Indigenous Consultation and Engagement

A Primer

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Message from our Managing Partner:

ASI is pleased to offer you this primer as a guide to assist in the important process of building working relationships with Indigenous communities. Given that the management of archaeological resources in Ontario often involves sites of Indigenous origin, ASI has been working with and for First Nations since our founding in 1980. We consider the relationships we have established, both with individuals and the communities they represent, to be one of the privileges of our profession. We hope you find some of the insights we have gained along the way to be helpful.

The product of our work is essentially stories about the past. Sharing these stories with descendant communities and society at large is the ultimate goal of heritage management practitioners. Though our stories are different, we believe they can often be complementary to those that descendant communities—both Indigenous and non-Indigenous— already possess or glean from other sources, such as written records and oral narratives. Experience has shown that the best way to arrive at complementary narratives of the past is to work collaboratively with descendant communities to share information and insights. This includes taking the time to understand the different values and worldviews that inform the collaborative process. What could be a more fundamental or important human endeavor than seeking mutual understanding and respect in the interest of achieving common or complementary goals?

In the pages that follow, we summarize our current understanding of the constantly evolving statutory and policy context which frames the processes of Indigenous consultation, engagement, and reconciliation in Ontario. We are aware that the result is a text through which the colonial vernacular of the source material echoes clearly. These words may or may not strike a disharmonious chord to your ear, but even this is a cultural sensitivity worth developing. We hope you read this document with a critical and reflective eye and, above all, remember that this is about acknowledging the rights of other people and building respectful, harmonious relationships with them.

Robert I MacDonald, PhD, RPA

Cover images (from top to bottom):
Stone biface cache, the Colborne Site.
A groundstone steatite bead.
Ontario heritage plaque commemorating the Jean-Baptiste Lainé Site.

Introduction

Canadian society is striving to rebalance the relationship with Indigenous peoples guided by statutory rights and obligations, including those established in the Canadian constitution and developing case law, principles, such as those outlined in the United Nations Declaration on the Rights of Indigenous People (UNDRIP), and recommendations, such as those of the Truth and Reconciliation Commission of Canada (TRC). As an industry leader in Canadian heritage resource management, ASI supports this process and works constantly to stay abreast of its evolving implications to our business and to the businesses of our clients.

This document is intended to provide clients with contextual information to help understand our various roles in pursuing the national goal of reconciliation with Indigenous peoples. It should not be considered a substitute for advice from legal counsel who specialize in Indigenous law and the information is subject to change as case law and government policy continues to develop. We urge all clients to understand the obligations that we all have with respect to Indigenous peoples under Canadian law and, with the help of ASI, to fulfill these obligations to the best of our ability. The management and staff of ASI are always available to answer questions and assist as best we can.

The following sections begin with discussions of the two main ways that the reconciliation process is approached in Canada, consultation and engagement. Although similar in many ways, there are fundamental legal distinctions of which clients should be aware. We then offer recommendations on a principled approach that we believe will best serve all concerned. Since many of the terms and concepts addressed in this document may be new or unfamiliar to clients, the recommendations are followed by a series of definitions. We trust that you will find this information helpful.

Quartzite projectile point

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Consultation

Public sector clients who represent the Crown, including federal, provincial, and territorial governments, bear the Crown duty to consult and accommodate Indigenous peoples, as may certain Crown agencies and regulatory bodies in some situations. These clients are generally alert to this duty and often have professionals in their ranks with the responsibility of guiding the process. While ASI cannot undertake a Crown duty to consult, when called upon to assist with the procedural aspects of consultation, ASI is prepared to render that assistance.

Currently, the responsibility of clients representing municipalities and certain other regulatory bodies (e.g., Conservation Authorities) is less well defined in government policy or case law. This relative lack of clarity presents obvious challenges to these governmental agencies and to the Indigenous peoples and third parties—such as development proponents seeking government approvals—who must deal with them. Nevertheless, it has been recommended to governmental agencies wielding powers delegated by the Crown that they "do the most you can within your legal powers to carry out consultation with aboriginal parties where their rights or claims may be affected (Kleer, 2011)."

Private sector clients do not bear the Crown duty to consult, although when involved in a situation where this duty has been triggered and is being fulfilled by the Crown, it is in their best interests to support the Crown by assisting with the procedural aspects of consultation (PAOC) (Government of Canada, 2011). In managing the consultation process, the Crown will delegate to the private sector proponent the PAOC it deems appropriate, if any. The objective would be a productive three-way dialogue between the Crown, the proponent, and the Indigenous group leading to meaningful consultation. Private sector proponents also have an interest in ensuring that the Crown's duty to consult is adhered to by the responsible Crown entity in order to avoid litigation or other actions by Indigenous or other parties that might interfere with their project.

Partner Andrew Riddle assists with artifact identification at First Nations Liaisons training with the Mississaugas of the Credit First Nation- photo courtesy of the OAS

Consultation

As noted above with respect to municipalities, there currently exist many situations where the Crown duty to consult may not yet have been formally triggered, but where this duty is gradually working its way into the process. One example of this is the latest Provincial Policy Statement (2014), issued under the Ontario Planning Act. It notes that, "The Province recognizes the importance of consulting with Aboriginal communities on planning matters that may affect their rights and interests (Government of Ontario, 2014: 4)." Under Section 2.6.5, it further requires that, "Planning authorities shall consider the interests of Aboriginal communities in conserving cultural heritage and archaeological resources (Government of Ontario, 2014: 29)." Finally, and most explicitly, under Section 4.3 it states: "This Provincial Policy Statement shall be implemented in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the Constitution Act, 1982 (Government of Ontario, 2014: 33)." The result of this is the gradual adoption of planning policies by municipalities—with the endorsement of the Ministry of Municipal Affairs and Housing—that serve to bring the municipal planning process into alignment with the Indigenous consultation duties of the Crown. This approach is consistent with the federal government's guiding principals that seek to integrate consultation within existing regulatory approval processes. (Government of Canada, 2011) Private sector land development proponents need to be aware of these changes and the fact that consultation and engagement with Indigenous peoples is becoming a more rigorous feature of the planning approvals process across Ontario and throughout Canada.

A site visit with Huron-Wendat representatives

Engagement

The Ontario Ministry of Tourism, Culture and Sport (MTCS) licenses archaeologists under the provisions of the Ontario Heritage Act. In carrying out their work, licensees have a statutory obligation to comply with the "Standards and Guidelines" established by MTCS for consultant archaeologists (Government of Ontario, 2014). These (obligatory) standards and (optional) guidelines include engaging with Aboriginal communities when dealing with archaeological sites of Indigenous cultural affiliation.

Development proponents do not always bear the statutory obligation for engagement, the licensed archaeologist does. As with consultation, though, it is to the proponent's benefit to support the engagement process in the interest of developing and maintaining positive relations with interested Indigenous communities in the context of the broader and more complex relations that exist between the Crown, approval authorities, Indigenous communities, and the public.

Unveiling of plaques celebrating Huron-Wendat heritage

In an effort to facilitate the engagement process, the archaeological resource management industry works with Indigenous communities to develop best practices for engagement. Over the last decade, the approach that has gained the most widespread acceptance has been the training and inclusion of Indigenous practitioners, variously referred to as liaisons, monitors, or field liaison representatives (FLRs), to work alongside consultant archaeologists in the field.

Trained liaisons are also increasingly deployed by Indigenous communities to participate in fieldwork undertaken by other professionals, such as environmental consultants, and requirements for such participation is being written into municipal official plans. With costs for these workers underwritten by development proponents, Indigenous communities gain both capacity funding, allowing them to participate in the engagement process, and first-hand knowledge of the archaeological fieldwork dealing with their cultural patrimony. Working with Indigenous liaisons, often from more than one Indigenous community with overlapping treaty lands or traditional territories, has become routine practice for archaeological heritage management firms such as ASI and for many of our clients.

Recommendations

ASI recognizes that it can be challenging for clients to understand their role in consultation and/or engagement when policies and procedures guiding these processes are still in their developmental stages. We consider the advice of the Honourable Frank Iacobucci, retired justice of the Supreme Court of Canada, to be instructive:

> *While compliance with legal requirements is, of course, necessary, our experience working with indigenous groups, governments, project proponents and others suggests that an approach focused on building relationships and parties' underlying interests from the outset – not positions or strict legal rights – tends to lead to the best results for all. This approach is consistent with, and facilitates, reconciliation, and it can be implemented immediately, without the need to wait for future legislation, policy and jurisprudence.* (Iacobucci, 2016)

Our experience, and that of our clients, bears out the value of a proactive approach to building relationships of trust with Indigenous communities and the professionals who represent them. Frequently the questions of our clients can be as fundamental as, "in whose traditional territory does my project fall and with which Indigenous group(s) should I be dealing?" We are always pleased to help our clients when they turn to us for information and guidance, but we also encourage clients to inform themselves of these evolving areas of business practice, develop their own personal relationships with relevant Indigenous professionals, and seek expert legal advice for support.

To assist in this process, we can offer contact information for relevant Indigenous communities and Indigenous law specialists, as well as links to reference material that we hope you find useful. If, at any time, questions or concerns arise, ASI is always glad to help you address them.

Elder Alex Mathias pointing out a significant cultural landscape feature in Temagami

Definitions

Aboriginal People(s) – Section 35 of the Canadian constitution defines the Aboriginal peoples of Canada as being comprised of the First Nations, Inuit, and Métis. More recently, the term "Indigenous" has begun to replace the term "Aboriginal" in accordance with international usage as exemplified in such documents as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Nevertheless, as a term embedded in the constitution, the term "Aboriginal" is also correct and will retain legal currency.

Aboriginal Right(s) – For an activity to be an Aboriginal right, it must be an element of a practice, custom, or tradition integral to the distinctive culture of the Indigenous community claiming the right. Such rights are collective, not individual, rights. With respect to First Nations and Inuit communities, the activity must have existed at the time of first contact with Europeans, whereas for Métis communities, the activity must have existed prior to the period of effective European control. In all cases, the activity must have on-going historical continuity and remain integral to the community's culture.

Aboriginal Title – A specific form of Aboriginal right, Aboriginal Title requires an Indigenous community to have occupied the subject lands prior to the Crown asserting sovereignty, occupation continuity between the period prior to assertion of Crown sovereignty and the present, and exclusive occupation when Crown sovereignty was asserted. **Aboriginal Rights** (q.v.) or title may be modified or surrendered through treaties (see also **Treaty Rights**).

Accommodation – The responsive, good-faith balancing of interests, between those of the Crown and those of Indigenous peoples, is a fundamental element of the Crown duty to consult and is referred to as accommodation (the Crown duty is properly referred to as the Crown's Duty to Consult and Accommodate). Where required, it may involve the Crown taking steps to avoid or mitigate harm to Aboriginal or treaty rights. While this does not provide affected Indigenous communities with a veto over a proposed decision or action, in certain situations an Aboriginal community's consent may be required (Government of Ontario, 2017)(see also **Free, Prior and Informed Consent**). Accommodation may also occur in a process of **Engagement** (q.v.) where, for example, a third-party proponent negotiates some sort of settlement, such as an Economic Benefit Agreement, with an Indigenous community in an effort to balance interests.

Consultation – In the context of upholding our constitutional obligations to Indigenous peoples, the term "consultation" refers specifically to the process of fulfilling the Crown duty to consult and accommodate (q.v., see also **Engagement**). In each situation, the nature of the consultation is determined by such factors as the nature, scope, and strength of the claim to an established or asserted Aboriginal or treaty right and the seriousness of the potential impacts of a government proposed action or decision on the right. While consultation must be shown to be meaningful, it does not imply a veto right on the part of the Aboriginal or treaty right holders (Government of Ontario, 2017). It may, however, lead to some form of substantive restitution referred to as an **Accommodation** (q.v.).

Crown Duty to Consult and Accommodate – The Crown's duty to consult and accommodate (often referred to as the duty to consult) Indigenous people is founded on the honour of the Crown and the constitutional protection accorded Aboriginal rights and treaty rights under section 35 of the Constitution Act, 1982. This duty, which has been upheld by the Supreme Court of Canada in multiple rulings, occurs when the Crown (federal, provincial and, from a practical point of view, territorial governments) contemplates an action that might adversely affect an Aboriginal right or treaty right. The nature, scope, and content of the Crown's duty to consult and accommodate is defined on a case-by-case basis and the process continues to be clarified and defined by case law. While the Crown duty to consult and accommodate cannot be entirely delegated to third parties, neither are third parties free of a general obligation to assist with and facilitate the consultation process (see **Procedural Aspects of Consultation**).

Engagement – Dialogue and interaction with Indigenous peoples outside of the strict framework of the Crown duty to consult (i.e. **Consultation**, q.v.) is often referred to as engagement. The specific form of engagement most relevant to the work of ASI is that mandated by the Ministry of Tourism, Culture and Sport to licensed archaeologists in Ontario (Government of Ontario, 2011a & 2011b) Engagement may occur as part of a consultation process, as a process parallel to consultation, or as a stand-alone process, depending on the requirements of the situation.

First Nation(s) – This term, which has replaced the term "Indian" when referring to Indigenous people(s) who are neither Inuit nor Métis, is considered respectful of the nation-to-nation relationship that these groups have with the Crown. It is frequently used as a respectful substitute for the word "band," as defined in the Indian Act and the groups thereby recognized by the Crown. Since it may also refer generically to people who are, or are not, registered with "status" under the Indian Act, care must be taken in using this term to avoid confusion.

Free, Prior and Informed Consent (FPIC) – Derived from the UN Declaration on the Rights on Indigenous Peoples (UNDRIP, q.v.) and its policy predecessors, the concept of free, prior and informed consent is a set of principles that is generally consistent with existing Canadian legal and policy frameworks pertaining to rights-based consultation with, and accommodation of, Indigenous peoples. Since Canada announced that it would adopt and implement UNDRIP in 2016, the legal and policy implications of FPIC in the Canadian context are still being resolved. UNDRIP does establish, "'consent as the objective of consultations with indigenous peoples,' not a free-standing right in all circumstances. While a veto enables arbitrary or uninformed decisions and inhibits meaningful consultation, consultation in the aim of achieving consent emphasizes meaningful and informed dialogue and accommodation (Iacobucci et al, 2016)."

Indigenous Group – For purposes of consultation or engagement, an Indigenous group is a community of First Nations, Inuit, or Métis people recognized by the Crown that holds or may hold Aboriginal and treaty rights under section 35 of the Canadian Constitution Act, 1982 (Government of Canada, 2011). For other purposes, the term "Indigenous group" may also refer to organizations that do not hold such rights on behalf of their members.

Métis – Although sometimes used in common parlance to refer to people of mixed Indigenous heritage, the term has a very specific legal definition for purposes of asserting Aboriginal rights under section 35 of the Constitution. Although individuals may self identify as Métis, to claim Aboriginal rights they must also be a member of a present-day Métis community and have ties to an historic rights-bearing Métis community.

King's Forest Park public archaeology day

A ceramic pot from the Hidden Springs Site

Procedural Aspects of Consultation (PAOC) – While the legal responsibility for the Crown duty to consult cannot be delegated to third parties, certain procedural aspects of the consultation process can be. They include but are not limited to such things as the following: notifying Indigenous communities and providing them with project information; considering requests for capacity funding; meeting with Indigenous communities; receiving community input about possible adverse impacts on rights; keeping consultation records; relaying community feedback to the Crown; and, proposing accommodation measures to the Indigenous communities and the Crown (Landmann, 2012, and Sterling and Landmann, 2011).

Provincial Policy Statement (PPS) – Issued by the Ministry of Municipal Affairs and Housing under provisions of the Ontario Planning Act, the PPS provides policy direction on matters of provincial interest related to land use planning and development. As a key part of Ontario's policy-led planning system, the PPS sets the policy foundation for regulating the development and use of land. The latest edition of the PPS came into effect in 2014.

Traditional Territory – A designated area of land to which a recognized Indigenous group has claimed or established traditional use or occupation (Government of Canada, 2011). Traditional territories often extend beyond **Treaty Lands** (q.v.) and **Treaty Rights** (q.v.) do not normally apply therein.

Treaty Right(s) – Specific rights have been established in treaties entered into by Indigenous peoples with Crown governments, including France and Britain prior to confederation and Canada post-confederation. Existing treaty rights are protected under section 35 of the Canadian constitution (see also **Aboriginal Rights**).

Treaty Lands – An area defined by a treaty which is owned and managed by the Indigenous group that negotiated the treaty and within which **Treaty Rights** (q.v.) apply. Such areas are distinct from, but may be located within, a **Traditional Territory** (q.v.).

Truth and Reconciliation Commission of Canada (TRC) – In 2008, the Government of Canada established the TRC as part of the Indian Residential Schools Settlement Agreement with a mandate to shed light on what happened in Indian Residential Schools (IRS) across Canada. On its conclusion in 2015, it issued a series of reports and a set of ninety-four calls to action.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) – Adopted by the UN General Assembly in 2007, UNDRIP is a forty-six-article policy statement endorsed by a majority of states. It articulates the rights of Indigenous peoples in such areas as maintaining and strengthening their own institutions, cultures and traditions, and pursuing their own development pathways. It also establishes an important standard for eliminating human rights violations against Indigenous peoples and for opposing discrimination and marginalization.18 Among the principles it contains is that of **Free, Prior and Informed Consent** (q.v.). Canada gave its full endorsement of UNDRIP in 2016.

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Northern Ontario canoe survey

ASI