

Colliding Interests: where municipal and Aboriginal planning interests meet, and the Duty to Consult

Presentation outline

Well! Part of me feels like I shouldn't even be on this panel today. I have yet to learn all that I think I should know in order to be a qualified speaker here! So... I'm going to talk briefly about the planning context today, in which planners are educated and work in the field without adequate knowledge of aboriginal cultural landscapes and aboriginal "interests" in general. I use air quotes there because the inadequacies of language being used – aboriginal "interests" are sometimes lumped into the area of "public interest", which quite often means that those aboriginal interests are inadequately addressed. Sometimes I talk about planning and Aboriginal rights, which certainly has a heavier level of importance, but I find this insufficient as well. It implies that what brings indigenous voices into the planning process is only tied to what the law says, and quite often the law is understood in its most basic requirements. In a few minutes I'll talk a bit about that in the context of planning law and policy.

The sub-title of my presentation also makes me cringe a bit – "where municipal and Aboriginal planning interests meet" – it implies that municipal interests and Aboriginal interests are separate issues, but I don't believe they ever were separate in the first place, it's just that the indigenous side of things has been ignored. The Ipperwash report cites the thousands of Aboriginal archaeological sites that have been destroyed as Toronto experienced massive development and growth over the second half of the 20th century. As far as I can tell, pretty much everywhere in Ontario is covered by a treaty, and within those areas there are municipalities. And where there is little or no archaeology present, whether due to its destruction or because the Aboriginal communities that lived on or passed through that area settled only lightly, these may be part of a significant landscape for an Aboriginal community. In Toronto, although many of the archaeology in downtown no longer exists, the Humber River is an example of an important landscape, a transportation route used by many different nations. There is now a walking trail that has plaques and markers acknowledging this importance, and work is being done to continue that project in the City of Vaughan. But this work is usually done by special groups that come together for a project. I would like to talk about how municipal planners engage with Aboriginal communities, largely through First Nation consultation offices.

I was asked to be on this panel after speaking at the Ontario Heritage Conference in Midland, where I presented on a panel looking at Aboriginal archaeology in the province. There, I also felt like a panel-fraud, because what did I know about archaeology? I've sort of stumbled into this area of cultural heritage because of where my masters research took me.

In the 2nd week of my planning masters at Ryerson, we were asked to write a site assessment as our first planning law class assignment. This was a seemingly simple task, for which we were shown how to use a mapping tool that would give us all the information we needed. We were to choose a property and then, using this mapping tool, find out the land designation and any additional information about that property. I chose a parcel of land that had been recently developed on the Moose Deer Point First Nation reserve, on the south eastern shore of Georgian Bay – this was a place I've grown up going to with my family, on our way to the cottage, and so I wanted to learn more about the area. I thought this would prove to be more interesting than a building on the streets of Toronto. The mapping tool would show us parcels of land in different colours, according to the designation (so, pink for mixed-use

residential, for example, green for parkland), and on the side of the screen was a text panel that gave more specific information. I thought, “hey, maybe I’ll find this will have information about a treaty too”. As I zoomed into my chosen location, I found that the map had suddenly gone grey, and the text panel showed only the words “no information available”. After a few agonizing hours of trying to find out what I’d done wrong, I realised that in fact I *had* no access to this sort of information. This tool, that was supposed to give me all the answers, took me to a blank wall and my head was a bit bruised.

Once I had recovered from the panic-filled days that ensued, because of course I had to choose a new site and do the whole assignment last minute, I reflected on that discovery and realised I’d found the area I wanted to research. My introduction to planning gave me first hand experience of the disconnect that exists between non-Aboriginal planners and Aboriginal communities.

This was almost three years ago, and today I continue to focus my work on essentially the same thing.

My major research paper looked at how the Ontario planning process incorporates Aboriginal and Treaty rights, and Aboriginal interests in general. I should add that originally, I just wanted to explore how accredited planning education addresses these issues – it took me about a week to realise that, but for a few exceptions, it basically isn’t taught. I then began to look into just *what* wasn’t being taught, and I began to tackle an area of research that was relatively new, and fairly complex. It required rather interdisciplinary research, including planning law, legal history, indigenous and euro-canadian history, archaeology, counter-colonial theory, and environmental studies, just to name a few. Needless to say, by the end of all that, I felt I had only scratched the surface. But in doing so, I learned that not only did planning education not address the issues, but in practice, there was a general lack of understanding on the part of planners of the importance of engaging with Aboriginal communities, because there were gaps within the planning structure.

So, this brings me to what I’m working on now, a year after finishing school.

In partnership with the Mississaugas of New Credit First Nation, I am developing a website that will be a resource to look to for the various aspects of planning consultation with Aboriginal communities in Ontario. I chose to partner with the Mississaugas of New Credit because they are working on a number of endeavours that focus on planning issues facing Aboriginal communities across Ontario, not just their own community, and one of the planners there, Carolyn King, had been extremely enthusiastic about the project when I first started talking to her about it. I embarked upon this work when I realised I was hearing the same thing over and over again: that there wasn’t enough guidance for municipal planners to engage effectively with Aboriginal communities. Although there is *some* guidance available, it covers the bare minimum.

I should do a brief explanation of the Duty to Consult: this is a Crown obligation, which means that the Federal, and in some case the provincial governments, owe a duty to consult (and where appropriate accommodate) Aboriginal communities when their interests are at stake due to a particular project. This can be as simple as a public works project in the City of Vaughan, in southern Ontario, that may affect a body of water which falls within a treaty area, or resource extraction in northern BC. While only the Crown owes this duty, procedural aspects can be delegated to a 3rd party – usually referring to a company or organisation. However, municipalities also fall into this 3rd party category, and these procedural aspects are delegated through policy.

The Ontario Planning Act makes reference to Aboriginal interests in Section 5.9, where it says that when a by-law is being proposed within one kilometre of a reserve, the chief must be notified “by personal mail, regular mail, or fax”. This doesn’t take into consideration, however, the fact that First Nations have interests far beyond the boundaries of their reserve. And it doesn’t address the fact that municipalities have increasing approval authority over matters that impact Aboriginal interests. These can be environmental, in reference to treaty rights, or they could be archaeological, or perhaps cultural landscapes not articulated in treaties nor perhaps dotted with archaeological evidence. Furthermore, there are some communities that have a great amount of interest in southern Ontario but who are located hundreds of kilometres away, such as the Huron Wendat Nation who’s reserve is located outside of Quebec City. Furthermore, this is only in reference to by-law changes, and doesn’t address projects with potential impact that do not require by-law amendments. Needless to say, the 1km notification rule does little, if anything. The Provincial Policy Statement (or PPS), where things get a little more specific, does not even include the word Aboriginal. Hopefully the upcoming iteration of the PPS will make reference to Aboriginal interests, as the Province has received hundreds of comments, many of which have articulated this omission. While these upper level planning documents say little to nothing about Aboriginal interests, there are some planning documents that do trigger consultation requirements: Environmental Assessments are an increasing requirement for municipalities, which trigger the process of consultation where it hasn’t already begun. And even where an Environmental Assessment is not triggered, archaeological work may be involved in a project, which will require consultation (for which there are specific guidelines now as well). Even though these few policies exist to guide planners, there is still a lack of understanding in general of the importance of proper engagement and consultation – at a committee of adjustment meeting in one city, one of the committee members was heard saying to an applicant asking about digging, “well, if it’s gold, bring it to us, if it’s bones throw it over the fence!”. So, not only is the culture within municipal planning still in need of a shift, but even when there is a positive attitude towards engagement – and don’t get me wrong, there are many planners and planning departments that are keen to build relationships with Aboriginal communities around them, and to effectively engage with them – it is often a confusing process.

At the moment there *are some* resources to be found online that would aid those seeking to facilitate such engagement efforts, but these are scattered around, and require that planners know to look for such resources in the first place. As I mentioned earlier, there is little in planning education in Canada that prepares planners for this facet of their work. So the website that is in development will provide users with some help.

So, back to the website: what users will find on this resource is a wide range of information, from practical info about consultation guidelines and protocols that they can look to, to background reading which will provide a better understanding of the context in which we plan now, and how we got here.

The resource library page will take users to a catalogue of all the guidelines that exist, such as the Environmental Act assessment guidelines, or Tourism, Culture and Sport’s guidelines on archaeology; as well as Aboriginal communities’ consultation protocols. It will also include resource industry guidelines. Quite often resource companies will put together Impact Assessment agreements with individual First Nations or a group of First Nations, and these will be kept private. Due to this unofficial policy of keeping agreements such as this private, it continues to be difficult for others to learn from them. However, for those guidelines that are publicly available, users will find resources to better understand them, such as

the Chiefs of Ontario's Environmental Assessment Toolkit and a similar resource from the First Nations in BC.

The resource library will also include treaty information (such as text and maps), relevant court cases (including the case text, related commentary, and updates), and information on governance (such as how band councils govern, and how municipal planning departments work).

Another important aspect of the website will be communications information, providing users with up-to-date contact information for both consultation officers in Aboriginal communities as well as those municipal planners working on consultation.

The goal is for this resource to be of use *not only* for municipal planners, but First Nation planners and consultation workers, as well as consulting firms, developers, lawyers, and others. Of course this will take time, so to begin with the focus of the website when it is launched will be on municipal planners and Aboriginal planners and consultation departments. In the meantime I'm working on building up a network of people who might want to contribute, or who simply wish to be kept informed.

Urban planners are well aware of the importance of cultural and heritage landscapes – such terms are an important part of the planning vernacular. And yet, Aboriginal cultural landscapes are not commonly understood as an important aspect of municipal and regional planning. As I learned quickly from that class assignment, there continues to be a disconnect between Aboriginal and non-Aboriginal planning interests. It is changing, though slowly. Many planners are now aware of the importance of engaging and building relationships with Aboriginal communities, in Ontario particularly with First Nations. Various municipalities have consulted and engaged with First Nations to create Archaeology Management Plans, and many are currently working on kick-starting or improving already started processes of engagement. However, a number of issues remain somewhat murky and continue to hold back progress.

One such issue is that of funding capacity, as in, who is going to foot the bill in order that the First Nation can be meaningfully engaged. Already we have seen conflict arise because of this murky area: at Six Nations of the Grand River, the Haudenosaunee Council (the traditional council) has created its own organisation, the Haudenosaunee Development Institute (or HDI) that levies fees from developers wanting to develop land within their asserted traditional areas. This assertion of authority has already led to conflict between developers and the HDI. When municipalities are asked to pay such fees, they are often left frustrated because this is not included as part of any consultation requirements – the Haudenosaunee council is not the elected council, and it is the elected council that municipalities are required to meet with when they do engage in consultation. The question of how effective engagement is funded must be addressed by various levels of government. Which brings us back to that other murky issue, which is who owes the duty to consult.

For the first time, a recent court case addressed for the first time really, the issue of whether municipalities owe this same duty to consult. In *Neskonlith v. Salmon Arm City*, it was affirmed that municipalities do not owe this duty. However the case suggests that best practices continue to be for municipalities to properly inform a First Nation with interests in the area, and in some cases modify the

plan. So, this leaves us in the same spot – that municipalities don't owe the duty to consult but they *are* expected to engage with First Nations.

And so, municipal planners look to what policy tells them, which is as I mentioned earlier, often the bare minimum. And conflict has arisen even when this bare minimum is used as the measurement of effective engagement. As I mentioned earlier, the planning act only calls for notification, and that is increasingly understood to be insufficient. And furthermore, when municipalities are required to consult First Nations, they are directed to the elected councils. Again, the context at Six Nations demonstrates that the Planning Act's notification requirements don't always address the issue. A vast portion of the Six Nations community supports the traditional council over the elected council, and thus, if the municipality fails to engage with the Haudenosaunee Council, such engagement efforts are often brought to a halt as a result of protest from the Haudenosaunee. What many are saying now is that while there is this bare minimum standard of engagement, it is in the best interests of the municipalities to go beyond standard. But here we come back to the issue of funding, in that quite often only the bare minimum is funded.

Ultimately what is needed is a general shift in how planning practitioners, whether it is those working for a municipality, or within private firms (many of whom are hired by municipalities to do this very work), view the importance of Aboriginal interest in the context of local and regional planning. This shift has been kick-started by some and hopefully it will continue into the accredited planning education system, as well as the whole of planning practice. In Ontario at the moment, archaeology has certainly become one of the clearest ways that planners engage with First Nations. However, it strikes me that, although this is an important development, we must look beyond archaeological heritage as the easiest way to understand Aboriginal interest in the land. As the other panelists have articulated, Aboriginal cultural landscapes are not only about the past, but about living cultures, today and into the future.

