

**STAFF REPORT: Planning & Building Services Department**



**REPORT TO: Planning & Building Committee**  
**MEETING DATE: January 16, 2012**  
**REPORT NO.: PL.12.07**  
**SUBJECT: Aboriginal Consultation – Planning Matters**  
**PREPARED BY: D. Finbow, Director, Planning & Building Services**

**A. Recommendations**

**THAT Council receive Planning Staff Report PL.12.07 respecting Aboriginal Consultation – Planning Matters.**

**B. Background**

Council at its meeting of December 13, 2011 received Engineering & Public Works Staff Report EPW.11.110 and adopted the recommendations contained therein respecting “Aboriginal Consultation and Accommodation Letter of Agreement - Landfill Expansion and Mining”.

In speaking to the matter, Deputy Mayor McKinlay requested that “a background report of applicable legislation that empowers First Nations with respect to planning matters” be forwarded to Council “so that Council can have a better understanding”.

***Planning Act***

Planning matters in the Province of Ontario are regulated by the *Planning Act* and related Regulations, Policy Statements, Zoning Orders and Provincial Plans.

The *Planning Act* facilitates the adoption of local Official Plans, the enactment of Zoning By-laws, the passing of Minor Variances to Zoning By-laws, provides special powers to Committees of Adjustment to deal with extensions/expansions and changes to non-conforming uses amongst other things and allows for the granting of consents and the approval of Plans of Subdivision (Grey County is the approval authority).

The *Planning Act* sets out consultation requirements for all of the above. An example is that which is found at Section 34 (13) with respect to zoning by-laws:

**Notice**

(13) Notice of the public meeting required under subclause (12) (a) (ii) and of the open house, if any, required by clause (12) (b),

(a) shall be given to the prescribed persons and public bodies, in the prescribed manner; and

(b) shall be accompanied by the prescribed information. 2006, c. 23, s. 15 (6).

As Council will note, Section 34(13) (a) indicates that notice shall be given to the prescribed persons and public bodies, in the prescribed manner. The prescribed persons and public bodies are found within the various Regulations made pursuant to the *Planning Act*. With respect to zoning by-laws, O.Reg. 545/06 identifies the persons and public bodies that notice must be provided to. This includes “The chief of every First Nation council, if the First Nation is located on a reserve any part of which is within one kilometre of the area to which the proposed by-law would apply.”

As there is not a First Nation reserve within one kilometre of the geographic boundary of the Town of The Blue Mountains, there is not an obligation within the *Planning Act*, or its related Regulations, for the Town to provide notice of planning applications/initiatives to a First Nation. However, there are obligations beyond the statutory requirements of the *Planning Act* that must be considered which are examined in further detail in this Report.

Notwithstanding the forgoing, Planning Services do circulate all planning applications to the following Aboriginal Nations/Peoples/Organizations:

- Historic Saugeen Metis;
- Metis Nation of Ontario; and,
- Saugeen Ojibway Nation

In light of correspondence received over the past few years from the solicitor representing the Huron-Wendat Nation, Planning Services staff are consulting with the County of Grey as to the provision of notice to them.

### **Provincial Policy Statement, 2005 (“PPS”)**

Section 3(5) of the *Planning Act* requires that a decision of the council of a municipality in respect of the exercise of any authority that affects a planning matter shall be consistent with policy statements issued by the Province. The PPS includes provisions with respect to cultural heritage and archaeology. Section 2.6 of the Provincial Policy Statement indicates the following:

#### **2.6 Cultural Heritage and Archaeology**

**2.6.1** *Significant built heritage resources and significant cultural heritage landscapes shall be conserved.*

**2.6.2** *Development and site alteration shall only be permitted on lands containing archaeological resources or areas of archaeological potential if the significant archaeological resources have been conserved by removal and documentation, or by preservation on site. Where significant archaeological resources must be preserved on site, only development and site alteration which maintain the heritage integrity of the site may be permitted.*

**2.6.3** *Development and site alteration may be permitted on adjacent lands to protected heritage property where the proposed development and site alteration has*

been evaluated and it has been demonstrated that the *heritage attributes* of the *protected heritage property* will be *conserved*.

Mitigative measures and/or alternative development approaches may be required in order to conserve the *heritage attributes* of the *protected heritage property* affected by the adjacent *development* or *site alteration*.

To address Policy 2.6, the Town's Planning Services Division requires the provision of an Archaeological Assessment prepared by a licenced professional archaeologist for developments that may be of potential impact. In addition to Official Plan Appendix Map 'D' (Appendix 'A") that depicts "Archaeology Areas", developed in consultation with the County of Grey and the Ministry of Tourism, Culture & Sport (formerly the Ministry of Tourism and Culture), the provincial criteria for determining archaeological potential is also utilized.

### **Provincial Criteria for Determining Archaeological Potential**

- Known archaeological sites within 250 metres
- Water source (primary, secondary, ancient) within 300 metres
- Elevated topography (e.g., knolls, drumlins, eskers, plateaux)
- Pockets of sandy soil in a clay or rocky area
- Unusual land formations (e.g., mounds, caverns, waterfalls)
- Resource-rich area (concentrations of animal, vegetable or mineral resources)
- Non-aboriginal settlement (e.g., monuments, cemeteries)
- Historic transportation (e.g., road, rail, portage)
- Property protected under Ontario Heritage Act
- Local knowledge
- Recent disturbance (extensive and intensive)

In instances of development proposed outside of the area identified by Official Plan Appendix Map 'D', Planning Services attempt to utilize a balanced approach with respect to the Provincial Criteria noted above in determining if an Archaeological Assessment is required.

Licensed archaeologists must comply with the Ministry of Tourism, Culture and Sport standards and guidelines when carrying out and reporting on archaeological fieldwork. There are four stages of archaeological fieldwork moving from identification of areas of archaeological potential and archaeological resources to assessment of their significance. Archaeological resources are often on or below ground, or form part of a cultural landscape.

Examples of instances where an Archaeological Assessment has been required include the County of Grey's Emergency Medical Services Building; the Bannerman, Lendvay, Georgian Gate/Windfall and Terrasan development proposals; and, the Boyd and Phelan consents. In the instance where such Assessment identifies areas of potential interest for Aboriginal peoples, Planning Services would ensure that consultation occurred with Aboriginal peoples, County of Grey, Ministry of Municipal Affairs and Housing, and the Ministry of Tourism, Culture and Sport (and potentially the Ministry of Aboriginal Affairs).

### **County of Grey Official Plan**

County of Grey Official Plan Amendment No. 80 added the following to the County Official Plan at Section 6.13 (8):

**“(8) Consultation shall be required with the First Nations for all County Official Plan Amendments, Local Official Plan or Secondary Plan Amendments, Plans of Subdivision or Condominium. Local municipalities shall also be encouraged to consult with First Nations on all local Planning Act applications.**

**The County is currently developing a consultation protocol in concert with the First Nations. This protocol shall ultimately govern how and when consultation shall occur. In the interim, County and Local staff along private developers are encouraged to consult with the First Nations.”**

Council will note that OPA No. 80 is specific to First Nations; that local municipalities are to be encouraged to consult on all local *Planning Act* applications; and, that the County is developing a consultation protocol. Planning Services staff have been advised that upon OPA No. 80 coming into full force and effect, the County of Grey will turn their attention to the development of the referenced protocol. (Note: An Ontario Municipal Board Hearing date has not been set with respect to the appeals filed with regard to OPA No. 80.)

### **Town of The Blue Mountains Official Plan**

The Town's Official Plan contains policies related to cultural heritage significance (Appendix "B"), including areas of archaeological potential, however the Official Plan is silent with respect to consultation with Aboriginal peoples. This matter is part of our Five Year Official Plan Review.

## **Aboriginal Peoples Consultation & *The Constitution Act***

Local governments' relationships with Aboriginal peoples have changed considerably over the past number of years. "Existing treaty and Aboriginal rights received constitutional protection in 1982 (*The Constitution Act*). Since then, the Supreme Court of Canada has made a series of decisions that have provided clarity and direction for the Crown's understanding of its duties with regard to these constitutionally protected rights."<sup>(1)</sup> As noted in the Province of Ontario's "Municipal-Aboriginal Relationships: Case Studies":

"The special characteristics of Aboriginal communities make municipal-Aboriginal relationships unique. *The Constitution Act*, 1982 recognizes the Aboriginal and treaty rights of Aboriginal peoples – which include Indians (more commonly referred to as "First Nations"), Métis and Inuit. Recent court decisions have determined that these rights may trigger a duty to consult with Aboriginal communities in certain circumstances. If the Crown (federal, territorial, provincial) is considering a decision that may adversely affect established or asserted Aboriginal or treaty rights, the Crown has a duty to consult and, where appropriate, to accommodate the affected Aboriginal peoples."

With respect to the "duty to consult", in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 the Supreme Court of Canada "held that procedural aspects may be delegated to proponents but not the duty itself."<sup>(2)</sup> In this regard, the Province of Ontario has delegated certain procedural aspects of consultation to third parties but acknowledges that the ultimate legal responsibility for fulfilling the Crown's duty to consult Aboriginal peoples rests with the Province. At this time, the Province has not developed a Provincial Consultation Protocol on Aboriginal Consultation related to planning matters however the Province has released the following documents that speak to, or require, consultation with Aboriginal peoples:

- Draft Guidelines for Ministries on Consultation with Aboriginal Peoples related to Aboriginal Rights and Treaty Rights June 2006 (Appendix "C")
- Municipal-Aboriginal Relationships: Case Studies (Appendix "D")
- Toward Developing an Aboriginal Consultation Approach for Mineral Sector Activities – A Discussion Paper Winter 2007
- Draft Aboriginal Consultation Guide for Preparing a Renewal Energy Approval (REA) Application, Ministry of the Environment Spring 2011
- Ministry of the Environment – Various (Transit, Waste, Electricity) Consultation Requirements (Waste Consultation – "Appendix "E")

The Province of Ontario's Municipal-Aboriginal Relationships: Case Studies notes that "the Ministry of Municipal Affairs & Housing's position is that municipalities have a duty to consult in some instances."

(1) Toward developing an Aboriginal Consultation Approach for Mineral Sector Activities, Province of Ontario 2007

(2) Crown Duty and The Duty to Consult, Christopher Devlin, June 2, 2010

In the absence of a Provincial Consultation Protocol on planning matters this leaves planning approval authorities with a lack of clarity as to consultation and will lead to inconsistent practices across the Province and perhaps create incremental increases in expectations in terms of what meaningful consultation involves.

The Saugeen Ojibway Nation (SON) has published “Principles for Proponents working in the Traditional Territories of the Saugeen Ojibway Nation” (Appendix “F”). This document includes the following:

The Saugeen Ojibway Nations consist of the Chippewas of Saugeen and the Chippewas of Nawash Unceded First Nation. The traditional lands of the Saugeen Ojibway Nations extend east from Lake Huron to the Nottawasaga River and south from the tip of the Bruce Peninsula to the Maitland River system (11 miles south of Goderich). The traditional waters around these lands include the lakebed of Lake Huron from the shore to the US border and the lakebed of Georgian Bay to the halfway point.

#### **5. Protection of Culturally Specific Sites (burial grounds, ancient habitation sites etc.)**

Areas within the traditional territories of the Saugeen Ojibway Nations are sacred and are of significant cultural value. It is imperative that these sites are properly identified and protected. Therefore:

- a) The proponent must, with SON participation, determine whether the site for the proposed project is of any cultural significance to the SON.
- b) The proponent and the SON must assess whether the project will have an adverse impact on any existing culturally specific site(s).
- c) If the heritage resource potential of any site(s) proposed for surface disturbance has not yet been assessed for archaeological potential, then, prior to any disturbance, the proponent must conduct a site archaeological survey according to terms agreed to by the SON.
- d) If artefacts or remains are found, all work at the site must cease and the SON notified immediately. The proponent and First Nation representatives will then enter into negotiations regarding the disposition of artefacts and the protection of remains.
- e) Socio-cultural impact assessment studies may need to be conducted at the proponent’s expense.

#### **9. Capacity**

- a) The proponent must provide the Saugeen Ojibway Nations with sufficient funding to ensure that the SON can participate fully in the negotiation of a Protocol Agreement and in the consultation process itself, which includes the various studies, and stages of the assessment process.

Recently, the Director, Planning & Building Services, attended a seminar sponsored by Willms Shier LLP whereat Aboriginal Consultation was discussed. Copies of pertinent slides from the presentation are included for Council's information.

## Why a Duty to Consult?

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- **Section 35, Constitution Act, 1982 recognizes and affirms existing Aboriginal and treaty rights of Aboriginal peoples of Canada**
- **Key Supreme Court of Canada decisions on Consultation:**
  - *Delgamuukw v. British Columbia* - 1997
  - *Haida v. British Columbia* - 2004
  - *Taku River Tlingit v. British Columbia* - 2004
  - *Mikisew Cree First Nation v. Canada* - 2005
  - *Rio Tinto Alcan v. Carrier Sekani Tribal Council* - 2010
  - *Beckman v Little Salmon/Carmacks First Nation* - 2010

## When Triggered?

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- 1) the Crown has knowledge of the potential existence of aboriginal right or title**
  - Claim must be credible; asserted rights trigger; proof claim will succeed is not required;
- 2) contemplates conduct**
  - Permits and strategic level decisions (i.e. planning); legislation?
- 3) which might adversely affect it**
  - Conduct must have direct causal relationship to potential for adverse impacts
  - Conduct that does not trigger: underlying infringement, continued breach, lack of past consultation, potential to affect negotiating position

## **Who Owes the Duty?**

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- **Federal governments /agents**
- **Provincial governments /agents**
- **The Crown can delegate procedural aspects of the duty to consult to third parties (e.g. municipalities, developers)**
  - Crown always retains the duty to consult
  - Crown makes consultation a pre-condition to many regulatory approvals

## **What is the Duty to Consult?**

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- **Consultation must be “meaningful” and in good faith – usually includes capacity funding**
- **Must start early and continue throughout approval process**
- **Must involve willingness to make changes to project to mitigate impacts**
- **Third party consultation efforts may be considered by the Courts to determine if the Crown duty is met**
- **Depth of consultation varies depending on seriousness of impacts and strength of claim**

# Content of the Duty

## Characteristics:

- Weak Aboriginal claim
- Potential for infringement is minor

## Actions:

- Give notice
- Disclose information
- Discuss any issues raised in response to the notice

## Factors

- Specificity of promises made
- Seriousness of potential impact on right asserted
- Strength of claim to asserted right

## Characteristics:

- Strong Aboriginal claim
- Right and potential for infringement is high
- High risk of non-compensable damage

## Actions:

- Deep consultation
- Opportunity to make submissions
- Formal participation in decision-making process
- Written reasons showing how Aboriginal concerns were considered
- Accommodate
- Consent



Given the absence of a Provincial Protocol related to Aboriginal Consultation, the exact extent of required consultation with Aboriginal peoples cannot be determined in advance of evaluating the characteristics of a specific application (i.e. strength of the claim and potential impacts).

## Summary

As noted in the Ipperwash Inquiry (page 687, Volume 1):

Usually, the immediate catalyst for most major occupations and protests is a dispute over a land claim, a burial site, resource development, or harvesting, hunting, and fishing rights. The fundamental conflict, however, is about land.

In light of this, some of the policy recommendations of the Ipperwash Inquiry (Volume 2) speak to land related matters including:

- The provincial government should work with First Nations and Métis organizations to develop policies regarding how the government can meet its duty to consult and accommodate. The duty to consult and accommodate should eventually be incorporated into provincial legislation, regulations, and other relevant government policies as appropriate (Recommendation 14);

- The provincial government should promote respect and understanding of the duty to consult and accommodate within relevant provincial agencies and Ontario municipalities (Recommendation 15);
- The provincial government should work with First Nations and Aboriginal organizations to develop policies that acknowledge the uniqueness of Aboriginal burial and heritage sites, ensure that First Nations are aware of decisions affecting Aboriginal burial and heritage sites, and promote First Nations participation in decision-making. These rules and policies should eventually be incorporated into provincial legislation, regulations, and other government policies as appropriate (Recommendation 22);
- The provincial government, in consultation with First Nations and Aboriginal organizations, should determine the most effective means of advising First Nations and Aboriginal peoples of plans to excavate Aboriginal burial or heritage sites (Recommendation 25); and,
- The provincial government should encourage municipalities to develop and use archaeological master plans across the province (Recommendation 26).

The matter of Aboriginal consultation on planning matters goes well beyond the legislative requirements of the *Planning Act* and related Regulations. The Supreme Court of Canada has determined that there is a duty to consult, that consultation must be meaningful and, that there may be a duty to accommodate (efforts to reconcile, adjust or adapt). Further, as noted in the SON consultation document, it is common for Aboriginal peoples to request/require funding so that they can participate fully.

Staff will continue to monitor developments in Aboriginal Consultation.

### **C. The Blue Mountains' Strategic Plan**

1. Managing growth to ensure the ongoing health and prosperity of the community.

### **D. Environmental Impacts**

N/A

### **E. Financial Impact**

N/A

### **F. In Consultation With**

The contents of this Report have been reviewed with the Town's Chief Administrative Officer and the Town's solicitor.

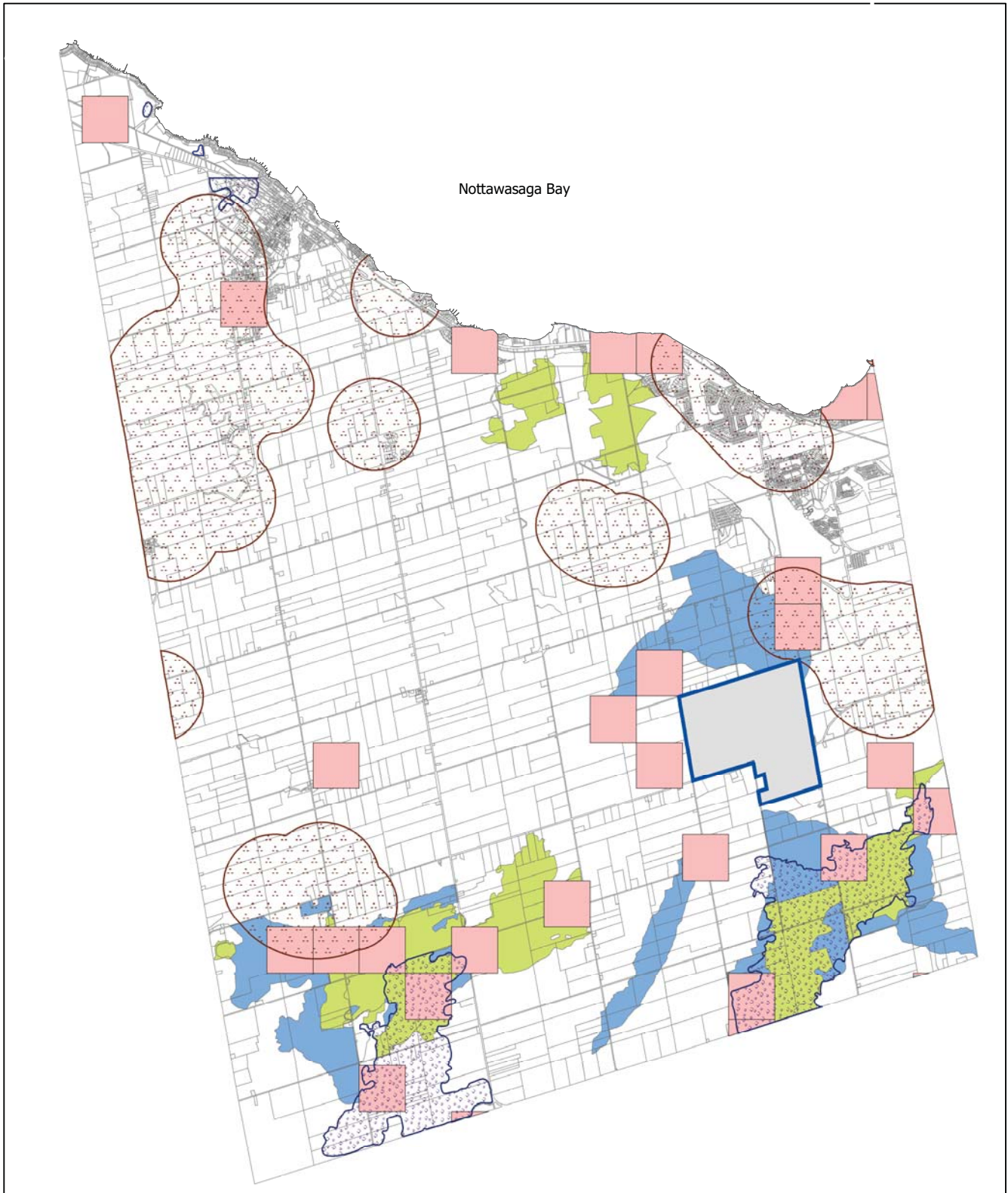
## **G. Appendices**

- A. Official Plan Appendix Map 'D' - "Archaeology Areas"
- B. Section 8.11, Subsections (5) – (8) of the Town's Official Plan – "Cultural Heritage Resources"
- C. Draft Guidelines for Ministries on Consultation with Aboriginal Peoples related to Aboriginal Rights and Treaty Rights – Province of Ontario
- D. "Municipal-Aboriginal Relationships: Case Studies" - MMAH
- E. Waste Consultation Requirements - MOE
- F. "Principles for Proponents working in the Traditional Territories of the Saugeen Ojibway Nation"

Submitted by:

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
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Nottawasaga Bay

## Town of The Blue Mountains Official Plan

### LEGEND

-  ANSI - Earth Science
-  ANSI - Life Science
-  Archeology Areas
-  Rare Species Occurances
-  Deer Wintering Area

Appendix Map 'D'  
 Natural Heritage Features  
 ( As Amended by OPA 4 )



SCALE 1:80,000  
 OCTOBER 2005

district pursuant to the Ontario Heritage Act. Council shall follow the procedures established by the Ministry of Citizenship, Culture and Recreation for the preparation of a heritage conservation district plan.

- (5) Where there is a site of cultural heritage significance, including any area of archaeological potential which has been identified in consultation with the Ministry of Citizenship, Culture and Recreation, Council shall require an assessment before any new land use is permitted, including any development, excavations, grading and/or the construction of roads and services. Where development may destroy or significantly alter cultural landscapes or heritage features, actions should be taken to salvage information on the features being lost. Such actions could include the recording of buildings or structures through measured drawings or photogrammetry, or their physical removal to a different location. If a significant archeological resource is located Council shall also require the developer to undertake an archaeological salvage operation as a condition of approval of any development.
- (6) Council may require that an archaeological site or other cultural heritage resource be appropriately zoned under the implementing Zoning By-law to ensure its preservation. In cases where further studies or other requirements must be met prior to development, Council may apply the Holding Zone, Deferred Development Zone, or other appropriate zoning provisions of this Plan. In some cases, Council may consider Bonus Zoning, as further provided under Section 11.7. Appropriate zoning provisions may also be established based on relevant cultural heritage resources studies or programs, including any Heritage Conservation District, potential archaeological operations, and cultural heritage master plans. The establishment of open space blocks, dedications to the municipality, and other conservation measures within development proposals shall generally be required by Council under the development approval process, where deemed necessary or appropriate.
- (7) It is the intent of the Plan to encourage the preservation of cultural heritage features within the Town. In an attempt to inventory, interpret, evaluate, maintain and conserve such features, where possible, the following measures are also encouraged:
  - (a) Care should be taken to discover unknown and to preserve known archaeological sites (especially native burial sites) and areas where such sites might reasonably be expected to exist.
  - (b) Existing heritage features, areas and properties should be retained and reused. To determine whether such actions are feasible, consideration shall be given to both economic and social benefits and costs.
  - (c) New development, including reconstruction and alterations, should be in harmony with the area's character and the existing heritage features and building(s) in general mass, height and setback and in the treatment of architectural details, especially on building facades.

- (d) Where new development involves a heritage feature it should express the feature in some way. This may include one or more of the following:
  - (i) preservation and display of fragments of the former buildings' features and landscaping;
  - (ii) marking the traces of former locations, shapes and circulation lines;
  - (iii) displaying graphic verbal descriptions of the former use;
  - (iv) reflection of the former architecture and use in the new development.
- (8) Council may consider the preparation of one or more cultural heritage resources master plans, including any appropriate measures to be incorporated within development approvals, as well as any other land use provisions or matters which may be appropriately considered by Amendment to this Plan. In this regard, particular attention shall be given to the provisions of Section 6.4.2.

### **8.12 Lands Used for former Orchard Production**

- (1) Applications for a plan of subdivision or consent upon lands known to have been used for orchard production shall not be approved unless accompanied by a report prepared by a qualified consultant, and based on on-site testing of soils, to determine the extent of any contamination hazard and the need for rehabilitation or removal of the soils. The final report shall be carried out to the satisfaction of Council and the Ministry of Environment . Where rehabilitation is determined to be necessary, proponents will be required to follow the Ministry of the Environment decommissioning and site re-use guidelines.
- (2) On lands used or previously used for orchard purposes, in particular orchards containing fruit trees, Council shall, as a condition of approval of a plan of subdivision or approval pursuant to Section 41 of the Planning Act, require that all fruit trees on the lands be destroyed.

### **8.13 Minimum Distance Separation and Nutrient Management**

- (1) All new land uses and new or expanding livestock facilities shall comply with the Minimum Distance Separation Formula. The MDS Formula have been developed by the Province to separate uses so as to reduce incompatibility concerns about odour from livestock facilities. MDS Formula I provides minimum distance separation for new development from existing livestock facilities. MDS Formula II provides minimum distance separation for new or expanding livestock facilities from existing or approved development. The creation of new lots shall also comply with these provisions in a manner which will ensure dwellings meet the MDS formula. Appropriate setbacks and regulations for livestock facilities shall be established under the implementing Zoning By-law for this purpose.

*For Discussion Purposes Only*

**DRAFT GUIDELINES FOR MINISTRIES ON  
CONSULTATION WITH ABORIGINAL PEOPLES  
RELATED TO  
ABORIGINAL RIGHTS AND TREATY RIGHTS**

June 2006

**DRAFT**



This information is for general guidance only and is not a substitute for seeking legal advice. Ministry staff should always consult their Legal Services Branch to obtain advice on how the Crown's obligations to consult Aboriginal peoples may apply in particular circumstances.

## ONTARIO'S VISION

### A New Relationship with Aboriginal Peoples

Ontario is charting a new course in its relationship with Aboriginal peoples. We are committed to establishing constructive, co-operative relationships that are based on mutual respect and which lead to improved opportunities for all Aboriginal peoples.

We are working with Aboriginal peoples on shared priorities in a number of areas, including education, health and youth, among others. Initiatives are being undertaken with a goal of closing the socio-economic gap between Aboriginal peoples and other residents of Ontario.

Aboriginal rights stem from practices, customs or traditions which are integral to the distinctive culture of the Aboriginal community claiming the right. Treaty rights stem from the signing of treaties by Aboriginal peoples with the Crown. Aboriginal rights and treaty rights are protected by section 35 of the *Constitution Act, 1982*.

Consistent with its respect for Aboriginal rights and treaty rights, and its commitment to meeting the province's constitutional obligations to consult Aboriginal peoples, Ontario is working to develop effective consultation processes. Ontario believes that better processes will mean clearer communication, better decisions and lasting outcomes that benefit both Ontario and Aboriginal peoples.

Our priorities include developing more effective consultation processes. One way to advance this goal is to provide better guidance to Ontario ministries on how to fulfill their consultation obligations.

The principles that will influence the development of our final consultation guidelines are:

- Respect for all Aboriginal peoples living in Ontario
- A commitment to meeting Ontario's constitutional obligations to consult Aboriginal peoples.
- The development of effective and efficient consultation processes
- Aboriginal participation in the process of developing the final consultation guidelines

*"In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)."*

Chief Justice  
McLachlin, *Taku River*  
decision (2004,  
Supreme Court of  
Canada), para. 24

Ontario has heard and is listening to Aboriginal leaders and recognizes that their communities face many challenges. Appropriate and meaningful consultations with Aboriginal peoples are key to promoting strong partnerships, enabling the development of Ontario's rich natural resources, protecting the environment, and enhancing Aboriginal participation in the benefits of natural resources development. We will seek the input of our Aboriginal partners on the draft guidelines to ensure the guidelines provide effective guidance on fulfilment of the Crown's obligations.

Ontario recognizes that achieving effective guidelines will take cooperation, determination, understanding and commitment by all parties. We are committed to acting in a spirit of mutual respect and fairness, and to achieving an effective approach to consultation that will move Ontario and Aboriginal peoples toward a new era of cooperation and partnership.

DRAFT

## INTRODUCTION

Aboriginal peoples in Ontario have identified, as a priority, the need for consultation processes that meet the Crown's obligations to consult with Aboriginal peoples and which respect Aboriginal rights and treaty rights. Aboriginal rights and treaty rights are protected under section 35 of the *Constitution Act, 1982*.

In recent years, the Courts have addressed the nature and scope of the Crown's duty to consult Aboriginal peoples on matters affecting Aboriginal rights and treaty rights.

Consistent with its respect for Aboriginal rights and treaty rights, and its commitment to meeting the province's constitutional obligations to consult Aboriginal peoples, Ontario is working to develop effective consultation processes. Ontario believes that better processes will mean clearer communication, better decisions and lasting outcomes that benefit both Ontario and Aboriginal peoples.

We also recognize that industry is looking for clarity on the consultation process and wants to ensure it can move ahead with its initiatives in a timely way.

In developing more effective consultation processes, Ontario has prepared draft consultation guidelines to assist ministries in fulfilling consultation obligations related to Aboriginal rights and treaty rights. The draft guidelines contain an overview of the nature and scope of the Crown's duty to consult Aboriginal peoples, as well as practical advice on fulfilling the duty.

Ministries should use the guidelines when developing specific consultation processes within their mandates. The guidelines are to be used in conjunction with ministries' statutory or regulatory requirements and any processes agreed upon between an Aboriginal community and a ministry.

In addition to developing consultation guidelines, which deal with consultation related to Aboriginal rights and treaty rights, the government is also working to develop effective engagement practices for involving Aboriginal peoples in other initiatives that directly affect Aboriginal communities.

## THE CROWN'S DUTY TO CONSULT AND ACCOMMODATE

The following section provides an overview of the nature and scope of the Crown's duty to consult Aboriginal peoples. It also explains the concept of accommodation of Aboriginal or treaty rights, which may be required in some instances.

### ***Why does the Crown have a duty to consult Aboriginal peoples?***

The Crown's duty to consult has its source in the honour of the Crown and the constitutional protection accorded Aboriginal rights and treaty rights under section 35 of the *Constitution Act, 1982*.

### ***When does the Crown have a duty to consult Aboriginal peoples?***

The Crown has a duty to consult with Aboriginal peoples when the following conditions occur:

- The Crown has knowledge, real or constructive, of the existence, or potential existence, of an Aboriginal right or treaty right
- and**
- The Crown contemplates conduct that might adversely affect the right in question.

*"...the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between Aboriginal and non-Aboriginal peoples."*

Justice Binnie,  
*Mikisew Cree*  
decision (2005,  
Supreme Court  
of Canada),  
*para. 3*

## ***What is an Aboriginal right?***

Aboriginal rights are collective rights. For an activity to be an Aboriginal right, it must be an element of a practice, custom or tradition which is integral to the distinctive culture of the Aboriginal community claiming the right.

- For First Nations and Inuit communities, the activity must have existed at the time of first contact with Europeans.
- For Métis communities, the activity must have existed prior to the time of effective European control.

In both instances, the current practice, custom or tradition must have continuity with the historic practice, custom or tradition, and it must remain integral to the community's culture. Present-day activities may be the modern form of a historical practice, custom or tradition.

Aboriginal title is a particular type of Aboriginal right. For Aboriginal title to be established, an Aboriginal community must have occupied the lands prior to the Crown asserting sovereignty over the lands, there must be continuity between present and pre-sovereignty occupation, and the occupation must have been exclusive at the time the Crown asserted sovereignty over those lands.

Aboriginal rights or title may be modified or surrendered through treaties. The impact of a treaty on Aboriginal rights or title will depend on the interpretation of the particular treaty.

Existing Aboriginal rights are protected under section 35 of the *Constitution Act, 1982*.

### ***What is a treaty right?***

Treaty rights are the specific rights of Aboriginal peoples embodied in the treaties they entered into with Crown governments. Crown governments were initially France or Britain, and, after Confederation, Canada.

Historic treaties were often set out in writing. However, the courts have found that oral promises can also form part of a treaty and give rise to treaty rights.

Matters that treaty rights often relate to include but are not limited to:

- The creation of reserves
- The payment of money
- The right of Aboriginal communities to hunt, fish and trap subject to the terms of the treaty.

Provincial laws or activities can affect treaty rights, such as treaty rights to hunt, fish and trap.

Existing treaty rights are protected under section 35 of the *Constitution Act, 1982*.

### ***What is an established Aboriginal or treaty right?***

An established Aboriginal or treaty right is an Aboriginal right or treaty right that has been recognized expressly through treaties or the courts.

### ***What is an asserted Aboriginal or treaty right?***

An asserted Aboriginal or treaty right is an Aboriginal right or treaty right that has been asserted by an Aboriginal community, but has not been proven in court or included expressly in a treaty.

### ***What determines the extent of consultation required?***

The nature, scope and content of the Crown's duty to consult can vary widely, depending on the particular circumstances.

Factors that can influence the extent of the Crown's consultation obligations include:

- The nature and scope of the established or asserted Aboriginal or treaty right
- The strength of the claim to an asserted Aboriginal or treaty right
- The seriousness of the potential impacts of a government proposed action or decision on the right
- The need to respond to unforeseen or urgent circumstances.

***“Consultation must be meaningful.”***  
**Chief Justice McLachlin, *Haida* decision (2004, Supreme Court of Canada), para. 10**

### ***What must the Crown do to fulfill the duty to consult?***

The duty to consult generally has both information and response components.

The level and extent of a ministry's consultation with an Aboriginal community will depend on the particular circumstances; the consultation activities to be undertaken and how they are approached will vary.

Some of the activities the consultation process may include are:

- Providing information on the proposed project or government decision to the Aboriginal community
- Obtaining information on potentially affected rights
- Listening to any concerns raised by the Aboriginal community
- Attempting to minimize adverse impacts on Aboriginal and treaty rights.

The level and extent of the consultation may change as the process unfolds and new information comes to light.

In all cases requiring consultation, the Crown must act in good faith to provide meaningful consultation appropriate to the circumstances.

***When does the Ontario government need to take steps to accommodate an Aboriginal right or treaty right?***

The Crown may be required to take steps to accommodate an established or asserted Aboriginal or treaty right in cases where the following conditions occur:

- A proposed government action or decision will adversely impact an established Aboriginal or treaty right;
- or**
- A strong case exists for an asserted Aboriginal or treaty right, and a proposed government action or decision may adversely affect this right in a significant way.

***What is meant by accommodation?***

Accommodation involves a process of balancing of interests. Responsiveness is a key requirement. Accommodation, where required, may involve a ministry taking steps to avoid irreparable harm or to minimize the adverse effects of a proposed government action or decision on Aboriginal or treaty rights.

The process does not generally provide the affected Aboriginal community with a veto over a proposed decision or action. But in some limited circumstances — for example, involving serious infringements of Aboriginal title — an Aboriginal community’s consent may be required.

***Does the duty to consult and accommodate apply when the Crown has a right to take up lands under a treaty?***

Under some Ontario treaties, the treaty rights of Aboriginal communities to hunt, fish or trap are subject to the Crown’s right to take up lands for various purposes. The courts have interpreted similar provisions in treaties in other provinces as giving rise to a duty to consult and, if appropriate, accommodate when taking up lands in some circumstances.

*“A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other’s concerns and move to address them.”*

**Chief Justice McLachlin, *Haida* decision (2004, Supreme Court of Canada), para. 49**

***What is the role of Aboriginal communities in the consultation process?***

As Aboriginal rights and treaty rights are collective rights, ministries must undertake consultations with Aboriginal communities. The communities in question must possess or assert constitutionally protected Aboriginal rights or treaty rights which may be adversely affected by the government's proposed actions or decisions.

All parties are expected to participate in the consultation process in good faith. The Courts have stated that there is an onus on Aboriginal communities to:

- Make their concerns known to ministries
- Respond to ministries' attempts to meet their concerns and suggestions; and
- Attempt to reach some mutually satisfactory solution.

Where an Aboriginal community has asserted an Aboriginal or treaty right, Aboriginal communities are expected to outline their claims with clarity, focusing on the scope and nature of the rights they assert and on the nature of the alleged infringements.

***What is the role of third parties in the consultation process?***

The Crown may delegate procedural aspects of consultation to a third party — for example, industry proponents seeking approval of a development proposal. But the ultimate legal responsibility for fulfilling the Crown's duty to consult Aboriginal peoples rests with the Crown.

## **DETERMINING WHETHER CONSULTATION IS REQUIRED**

Guided by the obligations and principles described above, government decision-makers must always assess particular circumstances to determine whether their ministry has an obligation to consult Aboriginal peoples.

If the ministry does have a duty to consult, then it must determine the level and extent of consultation required, and how the consultation should be undertaken. This involves assessing how the government's proposed decisions and actions may affect Aboriginal peoples, as well as the nature and strength of any rights that Aboriginal communities have claimed or asserted.

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## Identifying the Potential Impacts on Aboriginal Communities

The following questions will help ministries to identify the impacts of a proposed government decision or action on Aboriginal peoples and determine whether these impacts relate to Aboriginal and treaty rights. They will also help ministries to identify the nature and extent of the rights in question, including any limits that are placed on treaty rights.

- Will the government's proposed action or decision affect the interests of Aboriginal peoples?  
→ If yes, how?
- If the government's proposed action or decision affects an Aboriginal interest, is the interest in question the subject of an established or asserted Aboriginal or treaty right?
- What are the terms of any relevant treaties? Are there any internal limits on the rights set out in the treaty?
- If an Aboriginal interest relates to an asserted Aboriginal or treaty right, what is the basis of the assertion? What information has been provided to support the existence of the asserted right?
- Have Aboriginal communities or organizations been consulted on similar matters in the past, or expressed a desire to be consulted?
- Are any agreements or protocols in place with Aboriginal communities that require the provincial government to consult with the communities or provide them with notice?

Where the issues relate to the use of lands and resources, other questions to consider include:

- Will the government's proposed action or decision affect lands or resources?
  - If yes, how?
- Where are the lands located in relation to established Aboriginal communities that possess or assert Aboriginal rights or treaty rights?
- Are the lands Crown lands or private lands?
- How are the lands currently being used?
- Are the lands in an area subject to a land claim or litigation brought by Aboriginal peoples?
- Has an Aboriginal community previously expressed an interest in relation to the lands, or uses of the lands?
- Will the government's proposed action or decision affect lands or resources that Aboriginal peoples have traditionally relied on for hunting, fishing or trapping?
  - If yes:
    - How significant will the impacts be?
    - Will the impacts be permanent or temporary?
- What treaty area do the lands and resources fall within?
- Does the treaty provide for the modification or surrender of Aboriginal rights or title?
- If the treaty preserves the right to hunt, fish or trap, does the treaty place any limits on the scope of such rights? For example:
  - Geographic limits?
  - Specific form of government regulation?
  - A Crown right to take up lands under the treaty?

## Gathering Relevant Information

In determining whether the Crown has a duty to consult, ministries should consider potentially relevant sources of information at their disposal.

Potentially relevant sources of information can include:

- Maps showing Aboriginal community locations
- Relevant treaties and other agreements
- Land claims
- Ongoing litigation
- Crown resource allocation maps.

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## **DEVELOPING A CONSULTATION APPROACH**

### **Assessing the Level of Consultation Required**

If a ministry has determined that it has an obligation to consult, then the next step is to determine the extent of this obligation.

#### **In making its determination ministries must consider:**

- The nature and scope of the established or asserted Aboriginal or treaty right
- The strength of the claim to an asserted Aboriginal or treaty right
- The seriousness of the potential impacts of a government proposed action or decision on the right
- The need to respond to unforeseen or urgent circumstances.

The law requires the ministry to undertake a process of meaningful consultation which should occur in a timely manner and at a point in the government's process where the information provided and obtained can be meaningfully considered.

Ministries need to approach the consultation process flexibly. The level or extent of consultation may change as the process unfolds and new information comes to light.

### **Developing a Consultation Approach**

There is no single template for how ministries should conduct consultations with Aboriginal communities. Ministries must assess each situation on its particular circumstances.

Approaches should be flexible and adaptable, taking into account that information obtained during consultations may alter the Crown's assessment of the extent of its consultation obligations.

There are a number of questions that ministries should consider when developing their consultation approaches. These questions include:

- Which Aboriginal communities should be consulted?
- Where are these Aboriginal communities located?
- Who are the appropriate representatives of the Aboriginal communities for the purposes of the consultation?
- What information does the ministry need to obtain through the consultation?
- What information does the ministry need to provide affected Aboriginal communities?
- How will this information be shared with affected Aboriginal communities?
- How will concerns raised in the consultation process be addressed?
- What are the timeframes for the consultation? Are they adequate to provide meaningful opportunities to respond and provide input?
- Will additional resources be needed to facilitate the consultation?
- Have any consultations with affected Aboriginal communities already been undertaken or attempted, by a project proponent or other third party?
- What role will proponents or third parties have with respect to the ministry's consultation process with affected Aboriginal communities?
- What role will other ministries and agencies have in the consultation process?
- Are other government processes under way or planned related to the proposed decision, action or project in question?

In some instances, other governments (e.g., Canada) may also have legal obligations to consult Aboriginal peoples. In such circumstances, ministries should consider the relationship of those obligations to the fulfillment of the province's obligations.

### **Involving Aboriginal Communities**

In developing its consultation approach, a ministry should carefully consider the perspectives of the Aboriginal community or communities to be consulted.

In some instances, ministries may need to have discussions with the affected Aboriginal community or communities, to determine what processes or approaches should be used to consult with the communities. This will frequently be the case with larger projects that have the potential for broader impacts on Aboriginal rights or treaty rights.

### **Involving Proponents or Licensees**

Ministries will also need to consider whether or how third parties, such as proponents or licensees, should be involved in the consultation process. In many circumstances, involving third parties in the consultation will benefit both the ministry and the Aboriginal communities.

### **Requests for Resources**

In some instances, particularly with larger projects, Aboriginal communities may request resources to facilitate their involvement in the consultation process. Such requests would need to be considered on a case-by-case basis.

### **Government Co-ordination**

If multiple government approvals are required, there should be a coordinated approach to the government's consultation with Aboriginal communities. Often, such coordination is required across ministries at various levels — for example, senior management, policy, operations, legal services and communications.

## **IMPLEMENTING THE CONSULTATION APPROACH**

### **Informing the Aboriginal Community of the Project**

Ministries undertaking consultations with Aboriginal communities should provide the communities with relevant and reasonably available information regarding the subject of the consultations in a timely manner. Ministries should also ensure that consultations involve the appropriate representatives of the affected Aboriginal communities.

### **Further Identifying Rights and Impacts**

A consultation process may involve seeking further information from Aboriginal communities on the nature of established or asserted Aboriginal or treaty rights, or on how the government's proposed decisions or actions may adversely affect or interfere with the community's established or asserted rights.

In these circumstances, ministries should request information from the Aboriginal communities about the scope and nature of any community activities or interests that may potentially be affected by the government's proposed actions or decisions, and on how they relate to established or asserted Aboriginal rights or treaty rights. The Aboriginal communities should also be asked for their views on the potential impact of the proposed actions or decisions on their rights.

Ministries should gather relevant information from other ministries as well. Information collected should be organized, documented, and sources identified, for future reference.

### **Addressing Concerns/Accommodating Aboriginal or Treaty Rights**

Where Aboriginal communities have raised concerns or identified impacts that would give rise to a duty to accommodate as outlined earlier in the guidelines, ministries need to consider the steps they can take to address these concerns.

At this stage, the government should consider the scope and extent of the concerns raised. The ministry should seek to identify, through discussions with the affected Aboriginal communities and, if applicable, third parties (e.g., project proponent), what measures can be put in place to limit possible adverse impacts on the community's established or asserted Aboriginal or treaty rights.

Circumstances may arise where a duty to accommodate exists, but a ministry and an Aboriginal community cannot agree on how to accommodate the community's established or asserted Aboriginal or treaty rights. In such cases, government decision-makers should consider whether they have made good faith efforts to address the concerns raised by the Aboriginal community. Some questions include:

- Have sufficient steps been taken to avoid irreparable harm?
- Have adequate attempts been made to minimize the adverse impact of the proposed government action or decision?
- Does the proposed approach reflect an appropriate balancing of interests?

In some circumstances, consideration will need to be given to whether proceeding could result in an infringement of an Aboriginal or treaty right and whether the infringement would be justifiable. In such circumstances, legal advice should be sought on the factors the courts will consider in determining whether an infringement is justified and on their application to the proposed action or decision.

### **Advising Aboriginal Communities of Decisions**

Where consultation has been undertaken with an Aboriginal community and the ministry has made a decision on how it will proceed, it should communicate the decision to the affected Aboriginal community in a timely manner.

**This information is for general guidance only and is not a substitute for seeking legal advice. Ministry staff should always consult their Legal Services Branch to obtain advice on how the Crown's obligations to consult Aboriginal peoples may apply in particular circumstances.**

Municipal-Aboriginal  
**RELATIONSHIPS:**

*Case Studies*





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# Foreword

“The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people’s concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.”

Justice Binnie, *Mikisew Cree* decision (2005, Supreme Court of Canada), *para.1*

This document is for information only and is not a substitute for seeking legal advice. Every reasonable effort has been made to ensure the currency and accuracy of the information presented in this document. However, users should verify the information from other sources prior to making decisions or acting upon it.

# Introduction

Local governments' relationships with Aboriginal peoples are changing. Across Canada, municipal governments and neighbouring Aboriginal communities are developing stronger relationships. Together, they are creating opportunities to improve the quality of life for their residents.

Establishing and maintaining respectful relationships between all parties is essential to good municipal-Aboriginal relationships and is a basic principle of good municipal governance. By respecting each other's perspectives and developing relationships, municipalities and Aboriginal communities can build trust, address potentially challenging issues and act collaboratively to achieve social and economic well-being for all residents.

The special characteristics of Aboriginal communities make municipal-Aboriginal relationships unique. *The Constitution Act, 1982* recognizes the Aboriginal and treaty rights of Aboriginal peoples – which include Indians (more commonly referred to as 'First Nations'), Métis and Inuit. Recent court decisions have determined that these rights may trigger a duty to consult with Aboriginal communities in certain circumstances. If the Crown (federal, territorial, provincial) is considering a decision that may adversely affect established or asserted Aboriginal or treaty rights, the Crown has a duty to consult and, where appropriate, to accommodate the affected Aboriginal peoples.

The Ministry of Municipal Affairs and Housing's position is that municipalities have a duty to consult in some circumstances. This document is designed to help municipalities and their staff understand the opportunities and responsibilities to engage and consult with Aboriginal communities, and provides examples of current experiences.

## Relevance to Municipalities

Aboriginal history is an integral part of the heritage of Ontario. The existing Aboriginal and treaty rights of Canada's Aboriginal peoples are recognized and affirmed in the *Constitution Act, 1982*. Aboriginal peoples participate in local economies and have interests such as community health, investment and growth. Engaging Aboriginal peoples should be part of a municipality's regular business practices.

Engaging Aboriginal communities has many benefits to First Nations, Metis and local governments, as can be seen in the case studies which follow. The case studies provide examples of opportunities where Aboriginal peoples and municipalities shared a mutual interest in the community. Early and frequent engagement with Aboriginal communities provides knowledge that can help in future decision-making.

## Engaging Aboriginal communities

Engaging Aboriginal communities is different from engaging with others. Recognition of Aboriginal rights is enshrined in Canada's constitution. Aboriginal communities have different cultural and governance structures, and they may also differ from each other in many ways.

“In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1) [of the *Constitution Act, 1982*].”

Chief Justice McLachlin, *Taku River* decision (2004, Supreme Court of Canada), *para. 24*

Strong municipal-Aboriginal relations can assist in meeting a range of objectives, including identifying areas of mutual interest and developing joint initiatives, meeting regulatory requirements for community development, partnering on service delivery and resource management. Numerous municipalities across Ontario are already engaging Aboriginal peoples on a range of issues.

There are a number of matters in which local Aboriginal communities can be engaged. These matters could include:

- Land-use planning and development processes.
- Policy development and implementation.
- Preparation of archaeological master plans.
- Infrastructure planning and environmental assessment processes.
- Proposed changes to municipal boundaries.
- Policies related to cultural protection and development, i.e., protection of archaeological and burial sites.

There are a number of tools which municipalities could consider using, including:

- A shared services agreement with Aboriginal communities.
- A dispute settlement protocol which can be used when challenging issues arise during future discussions between a municipality and an Aboriginal community.

While there are broader issues around Aboriginal and treaty rights, and the Crown/Aboriginal relationship, finding ways to address local needs is also very important. Municipalities are well positioned to facilitate local solutions to local concerns.

# Aboriginal and Treaty Rights

Understanding Aboriginal and treaty rights is important to forming partnerships with a local Aboriginal community.

Aboriginal and treaty rights have a long history in Canada. The *Constitution Act, 1982* recognizes these rights and identifies who holds them by defining Aboriginal peoples to include Indians, Métis and Inuit.

## **Part I** **Section 25 of the Canadian Charter of Rights and Freedoms**

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

## **Part II** **Rights of the Aboriginal Peoples of Canada**

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit, and Métis peoples of Canada.
  - (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are collective rights, meaning that they are held by the community rather than the individual.

## *Established Rights and Asserted Rights*

It is important to be aware of both established rights and asserted rights. Established rights include the rights that have been recognized in an existing treaty or court decision. Rights claimed by Aboriginal peoples that are not recognized in such a way are known as asserted rights. These may often include assertions related to land and/or hunting and fishing but may also include other matters. New assertions may arise at any time, which is one of many reasons why Aboriginal engagement processes need to be flexible and responsive to changes in circumstances.

## *Aboriginal Rights*

For an activity to be an Aboriginal right, it must be an element of a practice, custom or tradition which is integral to the distinctive culture of the Aboriginal community claiming the right.

- For First Nations and Inuit communities, the activity must have existed at the time of first contact with Europeans.
- For Métis communities, the activity must have existed prior to the time of effective European control.

In both instances, the current practice, custom or tradition must have continuity with the historic practice, custom or tradition, and it must remain integral to the community's culture. Present-day activities may be the modern form of a historical practice, custom or tradition.

Aboriginal rights may be modified or surrendered through treaties. The impact of a treaty on Aboriginal rights will depend on the interpretation of the particular treaty.

## *Treaty Rights*

Treaty rights are the rights that Aboriginal communities have as a result of special agreements entered into with the Crown. For example, a treaty may recognize the signatory Aboriginal communities' rights to hunt, fish and trap.

In reviewing treaties, municipalities should consider how the treaties may have been understood by the Aboriginal peoples who signed them. Municipalities could obtain information directly from potentially affected Aboriginal communities and could examine historical documentation.

Municipalities may also wish to consult their lawyers for advice regarding how case law or a particular treaty may apply to their situation. Effective engagement and partnership with local Aboriginal communities is more likely to succeed if the relevant Aboriginal and treaty rights are understood by all parties.

# Case Studies

Across Canada, there are a number of examples of successful Aboriginal-municipal relationships and the following case studies highlight some of the experiences in Ontario. It should be emphasized that the unique experiences of each municipality and local Aboriginal communities will play a role in shaping engagement. The following section sets out a few instances where municipalities and Aboriginal communities have found innovative ways to work together.

## Case Study: Teston Site Ossuary, York Region

**Parties:** York Region, City of Vaughan, Huron-Wendat Nation, Mississaugas of Scugog Island First Nation, Six Nations of the Grand River

In August 2005, the excavation for widening Teston Road uncovered human remains under the original Teston Road pavement. York Regional Police and the Office of the Chief Coroner investigated the discovery and concluded that there was no recent forensic interest. The site was released back to York Region, which informed the Cemeteries Branch of Ontario's Ministry of Government Services and the Mississaugas of Scugog Island First Nation (the geographically closest First Nation) of the discovery. Recognizing the possibility that other First Nations with a closer affiliation may have an interest in the burial site, contact was also made with the Huron-Wendat Nation and Six Nations of the Grand River.

An archaeological investigation was commissioned by York Region. The purpose of the archaeological investigation was to determine the likely origins of the burial site, including an estimation of the age and number of persons interred, and their cultural affiliation. As part of the investigation, more than 20,000 pieces of human remains that had been displaced during the initial discovery of the Teston Site Ossuary were recovered.

A report summarizing the findings of the investigation was submitted to the Registrar of Cemeteries. The Registrar of Cemeteries Declaration recognized that the ossuary contained remains of ancestors of the Huron Wendat Nation, the Mississaugas of Scugog Island First Nation, the Six Nations of the Grand River and various Anishnabeg communities of the north shore of Lake Ontario.

The first formal meeting was held in November 2005. There was a consensus among the First Nations that the Teston Site Ossuary should remain in its original location and the road be realigned. Recognizing the historical and cultural significance of the Teston Site Ossuary, York Region began investigating how this could be accommodated. After conducting technical studies and discussions with the First Nations, neighbouring residents and the City of Vaughan, the site was redesigned. The disturbed portion of the Ossuary was to be reconstructed to reflect its original layout and to allow the displaced remains to be returned to their original burial site.

In May 2006, the redesign was completed and submitted to the First Nations for their review. In July 2006, York Region met again with the First Nations, neighbouring residents and the City of Vaughan. There was consensus approval of the redesign and York Region began implementing the changes.

### **Case Study: Teston Site Ossuary, York Region – *continued***

By December 2006, the road construction was complete and fully opened to traffic. The Teston Site Ossuary was protected and in May 2007, the First Nations communities came together to bury the displaced remains. They conducted a traditional, culturally appropriate ceremony which included lining the bottom of the ossuary with animal skins and burning sage. Ceremonies were performed by Elders and spiritual leaders.

This example demonstrates the importance of communication and the willingness of all parties to work together. The Region identified an Aboriginal concern, conducted research, contacted the affected parties, and then each party worked towards finding a resolution. Aboriginal traditions were respected and the Region also worked closely with the affected lower tier municipality and residents.

### **Case Study: Town of Midland**

**Parties:** Town of Midland, Huron-Wendat Nation, Beausoleil First Nation

In 2003, during site preparation for construction of a municipal community centre, workers unearthed human remains and the Town immediately ceased work. The Town's museum curator, having identified the site as a potential Aboriginal ossuary, contacted the closest Aboriginal community. The Town began discussions with First Nations on how to go about protecting and preserving the land.

A consultation with the First Nations led to the implementation of protection and preservation measures. The First Nations participating in the discussions were the Beausoleil First Nation, which is located near Midland on Christian Island, as well as the Huron-Wendat Nation. The Huron-Wendat Nation was known to have occupied the area and it is believed that Huron-Wendat ancestors were buried in the ossuary. The protection and preservation measures were designed to ensure that future generations can access the site. The mayor and municipal council provided staff with full financial and political support to move ahead on this project.

During this consultation, the Town followed the guidance of a First Nations Elder. A privacy barrier was erected and security guards were hired to protect the site from damage. The Town recovered the distributed remains and stored them until the site was stabilized. In 2003, the Town supported the First Nations in the reburial ceremony. In consultation with the First Nations, the Town landscaped the area and erected a commemorative stone. The site has since been declared an Aboriginal peoples' cemetery.

The quick action on the part of the Town to recognize the importance of the site and to notify its neighbouring Aboriginal community was important to the building of good relations between the parties. The Town provided some financial support for costs incurred by the First Nations. In this case, leadership and a respectful approach resulted in a cooperative and constructive consultation with positive outcomes.

## Case Study: Town of Midland – continued

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*“Although a result of an unfortunate incident, the outcome has led to positive discussions and sharing of cultures between the Town and First nation groups. No lawyers were involved and a resolution was amicably agreed to by all parties involved. The preservation of the ossuary and identification of the site holds enormous significance to the First Nations. There was a building of relationships between First Nations and the Town; it raised public awareness and has put in place a stewardship of land developments and controls; and has resulted in the step up of archaeological assessment.”*

– Fred Flood – “Ontarajia: A Huron Wendat Ossuary” – The Association of Professional Archaeologists, 2007-01 Winter Edition

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## Case Study: Common Ground Working Group with Abitibi-Consolidated – Kenora, Ontario

**Parties:** City of Kenora and The Grand Council of Treaty #3, as led by Wauzhusk Onigum, Ochiichagwe ‘Babigo’ Ining and Obashkaandagaang Bay First Nations; with contribution from Abitibi-Consolidated Ltd.

In 2001, the leaders of the Grand Council of Treaty #3 and the City of Kenora created the Common Land, Common Ground initiative as a way for First Nations and municipal governments to discuss areas of mutual concern. The initiative was based on the idea that governments whose people share a territory and its resources should create and maintain ways to live and work in harmony. Both municipal and First Nations leaders realized that an ongoing, constructive relationship could help avoid potential disputes in the future.

In 2004, the community became aware of the Rat Portage historic site, a key link in the trans-Canada canoe route. This portage had been the path shared by all peoples over thousands of years. There was a clear and profound Aboriginal tie to the site and ‘ownership’ could have been contentious. However, in the spirit of the Common Land, Common Ground initiative, and in respect for the ‘shared path’, both the City of Kenora and the First Nation leaders resolved to move forward as equal partners in the management of the site.

The future of some nearby lands was also a delicate situation. Tunnel Island, owned by Abitibi-Consolidated, was 370 acres of undeveloped land that was considered to be valuable, and which contained evidence of over 8,000 years of continuous human occupation. With the closure of its mill, Abitibi was divesting itself of its holdings in Kenora and both the City and First Nations expressed their interest in these heritage lands.

## Case Study: Common Ground Working Group with Abitibi-Consolidated – Kenora, Ontario

– continued

In a two-day facilitated meeting, leaders and Elders from the Grand Council, the three First Nations, municipal leaders and representatives of the company discovered they had a common vision, shared principles and connections to the Tunnel Island land. They emerged describing a renewed partnership: one of alliance and sharing between peoples, which was the original intent of the treaty.

When the First Nations and municipality committed to collaborate on the management of the Rat Portage, Abitibi indicated that it might grant the Tunnel Island land to such a partnership. By the fall of 2006, a formal memorandum between the First Nations, the municipality and the company was in place. It dedicated the land to all the people under joint management, so the land would be “Common Ground” forever.

The land is jointly managed by the Common Ground Working Group (CGWG) which is composed of the City of Kenora, Grand Council Treaty #3 and the three First Nations that formed the original Rat Portage Band: Wauzhusk Onigum, Ochiichagwe ‘Babigo’ Ining and Obashkaandagaang Bay, as well as assisted by the federal and provincial governments. The CGWG makes decisions through consensus and respects the due processes required of both the Aboriginal and non-Aboriginal systems. All members of the group, as well as the public, shared in the traditional Anishnabeg ceremonies to honour the land and the waters on which everyone depends.

The CGWG has gone a long way to build on the commonalities between the First Nations and municipality. However, its process is very careful to respect and even celebrate its members’ differences. The CGWG’s success demonstrates the value of having consistent working relationships in place to handle issues of mutual concern between municipal governments and First Nations. As seen by Kenora’s experience, when different communities join together to tackle shared issues, they are likely to find mutually beneficial solutions and new opportunities for collaboration.

The Common Ground Working Group has presented its work to a wide range of audiences and continues to be interested in sharing its approach with others.

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*“I am honoured to be present [at the signing of this agreement] as we take our first formal steps together down the shared path of our Common Ground.”* – Len Compton, Kenora Mayor

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## Case Study: Elliot Lake – Serpent River First Nation MOU

**Parties:** City of Elliot Lake, Serpent River First Nation

On September 4, 2007, a ceremony was held for the official signing of a Memorandum of Understanding (MOU) between the Serpent River First Nation (also known as the Anishinabek of Genaabaiging) and the City of Elliot Lake.

### **Case Study: Elliot Lake – Serpent River First Nation MOU – *continued***

The MOU affirms collaboration between the First Nation and the City through a Joint Relations Committee (JRC), which focuses on five key priorities:

- Economy / employment / procurement.
- Heritage planning and sharing of resources.
- Mutually beneficial supported initiatives, programs, and services.
- Land use and acquisition.
- Joint lobbying and communications with other governments.

The MOU also notes that these priorities are subject to change and may be updated.

The JRC initiative began in February 2006. The committee is composed of members from both the Serpent River First Nation and the City of Elliot Lake. The JRC’s responsibilities include providing information, options and recommendations to their respective councils for action or resolution.

The committee’s terms of reference states that both parties recognize a need for collaboration to rebuild the economy of the area. It highlights the shared principle that replacing an ad-hoc relationship with a formal joint relations committee will increase economic opportunities and ultimately provide a discussion venue for the two communities.

The creation of the JRC is a proactive measure that recognizes the long-standing common interests of the two communities. It provides a stable forum for identifying and understanding concerns, working towards solutions and promoting the economic and social well-being of the communities.

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*“Today we are celebrating the beginning of a new, constructive relationship. It will be a template for future successful agreements between other First Nations in Ontario and their neighbours.”*

– Mayor Rick Hamilton, City of Elliot Lake - Report by the Joint Relations Committee – Sept.4, 2007.

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### **Case Study: Belle Island and Kingston’s Future Aboriginal Relationships**

**Parties:** City of Kingston, the Six Nations of the Grand River, the Algonquins of Ardoch, the Algonquins of Sharbot Lake, the Algonquins of Pikwàkanagàn, the Mohawk Council of Akwesasne, the Mohawks of the Bay of Quinte and the Huron-Wendat of Wendake

In 1988, human remains were discovered on Belle Island, a 37.5 acre parcel of land in the Great Cataraqui River. The City of Kingston recognized the historical importance of the island and recommendations were made to do further work on the more recent remains. A year later, City council passed a resolution that portions of the island be registered as a cemetery.

### **Case Study: Belle Island and Kingston's Future Aboriginal Relationships – *continued***

In 2000, the remains were interred and an archaeological assessment of the site was conducted. The following year, City council passed a resolution recognizing that Belle Island contained First Nations cultural heritage resources and began consultations with local First Nations. Discussions regarding the history and protection of the site took place from 2001-2005 among the Belle Island parties. Notices of the discussions were also given to various federal and provincial departments and agencies.

In the fall of 2006, City council approved a strategy of specific actions and commitments to protect the site, which was established through discussions with local First Nations. This strategy included:

- Establishing an implementation team composed of three staff members representing the City of Kingston and three representatives from the First Nations, to undertake the elements of this proposed strategy.
- Agreeing that the island should remain under the land use jurisdiction of the City and that the City should retain responsibility for insurance, services and security, as may be required.
- Creating a plan for the future use of the island to enhance its natural grace and dignity.
- Agreeing to impose land use planning restrictions to ensure the future protection of the island and its natural and human values.
- Taking steps to set the island apart physically (i.e., limiting routes of access to the island).

### **Aboriginal Relationships after Belle Island**

Out of the Belle Island experience, the City of Kingston determined that it needed to address Aboriginal interests as part of its normal business practices. The City committed to engaging with Aboriginal peoples in two ways:

- Provide early notice and documentation of land use plans to a wide range of Aboriginal communities.
- Consult more specifically on identified future projects.

The City's approach to including Aboriginal peoples in its business will develop and evolve as the City gains experience in sharing and gathering information with all Aboriginal groups. A significant step that will inform future decision-making processes is the development of an archaeological master plan by the City of Kingston.

The collaboration of the City of Kingston and the First Nation communities is an example of what is hoped will be a developing and meaningful municipal-Aboriginal relationship. The relationship developed by the implementation team, which had been established to address the Belle Island issue, should help future consultations between the City and Aboriginal peoples.

# Overall Lessons Learned

- It makes good sense to engage early and build relationships with Aboriginal communities.
- Be proactive in establishing municipal-Aboriginal relationships.
- Early and frequent engagement with Aboriginal communities provides knowledge that can help in future decision-making.
- Recognize and respect that building municipal-Aboriginal relationships may take time. Be aware that there are many competing demands for communities with limited resources.
- Be mindful that Aboriginal communities may be dealing with many notices from various organizations and governments.
- Understanding differences is important – Aboriginal communities are not municipalities or stakeholders.
- One size does not fit all – there are variations in municipal and Aboriginal governance models, so any engagement process must be flexible.
- Numerous municipalities across Ontario are already engaging with Aboriginal peoples on a range of issues.
- The engagement process should aim to develop a common understanding of shared interests, concerns, expectations and responsibilities.
- Formal and stable processes, such as joint relations committees, are useful tools to promote understanding and cooperation and to develop mutually beneficial solutions.
- It is important for parties to share their perspectives on the potential impacts of a proposed project/decision on treaty and Aboriginal rights.

# Selected Resources

- Indian and Northern Affairs Canada  
([www.ainc-inac.gc.ca](http://www.ainc-inac.gc.ca))
  - ✧ Contains information such as:
    - The status of specific claims.
    - First Nation profiles.
    - Treaty information, including mapping.
  - ✧ Contact INAC directly for information on specific claims, comprehensive claims, litigation matters and other relevant information.
  
- Ontario Ministry of Aboriginal Affairs  
([www.aboriginalaffairs.gov.on.ca](http://www.aboriginalaffairs.gov.on.ca))
  - ✧ This site brings together information on Aboriginal affairs in Ontario, including information on:
    - The role of the Ministry of Aboriginal Affairs.
    - Land claims.
    - Building partnerships.
  
- Aboriginal Canada portal  
([www.aboriginalcanada.gc.ca](http://www.aboriginalcanada.gc.ca))
  - ✧ A site created through a partnership of government departments and Aboriginal communities, that serves as a window to Aboriginal peoples online resources and government programs and services.
  
- Federation of Canadian Municipalities: Land Management Project  
(<http://www.fcm.ca/english/View.asp?mp=532&x=790>)
  - ✧ The Federation of Canadian Municipalities, in partnership with several Aboriginal organizations and the federal government, developed the Land Management Project. This initiative encourages communication, understanding and cooperation between Aboriginal peoples and municipal governments in the areas of land management and social and economic development.
  - ✧ The website includes a toolkit, best practices, a community resource guide and news on upcoming workshops.
  
- Aboriginal communities
  - ✧ Aboriginal communities may provide further information and resources.
  
- Chiefs of Ontario  
(<http://www.chiefs-of-ontario.org>)
  - ✧ The website for a coordinating body for First Nations located within the Province of Ontario.

- Métis Nation of Ontario  
([www.metisnation.org](http://www.metisnation.org))  
✳ A site containing a variety of Métis specific information.
- CivicNet BC's Resources on Aboriginal peoples Issues  
([www.civicnet.bc.ca/siteengine/activepage.asp?PageID=10&bhcp=1](http://www.civicnet.bc.ca/siteengine/activepage.asp?PageID=10&bhcp=1))  
✳ While the operating environment of BC municipalities is different, the section on Relationship Building and Dispute Resolution offers many documents that highlight best practices.
- Supreme Court decisions available at  
([scc.lexum.umontreal.ca/en/index.html](http://scc.lexum.umontreal.ca/en/index.html))

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Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 S.C.R. 550

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69

# Contact Information

Should you have any questions or comments on the document please contact:

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Local Government Policy Branch

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Should you require another copy of this document go to: [www.mah.gov.on.ca/Page6054.aspx](http://www.mah.gov.on.ca/Page6054.aspx) or contact one of the Ministry of Municipal Affairs and Housing Regional Offices listed below:

### **Central Municipal Services Office (Toronto)**

*General Inquiry: 416-585-6226*

*Toll Free: 800-668-0230*

**Servicing:** Durham, York, Peel, Halton, Simcoe, Muskoka, Dufferin, Niagara, Hamilton, Toronto

### **Eastern Municipal Services Office (Kingston)**

*General Inquiry: 613-545-2100*

*Toll Free: 800-267-9438*

**Servicing:** Frontenac, Leeds & Grenville, Lennox & Addington, Haliburton, Hastings, Kawartha Lakes, Lanark, Northumberland, Ottawa, Peterborough, Prescott-Russell, Prince Edward, Renfrew, Stormont, Dundas, Glengarry

### **Northeastern Municipal Services Office (Sudbury)**

*General Inquiry: 705-564-0120*

*Toll Free: 800-461-1193*

**Servicing:** Cochrane, Algoma, Manitoulin, Sudbury, Parry Sound, Nipissing, Timiskaming

### **Northwestern Municipal Services Office (Thunder Bay)**

*General Inquiry: 807-475-1651*

*Toll Free: 800-465-5027*

**Servicing:** Thunder Bay, Kenora, Rainy River

### **Western Municipal Services Office (London)**

*General Inquiry: 519-873-4020*

*Toll Free: 800-265-4736*

**Servicing:** Waterloo, Wellington, Bruce, Elgin, Essex, Grey, Huron, Chatham-Kent, Lambton, Middlesex, Oxford, Perth, Norfolk, Brant, Haldimand



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# **Guide to Environmental Assessment Requirements for Waste Management Projects**

**Legislative Authority:**

*Environmental Assessment Act, R.S.O. 1990, Ontario Regulation 101/07*

**Date:**

March 15, 2007



Please note that information on which government agencies were consulted, government agency concerns or issues and how they have been resolved or addressed, as well as copies of key government agency comments are required to be included in the Environmental Screening Report.

### **A.3.3 Consultation with Aboriginal Communities**

Consultation with Aboriginal communities in the Environmental Screening Processes is intended to allow the proponent to identify and address concerns and issues of Aboriginal communities and to provide an opportunity to receive information about and have meaningful input into the project review and development. In addition, such consultation is intended to address situations where the Crown may have a duty to consult with Aboriginal communities.

It should be noted that whether or not the Crown has a constitutional duty to consult with an Aboriginal community, the community may be an interested person for the purposes of consultation in the Environmental Screening Process. References to interested persons in the requirements for consultation should be read to include Aboriginal communities.

To assist proponents in developing a list of Aboriginal communities that are required to be consulted, the proponent should contact the Branch using the contact information listed above for a list of organizations that proponents can contact.

Aboriginal rights and treaty rights are protected by section 35 of the *Constitution Act, 1982*. Aboriginal rights stem from practices, customs or traditions which are integral to the distinctive culture of the Aboriginal community claiming the right. Treaty rights stem from the signing of treaties by Aboriginals with the Crown.

The Crown may have a duty to consult with Aboriginal communities in order to satisfy its responsibilities with respect to potential adverse impacts of projects on asserted or established aboriginal or treaty rights. This Guide is not intended to fully describe how any such duty, if it is triggered, may be discharged. However, the Crown may delegate the procedural aspects of consultation to proponents, and recognizes a corresponding responsibility of Aboriginal communities to participate in this process, make their concerns known and respond to efforts to address their concerns. To the extent that any Crown duties of consultation are triggered for a particular project, the Environmental Screening Process set out in this Guide describes some of the actions and procedural aspects of consultation that proponents are required to take with respect to consultation with Aboriginal communities.



## Principles for Proponents working in the Traditional Territories of the Saugeen Ojibway Nations

The Saugeen Ojibway Nations consist of the Chippewas of Saugeen and the Chippewas of Nawash Unceded First Nation. The traditional lands of the Saugeen Ojibway Nations extend east from Lake Huron to the Nottawasaga River and south from the tip of the Bruce Peninsula to the Maitland River system (11 miles south of Goderich). The traditional waters around these lands include the lakebed of Lake Huron from the shore to the US border and the lakebed of Georgian Bay to the halfway point.

The following principles will form the basis of any future relationship with the proponent and a negotiated protocol for consultation and accommodation.

### **1. Rights and Interests**

The rights and interests of the Saugeen Ojibway Nations are as follows:

- a) Pursuant to our 19<sup>th</sup> century Treaties with the Crown, the SON occupy large Reserves bordering Lake Huron or Georgian Bay. Because these reserve lands were exempted from the surrender in the Treaty, the SON have Aboriginal title to those lands. Those reserves sustain the SON's future in various ways. They are our residential communities, include places of cultural and spiritual significance, and are the base for our fisheries and other economic opportunities, including valuable recreational properties. Those proprietary rights and interests depend on a safe and stable, toxic-free environment, including clean water from Lake Huron or Georgian Bay.
- b) The SON have subsistence fisheries and land-based harvesting practices and rights throughout our territory. These provide vital support for our Aboriginal culture and way of life, as well as the economy, health and social relationships in the SON communities.
- c) The SON also have commercial fishing rights in Lake Huron and Georgian Bay. These Aboriginal and Treaty rights were confirmed in *R v Jones and Nadjiwan*, [1993] 3 CNLR 178, and are an interest of growing economic importance, in light of the large scale settlement and development in the territory.
- d) The SON also have two major land claims before the courts. One is an aboriginal title claim to the lakebeds of our traditional waters. The other affects the whole of Bruce Peninsula, including the land under navigable rivers and lakes.

## 2. Consultation

The Supreme Court of Canada has recently explained the Crown's legal obligations to consult aboriginal peoples, in three decisions: *Taku River Tlingit v British Columbia* [2005] 1 CNLR 366, *Haida Nation v British Columbia* [2005] 1 CNLR 72, and *Mikisew Cree v Canada* [2006] 1 CNLR 78. In subsequent decisions by courts in British Columbia and Ontario, further details have been clarified – see e.g., *Musqueam Indian Band v Canada* [2005] 2 CNLR 212 (B.C.C.A.), *Platinex Inc. v Kitchenuhmaykoosib Inninuwig First Nation* (Ont. SCJ, July 28, 2006).

It is now settled that a government must engage in consultations with an Aboriginal people when considering a decision that might adversely affect their Aboriginal or Treaty rights or interests intended for protection by section 35 of the *Constitution Act, 1982*. If there is a potential for substantial adverse impacts or infringement, there is a corresponding obligation to protect and accommodate the affected rights or interests.

These consultation and accommodation obligations are based on the honour of the Crown. They reflect the ongoing requirement to pursue the reconciliation of pre-existing Aboriginal rights and interests with Crown sovereignty. These are continuing obligations that emerge from the Crown-Aboriginal relationship, and which arise whenever there is a reasonable likelihood that Aboriginal interests could be at risk. If governments do not fulfill these obligations, the courts may disallow authorizations for proposals that triggered the duty.

Therefore, in the context of the SON:

- a) The process must focus on the impacts/infringement. The Crown must genuinely seek to inform itself about and substantially address the First Nation's concerns.
- b) The focus must be on the outcome and not just the process. The appearance must not triumph over content.
- c) The key is to focus the consultation process on the constitutionally protected aboriginal rights in question. This is not just a chat. This is not a discussion about "interests". This is a process required because the Crown is proposing to allow something to take place that could infringe a right or rights protected by s.35 of the Canadian Constitution. The scope and nature of the consultation and accommodation are inextricably linked to the rights at stake.
- d) The substantive requirement is that the Crown "demonstrably integrate" the rights and title claims raised by the First Nation into the decision making process.
- e) The Crown's legal duty to consult with the Saugeen Ojibway Nations cannot be delegated to third parties.
- f) Consultation cannot proceed in the absence of the Crown.

- g) The SON, after the Environmental Assessment process, will be consulted about any subsequent permitting, approval and licensing processes that are a part of the overall project.

### 3. Protection of the Environment

The Saugeen Ojibway Nations' traditional territories have been their home long before contact and will continue to be their home for generations to come. The full expression of Saugeen Ojibway Nations' rights depends on healthy, biologically diverse ecosystems. Therefore:

- a) The SON must have full participation in any environmental screening or assessment process.
- b) The SON are entitled to share and have access to all necessary information relating to environmental screening or assessment reports and processes, especially those that might reveal potential impacts on Saugeen Ojibway Nations' rights, claims and way of life.
- c) The SON must have full participation in the ongoing monitoring of the project.
- d) A separate Environmental Agreement will be required. Components of the Environmental Agreement would include (but would not be limited to):
  - i. terms and conditions that are necessary as identified by the SON's environmental review of the project;
  - ii. a determination of the level of engagement of the SON in the ongoing environmental management of the project, including decommissioning of the project;
  - iii. delivery of environmental monitoring data, studies and other information to the SON for periodic evaluation;
  - iv. periodic independent evaluation of the proponent's environmental performance;
  - v. the collection of baseline data for use as environmental health indicators.
  - vi. environmental reporting to the SON on a regular basis;
  - vii. review and approval authority by SON of environmental management plans (especially closure/decommissioning plans);
  - viii. an endorsement of the precautionary principle;
  - ix. agreement on the preservation of sensitive naturally occurring ecologies, including species of particular cultural interest to the SON;
  - x. restoration, where practical and appropriate, of indigenous species;
  - xi. compliance with regulations, standards and best practices of the day.

### 4. Sustainability of the First Nations

In the past, many projects, legislation, policies and practices have proven incompatible with the Saugeen Ojibway Nations' rights, interests and way of life. Therefore:

- a) The proponent must accommodate the rights and interests of the SON such that the project contributes to the SON's well-being and does not undermine it.
- b) Any adverse impact or infringement upon the SON's rights and way of life and the sustainability of these interests within their traditional territories must be fully addressed and mitigated by the proponent. This would include impacts on harvesting rights, particularly SON rights to a commercial fishery.
- c) The proposed project must be consistent with the SON's vision for the land and waters of their traditional territories, respectful of their rights and interests and it must contribute to the cultural, economic and social vitality of their people.

## 5. Protection of Culturally Specific Sites (burial grounds, ancient habitation sites etc.)

Areas within the traditional territories of the Saugeen Ojibway Nations are sacred and are of significant cultural value. It is imperative that these sites are properly identified and protected. Therefore:

- a) The proponent must, with SON participation, determine whether the site for the proposed project is of any cultural significance to the SON.
- b) The proponent and the SON must assess whether the project will have an adverse impact on any existing culturally specific site(s).
- c) If the heritage resource potential of any site(s) proposed for surface disturbance has not yet been assessed for archaeological potential, then, prior to any disturbance, the proponent must conduct a site archaeological survey according to terms agreed to by the SON.
- d) If artefacts or remains are found, all work at the site must cease and the SON notified immediately. The proponent and First Nation representatives will then enter into negotiations regarding the disposition of artefacts and the protection of remains.
- e) Socio-cultural impact assessment studies may need to be conducted at the proponent's expense.

## 6. Experts and Assessments

- a) The proponent must seek the approval of the SON for the appointment of experts who will conduct traditional land use studies, archaeological studies and ethnographic studies that assess the impacts of the project.
- b) The SON must play a meaningful role in any assessments or studies regarding the project and its impact on their rights and way of life and the sustainability of these

interests within their traditional territories. This role might include the setting of terms of reference and the peer review of such studies.

## 7. Mitigation Strategies

Accommodation is an integral part of consultation. Therefore:

- a) The proponent and the SON must jointly develop mitigation strategies that fully address the SON's concerns.

## 8. Information Sharing

An open and transparent process, conducted in good faith is at the heart of proper consultation. The Saugeen Ojibway Nations must be able to make informed decisions, understand fully the effects that a decision may have, and ensure their decisions are consistent with the needs, aspirations and concerns expressed by their communities. Therefore:

- a) The proponent must provide the necessary vital and detailed information pertinent to the project and its impacts on the SON's rights and interests and the sustainability of these interests within their traditional territories.
- b) The SON must share all information with the proponent that addresses their concerns regarding potential impacts of the project and any other information that is necessary in terms of assessing and or monitoring the project as well as designing and implementing any required mitigation measures.
- c) All information must be provided in a timely manner.

## 9. Capacity

- a) The proponent must provide the Saugeen Ojibway Nations with sufficient funding to ensure that the SON can participate fully in the negotiation of a Protocol Agreement and in the consultation process itself, which includes the various studies, and stages of the assessment process.

## 10. Benefits

The SON is generally excluded from the educational, employment and business opportunities that industry brings to others in their traditional territories. Therefore:

- a) The proponent and SON will negotiate an agreement that will include, but is not limited to, compensation, employment, training and business opportunities.