planning activities of public bodies” (Part I 2.m), “the resolution of planning conflicts involving public and private interests” (Part I 2.n), and “the appropriate location of growth and development” (Part I 2.p) (*Ontario Planning Act*, R.S.O. 1990). Doumani and Foran point out that, in articulating provincial power over municipal actions through the “interests of the province” section, the province is exercising “direct control” (2011, 33); this document demonstrated the top-down approach to planning in Ontario. However, with the implementation of the *Municipal Act, 2001*, which recognized cities as “re-

sponsible and accountable levels of government” and enabled them to “determine the appropriate mechanisms for delivering municipal services to their communities” (Ontario 2012, section 1), the relationship between province and municipality has shifted. Now that municipal governments have heightened power over the provision of services and the decisions regarding urban land development, and given that the Crown has a great deal of knowledge of First Nation interests, despite the fact that they remain constitutionally “creatures of the province” (the *British North America (BNA) Act*, 1867, s.9(2)), it seems plausible that Crown duty could extend to municipalities, beyond the existing statutory obligations. A recent court case has brought this contentious issue to light: in *Neskonlith Indian Band v. The City of Salmon Arm et al.*, 2012, BCCA 379, the court maintains that a duty to consult does not extend to municipalities. However, there are voices within the legal field arguing that the situation is far from clear, and that there is in fact room to argue the case that the duty could extend to municipalities (Rowinski 2009, 15; Promislow 2013, 73). Without any changes made to current land use planning practices, and if land use planning is understood as being shaped by the policies and objectives of the state, it will continue to be seen as “implicated not only in ongoing processes of dispossession, but also in the normalization of non-Indigenous land occupation” (Dorries 2012, 15).

#### THE RED HILL VALLEY PARKWAY PROJECT AND THE DUTY TO CONSULT

In order to examine the Red Hill Valley Parkway Project and to assess its meaning in terms of First Nation-municipal relations and the duty to consult, primary and secondary research was conducted. Literature and policy documents were reviewed to assess broadly the issues related to planning and First Nations peoples in Ontario, in provinces where newer treaties have been established, and internationally. There was a strong counter-colonial thread running through the literature that was reviewed across the fields of planning, geography, political science, linguistics, education, law, and policy legislation. Primary research consisted of 17 interviews conducted over the telephone and in person. Participants were selected using purposive sampling (Berg 2009, 50) and were contacted using publicly available information. Twelve planners, academics and accredited and non-accredited planning practitioners were interviewed with the remaining interviews involving two archeologists and three lawyers. Eleven of the respondents were settler, non-First Nations, whereas six self-identified as First Nation. Participants were asked permission for the interview to be audio recorded. One participant chose not to be recorded, and for concerns regarding research accuracy, no quotations were drawn from that interview. In order to protect the confidentiality of participants, when directly quoted, we categorized our interview participants with the label ‘P’ for participant, and a corresponding number from 1 to 17; however these numbers do not reflect the sequence of interviews. The researchers ensured that all quotes have been verified and validated by the respective participants prior to publication.

The City of Hamilton is a single-tier municipality, located on the western tip of Lake Ontario, at the heart of the Greater Golden Horseshoe. The region has been occupied for the past ten millennia, and the establishment of European settlements (which would become cities such as Hamilton, Toronto, and other cities) along the shores of Lake Ontario, was a continuation of ancient settlement patterns (Williamson 1998, 25; 52). The Six Nations of the Grand River First Nation (“Six Nations”) and the Mississaugas of New Credit First Nation (“the Mississaugas”) make up the area’s major First Nations communities, with populations living on reserves south-west of Hamilton and within cities and towns in the region overall. Both First Nations have asserted land claims in the region. Hamilton, like many other southern Ontario municipalities, sits entirely within the area of a number of asserted traditional and treaty territories: the Nanfan Treaty of 1701 (Six Nations), the Mississaugas of New Credit First Nation Traditional Territory, and the Six Nations of the Grand River Haldimand Tract.

On November 3, 2007, the City of Hamilton opened the Red Hill Valley Parkway with a ceremony, attended by the Mayor of Hamilton, provincial representatives, City Council, City staff, the local community, as well as members of the area’s First Nations. The Haudenosaunee traditional council of Six Nations undertook a wampum exchange with Confederacy chiefs to mark the agreements made with the City (City of Hamilton 2007). From the project’s initiation in 1956 to its opening in 2007, it faced challenges posed by changing provincial governments, environmental opposition, and opposition from the Six Nations community and Haudenosaunee (Murray 2004). After various environmental studies were conducted, the Red Hill Valley monitoring project was implemented, a set of agreements was created between the Haudenosaunee and the City to govern the Valley, and a Joint Stewardship Committee was established made up of City staff and Six Nations members. Once completed, the project received several awards, and the agreements serve as a model for other municipal-First Nations agreements.

The Red Hill Valley Parkway project serves as a useful example of municipal-First Nations relations and the duty to consult. Using Newman’s<sup>4</sup> five-point checklist of elements to understanding the duty, we examine the Red Hill Valley Parkway project further. First, Newman (2010, 16) points out that the duty arises “prior to proof of an Aboriginal rights or title claim.” In this case, there was already a clearly stated assertion of traditional and treaty territories, as mentioned above, thus it was evident that there was significant First Nation interest in the Red Hill Valley (Murray 2004). Second, as Newman goes on to point out, the duty is triggered with a minimal level of Crown knowledge that there could be a conflict due to a particular development. Unlike the Haida case, the Red Valley Parkway Project was driven by the municipal government. Nevertheless, similar interests were manifest regardless of Crown involvement, and given that municipal planning must be in line with Provincial interests, the Crown’s responsibility was, in turn, procedurally delegated. In this case, there was more than minimal knowledge of potential for conflict (Mulkewich and Oddie 2009).

Third and fourth, not only is there a spectrum of the “strength or scope of the duty,” in terms of the strength of the Aboriginal claim or seriousness of the potential impact, there is also a range of what is demanded of the government, from minimal notifications to accommodation of Aboriginal interests (Newman 2010, 16). As noted by P8:

Duty to consult by provinces or business via [the] provinces or Feds should include municipalities simply because it’s all about development and partnerships. I’ve always found that when municipalities understood this, they were quite anxious to become partners and neighbours to that type of progress. Years ago there was a shift in identifying bands as First Nations, coming partly out of the political stance that we are all equals in this; there are three founding nations to the country of Canada (Interview, March 22, 2011).

In the case of the Red Hill Valley, although the City of Hamilton was not forced by the Crown to engage with those First Nations with interests in the area, it became clear that the project would not move forward without some level of engagement and accommodation. The city government understood that there were First Nations with constitutional status and unique interests, unlike the general public, and thus they were integrated into the planning process differently than mere stakeholders (Smith 2008, 9). Consultation continued to take place after the project concluded, as the drafts of the Archaeology Management Plan were circulated among First Nation planning staff and elected and traditional councils, for feedback in a timely manner. Finally, as Newman’s fifth point articulates, if a government fails to meet its duty to consult, a number of remedies can be called upon. In this case, however, the City had engaged some of the interested First Nations before the situation transformed into a major conflict, thereby avoiding costly remedial work.

Ultimately, the municipal government fulfilled a duty to consult; however, it is significant that this did not take place until protests had occurred, and it was clear that since the city government had so much invested, it realized it had no choice. If this had not been a project fifty-years in the making then perhaps the city government would not have been so willing to work with the First Nations so progressively. As a result of this engagement, the planning process has been altered slightly, in that, on the one hand, the Mississaugas and the Six Nations staff have been involved in the creation of Hamilton’s Archaeology Management Plan; on the other hand, since the completion of the project, the Joint Stewardship Committee seems to have fallen by the wayside.

There is a growing realization that even if municipalities do not owe a legal duty to consult, the courts will have little difficulty finding them accountable if a case were taken to the Supreme Court (Rowinski 2009). Ultimately, while municipalities hold statutory obligations to consult, they do not owe a legal duty to

consult. It seems likely that this may change within the next few years, however, and as a result of this current lack of clarity, proactive engagement is by far the best plan of action (Abouchar 2011). Understanding how municipalities fit into the jurisdictional and governance framework of provincial planning is crucial to understanding their role in the duty to consult. As noted by P13, however, what is missing is clear guidance from the province by way of land use planning tools and policy:

It's not that [municipalities] don't want to consult or think less of First Nations, but they are dealing with a certain set of rules that doesn't incorporate the Duty to Consult. The Ministry of Municipal Affairs and Housing provides case studies, saying to go out and consult, but the examples that they give are those where there is a common interest, not where there is an obligation. Municipalities want to work together with First Nations to develop economic opportunities. So, sure, they'll draft protocols together, because their interests are aligned, [but] the provincial government needs to make up its mind and provide clear guidance to the parties (P13, interview, February 10, 2011).

#### MOVING FORWARD: CHALLENGES AND LESSONS LEARNED

Many interview participants have expressed a general feeling that improvements can be made to municipal-First Nations relations, even without leadership from the Crown. Municipal planners are learning from their experiences, archaeologists are working with First Nations and municipalities to improve their relations with connected First Nations, and developing proactive planning documents like Archaeology Management Plans. Through the challenges and lessons learned in cases such as the Red Hill Valley Parkway development, and learning from forward-thinking communities, it may be possible to improve the way that planning in Ontario incorporates First Nations and their interests into these processes.

First, it is clear that project-by-project engagement, though perhaps initially less costly than long-term planning, is limiting in that it does not establish a stable working relationship upon which to ground progressive collaboration, and prevent potential conflict between municipalities and First Nations. This kind of temporary measure maintains the engagement process as a reactionary, defensive, or mitigative one. P14 noted that although planning work happens on a project-by-project basis, it “should be an overall process...currently it continues to be ad-hoc and this sort of engagement can be intimidating for staff who are worried about making mistakes and misunderstanding cultural differences” especially without having a sense of the big picture, and provincial direction (Interview, February 20, 2011). As noted by P13, “it comes down to money—if there is infrastructure funding, there's a line for Aboriginal

consultation... however, if there is no Crown trigger, and the municipality goes with the consultation anyway, they are stepping beyond their requirements” (Interview, February 10, 2011).

One planner involved in engagement among the City of Hamilton and the Six Nations and Mississaugas found that the unfamiliar nature of the municipal-First Nations relationship meant that the city left it to the Six Nations, the most prominent First Nations voice protesting the Red Hill Valley Parkway project, to contact other interested First Nations. What this planner eventually realised was that the Six Nations had not invited the Mississaugas into the process, despite their interest in the land. Engagement between the City and the Mississaugas was initiated later on in the process, thus demonstrating to that planner that City staff must become more cognizant of all the First Nations with rights and interests within their boundaries, in order to avoid excluding relevant groups from the process. Highlighting his own First Nation identity, the interview participant P8 noted how, “[b]y virtue of the BNA act and the Constitution Act... and the treaties, and the relationship that has existed since first contact, negotiations have to take place with a recognition that we [First Nations] are equal to the federal government” (Interview, March 22, 2011). P17 noted that as a result of frequent staff changes at municipalities, there is no institutional memory of what has been done, or what has started and that, “relationships between municipal governments and nearby First Nations need to be established so that when issues do arise, there is a healthy foundation on which to ground any negotiations and problem solving,” (Interview, February 11, 2011).

It follows, then, that one of the most common points from interview participants was the need for sustainable relationships, but that these relationships require a level of engagement for which there is little capacity, either for municipal staff or First Nations staff. Quite often, this proactive engagement is a result of individuals who see this as an important issue, and will take on extra work. All interview participants commented on this capacity issue as being a roadblock to better relations. Indeed, although some municipalities are keen to engage with First Nations, P14 noted that there is little time to engage, and that the duty to consult serves mostly as a temporary solution to potential conflict, “as relationships take time; you have to follow up and be engaged in everyday events... and municipal planners already carry heavy loads” (Interview, February 20, 2011). Scheduling was also pointed to as a roadblock: while municipal planners work according to budgetary schedules, First Nations staff work with different schedules, and have different election calendars. Often municipal planners are eager to achieve goals much quicker than understaffed First Nations planning offices are able. “Scheduling a meeting at city hall” after all “is different than at a First Nations reserve” (P7, interview, February 21, 2011) and it can be difficult for city councils and band councils to develop working relationships because of their different perspectives of timelines (P3, interview, February 21, 2011).

First Nations planning staff are also inundated with notifications from numerous municipalities, creating an overwhelming amount of paperwork to be dealt with, even before talking can begin. P7 notes that there are “too many notifications and not necessarily ones that [they] are interested in as First Nations peoples,” (Interview, February 21, 2011). This sentiment was mirrored by P13 who noted that “there is excessive notification that isn’t always relevant, which means that First Nations are inundated with notification...there is a desire for a central registry” (Interview, February 10, 2011). Consequently, in order to find ways of stemming the flow of paperwork associated with notifications, some First Nations want to take action and they feel they can address this problem by contributing to the revision of the Planning Act and Provincial Policy Statements. “The way that [planning] is structured, First Nations are not notified until very late in the process... When the shovel is in the ground, all rules have been followed and the only thing they do is to address the concerns and mitigate [problems]” (P7, interview, February 21, 2011). When viewed together, these challenges make it difficult for municipal and First Nations exchanges to take place on equal footing, if at all. Some interviewees noted that there are conflicts between First Nations and municipal planners, and within First Nations, between traditional councils and elected councils. “The difference between how First Nations run things and how municipalities run things... further complicates consultation; chiefs take more time to come to decisions, and because of that longer time frame they may lose funding” that might come with certain development decisions (P3, interview, February 21, 2011).

There are a number of ways to counteract these challenges, which work towards demystifying processes and cultures among the different parties. To begin with, municipal planners can reach out to First Nations staff by inviting them to committee meetings, to which the public are welcome, in order to better understand the issues facing a particular municipality. Both P5 and P14 indicated that they found that the clearest guidelines for consultation came from communities themselves—that “First Nations are very willing to tell you how to engage properly, and [are] ... very excited whenever municipal government is willing to approach them” (Interviews, February 17 and February 20, 2011). Conversely, First Nations could invite municipal staff to similar events. Such reciprocal relations will rely on staff being interested, and seeing the benefit of this, in order to succeed—thus there must be more incentive from above for municipalities to build up such relations in this way. P1 notes that it is not that municipalities do not want to consult or that they think less of First Nations, but that they are dealing with a certain set of rules that does not incorporate a duty to consult:

[H]ere’s the dilemma with municipal-Aboriginal consultation. The municipalities are told to do it [to consult] early; told to do it at a strategic level. But at that point they don’t have enough information. All they can say is maybe one day in the

future someone may do something [with a particular piece of land]... And even if there is a project in the future, there may not be trigger for the Duty to Consult unless a [Provincial] approval or an environmental assessment is required. First Nations don't want to wait till then; they want to have a more hands-on role early in the process. (Interview, February 29, 2011)

In the same light, there must be heightened knowledge, among municipal and First Nations parties, but particularly on the part of City staff, of the First Nations with interests in their particular municipal lands. P8 notes that “the way to make meaningful relationships is to know about the community [and that] it's sometimes as simple as knowing the cultural traditions of the differing communities... Planners need to know the history of the land, how did it get to be the way it is today...” (Interview, February 22, 2011). Municipal staff must have increased awareness of the history of such First Nations in the area, their rights, as well as an understanding of cultural nuances. This knowledge will demonstrate goodwill and an earnestness to build an ongoing relationship. Ultimately, “history is number one... planners must know the history of colonization, specifically the Indian Act, reserve system, residential schools system and multigenerational effects that are present and ongoing. That is why First Nations want to talk about [first contact]. Failing to acknowledge that is an easy way to upset them,” (P12, interview, March 6, 2011). When municipalities and First Nations start to foster such positive relationships, then progressive planning can begin to take place. Saskatoon is one example of a municipality that has worked on building positive relations, and engages in partnership-building work “to demystify [how] First Nations [work] with city hall, creating a friendly environment, and trying to promote First Nations' involvement, and the idea that First Nations can take resources and invest them in the city.” (P16, interview, February 2, 2011; City of Saskatoon 2012).

## CONCLUSION

In this paper, we have addressed the issue of how the planning process in Ontario engages municipal planners with First Nations, and how to improve that engagement where it exists, and help foster it where it does not yet exist. A number of issues have emerged from this exploration, demonstrating a great need for further research and writing in this area. To begin with, there is a significant gap in planning literature when it comes to the role that land use planning has played in dispossessing and regulating Aboriginal peoples and their rights (Borrows 1997; Dorries 2012; Jojola 2008). Furthermore, there is a need for more literature focusing on the potential for not just statutory obligations, but a legal duty being extended to municipalities. Planners must stay abreast of developments such as the Neskonlith case in order to respond to the shifting context of planning. Such

research, when brought into the planning curriculum in Ontario, and the country at large, would represent a step towards nurturing a generation of planners with a more heightened awareness of the history and context of planning, and how First Nations play a significant role in contemporary land use planning and decolonizing practices (Porter 2010).

Since Ontario municipalities have increased decision-making capacity with respect to land that is part of a First Nations land claim, then there is a connection to be made with municipal land use planning, Aboriginal rights and the duty to consult must be made in practice. Simply put, municipalities are responsible for planning decisions locally that will “determine the future of communities” (Ontario 2010, 3). The planners interviewed noted that, in spite of an absence of clear guidance, it is evident that establishing and maintaining good relations between municipalities and First Nations is a pivotal starting point. Just as municipalities engage with parallel jurisdictions with similar interests, municipalities must engage with First Nations in that manner. Recognizing that municipal-First Nations engagement is more than simply a “duty” but in fact common sense will require both legislative change and a cultural shift in how planning is done and what is included in professional planning curricula.

#### ACKNOWLEDGMENTS

We thank the journal’s editors and the three anonymous reviewers who offered insight into drafts of this paper. Special thanks to Pam Palmater and Ron Keeble at Ryerson University for their valuable insights into this research, and to Fraser McLeod for his policy research assistance. This research was supported by the Social Sciences and Humanities Research Council of Canada, as well as the Ontario Graduate Scholarship Program.

#### NOTES

<sup>1</sup> The Government of Ontario established The Ipperwash Inquiry under the Public Inquiries Act. The Inquiry was mandated to investigate and report on events surrounding Dudley George, who was shot in 1995 during a protest by First Nations representatives at Ipperwash Provincial Park. George later died. It was also mandated to recommend ways to avoid future violence in similar circumstances. For more information, see <http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/index.html>

<sup>2</sup> Terminology is a complex and, at times, fraught issue. This article refers to Aboriginal peoples since it is discussing a legal issue, that of the duty to consult, and official documents surrounding this use ‘Aboriginal’ as a legal term covering all indigenous peoples in Canada. When referring to legislation we use the legal term. When referring to the First Peoples, we use the term ‘First Nations’.

<sup>3</sup> Municipalities are referred to as upper-, lower-, and single-tier municipalities according to their size, and the services provided. For more information, see [http://www.amo.on.ca/WCM/amo/AMO\\_Content/About/Municipal\\_101/Ontario\\_Municipal\\_Pages.aspx](http://www.amo.on.ca/WCM/amo/AMO_Content/About/Municipal_101/Ontario_Municipal_Pages.aspx)

<sup>4</sup> Newman's forthcoming (2013) edition of this text will address the issues facing municipalities with respect to the duty to consult.

## REFERENCES

- Abele, F., R. Lapointe, D. J. Leech, and M. McCrossan. 2011. Aboriginal People and Public Policy in Four Ontario Cities. In *Urban Aboriginal Policy Making in Canadian Municipalities*, ed. E. Peters 2011, 87-126. Montreal and Kingston: McGill-Queen's University Press.
- Abouchar, J. 2011. *Duty to Consult and Aboriginal Engagement*. Toronto: Willms and Shier Environmental Lawyers LLP.
- Barry, J., and L. Porter. 2012. Indigenous Recognition in State-based Planning Systems: Understanding Textual Mediation in the Contact Zone. *Planning Theory*, 11(2): 170-187.
- Berg, B. 2009. *Qualitative Research Methods for the Social Sciences*. Boston: Allyn and Bacon.
- Borrows, J. 1997. Living between Water and Rocks: First Nations, Environmental Planning and Democracy. *The University of Toronto, Law Journal*, 47(4): 417-468.
- . 2005. *Crown and Aboriginal Occupations of Land: A History and Comparison*. Toronto: Ipperwash Inquiry.
- City of Hamilton. 2007. Celebrating the completion of the Red Hill Valley Parkway. City of Hamilton Public Works, <http://www.hamilton.ca/NewsandPublications/NewsReleases/2007News/November/11-05-07ka.htm> (Accessed 4 February 2013).
- City of Saskatoon. 2012. Treaty Land Entitlement, [http://www.saskatoon.ca/DEPARTMENTS/Community%20Services/PlanningDevelopment/Documents/Future%20Growth/2012%20CofS\\_TLE%20Brochure\\_web.pdf](http://www.saskatoon.ca/DEPARTMENTS/Community%20Services/PlanningDevelopment/Documents/Future%20Growth/2012%20CofS_TLE%20Brochure_web.pdf) (Accessed 7 Feb 2013).
- Coyle, M. 2005. *Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future*. Toronto: Ipperwash Inquiry.
- DeVries, L. 2011. *Conflict in Caledonia: Aboriginal Land Rights and the Rule of Law*. Vancouver: UBC Press.
- Dorries, H. J. 2012. Rejecting the 'False Choice': Foregrounding Indigenous Sovereignty in Planning Theory and Practice. Unpublished PhD Dissertation. Toronto: University of Toronto.
- Doumani, R., and P. Foran. 2010. *Ontario Planning Legislation and Commentary*. Markham: LexisNexis.

- Flanagan, T., C. Alcantra, and A. Le Dressay. 2010. *Beyond the Indian Act: Restoring Aboriginal Property Rights*. Montreal: McGill-Queen's University Press.
- Haida Nation v. British Columbia*. (Minister of Forests) [2004] 3 S.C.R. 511.
- Harring, S. L. 1992. The Liberal Treatment of Indians: Native People in the Nineteenth Century Ontario Law. *Saskatchewan Law Review*, 56 (2): 297.
- Ipperwash Inquiry (Ont.). 2007. *Report of the Ipperwash Inquiry*. Vol. 1-4. Toronto: Published by Ministry of the Attorney General, Queen's Printer for Ontario. (Commissioner: Sidney B. Linden).
- Jojola, T. 2008. Indigenous Planning—An Emerging Context. *Canadian Journal of Urban Research*, 17(1) Supplement: 37-47.
- Miller, J.R. 2009. *Compact, contract, covenant: Aboriginal treaty-making in Canada*. Toronto: University of Toronto Press.
- Mulkewich, J., and R. Oddie. 2009. Contesting Development Democracy, and Justice in the Red Hill Valley. In *Environmental Conflict and Democracy in Canada*, ed. L. Adkin 2009, 243-261. Vancouver: UBC Press.
- Murray, C. 2006. *Aboriginal Consultation and Aboriginal Treaty Rights: Presentation to the Municipal Law Departments Association of Ontario*. Ontario: Secretariat for Aboriginal Affairs.
- Neskonlith Indian Band v. The City of Salmon Arm et al.*, 2012, BCCA 379
- Newman, D. 2010. *The Duty to Consult: New Relationships with Aboriginal Peoples*. Saskatoon: Purich Publishing, Ltd.
- Obamsawin, A. 1993. *Kanehsatake: 270 Years of Resistance*. Montreal: National Film Board. Ontario. Ministry of Municipal Affairs and Housing. 2009. *Municipal-Aboriginal Relationships: Case Studies*. Toronto: Queen's Printer of Ontario.
- . 2010. *Citizens' Guides: Land Use Planning*. Toronto: Queen's Printer of Ontario.
- . 2012. *Local Government- Municipal Act*. Toronto: Queen's Printer of Ontario.
- Ontario Planning Act*. 1990. [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90p13\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90p13_e.htm) (Accessed 9 February 2013).
- Peters, E. J. 2002. Our City Indians: Negotiating the Meaning of First Nations Urbanization in Canada, 1945-75. *Historical Geography*, 30: 75-92.
- . 2011. Aboriginal Public Policy in Urban Areas: An Introduction. In *Urban Aboriginal Policy Making in Canadian Municipalities*, ed. E. Peters 2011, 3-32. Montreal and Kingston: McGill-Queen's University Press.
- Porter, L. 2010. *Unlearning the Colonial Cultures of Planning*. London: Ashgate.
- Promislow, J. 2013. Irreconcilable? The Duty to Consult and Administrative Decision Makers. *Constitutional Forum constitutionnel*, 22(1): 63-79

- R. v. Sparrow*, [1990] 1 S.C.R. 1075
- R. v. Van der Peet*, [1996] 9 W.W.R. 1 (S.C.C.)
- Rowinski, J. 2009. *Developing Approval: Consulting with First Nations about Land Use*. Brooklin, ON: Law Office of John Rowinski.
- Smith, N. 2008. *First Nations' Interest and the Municipality: City of Hamilton Experience*. Toronto: Ontario Bar Association.
- Stanger-Ross, J. 2008. Municipal Colonialism in Vancouver: Planning and the Conflict over Indian Reserves, 1928-1950s. *Canadian Historical Review*, 89 (4): 541-580.
- Walker, R. C. 2008. Improving the Interface between Urban Municipalities and Aboriginal Communities. *Canadian Journal of Urban Research*, 17(1) Supplement: 20-36
- Walker, R.C, J. Moore, and M. Linklater. 2011. More than Stakeholders, Voices and Tables: Towards Co-Production of Urban Aboriginal Policy in Manitoba. In *Urban Aboriginal Policy Making in Canadian Municipalities*, ed. E. Peters 2011, 160-201. Montreal and Kingston: McGill-Queen's University Press.
- Williams, R. A. 1994. Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace. *California Law Review*, 82 (4): 981-1049.
- Williamson, Ron F., ed. 2008. *Toronto: A short illustrated history of its first 12,000 years*. Toronto: Lorimer.
- . 2010. Planning for Ontario's Archeological Past: Accomplishments and Continuing Challenges. *Revista de Arqueología Americana*, 28: 7-45.