1-1-2012

What I Should Have Learned In School : Making The Connection Between Land Use Planning & The Duty To Consult

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WHAT I SHOULD HAVE LEARNED IN SCHOOL:

MAKING THE CONNECTION BETWEEN LAND USE PLANNING & THE DUTY TO CONSULT

by

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A Major Research Paper

presented to Ryerson University

in partial fulfillment of the requirements for the degree of

Master of Planning

in

Urban Development

Toronto, Ontario, Canada, 2012

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ABSTRACT

This major research paper examines whether land use planning in Canada incorporates Aboriginal and treaty rights into its processes, by way of integrating the duty to consult, as well as to examine whether planning education teaches students about these issues. By examining literature and policy, and conducting interviews with planners, planning faculty, archaeologists and legal practitioners, this research sheds light on where the duty to consult First Nations intersects with land use planning in Ontario. The paper concludes with two recommendations: first, changes must be made to municipal land use planning in Ontario, and by extension the rest of Canada; second, foundational planning curriculum must provide planning students with knowledge of Aboriginal and treaty rights and land use planning.

Key words: land use planning, Aboriginal & treaty rights, education, consultation, municipalities

Acknowledgements

I would like to thank those who helped me as I worked through the research and writing of this paper. My supervisor and second reader, both of whom gave me valuable feedback (and extra tasks) that pushed me to write a better paper. My family, who provided me with moral and noodle support. My Bees Knees family for distracting me with all the swing-outs that kept me sane and healthy. And finally, all you who have spent your lives trying to make this country a more just place – I hope to join your ranks.

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After some 500 years of a relationship that has swung from partnership to domination, from mutual respect and co-operation to paternalism and attempted assimilation, Canada must now work out fair and lasting terms of coexistence with Aboriginal people."

Royal Commission on
Aboriginal Peoples

"In our minds, if we are looking towards a future where we can have peace in this land, the mechanism is there, and that is...those relationships of friendship [in our treaties]... That is the foundation we have to begin with."

Charlie Patton
Mohawk Trail Longhouse
Kahnawake, Quebec
As quoted in RCAP

I
Introduction

Rooted in a history of broken treaties and undermined trust, the past few decades have seen numerous conflicts revolving around land use between Aboriginal and non-Aboriginal peoples ("settlers"). In 1990, the Canadian government sent in 3500 troops to Oka, Quebec, to bring an end to a Mohawk land-occupation. The municipality intended to develop this land into a condominium and to expand a golf course, which the Mohawk Nation protested because it was on traditional territory containing sacred grounds (Obamsawin, 1993). The resulting violence left one person dead. As a result of this standoff, which represented a culmination of years of conflict over Aboriginal and settler occupation of land, a Royal Commission on Aboriginal Peoples was established. Its purpose was to examine many issues facing Aboriginal communities, and the overall context and history of Aboriginal-settler relations in Canada. Responding to the 16-point mandate handed down to the Commission by the Government of Canada in 1991, the Report for the Royal Commission on Aboriginal Peoples was published in 1996. Many of its recommendations have implications on how municipalities develop land. In a well known pattern however, many of them have yet to be acknowledged and/or acted upon by the Crown.

The Crown has a duty to consult with Aboriginal peoples in Canada when it has any knowledge that a particular development, for example, resource extraction or infrastructure growth, may impact Aboriginal or treaty rights. Furthermore, in some instances, the Crown must accommodate the Aboriginal peoples with respect to these rights. Although there are increasing examples of the duty being acknowledged and fulfilled on a case-by-case basis, land use

planning processes and policy in Canada, particularly in Ontario, systemically and consistently ignore this responsibility. While municipalities are not considered part of the Crown as the Federal and Provincial governments are, they are nonetheless required to act in accordance with the interests of the Crown, as stated in policy documents such as the Ontario Planning Act. Municipal land use planning organises and impacts significant areas of land in Ontario, often affecting First Nations interests, yet problematically, the province provides municipalities with little guidance on how to plan land use in compliance with the law.

This paper will examine the issue of where land use planning and the duty to consult intersect, in order to ascertain to what extent planning processes incorporate Aboriginal and treaty rights into the planning framework. This is important for a number of reasons. To begin with, consultation with Aboriginal peoples, especially First Nations in Ontario, is a legal obligation of the Crown, as articulated through numerous cases. Secondly, in addressing this issue, the amount of conflict that may otherwise take place can be minimised. Land use planning is central to how and where people in Canada live – Aboriginal and settler peoples alike. Therefore, the consequent processes must be examined continually to ensure that they best serve the needs and rights of the people that live on the land.

II
Methodology

i. research questions & approach

This paper will focus on land use planning primarily in the Province of Ontario, in order to provide a clearer picture of the planning processes in relation to Aboriginal rights. This research inquiry was guided by two research questions. The first asks: how does land use planning in Ontario incorporate consultation with First Nations into the processes? In order to answer this question the paper will first explore the historical context of Indigenous-Crown relations to understand why this question must be asked. At that point the paper will return to the research question and examine land use planning as it exists today in Ontario, to ascertain whether or not the planning process is compliant with laws pertaining to consultation with First Nations. The second research question, following this examination of land use planning in Ontario, focuses on planning education in Canada at large. It asks: do Canada's accredited planning programs educate students on Aboriginal rights as they relate to land use planning? To answer this question the paper must look at the accreditation system, what sort of education is provided, and what is missing.

In order to conduct this inquiry, several methods of research were required, including primary and secondary research. Beginning with the secondary research, a preliminary literature review was conducted in order to assess, on a broad level, the issues related to planning and Indigenous peoples, in Canada and internationally. This preliminary research led to examining municipal land use planning in Ontario with respect to the duty to consult and accommodate First Nations. Upon establishing a research focus, further secondary research was conducted, the

findings of which are woven into the following paper. This integrative approach to a literature review was chosen over the approach that includes a separate literature review section, because it was deemed more appropriate for the purpose and length of this paper. The literature reviewed is interdisciplinary, including academic research from disciplines such as planning, geography, political science, linguistics, education, law, as well as policy and legislation. Although the paper is not grounded in one particular theory, theories will be touched upon as a result of the interdisciplinary nature of the research. Yiftachel's work in planning theory that explores planning and social control is highly influential, and emerges when examining land use planning structures and governance (1998). In general, a counter-colonial perspective influences this research, in that the foundations of contemporary institutions are being examined and how they attempt to create reconciliation between a historically oppressed part of society and the status quo. For a more extensive research project, a counter-colonial approach might engage in participatory research, as Nicholls articulates in "Research and Indigenous participation: critical reflexive methods" (2008), however the framework for conducting this research did not allow for such an extensive approach to the research. Instead, the work of several counter-colonial authors will be referred to throughout the paper. The sources of this research include numerous Indigenous individuals, to bring a broader range of perspectives to this discussion of planning in Canada.

The primary research included telephone and in-person interviews, as well as communication with administrative staff and faculty from accredited university planning programs across the country. The proposal to conduct interviews was approved by the Ryerson Ethics Board, the protocol for which, as well as interview guide and data analysis, is included in the Appendix A. Interview participants were selected using purposive sampling (Berg, 2009, 50),

and were contacted using information made publicly available. Interviews took place in person, or by telephone, and were scheduled to take no more than one hour, although some participants chose to continue the semi-structured interview beyond the time indicated. A number of themes emerged from these interviews, which are reflected in the direction and conclusions of the research conducted, and are included in the qualitative data analysis in full (Appendix Ai). Although direct quotes are not used in this paper, the qualitative data provided sources of information which will be referenced throughout the paper as "interviews". In order to see whether or not students are provided with an Indigenous perspective or educational content in their planning education, communication with administrative staff and faculty from CIP-accredited planning programs across the country was conducted. Altogether, this primary research provided additional information where the secondary research seemed to fall silent.

Finally, the paper presents a case study examination, exploring the findings of the primary and secondary research. The development of the Red Hill Valley Parkway provides a demonstration of municipal-First Nation government relations (specifically, the City of Hamilton's relationships with the Six Nations of the Grand River First Nation, as well as the Mississaugas of New Credit First Nation), and the roles that municipal planners play. Ultimately, the examination of a case study along with the primary and any second research provides a well-rounded discussion of the issues at hand, and creates a springboard for further research.

ii. limitations, terminology & structure

As with all research inquiries, limitations must be acknowledged. To begin with, the interdisciplinary nature of this research provided some challenges to writing a coherent and informative paper. One of the positive aspects of interdisciplinary research is that the variety of

perspectives on one particular topic add richness to an examination, which can at times be absent from examinations that stay within one field of study. A drawback, on the other hand, is that there is less room for an in-depth exploration of the issue, as the author is less likely to develop an expertise in the numerous and diverse fields. This paper, however, can stimulate more in-depth and analysis of land use planning and Aboriginal rights, but given its scope, it does not delve too deeply into one particular aspect. However, this paper serves as a springboard for more in-depth analysis of the issues that have been raised here and in other work on planning and Aboriginal rights.

Another limitation is the reliance on terminology that will inevitably be problematic due to differences in interpretation. Commonly-used phrases and labels are deeply embedded with meaning that often requires contextual explanation. A perfect translation of meaning across languages and cultures is impossible due to the nuances that are built into meaning and interpretation of ideas (Davidson-Hunt & O'Flaherty, 2007; Loppie, 2007; Ringberg et al, 2010; Zuany, 2009). Questions of land use and jurisdiction to be considered will, as McKibbon points out, involve "different social, cultural and spiritual perspectives" (2006). The author is writing with the understanding that the various terms used may be understood differently, and will endeavour to make it clear how a particular term is being used and for what purpose. Given the need for a clear focus, land use planning in Ontario and consultation with First Nations in particular constitutes the heart of this study. Although there are other Indigenous peoples to be considered when looking at land use planning, such as the Metis and Inuit, this paper will focus on those peoples referred to in the *Indian Act* (R.S.C 1985) as "Indians". Having said that, unless a quotation requires the use of the term "Indian", the paper will primarily refer to Indians as "First Nations peoples", given that this is the commonly preferred terminology (interviews), one

that acknowledges the nation-status. The term "Indigenous" will be used to refer to those peoples who resided on the land prior to European contact. The term "Aboriginal" may be used when other texts are being referred to that use this term.

When referring to the various governments involved in land use planning and First Nations consultation, the paper will refer to several different types of government. The Crown refers to the Federal and Provincial governments, which hold the highest level of jurisdiction. Municipalities may at times be referred to as governments, however it must be understood that any powers of a municipal government stem from the Provincial government. Band Councils are those established through the *Indian Act*, which govern Indian reserves and those status Indians associated with that particular reserve. In some instances a traditional government exists, which finds its authority in the Indigenous practices rather than from *Indian Act*, which can at times come into conflict with the band council, as will be demonstrated pointed out in the case study later on in the paper. When it is necessary to make clear the distinction between governments, these terms will be used.

The paper will follow a simple structure, in order to present clearly the findings of the primary and secondary research. Part I provides the reader with an introduction to the paper by outlining the issue at hand, how the paper will engage with the issue, and why it is important. This sets the foundation for the rest of the paper. Part II provides an explanation of the methodology in order to explain how the research was conducted. The research questions and inquiry are presented, followed by an explanation of the types of research conducted and sources used. It is here that the limitations are set out, in order to establish scope and depth of the paper to follow. Part III provides historical context of Indigenous-Crown relations, to the research question. By examining the early stages of relations and how those relations changed over time,

one can better understand the context of conflict that characterizes the Indigenous-Crown relations in the 20th century. Any discussion of Aboriginal and Treaty rights, which are central to this Crown duty, must be prefaced with the historical context that set the stage for the court cases that defined the duty. It is only at this point, in Part IV, that the concept of the Crown's duty to consult and accommodate First Nations can be properly examined. All of this must be covered in order to begin looking at how land use planning intersects with Aboriginal rights.

Part V brings the reader back to the initial research question of how land use planning in Ontario incorporates consultation with First Nations into planning processes. In order to examine this, the structure and governance of land use planning in Ontario must be explained, to demonstrate the connection between Aboriginal rights and land use planning. The second section of Part V provides a case study examination in order to contextualise the issue in a particular planning project in Ontario. The development of the Red Hill Valley Parkway, and the relationships that formed between the City of Hamilton and the Six Nations of the Grand River First Nation and the Mississaugas of New Credit First Nation, respectively are explored, and a brief analysis is provided with respect to how the duty to consult fits into the case study. The main body of the paper concludes with Part VI, which returns to the second research question: whether Canada's accredited planning programs educate students on Aboriginal rights as they relate to land use planning. By exploring the issues raised throughout the paper with respect to planning students' education, Part VI provides a critique of the accredited planning education in Canada. This final part of the paper provides the final building block on which to found a set of recommendations for changing land use planning in Ontario and planning education in Canada, which makes up the final portion of the paper, Part VII.

While there is much to cover, this paper provides only a cursory examination of the material, in order to provide sufficient background before setting out recommendations. The ultimate purpose of this paper is two-fold: to articulate the need for changes in today's planning processes and education, but most importantly, to provide a stepping-stone for further research. Firstly, to encourage those interested in engaging in research on planning and First Nations in Canada, for which there is currently limited literature, the paper provides a number of areas that call for further research. The bibliography will lead the reader to important foundational research, as well as current literature. Secondly, in articulating the major connections between land use planning and Aboriginal rights, and presenting a clear set of recommendations, the paper seeks to make changes to land use planning processes and accredited planning education as they exist today.

III
Historical Context of Indigenous-Crown Relations

For thousands of years First Nation peoples have lived on the land as self-governing nations, with sophisticated systems of government and law established, long before the arrival of Europeans. Throughout this time, land was occupied, given, surrendered, and stolen by various peoples (Borrows, 2005; Williamson & Nahrgang, 2007; Williamson, 2008). Traditional land is viewed by Aboriginal peoples as "sacred; it is integral to their culture and identity" (Borrows, 2005, p.3). In order to protect their various interests in their distinct territories First Nations governments and leaders engaged in international treaty making, trade, and, when necessary, warfare. Complex systems of engagement were developed to prevent land use conflicts, and to maintain peaceful political and resource relations. A variety of means, including peace pipe ceremonies, engaging in potlatches, exchanging ceremonial objects, engaging in lengthy discussions, negotiations and diplomacy, were used to maintain peaceful relations (Borrows, 2005). Such intensive focus on protection of land and its use demonstrates the centrality of land to First Nations peoples. These traditional conventions provided the foundation upon which Indigenous-Crown relations were initiated when First Nations and Europeans first met.

i. contact & co-operation, conflict & negotiation

When Europeans arrived to explore the land and use the resources they might find there, they engaged in international relations between their European governments and the Indigenous

governments that they met upon arrival, formalising such relations and agreements with treaties (Borrows, 2005; Stranger-Ross, 2008; Williams, 1994). According to Williams during what he refers to as the "Encounter era", Europeans and Indigenous peoples engaged on equal grounds (1994, p. 987). Both Williams and Borrows argue that, for a period of time, Europeans adapted to Indigenous systems (Williams, 1994; Borrows, 2005). Some of the treaties created articulated land ownership, while others simply articulated the continuation of the use of the land (AANDC, 2010). Despite these "equal" relations, this was in the midst of the colonial era, when European governments sought to expand their empires, by extracting the newly "discovered" lands' resources (Pavao-Zuckerman, 2011). While the British Crown sought to maintain power over the French colonialists, it made strategic sense to ally with the First Nations. After the Wolfe defeated Montcalm, the *Royal Proclamation of 1763* articulated the protection of Indian lands and sought to restrict "European squatters and land sharks" (Flanagan, et al, 2010). The *Royal Proclamation* officially asserted the British Crown itself as the ruling government, asserting its sovereignty by assuming land use jurisdiction. At this early stage in the Crown's governance of the land, Flanagan, et al point out in their discussion of property rights that "[t]here was no attempt at negotiation or even consultation with the natives of North America regarding property rights which the Proclamation attributed to them" (2010, p. 58). Nevertheless, those agreements between the Crown and Indigenous peoples entailed significant rights regarding land tenure, land use, and to hunting and fishing, for example.

Since the establishment of the *Royal Proclamation*, over 500 treaties have been made in Canada (Borrows, 2005, p.10), dealing mainly with possession of land and the use of resources. This assertion of power over such an integral part of First Nations culture abandoned the early egalitarian Indigenous-Crown relations (Williams, 1994) for the antagonistic relations that would

characterise the following era. The *Royal Proclamation* formulated, contained, and implemented policies that shaped public space and future land use and settlement in Canada. One method was the creation of Indian reserves, with the intention was to articulate land that was to be set aside for the purposes of the First Nations, and to restrict settlers from using that land, though these reserve lands did not necessarily encompass all of the First Nations' traditional territory therefore their Aboriginal rights extend beyond the borders of reserves. Nevertheless, the *Royal Proclamation* and the treaties represent the earliest forms of land use planning, defining where settlers were allowed to settle and where land was restricted, how resources were to be used, and how Indigenous interests were to be protected from alienation and exploitation (Dorries, 2012).

Numerous Supreme Court of Canada cases have demonstrated, however, that settlers continued to arrive on the land, that the Crown took further control of the land, and promises to Indigenous peoples with respect to land use were undermined and broken (Borrows, 2005; Coyle, 2005; Harring, 1992). As Borrows notes:

> Crown officials often lacked the will or resources to restrain non-Aboriginal occupation of Aboriginal land. There are numerous other examples of similar non-Aboriginal occupations. Throughout southern Ontario, rights to hunt and fish reserved to the Indians through treaties were diminished as farmers and merchants physically blocked Aboriginal peoples from their traditional hunting and fishing sites. Rich farmlands and hunting grounds, used and occupied by the Indians for centuries before non-Aboriginal people arrived in Canada, were removed from Indian use by similar processes. (2005, p.20).

As a result of the Crown's continued *laissez-faire* attitude toward land use and settlement, white settlers took over vast tracts of land in Ontario, including First Nations land that had never been intended for non-Indigenous settlement. This settler-occupation of land was deemed legitimate as titles were acquired from the Crown, towns grew, and municipalities were formed. Any positive

Indigenous-Crown relations that had existed were continuously undermined, setting the stage for future conflict.

ii. Conflict & Negotiations

Numerous conflicts between the Crown and Indigenous peoples characterise twentieth century Indigenous-Crown relations, manifested in standoffs between First Nations protesters and police forces, and litigation. Rights that had been acknowledged through early Crown-Indigenous relations, articulated in documents such as the *Royal Proclamation*, and then re-enforced through Section 35 of the *Constitution Act, 1982*, had been undermined and ignored. The mid-twentieth century was a particularly low point in Indigenous-Crown relations, when "Aboriginal claims were not even recognized by the federal government as having any legal status" (*R.v. Sparrow*, [1990] 1 S.C.R. 1075]. Conflicts often occurred at the local level, where First Nations and supporters protested new land use developments. Tension between municipal residents and First Nations was most infamously demonstrated, when it flared into violence during the Oka Crisis, ignited by the municipality of Oka's plan to develop a golf course and condominium residence on traditional Mohawk land, which included sacred grounds, without any consultation with the First Nations whatsoever (Obamsawin, 1993). Although the underlying issue is that Aboriginal rights and land claims were being ignored, the usual arguments were centred on the idea of ownership of space and who's ownership was legitimate (Obamsawin, 1993). This kind of conflict was not unique, and various cases brought to the Supreme Court of Canada testified to the improper land use by municipal, provincial, and federal governments.

In 1982, the *Constitution Act* was implemented, within which were entrenched Aboriginal and treaty rights in Section 35. With this, the law established that these rights could

not be violated unless there was sufficient evidence that the Crown was justified (Coyle, 2005). But what are these rights that are being ostensibly protected, unless Crown violation can be justified? Section 35 articulates that treaty rights are those that "exist by way of land claims agreements or may be so acquired", and although this legislation indicates that only "existing" rights are acknowledged, the Supreme Court of Canada has made it clear such rights "will still be considered to exist unless they have been clearly and plainly extinguished by a federal law" (Coyle, 2005, p.23). Treaty rights that have been upheld by the Courts include activities like fishing for livelihood, as well as practicing traditional Aboriginal customs; according to Coyle, the variety of promises made through treaties in Ontario means that there is broad scope for treaty claims by First Nations in the province (2005, p.24). Aboriginal rights refers to the right to engage in activities, that contain "an element of practice, custom or tradition which is integral to the distinctive culture of the Aboriginal community claiming the right" (*R. v. Van der Peet,* [1996] 9 W.W.R. 1 (S.C.C.), para. 46). Despite the *Constitution Act*'s reference to land claims, the Courts have demonstrated that Aboriginal rights do not depend on Aboriginal title (*R. v. Adams,* 1996] 4 C.N.L.R. 1 (S.C.C.), para.11). Given the number of First Nation communities that *could* assert their Aboriginal rights, the Courts were urging negotiation and consultation, rather than litigation, in order to address claims and related issues (Coyle, 2005; Rowinski, 2009). By the twenty-first century, with land use conflicts such as those mentioned above, as well as habitual destruction of First Nations heritage due to municipal growth and construction (Williamson, 2010), it had become clear that Aboriginal and treaty rights had been continually undermined and neglected.

IV
Duty to Consult and Accommodate Aboriginal Peoples

In 2004, the Supreme Court of Canada established that the Crown owed a duty to consult, and where appropriate, accommodate Aboriginal rights. The Haida Nation brought a case to the Supreme Court of Canada, to challenge a decision made by the Minister of Forests, which issued a resources company a Tree Farm License (T.F.L.) on the Queen Charlotte Islands, lands that the Haida Nation referred to as Haida Gwai and that they claimed were theirs, though the claim was not yet legally proven. The initial case was "grounded in their assertion of Aboriginal title", and the duty of the federal government to consult with the First Nations about any development or sale that might occur on their land. Although it was clear that there was strong basis for the Haida Nation to win their title, there was a worry that in the meantime, they would "find themselves deprived of forests that are vital to their economy and their culture" (Haida, 2004, para.7). The main question for the Supreme Court was whether the Crown had a duty to consult with the Haida people when they decided to issue a T.F.L., to the forestry resource-based Weyerhaeuser Company. Ultimately, the Court decided that, yes, the Crown did have an obligation to consult with the First Nation, as the honour of the Crown demanded that "the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof" (Haida, 2004, para.27). Ultimately, the Court decided that the Crown – in this case, the provincial government – was obliged to consult with the Haida Nation prior to the issuing of a new T.F.L. It argued further that the Crown indeed had sufficient knowledge of the "potential

Aboriginal rights and title", which might have been impacted by the provinces "strategic planning for utilization of the resource" (Haida, 2004).

Central to the duty to consult is the need for better Indigenous-Crown relations. Numerous calls to resolve this problem, such as Supreme Court rulings and the Royal Commission on Aboriginal Peoples for example, suggest the need for a "set of communicative practices" (Dorries, 2012, p.144). Consultation is one such method of communicative practices, and Newman articulates five elements that are fundamental to understanding the duty to consult, which should be noted here:

1) the duty to consult arises prior to proof of an Aboriginal rights or title claim or in the context of uncertain effects on a treaty right;

2) the duty to consult is triggered relatively easily, based on a minimal level of knowledge on the part of the Crown concerning a possible claim with which government action potentially interferes;

3) the strength and scope of the duty to consult in particular circumstances lies along a spectrum of possibilities, with a richer consultation requirement arising from a stronger *prima facie* Aboriginal claim and/or a more serious impact on the underlying Aboriginal right or treaty right;

4) within this spectrum, the duty ranges from a minimal notice requirement to a duty to carry out some degree of accommodation of the Aboriginal interests, but it does not include an Aboriginal veto power over any particular decision; and

5) a failure to meet a duty to consult can lead to a range of remedies, from an injunction against a particular government action altogether (or, in some instance, damages) but more commonly an order to carry out the consultation prior to proceeding (Newman, 2009, p.16).

The kind of consultation required is not simply a matter of addressing First Nations "interests", but rather, the Crown must consult with First Nations regarding their legal rights. The concept of consultation and participation is not foreign to planning, and in many instances municipalities have been eager to invite First Nations to open houses to talk about municipal projects that might impact First Nations "interests". Such crucial consultations, however, cannot be lumped into public consultation. It is clear that First Nations have distinct, constitutional rights, which must be acknowledged on a different plane than the "public interest".

Municipal planners are starting to realise that they need to be more aware of the role they play in this duty to consult, however vague it may seem. All of the planners interviewed for this research noted that, although they were unclear as to how best to go about ensuring proper consultation takes place, they believed that establishing good relations between the municipal and First Nations governments was key to setting the groundwork for consultation. Qualitative research on the topic by Dorries, for her doctoral thesis elicited similar responses from planners (2012). Furthermore, there is a growing realisation that even if municipalities are not bound by law to fulfill aspects of the duty to consult, the courts will have little difficulty finding them accountable if a case were taken to the Supreme Court (Rowinski, 2009), and proactive engagement is by far the best plan of action (Abouchar, 2011; "duty to consult, obligation to listen", 2010; Ontario MMAH, 2009). As interview participants and others have noted, however,

what is missing is clear guidance from the province through by way of land use planning tools and policy, which the following part of this paper will endeavour to explore.

V
Land Use Planning in Ontario

It is important to understand how municipalities fit into the jurisdictional and governance framework of Provincial planning. The *Ontario Planning Act, R.S.O 1990* states that municipal council, "shall have regard to, among other matters, matters of provincial interest", which includes a number of areas ranging from ecological systems, to agricultural resources, to the development of safe communities, for example. Of particular interest are "the co-ordination of planning activities of public bodies" (Part I 2.m), "the resolution of planning conflicts involving public and private interests" (Part I 2.n), and "the appropriate location of growth and development" (Part I 2.p) (Ontario Planning Act, R.S.O 199). Doumani & Foran, in their commentary on the Ontario Planning Legislation, point out that in articulating the power of the province over municipal actions, through the "interests of the province" section, it is exercising "direct control" (Doumani & Foran, 2011, p.33), thus demonstrating the top-down approach to planning in Ontario.

But what exactly does planning entail, and what is it that planners do, particularly municipal land use planners? Planning involves a broad spectrum of activities, including technical work focusing on the details of infrastructure implementation and maintenance, as well as policy writing focusing on long-term goals for overall growth of a region. Yiftachel defines planning as "the formulation, content, and implementation of spatial public policies", and points out that it "includes all public policies that affect urban and regional development, zoning, and land use" – in other words, "the public production of space" (Yiftachel, 1998, p.395). The

Canadian Institute of Planners, the national collaboration of the provincial regulatory bodies that oversees the professional accreditation processes in Canada, states that planning is the "scientific, aesthetic, and orderly disposition of land, resources, facilities and services with a view to securing the physical, economic and social efficiency, health and well-being of urban and rural communities" (CIP, n.d., "planning is…"). This conventional understanding of planning reflects the western approach to the construction of space as a "rational" and "scientific" endeavour, which is widely credited for having historically dispossessed and excluded Indigenous peoples from their traditional lands and from the planning processes that shaped the settlement of colonial states such as Canada since colonization (Porter, 2004; Sandercock, 2003). With colonization, Aboriginal peoples in Canada were relegated largely to reserve areas, while settler communities resided in increasingly urban areas – a planning process referred to as *municipal colonialism* by Stranger-Ross (2008). Land use planning must be understood as being shaped by the policies and objectives of the state, and thus can be seen to be "implicated not only in ongoing processes of dispossession, but also in the normalization of non-Indigenous land occupation" (Dorries, 2012, p.15). With activities such as the implementation of zoning bylaws, the creation of official plans for municipalities, and approval of construction developments, land use planning is most clearly visible within the contexts of municipalities, thus it is important to understand what guides and governs municipal planners.

Although municipal land use planning takes place all over Canada, this paper focuses on the Province of Ontario in order to understand the framework within which a particular set of municipal planners work. The production of space – the allocation and organisation of land use and settlement patterns – is primarily overseen and implemented by municipal planners using a variety of tools that are easily available to planners and the public through the Ministry's website

(Ontario MMAH, n.d.). Land use planning in Ontario is governed by the *Ontario Planning Act, R.S.O. 1990,* and municipal planners look to the Planning Act to ascertain how land use is controlled and by whom (Ontario MMAH, 2010). Counties or regional/district planners work within a number of local municipalities, and thus are responsible for areas that go beyond the boundaries of one particular municipality, as well as the interaction of these various municipalities (Ontario MMAH, 2010, p.3). Simply put, municipalities are responsible for making planning decisions locally that will "determine the future of communities" (Ontario MMAH, 2010, p.3), regardless of whether this is within a single-tier municipality such as Toronto, an upper-tier one such as Temiskaming, or a lower-tier municipality such as Bracebridge.

As a result of provincial policies directing where growth can take place and at what rate, municipal planners focus on concepts such as densification, curbing urban sprawl, and housing availability and affordability. They are responsible for creating documents, such as official plans and zoning by-laws, that implement their intent to shape the growth of the municipalities and regions. Furthermore, planning boards in northern Ontario are given the power, by the Planning Act, to "adopt official plans and pass zoning by-laws for unorganized territory within their planning areas" (Ontario MMAH, 2010, p.3). Thus, in the formulation and implementation of land use plans and the approval of development applications, planners have "considerable power to influence urban land development" (Dorries, 2012, p.13). This is especially true now that municipalities have been given more significant authority with the implementation of the *Municipalities Act, 2001,* which modified the relationship between the province and municipalities, recognising them as "responsible and accountable levels of government" and providing them with the ability to "determine the appropriate mechanisms for delivering

municipal services to their communities" (Ontario MMAH, 2012a). The *City of Toronto Act, 2006* gave that particular municipality further powers to pass by-laws related to health and safety, as well as "economic, social, and environmental well being" (Ontario MMAH, 2012b). When weighing the implications of this decreasing dependence on the province, then, it is striking that very little of the literature and work in the field of planning, whether within academic literature or planning school curricula, focuses on the role of land use planning in the "dispossession of Indigenous peoples and the regulation of Indigenous rights" (Dorries, 2012, p.4; Borrows, 1997; interviews). If Ontario municipalities are being given increased autonomy over the provision of services and the decisions that must be made with respect to urban land development, and it is known by the Crown that Aboriginal peoples have rights associated with much of the municipal land in Ontario, then there the connection between municipal land use planning and Aboriginal rights must be made.

Constitutionally, municipalities are "creatures of the province" (the *British North America Act, 1867*, S.9(2)), and are thus not responsible for the honour of the Crown, or the Crown's duty to consult. However, as governance bodies responsible for land within the purview of the province, which *does* owe a duty to consult, it is not difficult to assign responsibility to municipal governments. On the one hand, actions taken by municipalities must be in accordance with the interests of the province as articulated in the *Ontario Planning Act*, while on the other hand, municipalities in Ontario have increased autonomy over decisions made within their boundaries by the *Municipal Act*. Thus, municipalities have increased responsibilities that must still be in line with the responsibilities of the province. As Rowinski points out, "there is ample reason to believe that a court will have no problem holding that such a duty does exist [for municipalities], in the appropriate circumstances" (2009, p.15).

The connection between municipal land use planning and the duty to consult and accommodate can be made a number of ways. To begin with, the space that is organised by municipal land use planners in Ontario is quite often of great interest to First Nations. Firstly, there are a number of First Nations currently engaged in claims concerning traditional territory and rights in Ontario (see Appendix B), thus the land use decisions made in municipalities that fall within these areas necessarily impacts First Nations interests, that is, their Aboriginal and treaty rights. As of 2005, forty-eight land claims were being reviewed by Ontario, and the average length of time that First Nations waited to hear whether their case would be negotiated or not was six years and ten months (Coyle, 2005, p.49). Whether or not these cases are negotiated or settled is largely irrelevant, in terms of the duty to consult and accommodate; as long as there is knowledge on the part of the Crown about a potential land claim, the duty to consult will be triggered should Crown activity impact on these rights. Given that municipalities must conduct themselves in a way that is consistent with the interests of the Province, it follows that municipalities have an obligation to consult with First Nations.

A second connection can be made where municipal land use activities trigger certain processes that involve the provincial or federal governments. Examples of how Ontario municipalities can trigger Provincial involvement are found in the *Ontario Planning Act*, *Environmental Assessment Act (1990)* and the *Heritage Act (1990)*. While there are other Acts such as the *Cemeteries Act* and the *Water Resources Act* that mention a municipal requirement to engage with First Nations (Abouchar, 2011), there is little in the way of clear direction, and it is the following Acts that provide the clearest indication of when and how municipalities must engage with First Nations.

The *Ontario Planning Act, 1990*

The *Ontario Planning Act* has been discussed to a certain extent above. The trigger for involving the province to consult with First Nations is found in Section 3(9). It states "Notice of a hearing on an application for a minor variance or permission under subsection 45(5) of the Act shall be given […] to all the following persons and public bodies except those who have notified the committee that they do not wish to receive notice:", which includes in Section 3(9)7, "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 subject land" (O.Reg.200/96). Although it is important that First Nations interests have been included at some point in the planning process, it is largely meaningless since very little municipal development occurs in Ontario within one kilometre of a reserve. Moreover, as noted above, Aboriginal and Treaty rights extend beyond the borders of the First Nation reserves – this notification requirement does not include contacting First Nations about development on their traditional lands. This regulation only refers to "notification", and there is no mention of engaging and accommodating any potential responses, a responsibility that is fulfilled with the delivery of the notice "by personal service, prepaid first class mail or telephone transmission of a facsimile" (O.Reg.200/96, s.3(9)). Furthermore, the Provincial Policy Statement, 2005, which is intended to clarify the *Ontario Planning Act* and guide planners in "matters of provincial interest related to land use planning and development" (Ontario MMAH, 2008), provides no guidance as to how and when municipalities must consult with First Nations ("PPS Five year review: Duty to consult", 2011; interviews). Although the *Ontario Planning Act* provides a comment on notifying First Nations when development projects may impact their interests, this does not refer specifically to their Aboriginal and treaty rights, and simply includes them in a list of other interest groups.

The *Environmental Assessment Act, 1990*

Ontario's *Environmental Assessment Act* ("EAA") is a piece of planning legislation that serves to ensure the protection, conservation and good management of the environment. Its assessment programs provide planning and decision-making processes that ensure the proper evaluation and documentation of a project before it reaches the construction stage. It applies to the "public sector", which includes provincial ministries, public bodies (e.g. conservation authorities), and municipalities. The Ministry of the Environment indicates that "Proponents subject to the Environmental Assessment Act must consult with Aboriginal communities potentially affected by, or interested in, a project" (Ontario MMAH, 2011), however there is little more direction other than to point proponents towards a variety of other ministries in order to ascertain which First Nation might have an "interest" in the project and how they should be involved. It is through the municipal class environmental assessments that engagement with a First Nation is required to occur, however the process of contacting and engaging with First Nations remains unclear, and it is clear from discussions with those involved in such processes that there is need for more clarity (interviews).

The *Heritage Act, 1990*

Ontario's *Heritage Act* ("OHA") is intended to provide municipalities and the provincial government with legislated power to protect built heritage as well as archaeological heritage of the province. Comprehensive amendments were implemented in 2005, which included updated powers for municipalities and the province to halt demolition projects, for instance, and to enhance the protection of, among other things, archaeological resources. This is where the connection is most clearly made between land use planning and First Nations. Archaeological

assessments are required for the approval of land development projects when it is known that archaeological sites are present or there is potential for their existence. The Standards and Guidelines for Archaeological Consultants (Ontario MTC, 2011) indicates that a four-stage assessment will require engagement with Aboriginal communities if the site is assessed to contain Aboriginal heritage. Prior to the updated Standards and Guidelines, it was up to the archaeological consultants to decide whether to maintain any archaeological heritage on site, or to take it off and store it or destroy it (Williamson, 2011), however a much more rigorous consultation process is required with the updated version. It is as a result of these archaeological requirements of municipal planning that the connection is made between land use planning and consultation with First Nations, but once again although this is a process of engagement that must take place, it is not clear whether this is part of the duty to consult.

Several Aboriginal consultation guidelines have been published in Ontario, most of which have not progressed beyond the "draft" stage, although it is through such guidelines and stipulations within the above Acts that the province sees fit to fulfill its duty. However, these guidelines and Acts are not clear enough to ensure sufficient, consistent consultation (interviews). Until the Supreme Court of Canada declares that municipalities owe a legal duty to consult and accommodate, consultation practices will continue to be ad hoc (interviews). In the meantime, there are some general guidelines that municipalities can adhere to, and the following instances are those in which municipalities could be delegated with the procedural aspects of the duty to consult:

- Passing or amending Official Plans
- Environmental assessment under Ontario Environmental Assessment Act

- Decisions affecting road allowance, permanent closing of roads or acquiring or disposing of interest in land over which a land claim exists
- Finding archaeological artifacts or remains
- Seeking a Ministry of the Environment Certificate of Approval or amendment
- Seeking permission from Conservation Authority or the Department of Fisheries and Oceans to work in or near water
- Signing a contribution agreement for infrastructure funding with the Crown (federal or provincial government) (Abouchar, 2011, slide 17)

While all of these are significant points for municipal planners to note, it is especially important to adhere to "decisions affecting road allowance, permanent closing of roads or acquiring or disposing of interest in land over which a land claim exists" (Abouchar, 2011, slide 17). A quick look at a map of southern Ontario, showing areas that are subject to land claims negotiations, contestations, or treaty rights (Appendix B) makes it clear that every municipality in southern Ontario must be aware of such interests. After all, as we have seen above, where there is an asserted right or land claim, whether or not it has been proven in the Courts, and which the Province has knowledge of, there is a legal duty to consult. Given all that has been laid out thus far, let us look at a case study in order to contextualise the duty to consult within a specific example.

VI
Case Study

The Red Hill Valley Parkway project consists of five elements: (1) an 8-km controlled-access parkway, with four lanes and 90km/h speed limit; (2) storm water management ponds; (3) the realignment of 7 km of the Red Hill Creek, by way of natural channel design techniques; (4) a 2.8 km combined sewer overflow pipe; and (5) a landscape management plan (Smith, 2008, p.9).

i. the project

On November 3rd, 2007 the City of Hamilton opened the Red Hill Valley Parkway with a ceremony, attended by the Mayor of Hamilton, representatives from the province, City Council, City staff, the local community, as well as members of the First Nations in the area. The Haudenosaunee traditional council of the Six Nations of the Grand River First Nation undertook a wampum exchange with Confederacy chiefs to mark the agreements made with the City of Hamilton (City of Hamilton, 2007). The project was initiated in 1956, although the City laid the groundwork for initiating the project with the recommendation from the City's first Official Plan in 1947 that the City acquire a final portion of the Red Hill Valley as a "greenspace buffer" (Friends of Red Hill Valley, 2004). Between 1956 and its opening in 2007, the project faced challenges, including shifting political support due to changing provincial governments, opposition due to environmental concerns, and opposition from the Six Nations First Nation community and the Haudenosaunee tradition council.

Ultimately, the project was completed after various environmental studies were conducted, the Red Hill Valley monitoring project was implemented to monitor the valley's resources and restore it to its traditional state. Finally the City and the Haudenosaunee created a set of agreements that encompass the area of the project. A Joint Stewardship Committee was created, with members made up of City of Hamilton staff and Six Nations members (Joint Stewardship Board, n.d.). The project has received several awards, including a Pinnacle Award for good public relations, an Environmental Achievement award, and the Award for Merit for Environmental Infrastructure. The agreements made between the City and the Haudenosaunee have been viewed as a model for municipal-First Nations agreements (interviews). Although the relationship between the City and the First Nations is certainly not problem-free, nor was the project acclaimed by all parties, this project serves as a useful case study to examine municipal-First Nations relations and the potential for integrating First Nations interests into a planning process.

The City of Hamilton is a single-tier municipality, located on the western tip of Lake Ontario, at the heart of the Greater Golden Horseshoe. The region has been occupied for the past ten millennia, and the shores of the Lake once made up an ancient highway, in the form of a major canoe trail, with hunters canoeing upstream along rivers leading from the Lake as far as possible, then continuing on foot (Williamson, 2008, p.25). Thus, the establishment of non-Aboriginal settlements that became cities such as Hamilton, Toronto, and other cities along the shores of Lake Ontario, was simply a continuation of settlement patterns that had been in place for thousands of years (Williamson, 2008, p.52).

The Six Nations and the Mississaugas of New Credit First Nations (hereafter referred to as "the Mississaugas") make up the area's major First Nations communities, as they have

population living on reserves south-west of Hamilton and within cities and towns in the region at large, and both First Nations have asserted land claims in the region (Appendix B). The City of Hamilton, like many other municipalities in southern Ontario, is entirely within the region of a number of asserted traditional and treaty territories: The Nanfan Treaty of 1701 (Six Nations), the Mississaugas of New Credit First Nation Traditional Territory, and the Six Nations of the Grand River Haldimand Tract.

In August of 2004, several members of the Six Nations community set up a roundhouse and sacred fire on the site of the first portion of the Red Hill Valley Parkway construction, and remained there for over a month, gaining support from First Nations and settler people alike (Oddie & Mulkewich, 2009). The occupation was deemed illegal by the City – a perspective that was mirrored in the mainstream media – and the City was given a Court injunction to move forward with construction, despite protestors' demands (City of Hamilton, 2003). Articles and editorial letters in the media reflected the widely held public belief that any Aboriginal or treaty rights that First Nations argued were being violated were outdated and no longer relevant, and that any protests were illegal and illegitimate (Oddie & Mulkewich, 2009, p.19). Another form of criticism of First Nations actions came from environmental activists who argued that those First Nations involved in the negotiations with the City that eventually came about were simply interested in exploiting the land for money (Oddie & Mulkewich, 2009, p.19). Such perspectives illustrate a general lack of knowledge of Aboriginal and Treaty rights, and Aboriginal histories in Ontario. Moreover, they illuminate the conflicts that arise from the settler-perspectives of Aboriginal peoples that conceptualise them as being solely interested in environmental stewardship, and having an identity that is tied to the land encompassed on reserves. This spatial and cultural divide is a result of the colonial history of settlement and governance in Canada,

which has denied First Nations the right to benefit economically from development on their traditional lands, and has associated settlers primarily with urban spaces and First Nations people with reserve land (Dorries, 2012; Stranger-Ross, 2008; Walker & Barcham, 2010). The negotiations between the City of Hamilton and the Haudenosaunee did not end these colonial conceptualisations. However the fact that such negotiations took place and agreements were implemented indicates a shift in relations.

ii. outcomes

At the outset, the Red Hill Valley Parkway was conceived by top-down planning methods, as was typical of that time. In order to follow through with the project, however, the City was obliged to modify the way in which it went about the planning process and had to integrate participation into the process, thus a negotiation process was used. Negotiations were commenced with the understanding, on the part of the City, that the Six Nations would notify other First Nations with interest in the area encompassed by the project (interviews). According to one of the City's planners, this was one of the lessons-learned, when it became apparent that the Mississaugas should have been involved in the negotiations, due to their interests in the land as well, yet they were largely left out of the process (interviews). Since the Red Hill Valley Parkway project, the City has been engaged with the Six Nations and the Mississaugas in the creation of Hamilton's Archaeology Management Plan (AMP). Understanding the Constitutional status and unique interests of the First Nations, in contrast to the general public, Six Nations and the Mississaugas have been integrated into the planning process differently than other mere stakeholders (Smith, 2008, p.9). Although there have been information sessions for the AMP to which First Nations have been invited along with other members of the public, more meaningful consultation has taken place when First Nation planning staff, as well as traditional and elected

council were circulated drafts of the AMP in order to ensure that their input is received in a timely manner (interviews). In this way, planning processes have been altered somewhat, since the Red Hill Valley Parkway negotiations.

Another challenge in municipal-First Nation relations and planning is differences in approach and priorities. To begin with, one issue that comes up frequently in municipal-First Nation relations is that of scheduling and budgeting issues. While the municipality is bound by its strict budgetary scheduling (interviews), First Nations deal with different budgetary schedules due to the different funding arrangements. As a result, City staff, in attempting to connect with First Nations staff in order to organise consultation meetings, sometimes get the feeling that the First Nations are not interested in engaging (interviews), while the First Nations staff may view strict such scheduling demands as indicative of a lack of commitment towards long-term engagement (interviews). Furthermore, there was a steep learning curve for City planners, who had to learn the history and culture of the First Nations that they were dealing with in order to better understand the context. Many of those interviewed for this research pointed out that despite their own ignorance of First Nations culture and history, by simply being honest and open, they were responded to with grace by First Nations, who were keen to help non-Aboriginal people learn about First Nation history and culture in the area. According to Nashkawa, the lack of education of the general public "on treaties and other issues facing First Nations" has been "stated time and again for years, by First Nation leaders, government officials, the courts, the Royal Commission on Aboriginal Peoples among many other sources. Yet First Nations leaders are constantly compelled to reiterate and defend the exercise of rights" (Nashkawa, p. 2005).

The heightened awareness on the part of City of Hamilton planning staff of the issues facing First Nations and the City's responsibility to engage with them is promising. However,

many challenges lie ahead for the municipal-First Nations relations, particularly between the City of Hamilton and Six Nations. While the Mississaugas of New Credit First Nation have an elected council only, and their planning framework is relatively compatible with that of the City of Hamilton, the Six Nations are governed by both an elected band council (*Indian Act*, section 74), as well the Haudenosaunee traditional council, and there is significant internal differences as a result. This presents an immediate challenge due to the fact that any of the City of Hamilton's required engagement with the Six Nations requires the City to consult with the elected band council, and only a minority of Six Nations members support the elected council rather than the traditional council (interviews).

In order to assert its sovereignty over the traditional and treaty territory, the Haudenosaunee have established the Haudenosaunee Development Institute, which charges development fees and requests funds from municipalities seeking to engage with the Six Nations when their interests are at stake. The problem arises, then, due to the fact that municipalities are in no way obliged to engage with a traditional council rather than the elected council. As a result of these governance complexities, consultations have been protested and stopped due to First Nations protesting, such as the consultations over the Rural Official Plan (interviews). Although the Province has "unequivocally said the HDI has neither authority nor jurisdiction over planning matters or fees", neither has it asserted this declaration by preventing HDI from stalling projects if the HDI does not receive fees from developers (Prokaska, 2008). Although some developers have taken the approach of engaging with First Nations to integrate their interests into a project (May, 2010), other developers refuse such demands and in the case of the Haudenosaunee, some have "accused HDI of extortion" (Prokaska, 2008). So long as such uncertainties remain the status quo, without any clear direction from the province, conflict will likely continue.

In this particular case, there was indeed a duty to consult the First Nations, as their rights would be impacted by the development. Using Newman's five fundamental elements of the duty to consult, referred to above, let us briefly re-examine the case study. Firstly, as the map of land claims in southern Ontario demonstrates (Appendix B), there are several First Nations that have asserted claims to an area that encompasses the City of Hamilton. Although these claims have yet to be settled in court, the fact that there are claims at all is enough to raise the duty to consult. Both the Crown and the municipal government had knowledge of these claims, and of the impact that the project would have on the region, with respect to Aboriginal rights as well as Environmental concerns. Given that part of the First Nations' interest in the area was their Aboriginal right to hunt, and live off the land (Six Nations, 2008), any environmental impacts would necessarily impact their rights. Thus, once again, there was clearly duty to consult. In order to ascertain the strength and scope of the duty, one would have to do a deeper analysis of the land claims, which was not within the scope of this paper. As for how the duty should be manifested, whether through notification or full consultation, it is clear that notification would not have been sufficient. Indeed, the City of Hamilton did engage with the Six Nations in order to negotiate a set of agreements that would enable the implementation of the Red Hill Valley Parkway project, as well as manage it after construction was to be completed. These included nine general agreements: an agreement to facilitate; a general agreement; an agreement for joint stewardship; and agreements concerning burials and archaeology; hunting, fishing, trapping, and gathering; road tolls; medicine plants; economic relations; and human heritage (Murray, 2004). The final element of the duty to consult refers to remedies to be taken should the appropriate consultation not take place. In this instance, the outcomes suggest that both parties were relatively satisfied with the consultation, and given that the agreements led to the creation of a

number of initiatives such as the Joint Stewardship Committee as well as the project to rehabilitate the Red Hill Valley plants to their natural state (interviews) it seems as though the consultation was successful. Thus, this case study demonstrates an example of successful consultation with respect to a particular project. However, this is yet another example of project-based consultation, rather than systemic changes to planning approaches, and that is a lingering problem that must be addressed.

Although there are triggers that require municipalities to notify or engage with FNs, it is not uniform and its implementation has been haphazard. Very often, simply notifying a First Nation of a project that may impact their "interests" is sufficient for the approval of the project in question. As a result, First Nations have been inundated with notifications and request for consultation about myriad projects, the paperwork for which requires a level of administration that is often not available. In fact, capacity issues were noted frequently in interviews with municipal planners as well as First Nations planners (interviews). Ultimately, the connection between land use planning and the duty to consult is not being made. As Smith points out in her examination of First Nations' "interests" and municipal developments, even after the successful negotiations over the Red Hill Valley Parkway, Six Nations continued to claim that the city "continuing to infringe on [the Six Nations'] ability to exercise [their] rights and interests" by neglecting to provide "meaningful consultation, accommodation or compensation" (Chief David M. General, as cited in Smith, 2009, p.2). Clearly, despite efforts to make changes on a project-by-project basis, the changes must come at a deeper, systemic, level.

In many cases, municipalities are being told to find out about which First Nations might be impacted by a municipal development, however, as Rowinski points out, in some cases Aboriginal rights and title may be "asserted from afar" (2009, 17). The land use processes in

place today in Ontario, and across Canada, were largely established during the mid-twentieth century (Hodge, 1985; Wolfe, 1994), at a time when Indigenous-Crown relations were at a particularly low point and Aboriginal claims "were not even recognized by the federal government as having any legal status" (R. *v. Sparrow*, 1990] 1 S.C.R. 1075). Since then, Canadian law concerned with Aboriginal and treaty rights has evolved, however land use planning processes have not evolved accordingly. As demonstrated above, while there is some indication within various Ontario planning legislation that municipalities have an obligation to engage with First Nations, the *Ontario Planning Act* and the *Provincial Policy Statement* (the highest level planning documents) do not sufficiently articulate the duty to consult and accommodate, therefore a discrepancy remains between planning processes and the law.

The connection between municipal planning and Aboriginal and Treaty rights in Canada may not be immediately apparent to planners today – after all, as this paper has shown, there is little indication in the Planning Act that municipalities must take into consideration the rights and interests of First Nations. Conflicts that have occurred between municipalities and First Nations in Ontario have largely been set off by development projects at the municipal level (Dorries, 2012), however as this paper has demonstrated thus far, the roots of these conflicts reach back to the foundations of colonial settlement. Planning professionals today have inherited problems rooted in colonisation, land theft, failure of the Crown to live up to treaty promises, and a failure to resolve Treaty and Land Claims in a timely manner (Borrows, 2005; Coyle, 2005; Harring, 1992; Nashkawa, 2005). As a result, planning in Canada is a cultural practice that "actively produces […] social injustice for Indigenous peoples" (Porter, 2004, p.2). In attempting to rectify such historically-rooted problems, land use planning in Ontario, and Canada at large, can provide mechanisms to minimise such conflicts and problems by integrating First Nations interests and

rights into the planning process, or it can aggravate these problems by failing to do so. As it stands now, planning processes lack fulsome consideration of the rights and interests of Aboriginal peoples across Canada.

Changes are in the works as we speak, however. First Nations are taking a stand by creating consultation protocols in order to respond to increasing requests for consultation (Dorries, 2009; interviews), and one First Nations planner in particular has insinuated herself into the five-year review of the Provincial Policy Statement in an attempt to ensure that First Nations rights are acknowledged in such high level policy documents as this (interviews). Many point out that the Provincial Policy Statement is not enough, but rather, the Ontario Planning Act must make clear reference to the duty to consult in order to ensure that municipalities fall in line with the law. As it stands now, many municipal planners have become aware of these issues, and that there is some sort of responsibility on behalf of municipalities to consult with First Nations when it comes to development projects, as a result of the growing focus of workshops, and best practices and case study documents and bulletins (Abouchar, 2011; "Building Capacity Through Communication", 2004; "Duty to Consult, Obligation to Listen", 2010; interviews; Murray, 2006; Ontario MMAH, 2009), . However, the case remains that there is insufficient clarity at the moment (interviews; Rowinski, 2009). As the time of writing, several texts focused on municipal-Aboriginal relations, with respect to planning and consultation especially, were going through rigorous editing processes and thesis dissertation reviews. A doctoral student at the University of Toronto successfully defended her PhD dissertation, which has been referenced in this paper. Students and faculty in planning programs around the country are making an effort to push forward these changes, so it is important at this point in the paper to focus on planning education, as it can provide an essential source of criticism of the planning process, and provides

the starting point for the country's future planners and educators. The Canadian Institute of Planners, having been mandated by its members to "address issues of importance to the planning profession and/or public interest" and to "champion and lead progress and change in planning practice", must take the time now to educate its current and future planners in terms of how national and local planning processes in Canada intersect with Aboriginal and Treaty rights. The following, and final part of the paper will examine planning education and the accreditation process, before the paper concludes with its recommendations.

VII
Planning Education & Accreditation

Planners, archaeologists, legal practitioners and various other professions are calling for clearer guidelines as to how and when to engage and consult with Aboriginal communities (interviews). PowerPoint lectures of presentations by environmental and Aboriginal law specialists to municipal employees seeking to better understand their responsibilities are easily found online. Archaeological firms are also engaged in this type of awareness-building, particularly Ontario's Archaeological Services Inc. (interviews). Furthermore, planners from across Ontario are organising workshops on the duty to consult and accommodate (interviews). The Union of Ontario Indians and other First Nations have articulated for some time the importance of educating students, media, and government on treaties and history of local First Nations (Nashkawa, 2005, p.9). Nashkawa points out that although such education may not prevent conflicts from occurring, "it may better prepare people who see about these stories in the media to understand the issue" (Nashkawa, 2005, p.9). Furthermore, a deeper understanding of the complex historic settler-Aboriginal relations as well as the complex relations that existed prior to European settlement will go a long way to provide solid foundations for proactive conflict resolution and, ideally, prevention. According to Leung, "the debate about what planning education should be follows essentially the debate about what planning is, or should be" (1989, p. 199). By bringing these issues to the fore in planning education, and highlighting them as significant issues for planners – no matter what the area of planning specialty – awareness will increase. So too will putting pressure on the Provincial governments to improve planning

processes, for which the CIP and other professional bodies of planners should take some responsibility.

i. planning curriculum

The School of Urban and Regional Planning at Ryerson University, for which this research paper is being written, states that its mission is "To provide excellence in planning education […] that prepares graduates to contribute as leaders in the community and the profession. The School is committed to advancing applied knowledge and research about cities and regions and to enhancing planning practice" (SURP, n.d., "Mission Statement") UBC's SCARP commits to advancing "the transition to sustainability through excellence in integrated policy and planning research, professional education and community service" (SCARP, n.d., "Welcome to SCARP"). The University of Manitoba's City Planning department states is mission as providing "a broad foundation for excellence in planning practices. The program strengthens the capacity of planning professionals and planning as a discipline to enhance the ecological sustainability, social equity and aesthetic qualities of human settlements" (City Planning, n.d., "Mission Statement"). The School of Planning at Dalhousie states that its "strength lies in understanding urban and environmental systems, and the relationships between them", pointing out that its approach is "community-centred, design-based, [and] focused particularly on the settlements of Atlantic Canada" (School of Planning, n.d., "Welcome to the School of Planning"). While these mission statements represent only a few of the many accredited programs across the country, it is clear that there are similarities in the focus on providing excellence in planning education, encouraging sustainability in community and environmental planning, exposing students to the interconnected nature of systems, and educating students on the nature of human settlements.

In his TED-x talk at McMaster University, Professor Hayden King spoke about Indigenous studies in a presentation entitled "Canoe believe it? Implications of an Indigenized Academy". In it, King stresses the problematic nature of Indigenous studies in universities, as they are positioned into what he refers to as "reserves" within the academic system: such programs and courses are often relegated to the periphery, both physically and program-wise, despite the fact that there are many instances when an Indigenous perspective would benefit a course or subject (King, TEDxMcMasterU, 2011). This is no less true for planning education. Based on the mission statements of the Canadian Institute of Planners and the various planning schools across Canada that provide accredited programs, as well as the findings from the literature and interviews, it is clear that planning students should learn about how land use planning and Aboriginal and Treaty rights intersect, and they should be exposed to issues facing Aboriginal peoples in Ontario and Canada at large.

Looking at the planning curriculum at Ryerson's School of Urban and Regional Planning, the potential for inclusion of an Aboriginal perspective and content into the courses is clear.

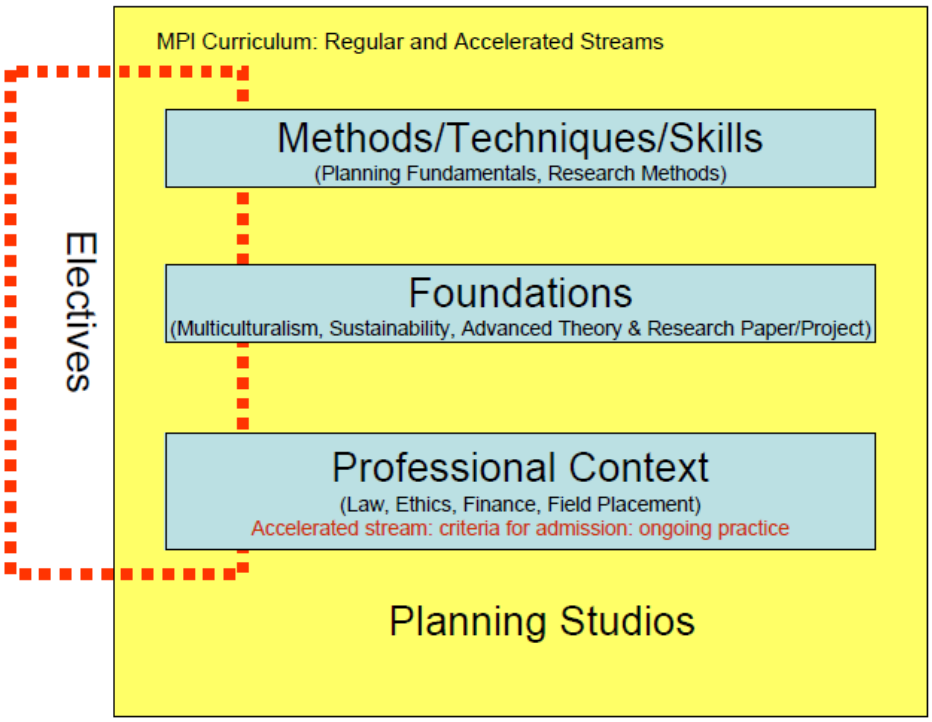


Fig.1: Ryerson University's School of Urban and Regional Planning curriculum map

Each of these areas of study that are fundamental to the accredited program can include Aboriginal context. To begin with, look to the Methods/Techniques/Skills section: any discussion of post-modern influence on planning will lead to discussions of participatory planning. There has been much work with First Nations communities in Canada in terms of participatory research and planning that can be looked to for examples and case studies (Castledon & Garvin, 2008; Davidson-Hunt & O'Flaherty, 2007; Loppie, 2007). Next, look to the Foundations section: any course on multiculturalism in urban contexts should focus at some point on the dynamic and growing urban Aboriginal population in Canada, and how that

influences policy and planning in cities. Any discussion of environmental sustainability in the Canadian context would be negligent in avoiding discussions of the sustainability ideology in traditional Indigenous cultures, and the innovative environmental initiatives that various First Nations have embarked on. Finally, any discussion of planning theory in Canada should examine the colonial history of planning in Canada, as it had a profound impact on the nature of human settlement in Canada over the past four centuries.

However, it is in looking at the Professional Context section that one can find the most obvious location in the curriculum to include discussion of Aboriginal and Treaty rights, and Aboriginal interests: as we have seen above, land use is increasingly affected by the Crown's legal duty to consult and accommodate Aboriginal peoples when there is knowledge of a potential for their legal and cultural interests to be negatively affected, and this is most certainly of fundamental importance for planning education. In an ethics course, students can look to case studies to examine the ethics of approving land use developments without proper consultation of First Nations peoples, for instance. In a finance class, students should learn about the creation of stand-alone reserves that have been located in cities such as Saskatoon, for example, and the potential for such endeavours to benefit both a First Nation and the recipient municipality – the impact of land claims on municipal finance is important to understand and very often misunderstood (Walker & Barcham, 2010). Finally, within the field placement, students could be given the opportunity to work with a First Nation community, exposing them to unique problems and solutions of which they would otherwise remain unaware. The final aspect of the core program includes a studio project, which could serve a similar function as a field placement.

Including Aboriginal perspectives and exposing students to such issues on such a wide scale depends very much on the capability of the faculty in a program, and thus this is a

reflection of an ideal situation, one which will require much progress in order to achieve. There is, however, an immediate need for a course that focuses on Aboriginal law and the implications for planning practice; such a course is fundamental to any accredited program. To be included in such a course would be a solid examination of Aboriginal and Treaty rights, and the duty to consult and accommodate, with the aim of examining how planning practice and Aboriginal interests intersect. In this course, students would learn about foundational documents such as the British North America Act, the Royal Proclamation of 1763, and a variety of treaties in order to understand the foundation of settlement patterns in Canada. Such foundational documents are not significantly included in the study of planning law, although various authors have asserted the importance of these documents as representing the earliest planning tools used by settler peoples (Dorries, 2012).

Moreover, since Indigenous legal systems influenced how the Crown adapted British Law to the unique context of Canadian colonialism (Borrows, 2005), students should be exposed to literature exploring these topics. This would also provide future planners with a better understanding of the context in which they find themselves when engaging with First Nations peoples who express distrust of Canadian planning, governance, and legal systems; such mistrust is not simply due to ignorance; rather, it is founded in centuries of conflict and broken promises on the part of the Crown. Woven into such a course must be an understanding of differing perspectives and interpretation of legal concepts, particularly those that are relevant to land use planning, such as land ownership, tenure, and sovereignty, for example (Agrawal, 1995; Borrows, 1997; Dorries, 2012; Loppie, 2007; Sandercock, 2004). Although there is far more that should be taught to planning students than can be included within a single course, an effort can

be made to successfully expose planning students to the importance of understanding the context and history of Aboriginal land claims, treaties, and rights with respect to planning.

For their part, planning students interested in these topics should explore the various aspects of planning that intersect with Aboriginal interests. There is a growing body of literature on housing and Aboriginal communities to examine. The Provinces of Manitoba and Saskatchewan provide case studies of stand-alone reserves, located within municipal boundaries, that demonstrate the social and economic potential for municipal and First Nations communities to benefit. Such case studies would provide ample material for major research papers and other types of term papers. This paper only touched upon how planning law and Aboriginal law intersect, and further exploration must be done. Another area to examine is that of participatory research and planning. First Nations communities are building capacity and work is being accomplished through collaboration between First Nations and academic and research institutions to work towards building that capacity. These are but a few examples of research that planning students can engage in while conducting their studies in planning education. Although there is not a plethora of literature on municipalities and the duty to consult at the moment, the next few years will see several works on municipal-Aboriginal engagement and planning published. Students should take the time to get in touch with those conducting research currently, and find out about what courses are available in different departments, in order to supplement their planning education with respect to Indigenous course content.

Courses focusing on planning and Aboriginal peoples have been, and continue to be offered at a few universities, however they are not yet required courses for planning students. In order to formulate such a foundational course, planning departments should look to existing courses, as well as these recommendations. A reading list can be gleaned from the themed

bibliography of this paper. By collaborating with those planning faculty across Canada who are already taking proactive steps to education the future planners of this country, as well as First Nations planning and legal practitioners, CIP-planning faculty will be making positive changes for planning in Canada by building connections and breaking down the divide between Aboriginal and settler peoples.

ii. planning accreditation

Provincial planning associations and institutes, such as the Ontario Provincial Planning Association (OPPI), are the regulatory bodies for the planning profession in Canada. While these provincial regulatory bodies are the ones that accredit planning professionals and planning programs, it is the Canadian Institute of Planners (CIP) that oversees this accreditation process. The CIP seeks to present Canada with the unified voice of the community of planners. Its member-mandated responsibility to "institute national standards for training, certification and best practices" provides a good starting point from which to briefly examine planning education in Canada, particularly in Ontario, with respect to how the accredited curriculum addresses the intersection of land use planning and Aboriginal and Treaty rights. As a professional body that seeks to "address issues of importance to the planning profession and/or the public interest", as well as to "champion and lead progress and change in planning practice", the CIP must make efforts to change the current state of affairs in planning. It represents over 7000 professional planners as well as students across Canada, thus the CIP has the ability to put pressure on the Provincial and Federal governments to make changes to better integrate Aboriginal interests into the planning processes. In Ontario this means First Nations interests in particular, however there is an increasing demand for consultation also coming from the Ontario Metis communities (Paradis, 2011).

Currently, there are 31 accredited planning programs at 16 universities across Canada with planning programs that are accredited by the CIP. Of these 31 programs, 16 are at the Masters level, 14 are at the Bachelor or diploma level, and one is at the Doctoral level. Planning students at the graduate level are drawn from a variety of disciplines, thus making the Masters programs students uniquely interdisciplinary. Given the short period of time within which to absorb the curriculum required for the accreditation, and the fact that for many of these students without a planning or geography background the curriculum content may be unfamiliar, it is difficult to ensure that students are provided with sufficient and appropriate education. However, the CIP provides universities with criteria to meet the accreditation demands, and those universities that are able to fulfill these requirements are given accreditation.

Graduate planning programs in Canada tend to be two years in duration, although Ryerson University also provides a one-year stream for those with significant professional experience and prior planning accreditation. There are also numerous universities that provide CIP-accredited bachelors degrees, in which students complete the required program over a 3- or 4-year period. In addition to the core courses, students are expected to enroll in elective courses, as well as conduct co-op or internship courses, depending on the program. The goal of the curriculum is to provide planning students with education that prepares them with the essentials in theory, design, and practice in order to meet the demands of their professional career. In the CIP Membership Manual, there is a section on "Diversity and Inclusiveness" which indicates that "planners should be aware of the diversity of their cultural setting and acknowledge the importance of inclusiveness" (Volume 3). It is up to individual planning programs, however, to define how they include this tenet into the core program. Some planning schools, such as the University of Northern British Columbia (UNBC), are immersed in an Aboriginal context, and

thus provide courses that expose students to issues facing First Nations and planners, but this type of educational acknowledgement is generally absent. Given the fact that Aboriginal and Treaty rights, which affect land use across Canada, are upheld by the Supreme Court of Canada, and increasingly affect how land use planning takes place in Canadian municipalities, this should factor in explicitly within the core curriculum.

Upon conducting a scan of the CIP-accredited programs in Canada, by perusing the courses provided, and contacting administration staff at the various departments, it is clear that nowhere in these programs is the issue of how land use planning and Aboriginal and Treaty rights intersect addressed as the focus of a core course, except at UNBC. There are elective courses provided in a few of the accredited planning programs (in Ontario, for example, Guelph University and University of Toronto), and in two cases an Indigenous-focused stream is provided within the program (at UBC's School of Community and Regional Planning, and UNBC's School of Environmental Planning). However, these depend largely on the initiative of professors that are interested in providing such an education because, although they are encouraged by the CIP, they are not required (interviews).

In the case of the University of Saskatchewan, which provides an accredited Bachelor's degree in planning, a course entitled *Planning with Indigenous Communities* was created but never taught, due to capacity issues (interviews). Dalhousie's planning program partners with the Cities and Environment Unit ("CEU"), a community action and research group, and through CEU's interest in working with Aboriginal communities, students are exposed to such issues. At the University of Toronto, a course that is regularly provided (though not required), focusing on resource management, exposes students to these issues, as does a recent course entitled *Planning and Colonialism*. The University of British Columbia's School of Community and Regional

Planning (SCARP) has created an Indigenous Community Planning program in order to provide Indigenous and non-Indigenous students with exposure to these issues – this new program accepts a limited number of students however, and there is no requirement for SCARP students to enroll in such courses. The University of Northern British Columbia (UNBC) provides a number of courses exposing students to these issues, however only one of these courses is part of the core curriculum.

Thus, a variety of approaches have been taken to try to address the omission of this type of planning course within the CIP-accredited core curriculum, including the creation of topic-specific courses, mainstreaming of Indigenous perspectives and case study examples into the regular courses, as well as the creation of a specialty stream. However, these efforts depend largely on the interest and motivation of individual faculty members, and thus face funding and capacity issues. Despite the fact that there is encouragement from the CIP for these universities to provide courses to students that expose them to the issues of land use planning and Aboriginal interests, there is little incentive for programs to put resources towards such courses as they are not required within the core curriculum.

As noted in the introduction of this paper, the intersection of land use planning and Aboriginal legal interests is important for planning students to learn, and the law regarding the duty to consult and accommodate Aboriginal peoples continues to develop. First Nations increasingly look to the creation of consultation protocols to ensure that municipalities pay attention to their interests when planning for municipal development. Municipal land use planners will be obliged to engage in these issues, and so they must be fully aware of the context in which they are working, in terms of the existing First Nations rights (proven *and* asserted) and how their work is affected by law related to Aboriginal and Treaty rights. Therefore, planning

education will play an integral role in the process of changing the nature of land use planning in Ontario, and Canada at large, in relation to the duty to consult

VIII
Recommendations & Conclusion

In order to ensure that First Nations are better integrated into the planning process in Ontario, and across Canada, a number of things must happen. Most importantly, provincial governments must alter planning processes in order to bring in Aboriginal perspective much earlier on in the overall process of land use planning. This isn't likely to happen at the instigation of the Provincial governments however. According to some, the most significant change would occur if a case involving a municipality and a First Nation that articulated a municipal duty to consult (interviews), however, as municipal governments are not the Crown, but "creatures of the Province", this is not likely to occur in the near future (interviews). The following two major recommendations regarding land use planning and planning education are being provided in an attempt to shift the status quo and make positive changes towards Crown-Indigenous relations, and the making lasting advances to the long-term national endeavour of reconciliation.

i. Recommendations

Recommendation I: Land use planning must incorporate duty to consult and accommodate First Nations

The Province of Ontario must incorporate the duty to consult and accommodate First Nations into its planning processes, in order to ensure that planning in the province complies with the law regarding Aboriginal legal status and rights. As this paper has demonstrated, there is a pressing need for changes to be made to processes that have been in place since the mid-twentieth century. Canadian law has evolved over the past decades in order to reach a point, today, at

which Aboriginal and treaty rights are acknowledged and upheld in the Courts. The system is not perfect, and many First Nations and settler peoples continue to fight for a more just system. The planning processes that exist in Ontario, however, are rooted in foundations that were established in an era when First Nations were not consulted on those policies and plans that would impact their rights. The Crown in Ontario, the provincial government, must ensure that these changes are made. However, such changes must be accompanied by a planning system that provides an appropriate educational foundation for future planners.

Recommendation II: Planning programs must educate planners on the connection between land use planning and Aboriginal and treaty rights

Planning education in Ontario must provide students with knowledge of First Nations peoples, their history and a clear understanding of the connection between land use planning and Aboriginal rights in the province, in order to ensure that these future planners are prepared with adequate knowledge and tools to meet the laws regarding consultation with Aboriginal peoples. Moreover, the Canadian Institute of Planners, and other professional bodies that influence accreditation and professional developments in planning have a responsibility to articulate the need for such changes. At a minimum, a course on planning law and Aboriginal and treaty rights should be provided in every planning program as a requirement of every student. Planning faculty should contact those who have created and taught similar courses when endeavouring to create an appropriate course.

ii. moving forward

As we have seen throughout the paper, the intersection of land use planning and First Nations interests – particularly with respect to their constitutionally-upheld and traditionally

asserted Aboriginal and Treaty rights and land claims – is a significant issue for land use planners today. This paper has provided a brief explanation of land use planning in Canada and Ontario, along with an introduction to the Canadian Institute of Planners, and its role in building a professional body of planners. By providing a cursory examination of the historical and legal context of planning and First Nations interests in Canada, particularly focused on Ontario, as well as a case study, the paper seeks to ground the reader in the appropriate knowledge in order to better understand the significance of these issues. Ultimately, the scope of this paper could not include an in-depth analysis of law and the various planning acts that govern municipal planners, rather, it was intended merely to shed light on where the connection between municipal land use planning and the duty to consult lies and to provide a framework for changing planning education accordingly.

Finally, the paper concludes by providing recommendations for the CIP to make changes to its accredited program, with respect to course content that exposes students to First Nations interests, in order to continue in its fulfillment of the CIP-mandate. In particular, it is recommended that accredited planning programs in Canada provide a mandatory course in Law, focused on where Aboriginal Law and Planning Law intersect. Such a course should provide students with an introduction to the foundational planning documents such as the Royal Proclamation, the British North America Act, and the various Treaties entered into by Aboriginal peoples and the Crown.

Increasingly, First Nations across the country are creating their own consultation protocols in order to fill the gaps left by Provincial and Federal governments that are unwilling to make explicit the requirements of those involved in planning projects that will affected their interests, or, where such guidelines do exist, they are insufficient. The Province of Ontario

continues to leave the matter somewhat murky, in terms of the obligations of municipalities, and it remains up to individual local planning departments to ensure that they do not make any mistakes. The recent proposed-cutbacks to the Environmental Assessment process means that more responsibility will be placed on the Provincial governments to ensure that such assessments are carried out properly, which will have a significant impact on First Nations interests. Given the preference of First Nations in Canada to engage with the Federal, rather than Provincial, government (interviews), there will likely be increased potential for conflict. If this cutback does in fact go forward, the Province of Ontario will be remiss if it does not make changes to the planning process in order to better integrate First Nations.

In the meantime, the Canadian Institute of Planners must live up to its various mandate goals by making changes to the accredited planning programs, and, at the very least, include a required course that focuses on land use planning, law, and Aboriginal and Treaty rights. By failing to do so, the CIP falls short in its efforts to adequately prepare planners with the knowledge and tools that they need to be excellent professionals, and work for the best interests of the public good. The just governance and management of land in Canada is central to the interests of the public and the wellbeing of the people living here. As Chief Justice Lamer noted in his concluding statements of *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010, that through negotiation based on "good faith and give and take on all sides" that reconciliation of Indigenous-Crown relations can be achieved (para. 186). As he states plainly, "let us face it, we are all here to stay" – it is time to rebuild the mechanisms of friendship on which to build just processes of managing and governing the land, and endeavouring to properly establish the "fair and lasting terms of coexistence" between Indigenous governments and the Crown.

Appendix A(i): Qualitative Data – summary

i. purpose

During the preliminary stages of research it became clear that gaps exist in the research when there is an absence of groundbreaking Supreme Court cases that could push the issue of municipal-Aboriginal consultation further. As such, qualitative research in the form of interviews were deemed an appropriate method of providing information where the literature fell short. Furthermore, it was thought that interviews could elucidate some of the issues that face professionals involved in the various aspects of Aboriginal consultation.

ii. method

A proposal for qualitative research in the form of semi-structured interviews was presented to the Ryerson Ethics Board (REB), and was approved in January 2012. In short, it was proposed that the potential participants, selected through purposive sampling (Berg, 2009, 50), would be contacted by way of publicly available contact information (either email or phone), and would be provided with a description of the project and the interview that they were being asked to participate in. Upon receiving approval from the REB, approval, participants were contacted and interviews were arranged: if the participant was located in the Greater Toronto and Hamilton Area (GTHA), interviews were conducted in person; interviews with participants outside of the GTHA were conducted over the phone.

A total of 19 potential participants were contacted, 17 of whom responded. The potential participants were contacted with a focus on providing a variety of perspectives from a range of relevant professions and experiences (planning, law, academic; professional, student). After preliminary research was conducted, it became clear that it is not only land-use planners who are affected by consultation policies, but many types of planners (including heritage, community, land use, etc.). Furthermore, given that the focus of the overall research is inquiring into the state of planning education, it was important that some of the participants have some experience with an element of planning education. Finally, the participants had to be aware of how planners are involved engagement with Aboriginal communities. The participant types, which were coded, include the following:

- Interview participant (P)
    - 17 in total
- Planning practitioner (PL)
    - 12 in total
    - 9 CIP-accredited
    - 3 non-accredited
        - 1 currently applying for accreditation
- Legal practitioner or student (as a lawyer, judge, professor, or student) (L)
    - 4 in total
- Faculty member in a CIP-accredited planning program (PF)
    - 5 in total
- Archaeologist (A)
    - 2 in total
- Settler person (of non-Indigenous origin) (S)
    - 11 in total
- Indigenous person (identifies with a community Indigenous to North America) (I)
    - 6 in total

All 17 respondents agreed to participate in the semi-structured interviews. Participants were asked permission for the interviews to be recorded. As only some of the participants agreed, not all of the interviews were documented verbatim. Therefore, no direct quotations were used. Any information with the citation "(interviews)", however, came from the interviews.

The interviews were conducted using a general set of questions, provided in the ethics protocol submission. Additional questions were created for the different types of participants. The semi-structured nature of the interviews meant that each interview took on a unique direction, depending on the experiences of the participant. In instances when the discussion veered to the point of being irrelevant for the purposes of the study at hand, the interview guide was used to bring the participant back to the focus of the research, while being careful not to invalidate their comments.

iii. analysis & discussion

Throughout these semi-structured interviews, a number of common themes emerged, some of which were held in common amongst all the participants. The following table provides the themes.

T1) Proactive municipal-Aboriginal government relationships are necessary in order to avoid further conflict

T2) Knowledge of culture and history of neighbouring communities is necessary for creating proactive and effective relations

T3) Better guidelines and clearer laws are necessary

A number of sub-themes emerged, those that were mentioned by a majority within a sub-category of participants.

ST1) Planning programs do not provide sufficient course content with respect to Aboriginal culture and history, and how these issues intersect with planning

ST2) Better planning education would be beneficial

The themes that emerged from the qualitative research support much of the literature findings, however the qualitative findings provide us with additional findings that illuminate some of the problems that practitioners face currently, when involved in consultation with Aboriginal consultation. What becomes quite evident is that many municipal planners who have been involved in this type engagement are searching for better ways to consult Aboriginal governments and communities. The issue of capacity, for both First Nations governments and municipal governments, seems to be one of the major factors prohibiting the progress of municipal-Aboriginal government relationship-building.

Appendix A(ii): Qualitative Data – Interview Guide

Primary Interview Questions – A Guide

The following set of primary interview questions are to act as a guide for the interviews. As mentioned in the online protocol, questions may arise spontaneously from this initial guide, during the interview.

To all subjects:

1) In your professional work, have you been required to get involved in an engagement process between municipal planners and an Aboriginal community/communities?

- As much as you are able, please elaborate on what that involvement entailed

2) What was your knowledge of Aboriginal communities like before you were involved in that particular work?

- If you did have previous knowledge, where did you gain this knowledge?

3) Do you find that there is clear guidance as to how various parties are meant to embark on engagement between municipalities and Aboriginal governments, with respect to development and planning projects?

4) What are some of the positive aspects of the engagement that has taken place?

5) What are some of the main problems that arise; what are the problems that you have experienced?

To planners:

1) What was the extent of your knowledge of the history of the Aboriginal communities in the region in which you work?

2) In what ways did/didn't your planning education prepare you for engaging with Aboriginal communities and governments?

3) Were you able to effectively engage with these communities without doing extensive research on your own?

- If you were required to do further research, did you feel that it fit with the level of background research you have been required to conduct in your usual work as a planner?

4) Do you think that the duty to consult policy that comes down from the Crown (federal and provincial governments) is matched with the appropriate guidance?

- What areas of planning have the most useful guidelines?

5) What could be done to improve engagement with Aboriginal governments and communities?

To university faculty:

1) To what extent does the course content of your planning program offer education with respect to planning processes and issues that specifically relate to Aboriginal communities and governments?

- If there is some amount of education in this respect, is it part of your regular curriculum?

- If there is not, what is the reason?

To staff of planning and administrative offices on First Nations reserves:

1) How do you experience the process of engagement, as it comes from the neighbouring municipalities?

2) Do you feel that your office has the capacity to respond to these requests?

3) Are the parties hoping to engage with your community fully aware of any claims this First Nation has filed, if any?

4) What could be done to improve engagement with municipalities?

To legal practitioners:

1) In what ways have you been involved in municipal-Aboriginal engagements?

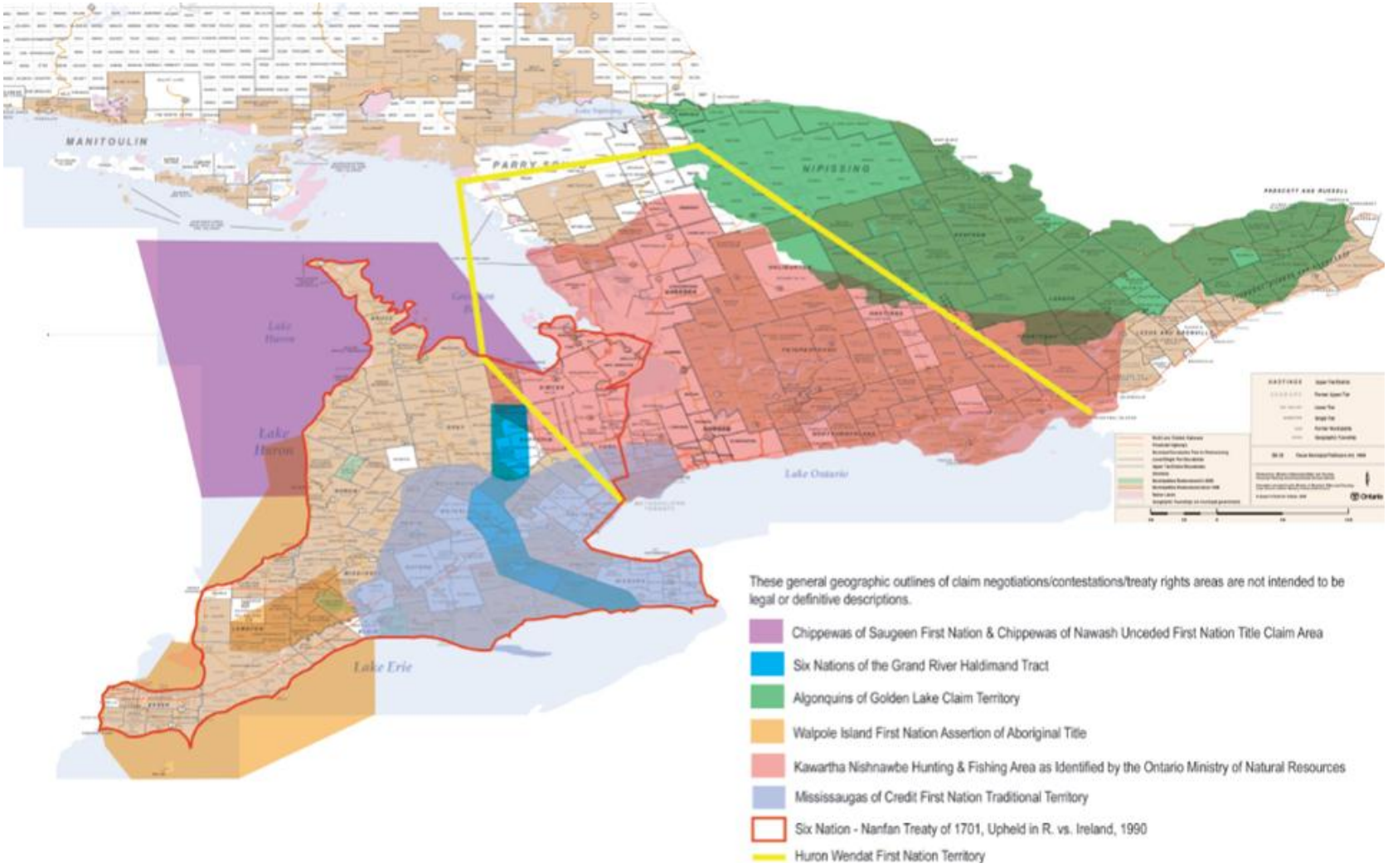
2) What are the major legislative and policy documents that affect and guide municipal planning practice?

3) From which level of government are guidelines provided?

4) What are the legal requirements of municipalities?

- How are these requirements different from the crown's fiduciary duty?

Appendix B: First Nations Land Claims and Traditional Territory in Southern Ontario



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