INDIGENOUS—MUNICIPAL RELATIONS
BEYOND CONSULTATION

Clara MacCallum Fraser,
Faculty of Environmental Studies,
York University
“Canada’s formation is not a simple horror story; nor is it the product of a gloriously pure birth. Canada is simultaneously a good and bad place with contested foundations, though severe power imbalances make it much better for some people than others. [...] The truth is that Canada’s formation does not just rest on racism, force, and discrimination. Canada is also rooted in doctrines of persuasion, reason, peace, friendship, and respect. While Canada’s ongoing creation is deeply flawed, it also contains various positive qualities which enhance many lives.” (p. 19, Borrows, chpt 1 in Borrows & Coyle)

INTRODUCTION

I am a Scottish-Irish settler¹ Canadian, with roots in the cultural and institutional foundations of this settler nation. The focus of my work and research is on the intersection of land use planning and Aboriginal and treaty rights. As I learn more about my own family and cultural roots, and as I realize the privilege of living in this land, I see it as my responsibility to take the time to better understand the Indigenous history and current context of the place(s) I call home, and to endeavour to walk along a path of reconciliation. According to the Truth and Reconciliation Commission (TRC, 2015), reconciliation is about “establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country. In order for that to happen, there has to be awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour” (p.113). As I write this, I am on the territory of the Mississaugas of the New Credit First Nation.² This land hosts a patchwork-quilt of overlapping territories: as well as the Mississaugas, this is the traditional territory of the Haudenosaunee Confederacy and the Huron Wendat and Petun Nations. It is 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.³ Most recently, settler communities have made this place home, and called it Toronto⁴ within a province, within a federation—another collection of layered assertions of sovereignty. Such a personalized introduction to a discussion paper is rather unconventional; however, one lesson that has been shared repeatedly by the elders and authors I have met is that one must begin by sharing with her audience a little of where she is coming from, so they can better understand what she is sharing. As you read this, where are you sitting or standing, exactly? What is the name of that place? Whose territory, whose land are you on? These are questions that we must ask ourselves, as citizens of this nation, regardless of where we stand in cities across Ontario or Canada; residents, stewards, and leaders of these communities of all sizes are responsible for understanding on whose land they stand and the historical context that predated settler conquest.

¹ By “settler” I mean a non-Indigenous person and society. Throughout this paper I attempt to push back against the us v. them narrative, and the idea that these problems are “Indigenous problems.” On the contrary, “we,” all of us living on Turtle Island/North America, have inherited the strengths and weaknesses, the “problems”. I also make use of personal pronouns in an attempt to raise the notion of personal responsibility that I believe we each hold, as Canadians, to strive towards an understanding and practice of reconciliation.

² Wherever possible, I use the name of a Nation. When speaking more broadly, I use the terms Indigenous, unless referring to legal/government policies, in which case “Aboriginal” may be used. When referring to this land prior to European settlement I will refer to it as Turtle Island. When referring to it now, I may refer to both Turtle Island and Canada.

³ Adapted from the statement developed by the Elders Circle (Council of Aboriginal Initiatives).

⁴ Tkaronto is a Mohawk word meaning “a gathering place,” and its association with what is now Toronto has a circuitous history For more on this, see Jeff Gray’s article “A defining moment for tkaronto”
With a land acknowledgement, while we point to Indigenous autonomy, we also acknowledge an almost unbelievable history of loss, broken promises, and forgotten relationships. The tensions that exist now around “whose land this is” are not new, although since the assertion of European, and now Canadian, sovereignty, the balance of power has shifted unhealthily to favour the Canadian state to the extreme detriment of Indigenous peoples, leaving a landscape of broken treaties. While acknowledging traditional territories and starting to make public references to the presence of treaties has been a significant development for many people, and though this development has accompanied a shift in the formal tone of public discourse, there are many who criticize such land acknowledgements as hollow, arguing that they mostly serve to assuage settler peoples’ guilt over a colonial history without actually examining the personal and public implications of such an acknowledgment (Vowel/âpihtawikosisân, 2016; Marche, 2017). And so we must ask: when settler peoples articulate a land acknowledgment, how much does that act truly acknowledge the significance of land? Do we examine what land means to us? Do we examine the values that we each hold, which undergird our decisions around the ways that we choose to care for, and share land with, one another?

After hundreds of years of non-Indigenous settlement on this land, the relationship between settler and Indigenous societies is strained, to say the least. Through state-led and state-supported policy and actions, myriad Indigenous peoples have been alienated from their lands, practices and cultures, communities, and health and well-being. In order to get the attention of settler society, Indigenous communities have had to resort to legal actions (that is, once it was made legal for them to do so [RCAP, Vol.2, Part 2, Section 5.1.6]). The Truth and Reconciliation Commission (TRC) emerged out of the Indian Residential Schools Settlement Agreement in 2008, and the Royal Commission on Aboriginal Peoples was commissioned as a result of the violence that erupted at Oka, Quebec in 1990. Today, tensions remain high; however, interesting changes are afoot. Ontario’s Provincial Policy Statement of 2014 now makes reference to “Aboriginal interests,” enjoining planners to take note of Aboriginal and Treaty rights enshrined in the Constitution, and ensure their actions do not flout these rights. Many provinces have legislated policies or draft policies around consultation processes (Ariss, MacCallum Fraser, Somani, 2017), and some municipalities are taking proactive steps to establish good working relations with Indigenous Nations in whose territory they reside.6

Much of the discussion around Indigenous–municipal relations has revolved around the legal concept of consultation—specifically, the duty to consult and accommodate. Planners and city-builders are increasingly calling for clarification on what that “duty” actually means, and what their obligations are. While the Provincial Policy Statement (PPS 2014) now makes reference to Aboriginal and treaty rights, there is little guidance for planners to ensure these rights are incorporated at a lower level. While an explanation of the duty is necessary, rather than prioritize a (western) legalistic interpretation of relationships, this

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5 For more on the history, see the RCAP Report, especially “Part Two: False Assumptions and a Failed Relationship.”

6 See the Federation of Canadian Municipalities Community Economic Development Initiative
discussion paper will make use of the idea of relationship-building as a framework within which to discuss consultation. Part one of the paper will look at treaty-making as a way to illustrate both how and why Indigenous–non–Indigenous relationships soured, but also where there is potential for healing. Part two will look at the duty to consult and accommodate in order to examine one way in which these issues are being addressed currently. The conclusion will bring us to the question: “So what do we do now?” Here, we will explore what is perhaps needed in order to nurture good relations and walk along a path of reconciliation. As leading Indigenous and Aboriginal law specialist Dr. John Borrows points out, law is living; it grows and evolves as communities and societies grow and evolve (1997, 2010, 2016). It is society that shapes the law, not the other way around. How do we begin to make those changes in a good way?7

PART 1: THE FOUNDATIONS OF RELATIONSHIP-BUILDING

TREATIES

For the most part, we are indeed all treaty people. With the exception of a few nations who chose not to sign a treaty with settlers or whose territory includes unceded land, Canadians live on this land thanks to the generosity of Indigenous nations generations ago, who chose to welcome the new arrivals (for the most part), inviting them into treaty with their own nation and by extension with Creation (Stark, 2017). Treaty-making has taken place for thousands of years on Turtle Island (which includes what we now know as Canada) and around the world. When European explorers and settlers arrived on Turtle Island, they were welcomed into already-established treaties based in the land, some established at the time of Creation,8 and others more recently. Treaties were, of course,
not unique to Indigenous peoples; for example, the Egyptian–Hittite peace treaty, otherwise known as the Treaty of Kadesh, was made around 1258 BCE (well over three thousand years ago). More recently, back on Turtle Island, new treaties were created with the arrival of European explorers and settlers, to ensure peaceful and mutually beneficial relationships. Today, the Canadian government is engaged in treaty negotiations with multiple nations internationally, as well as with various First Nations within Canada.

When treaties were signed on Turtle Island between Indigenous nations prior to the arrival of Europeans and, later, between Indigenous and European nations, aspirational and metaphorical language was often used to illustrate the importance and long-term nature of the relationship—thus you hear phrases such as as long as the grass grows, and the water runs.⁹ The promises to which treaties of peace and friendship bore witness have been remembered through the generations by Indigenous nations across the land, in spite of the state’s best efforts.¹⁰ However, they have largely been forgotten by the settler nation. While children in schools within the Haudenosaunee territories learn early on of their responsibilities and obligations to treaties that their human and non-human ancestors made (Kimmerer, 2013, p.105), settler children are only just beginning to learn something of the peoples whose generosity enabled the early settlers to survive and eventually thrive (Vowel, 2015). Most Canadian citizens have not grown up with an awareness of this history and these relationships as part of their foundational knowledge of “Canada.” Nevertheless, this is a history we inherited when we were born or settled here.

There have been many treaties signed on Turtle Island/North America—between Indigenous nations, and between Indigenous nations and settler nations and peoples. In southern Ontario, for example, there is the Indigenous treaty the Dish with One Spoon (mentioned above), and the Two-Row Wampum, an Indigenous–settler treaty.¹¹ The Dish with One Spoon, originally an agreement between Anishinaabeg and Haudenosaunee, illustrates for us how to peacefully share in the wealth of the land. The Two-Row Wampum illustrates for us how we might live alongside one another without one nation interfering with another nation’s way of life or pathway. These treaties illustrate ways that various peoples agreed to live in Right relationship with one another while trying to walk the path of Mino-bimaadiziwin.¹² And there are treaties of a similar nature to be found across the land.

One treaty that is of particular significance is the Treaty of Niagara (1764), in part because of the number of nations present from across the continent at the time of its signing, but also because of its connection to the Royal Proclamation of 1763 (Borrows & Coyle, 2017; Corbiere, 2014; Tidridge, 2015). The gathering at Niagara brought together more than 2000 Indigenous peoples (appointed as representatives by their nations) from myriad nations, including the Senecas, Mississaugas, Odawa, Potawatomi, Saulteaux, Dene, and Plains Cree, among many others. The Treaty

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⁹ For more context, see the Eighth Fire documentary “This is how long these words will last.”

¹⁰ See the TRC Report, especially in What we have learned: Principles of Truth and Reconciliation.


¹² The Anishinaabe concept of living life in a good way. Anishinaabemowin (Anishinaabe language) is deeply layered and philosophical, and so the simple translation of “a good way” or “good life” is too simplistic. To begin learning about mino-bimaadiziwin, see the Seven Generations Education Institute.
Treaty-making was a deeply important facet of the formation of what would come to be known as Canada, yet it does not make up a fundamental part of settlers’ understanding of what it means to be Canadian.

of Niagara focused in particular on how the Crown would share land with Indigenous nations, making great use of the language tradition of kinship—an Indigenous tradition that the Europeans adopted. This Treaty was critical in enabling European settlement to continue (though settlement did not continue in the spirit of mutual aid set out in that treaty).

The problematic nature of record-keeping aside, it has been made clear that treaty-making was a deeply important facet of the formation of what would come to be known as Canada, yet it does not make up a fundamental part of settlers’ understanding of what it means to be Canadian.

**ACKNOWLEDGEMENT & CREATION STORIES**

Perhaps you’ve been to an event that opens with an Elder speaking prayers, guests being smudged, tobacco being given as thanks for someone sharing the gift of their knowledge with the group. You may have heard reference to Creation13 and perhaps a story that constitutes part of a Creation story. You may have wondered “what does this have to do with this meeting?” Scholars and knowledge keepers tell us that sharing Creation stories is a way of drawing on Indigenous laws; indeed, Creation stories “give shape and meaning” to Indigenous laws (Stark, 2017, p.251). Through these stories a unique set of ethics emerges, thus grounding the event in an alternate point of view that has largely been “eclipsed by narrow court-driven focus on rights” (Stark, p. 252).

The Truth and Reconciliation Commission report called on Canadians to acknowledge Indigenous ways of knowing and doing, and to look at the worldview of Indigenous peoples as valid and important epistemologies, significant in their own right, and from which we would do well to learn. While the overarching focus of the TRC was on the history and impact of the Indian Residential Schools, their exploration of the issues touches upon every aspect of life, from land and sovereignty to food and justice. The TRC report drew on earlier commissions (eg. RCAP, 1996; Ipperwash, 2007), which called for similar actions and articulated this kind of awareness-building as one element along the path of reconciliation. Beginning an event with an opening ceremony led by a local Elder is one way to shift the dynamic so that the day is begun with an Indigenous perspective, thus interrupting the primacy of a settler narrative. As scholar Heidi Stark (2017) and others point out, much of Indigenous law is drawn from Creation stories, and that goes for Treaties too: the discussions that preceded the agreements often included reference to Creation, and thus invited both parties into relation with Creation and with Indigenous ways of knowing. In being invited into Treaty with Indigenous nations, settler peoples were invited into Indigenous legal practices, and into relationship with the Creator and the pre-existing responsibilities and obligations that accompanied any relationship with Creation. This is particularly significant when it comes to decisions around land, for, as Anishinaabe legal scholar Dr. John Borrows says, “Many Indigenous people believe their laws provide significant context

13 For example, within the Introduction (p. vi) of Indigenous Policy Framework for the City of Calgary.
and detail for judging our relationships with the land, and with one another” (p.253).

**WRITTEN VS. ORAL TRADITIONS**

Settler society has largely ignored the significance of treaty agreements, while also disregarding the language of love and kinship woven into some of the Treaty discussions (Borrows, 2017). Borrows follows up the statement above by saying “Yet, Indigenous laws are often ignored, diminished, or denied as being relevant or authoritative in answering these questions” (Stark, p.253)—that is, the questions around our relationships with the land, and with one another. There are many explanations for this dismissal of Indigenous law. One significant explanation, particularly with respect to Treaties that articulated how land was to be shared, is that the settler parties kept the written documentation of treaty negotiations as their go-to reference, mostly to exclusion of the discussions which took place alongside such written documentation. While much of that discussion would have involved Indigenous languages, a Crown representative would have been at least partly engaged in the discussion through translators. A record of what was agreed to in these discussions was usually made by Crown representatives, though in many cases, what was written down did not earnestly reflect the discussions that had taken place. Indigenous nations involved in discussions were also making record of the agreements, orally, and these records have been corroborated across other oral and written accounts. This accurate practice of record-keeping was noted at various times by Crown officials (Corbiere, 2017). Though they were often omitted from the official (ie. Crown) record, these discussions often remain the most significant portion of treaty negotiations for many Indigenous peoples. Herein lies one of many key tensions between Indigenous and non-Indigenous ways of knowing and doing: whereas settlers privileged the written word, Indigenous peoples privileged the oral documentation of the agreements. In part due to that difference, and also to the different understandings of what these documents signified, Treaties remained in the cultural consciousness of Indigenous peoples yet faded from the consciousness of settler society. The significance of this tension is being demonstrated still today, as courtroom discussions incorporate testimony of Indigenous knowledge keepers who learned much through oral story-telling. Indeed, oral traditional knowledge was used in the 2014 Tsilhqot’in case at the Supreme Court of Canada, as well as other cases in Canada and Australia (Ray, 2015).

**RELATIONSHIP WITH THE LAND**

Alongside the tension brought about by the cultural amnesia that enabled settlers to forget about their Treaty relationships lies the tension surrounding our relationship with the environment (that is, with Cre-
This broadly-held relationship with land sits in tension with the non-Indigenous ("western") peoples’ relationship with land, which is (again, broadly-speaking) centred on notions of private ownership and monetary potential (Dorries, 2012; Dixon-Gough, et al, 2017; Van Wagner, 2013). This distinction was not well understood at the time of signing treaties, nor is it clear to many people today.

**CEREMONY**

In her book *Braiding Sweetgrass*, Robin Wall Kimmerer points out that "ceremony focuses attention so that attention becomes intention. If you stand together and profess a thing before your community, it holds you accountable" (p.249). She continues, saying: “In many indigenous communities, the hems of our ceremonial robes have been unraveled by time and history, but the fabric remains strong" (ibid). Ceremony is integral to Indigenous ways of knowing and doing. Haudenosaunee peoples hold and share the Great Thanksgiving Address, which is meant to centre a person or a group of people around the act of giving thanks for what we are given.15 The act of settler communities beginning events with land acknowledgements could perhaps be seen as an act of ceremony, yet more often than not the implications of that acknowledgement are not examined or explored by the organisation—neither when it decides to adopt such a ceremonial statement at the event itself, nor afterwards. Kimmerer points out that while settler peoples do indeed have ceremonies, those that endure “are not about land; they’re about family and culture, values that are transportable from the old country. Ceremonies for the land no doubt existed there, but it seems they did not survive emigration in any substantial way” (p.250). Earlier she points out

14 To learn about these various tensions, see Robin Wall Kimmerer’s book *Braiding Sweetgrass*; Arthur Manuel and Grand Chief Derrikson’s book *Unsettling Canada*; Julien Gignac’s *Toronto Star* article “Bitter land dispute”; D.H. Taylor’s recent play *Cottagers and Indians*; A. Arnaquq-Baril’s documentary *Angry Inuk*

15 For an introduction to the Thanksgiving Address, see Skånoñh - Great Law of Peace Center’s video on the Address.
that the withering away of ceremony in settler society is likely due to several reasons: “the frenetic pace of life, dissolution of community, the sense that ceremony is an artifact of organized religion forced upon participants rather than a celebration joyfully chosen” (p.249). Not only has settler society chosen to forget the promises made through treaties, and the responsibilities we gained through those agreements, but it has displayed a level of suspicion towards ceremonies that makes being open to Indigenous ways of knowing and doing, as the TRC called for Canadians to do, incredibly challenging.

Indigenous treaties are a kind of ceremony, one that, through the responsibilities highlighted and invoked, honours the relationships between people in relationship with the land. Treaties into which subsequent settlers were welcomed, such as the Dish with One Spoon and the Two-Row Wampum, call for the various peoples to live peaceably together and to enable our mutual flourishing (Hill, 2016). We are to honour and respect one another’s ways of knowing and ways of doing. In order to respect and honour each other, however, each side must strive to learn about the other. Indigenous peoples have been forced to learn about settler peoples. Settler peoples, on the other hand, have had the luxury of choosing not to learn about those peoples whose generous welcome enabled us to make a home on this land. Many Indigenous people will articulate the profound differences in values between Indigenous and settler society, yet for many settler peoples this particular difference remains invisible. Canadian laws and institutions are founded on values and principles that seem to be universal, and yet they are not universally held (Mills, 2016). And so, how do we try to walk along a path of reconciliation? How do we start to make a shift away from privileging western value systems and ways of knowing, and instead begin to make space for Indigenous ones?

LOOKING TO UNDRIP

In 2007, the General Assembly of the United Nations adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This adoption was the result of an incredible decades-long effort by an international group of Indigenous activists. Initially, Canada was one of four nations (along with Australia, New Zealand, and the United States of America) that voted against it; in 2016, Canada removed its objections to the Declaration. In 2017, the Liberal government declared it would back calls to fully implement UNDRIP. Subsequently, however, Justice Minister Wilson-Raybould stated that implementing the Declaration was “unworkable,” though she soon relented, stating that implementation of UNDRIP would be unconditional, though limited by Canadian law (Palmater, 2017). What would it mean to implement the various declarations of UNDRIP, many of which16 uphold the rights of Indigenous peoples to maintain cultural practices that have implications for

16 See in particular UNDRIP Articles 5, 9, 13, 29, and 34.
how people live in relation with one another and with
the land? The Canadian state and settler society up-
holds a social contract as that which binds society
together through notions of individual rights, while
many Indigenous societies uphold a different social
contract, such as one that is rooted in the primacy
of mutual aid (Mills, 2017). What are the implications
for our social structures, if we do indeed attempt to
travel alongside one another without interference, as
the Two-Row Wampum calls us to do? This is a crit-
ical question for us today, as we seek to redress our
violent history.

When treaty rights are broken and forgotten, as
they have been across the land, there is no longer a
forum within which to discuss these issues—court
processes are costly and adversarial, and too often
the only recourse is conflict (Borrows & Coyle, 2017,
p.4). These conflicts then foreground the conversa-
tions around relationships and reconciliation instead
of around forming a deep ethical foundation upon
which to cultivate good relations. And yet, it is to the
legal framework that many are turning. Let us look,
then, to the duty to consult and accommodate: a
legal framework for relationship-building.

**PART 2: DUTY TO CONSULT
AND ACCOMMODATE –
A LEGAL LANDSCAPE**

The duty to consult and accommodate Aboriginal
peoples is a legal framework within which to envision
relationships between Crown and Indigenous peo-
ple in Canada. It is understood by some as one way
to walk along the path of reconciliation, to advance
the objective of reconciling pre-existing Aboriginal
societies’ sovereignty and Crown sovereignty, and to
uphold Aboriginal rights within the constitution. Yet
by others, given the Crown’s ability to override Aborig-
inal and treaty rights in favour of the “public good,” the
duty is seen as further enabling Crown exploitation
of resources and the watering-down of the nation-to-
nation relationship between the Crown and Indigenous
nations (Ariss, MacCallum Fraser, Somani, 2017, p.
6-7). This duty appears increasingly in provincial and
municipal policies and is implemented in a variety of
ways, such as notifications on zoning amendments
sent from municipal planners to neighbouring First
Nations, the creation of archaeology management
plans, and requests for First Nation involvement in
municipal government ceremonies. But what exactly
is the duty to consult and accommodate (“the duty”),
from what did it emerge, and what does it call for?

**HISTORICAL CONTEXT**

In 2004 and 2005, three cases appeared at the
Supreme Court of Canada (SCC) creating a legal wa-
tershed moment for Aboriginal rights with respect to
the honour of the Crown. This trilogy of cases, Haida
Nation v. BC, Taku River v. BC, and Mikisew Cree v. Cana-
da, demonstrated and affirmed that the Crown, when-
ever it is aware that its activities may have an impact
on or infringe Aboriginal and treaty rights, must con-
sult on the impacts that affected Aboriginal groups
may experience and accommodate the continued
exercise of their rights. Moreover, the purpose of this
duty, as illustrated in particular in Mikisew Cree, is the
“reconciliation of Aboriginal and non-Aboriginal peo-
bles and their respective claims, interests and ambi-
tions (Mikisew Cree First Nation v. Canada [Minister of
Heritage], 2005).” Although this trilogy of SCC cases
provided significant clarity on the matter, the courts
had been working towards this point for years.
Crown consultation of Aboriginal groups’ rights was first mentioned in *R v. Sparrow*, 1990, though most case law on the duty to consult and accommodate has focused predominantly on “consultation” rather than the critical second part of “accommodation” (*R. v. Sparrow*, 1990). Within this concept lies the notion that the “honour of the Crown” is at stake, when it comes to the Crown’s dealings with Aboriginal peoples. A recent paper by Felix Hoehn and Michael Stevens (forthcoming) point out that this is a “constitutional principle” which can be traced to the Crown recognizing its obligation of honourable dealing in the Royal Proclamation of 1763, in which the Crown pledged to protect Aboriginal peoples from exploitation (p.7).

The core aspects of the duty are:  

> that it is easily triggered, even with only minimal knowledge that a claim or right may be infringed by Crown activities;  
> that consultation must reflect the honour of the Crown and must be meaningful such that it reflects the Crown’s intent to meaningfully, substantially, address Aboriginal concerns.  
> consultation must occur before the proposed Crown activity  
> consultation must provide information about the proposal, and give reasonable opportunities to respond, a process which may include funding so as to enable the Aboriginal group’s participation, as well as sufficient time in order to respond  
> the Crown should use the knowledge gained through consultation to accommodate the exercise of rights by integrating that knowledge into its proposal  
> that the scope of the duty is not limited to immediate impacts, rather it applies too to overarching projects and high-level strategic decision-making processes that may impact Aboriginal rights  
> that the procedural duty is tied to substantive Aboriginal rights

**Strengths**

Some strengths of the duty to consult and accommodate are that (in theory, if not in practice) it:

- serves as an easily-triggered mechanism to protect Indigenous land rights  
- is a Crown duty  
- must be conducted prior to the rights being impacted  
- extends in theory to overarching projects, though this remains a challenge particularly with respect to small aggregate projects that may be conducted by different municipalities or companies but which, taken as a whole, constitute a significant impact  
- substantively addresses Aboriginal peoples’ concerns and accommodates the exercise of their rights.

**Limitations**

A significant limitation to the duty, however, is that Indigenous peoples do not have a veto over Crown proposals—indeed, the Crown opinion that a project is beneficial for the overarching public good is enough for it to supersede Aboriginal rights. Additionally, without adequate guidance for municipal planners, the duty to consult creates an atmosphere of urgency in which planners send notifications for all manner of activities, not just those impacting...
Aboriginal rights, to neighbouring Indigenous communities, creating mountains of paperwork for under-staffed and underfunded First Nations and Métis consultation offices (sometimes made up of a single person who may even be serving multiple other positions). Consultation staff, Chiefs, and Councils are repeatedly pointing out that they do not have the time or capacity to review this volume of notifications in order to address the requests within a timely manner (which is sometimes legislated), thus enabling municipalities to check off the requirement of notification without meaningfully fulfilling the task.

### Are Municipalities Responsible for the Duty?

An issue of particular ambiguity is **whether or not** municipalities have a duty to consult and accommodate. This duty is one held by the Crown—that is, the federal and provincial governments. While many municipalities already engage in consultation processes, some have been known to include a legal disclaimer at the foot of their consultation documents indicating that the municipality does not legally owe a duty to consult but that it is doing this proactively. Many First Nation Chiefs and Councils and consultation staff will insist that municipalities do owe a duty to consult, as they are making significant decisions (economic, cultural, environmental, etc.) that hold potential to impact Aboriginal and treaty rights—and there is increasing weight to this argument.

Hoehn and Stevens (forthcoming) argue that in fact municipalities do owe a duty to consult and accommodate. They make the case by: (1) illustrating the ways in which municipalities are already engaged in this process (thus demonstrating their adequate capability); (2) explaining how municipalities have evolved beyond their initial creaturely status into one of greater maturity and responsibility; (3) positing that municipalities in fact hold many powers delegated by the Crown, such that “any distinction between [their] actions and Crown action quickly falls away” (Clyde River, para 29, as cited in Hoen & Stevens); and (4) illustrating that, given the local nature of municipal–Indigenous relations, as well as the capacity of municipalities to engage in consultation processes, they are appropriately situated to engage in consultation with Indigenous communities. Hoehn and Stevens conclude that “after asserting sovereignty over Indigenous peoples, the Crown delegated a broad spectrum of the powers flowing from that sovereignty to local governments. If the duty to consult does not accompany the transfer of these sovereign powers, then it will not be able to play its essential role of protecting Aboriginal rights and promoting reconciliation” (p.40).

This view, however, is far from universal. To say nothing of the various perspectives questioning the validity of Crown sovereignty, Hoehn and Stevens’ paper responds to various critiques and defenses of the municipal role in the duty to consult and accommodate, including very significantly, the critique that if municipalities were to hold this Crown duty, that would critically water down the nature of the nation-to-nation relationship between the Crown and First Nations (Ritchie, 2013). Though Hoehn and Stevens address this concern, nevertheless the fact that we as a nation continue to look to the courts to define how we establish and care for relationships demonstrates a watering down of both nation-to-nation relationships, as well as community-to-community and person-to-person relationships. In its Code of Professional Conduct, the Canadian Institute of Planners tells us that “Planners [ought to] practice in

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19 In conversation with Carolyn King, former Chief, Mississaugas of New Credit First Nation, March 2018.

20 See works by Taiake Alfred, Jeff Corntassel, Glenn Coulthard, Leroy Little Bear, Leanne Simpson, for example.
a manner that respects the diversity, needs, values and aspirations of the public as well as acknowledge the inter-related nature of planning decisions and the consequences for natural and human environments” (Canadian Institute of Planners, 2018). Is a legalistic framework really the thing to lead us along the path in a good way?

**HOW TO IMPLEMENT THE DUTY**

While the duty to consult and accommodate is catching the attention of municipalities, the ambiguity of their role within that due means that its implementation is problematic. For instance, for many in the municipal context, the first question is the reactive “how do we avoid conflict?” For others, the question is “how do we build relationships with Indigenous communities nearby; which are those communities?” For others still, the question is “where do we even start?” On the other side of the equation, Chiefs and Councils, as well as consultation staff within First Nations and other Indigenous communities and organisations, are asking questions such as “how do we get municipalities to pay attention to our rights and incorporate those into their processes?”; “how do we understand the planning process so that we can insert ourselves?”; and “how can we shape the planning process so that we no longer have to think about ‘inserting ourselves’ but instead see that our rights become an integral component of the way relationships between people and land are cared for across this land?”

Guidance is needed in order to translate the case law around the duty to consult and accommodate into the vernacular of the every-day planner. Furthermore, legislation is needed to articulate Aboriginal rights and interests into documents and language that will enable meaningful change. This need for guidance is being echoed by planners and consultation staff across the province of Ontario, as well as by leading academic and practitioner planners. Through the efforts that the province is making to meet with and gather feedback from those involved in Indigenous–municipal consultation, we can see that this clarion call has been heard. However, we cannot only look to the province to make the necessary changes. While many different kinds of actions are needed to address this particular issue, and, more broadly, to address how this nation endeavours to walk down a path of reconciliation, cities—big, medium, and small—must step up to the plate and take initiative. However, many well-intended (and not-so-well intended) efforts have lined the halls of this nation’s colonial history. How, then, might we look to doing things differently?

Additionally, without adequate guidance for municipal planners, the duty to consult creates an atmosphere of urgency in which planners send notifications for all manner of activities, not just those impacting Aboriginal rights, to neighbouring First Nations, creating mountains of paperwork for understaffed and underfunded First Nations consultation offices (sometimes made up of a single person who may even be serving multiple other positions).
A common question among practicing and student planners focussing on land use planning and Aboriginal and treaty rights is: “This is all so frustrating—won’t you tell us what we can do?” A checklist is usually what they are after, and one can sympathize. However, what works for one situation will not necessarily work for another. One municipality might find it is within the territory for a First Nation with a well-developed consultation protocol, and the municipality must look to that protocol to know how to build a relationship; another municipality may be in the territory of several First Nations and Métis, and will have to engage with several kinds of protocols and acknowledge that there will be competing and entangled assertions of sovereignty to grapple with.

About the only certain common checklist item is to reach out to the Nation or community in question and begin by asking if they have a consultation protocol, and then to embark on a dialogue around what your relationship could look like.

There is a push to speed up planning approval processes, yet everything we know and learn about the nature of Indigenous-municipal relationship building indicates that more time and care is needed to nurture these already-fragile relationships. In some ways, what is needed is counter-intuitive: less doing, more thinking. For their part, municipalities must dig into the question of reconciliation. It took us centuries to get us to where we are today, and the concept of reconciliation surely doesn’t mean we will “fix” things in the next year or two. While there are immediate actions that municipalities can take (for example, setting up good relations between Mayors and Chiefs, and working with those communities in order to establish and support positions on both sides dedicated to maintaining and caring for those relations), there are also long-term actions needed. City staff—and indeed Canadians at large—ought to take time to delve into these questions by learning from the myriad established resources (in this paper, I have tried to share several such resources) and engaging in discussion with one another.

Just what does reconciliation mean?21 How did we arrive at this tension between Indigenous and non-Indigenous peoples?22 How do Indigenous and non-Indigenous values around land differ?23 What does it mean to “unsettle” ourselves?24 For a start, look out for events organized by Indigenous communities and nations, and go and listen. You may find a striking array of perspectives, which can be rather unsettling and unclear. The one thing that is certain is that this process of (un)learning will be unsettling and at times uncomfortable.

21 Start by looking to reports by the Royal Commission on Aboriginal Peoples, and the Truth and Reconciliation Commission.
22 For a general overview of different ways of knowing, and Indigenous perspectives on the history of colonisation, take some time to read, for example, Thomas King’s An Inconvenient Indian, Arthur Manuel’s Unsettling Canada, Robin Wall Kimmerer’s Braiding Sweetgrass.
23 Dip your foot into Anishinaabeg legal concepts through the writing of Aaron Mills, in particular his blog post In Lieu of Justice: Thoughts on Oppression, Identity & Earth, and his article The Lifeworlds of Law: Revitalising Indigenous Legal Orders Today (McGill Law Journal).
24 As well as Arthur Manuel, see the works of Leanne Betasamosake Simpson, and Chelsea Vowel/âpihtawikosisân.
The one thing that is certain is that this process of (un) learning will be unsettling and at times uncomfortable.

The path of reconciliation is indeed challenging. It involves practicing introspection, which can be painful; listening, which can be confounding and frustrating; attempting to do things right, which requires courage; and responding to critique with humility. These practices can be hard to come by, especially within a rampanently consumerist society that values craving and increase over gratitude and sustainability. This holds true for municipalities as well. We cannot talk about the duty to consult and accommodate without talking about many other things. We cannot talk about relationships between municipalities and Indigenous communities without learning about and reflecting on the history of broken promises of friendship and peace. We cannot talk about land use and land management without talking about what land means to us as a society and to listen to others about what land means to them. We cannot plan for a future in which we seek to avoid repeating the "sins" of our parents if we do not do these things.

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25 For example, Loblaws’ Crave More campaign, which turns what was once deemed a "sin" into a virtue. See also Ursula Franklin’s lecture "When the Seven Deadly Sins Became the Seven Cardinal Virtues)
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