

Municipal Governments and the Crown's 'Duty to Consult'

Towards a Process that Works for Local Communities

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The Association of Municipalities of Ontario (AMO) is a non-partisan, non-profit representing almost all of Ontario's 444 municipal governments. Working together, the municipal order of government can achieve shared goals and address common challenges.

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Executive Summary

Ontario's municipal governments, Indigenous governments and local industry need clarity about the province's approach to the 'Duty to Consult' and the corresponding 'Duty to Accommodate,' where appropriate. These duties come from a constitutional Crown obligation to consult Indigenous people on decisions that may affect Aboriginal and Treaty rights. At the same time, municipal governments want to strengthen and develop mutually beneficial relations with the Indigenous governments in their areas. Clear and pragmatic direction from the provincial Crown is necessary to facilitate these relations on the ground.

Shifting and siloed provincial approaches, judicial developments and ambiguity about implementation result in confusion about the municipal role in the Crown's Duty to Consult. In some cases, the lack of provincial clarity and supports has strained relations between municipal governments and Indigenous governments. Confusion around the Duty to Consult can also lead to municipal project delays and cost overruns. This creates administrative burden for municipal governments while increasing pressure on the property tax base.

To address these challenges, this AMO discussion paper explores the Crown's Duty to Consult as it relates to municipal governments. It aims to start a productive conversation between the provincial Crown, Indigenous and municipal governments about the municipal role in these constitutional processes. In doing so, it emphasizes the need for provincial leadership, including an ongoing role for the provincial Crown in Duty to Consult cases involving third parties like municipal governments.

The discussion paper is based on the view that while municipal governments may have a role to play in discharging procedural aspects of the Crown's Duty to Consult, they do not have an independent Duty to Consult. Municipalities are not the Crown. They do not have the constitutional authority to address the range of issues arising from Aboriginal and Treaty rights. Municipal governments are subject to many provincial approval processes and do not have access to critically relevant information on Crown-Indigenous relations. Moreover, a lack of knowledge, capacity and financial resources to fulfill the Duty also prevent municipal governments from independently assuming responsibility for discharging this Crown responsibility.

To further the implementation of the Crown's Duty to Consult in cases involving municipalities, AMO recommends that the Crown work with municipal and Indigenous leadership to:

- 1) Clarify Responsibility for the Duty to Consult and the Duty to Accommodate, where appropriate**
- 2) Establish a Practical Process with Municipalities and Indigenous Governments to address the requirements for consultation**
- 3) Provide Necessary Funding, Resources and Supports in Duty to Consult Proceedings**
- 4) Promote Municipal-Indigenous Relationship-building and Local Cooperation; and**
- 5) Involve Municipal Governments in Land Claim and Treaty Implementation Scenarios Affecting Municipal Jurisdiction**

AMO looks forward to working with Indigenous leadership and the Ontario Crown to develop a practical process that works for local municipal governments on the ground.

"The honour of the Crown is a foundational principle of Aboriginal law and governs the relationship between the Crown and Aboriginal peoples. It arises from 'the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people'...It recognizes that the tension between the Crown's assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples creates a special relationship that requires that the Crown act honourably in its dealings with Aboriginal peoples...The underlying purpose of the honour of the Crown is to facilitate the reconciliation of these interests...This endeavour of reconciliation is a first principle of Aboriginal law."

- *Mikisew Cree First Nation vs. Canada, 2018*ⁱ

Introduction

Municipal governments across Ontario are looking to better serve and work with the diverse Indigenous communities living within and near their municipal boundaries. Today, 85.5% of Indigenous people in Ontario live within municipalities.ⁱⁱ These residents contribute to the cultural diversity and economic development of local communities. Indigenous Ontarians living in nearby Indigenous communities also interact with neighbouring municipal governments. Many must travel through and stay within municipal boundaries to access healthcare, education and other social services.

The municipal order of government in Ontario has responded to the needs of Indigenous residents and neighbouring Indigenous communities by engaging in relationship-building, advancing anti-racism efforts and pursuing culturally appropriate service provision. Land acknowledgement statements, joint council meetings, Indigenous advisory councils, collaborative municipal-Indigenous agreements and Urban Indigenous Action Plans are increasingly common in Ontario. While these initiatives are promising, more can be done to improve the state of municipal-Indigenous relations across the province.

A challenge for municipal and Indigenous governments is uncertainty about the municipal role in the Crown's constitutional Duty to Consult. As third parties, municipal governments are often caught up in Duty to Consult processes. The Duty to Consult is different than regular provincial or statutory municipal consultation. Instead, it is a specific legal Duty owed by the Crown to rights-bearing Indigenous communities given its assertion of sovereignty and control over land and resources in what is now Canada. In *Haida*, the Supreme Court of Canada (SCC) confirmed that "the honour of the Crown cannot be delegated."ⁱⁱⁱ Federal and provincial governments are therefore responsible for fulfilling the Duty to Consult Indigenous communities, and where appropriate, accommodate Indigenous interests.

As will be discussed below, several provinces in Canada have assumed the responsibility articulated by the SCC by developing clear policies and procedures to give meaning to the Court's call for consultation and, where appropriate, accommodation. We are grateful to those that have shown the way. Without clear procedures in place, efforts to respect Aboriginal and Treaty rights through the implementation of the Crown's Duty to Consult are impacted by inefficiencies, delays, frustration and in extreme cases, costly litigation.

To date, Ontario remains behind in comparison to other provinces when it comes to developing practical and respectful processes to implement the Crown's Duty to Consult and the corresponding Duty to Accommodate. Instead, the province, as directed by the previous Ontario government, has responded to the judiciary's calls to action by attempting to push many of the provincial Crown's responsibilities onto third parties. This has happened without regard for whether the third parties have the necessary capacity and resources to adequately address the Crown's responsibilities. At the same time, the province has excluded municipal governments from key forums and discussions where municipal interests may be affected.

As "creatures of the province," municipal governments have been the primary targets of this provincial approach. The province of Ontario has argued that municipalities are independent decision-makers holding, against the findings of the Court, an independent municipal Duty to Consult. Further, Indigenous governments and municipal governments often require resources to effectively articulate their rights and interests when it comes to the Duty to Consult. Without access to the appropriate resources, legitimate rights and interests may not be heard and considered. This does not represent good governance and is a barrier to reconciliation.

Ontario's current approach to the Duty to Consult creates a challenging situation for municipal governments in terms of constitutional law, financial resources, legal support, information-sharing and good neighbourliness. AMO continues to believe that an open and constructive discussion with the Crown, Indigenous leadership and municipal governments is essential for all of us to move forward towards reconciliation. This discussion paper attempts to start a more productive conversation about actions Ontario can take to meaningfully improve its current approach to the Duty to Consult.

The paper will address the issue from a municipal government perspective. It begins by providing an overview of the legal framework governing the Duty to Consult, including how municipalities fit into the current framework. The paper also provides a description of municipal responsibilities for consultation under the *Planning Act* and a description of Ontario's current approach to the Duty to Consult. There follows a discussion of best practices developed by other provinces and the possible application of these practices to Ontario. The paper concludes by describing policy areas for consideration and by proposing recommendations for action that could be taken by Ontario to facilitate the process of consultation and accommodation with Indigenous peoples in cases involving municipal governments.

AMO welcomes feedback from the federal and provincial governments, Indigenous leaders and governments, municipal governments, businesses and residents. It is in our collective interest to get this right.

"Where do we want to be in 3 or 4 or 5 or 7 generations from now when we talk about the relationship between Aboriginal and non-Aboriginal people in this country? [...] Reconciliation will be about ensuring that everything that we do today is aimed at that high standard of restoring that balance to that relationship."

- Senator Murray Sinclair, Chair of the Truth and Reconciliation Commission of Canada ^{iv}

Legal Framework and Case Law in Ontario

"The fundamental objective of modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding."

- *Mikisew Cree v Canada, 2005*^v

Historical Background on the Duty to Consult

The principle of the honour of the Crown and the duties that flow from it are not vague concepts. They are fundamental to the constitutional make-up of Canada. A clear, practical process to implement these duties and appropriate guidance and supports for all parties involved are necessary to avoid cases that proceed to costly litigation. A practical process would also limit development delays damaging to neighbourly relations. By seizing the opportunity to clarify how Crown duties to Indigenous peoples are to be implemented in Ontario, the province can address its constitutional obligations in a constructive fashion. In doing so, it will advance the harmonious workings of Ontario's governments – Crown, Indigenous and municipal.

To provide historical context, in the 18th century, Britain and France struggled for European control over eastern North America. The ensuing war, known as the Seven Years War, ended in 1763 with the Treaty of Paris in which France ceded Canada to Britain. Shortly afterwards, King George III issued a Royal Proclamation on October 7, 1763.

The Proclamation, sometimes referred to as the Indigenous 'Magna Carta' of Canada, set out the fundamentals between Crown-Indigenous relations in British North America.^{vi} On one hand, it asserted the sovereignty of the British Crown over the territory acquired from France. On the other, the Proclamation recognized the rights of Indigenous peoples to their traditional lands within the territory. Finally, it sought to reconcile these two distinct principles by establishing a treaty system whereby the lands of Indigenous peoples could be legally ceded to the Crown.

This treaty system continues into the present and is protected by Canada's constitution. At Confederation, the Crown in Canada was divided between the Crown in right of Canada and the Crown in right of Ontario and other provinces. For this reason, the federal and provincial governments are responsible for maintaining 'the honour of the Crown' by upholding commitments made to Indigenous people during the assertion of sovereignty.

Despite the vision set out by the Royal Proclamation, the rapid influx of settlers, commercial development of natural resources, the arrival of European forms of governance and political expediency soon eroded the land base and livelihood of Indigenous peoples. Policies of assimilation, the relocation of Indigenous peoples onto reserves, social and political disenfranchisement, residential schools and chronic underfunding of services to Indigenous people has had devastating consequences for Indigenous communities. The findings of the Truth and Reconciliation Commission of Canada speak to this dark history. Some have described Canada's attempts to assimilate Indigenous people as 'cultural genocide.'^{vii}

The courts took the lead in the 1960s to change this state of affairs. The concept of the honour of the Crown began to be judicially developed. In *Calder*, the SCC found that Aboriginal title existed in

Canadian law.^{viii} Though not identical to property title, Aboriginal title grounds a real Indigenous interest in land.^{ix} It refers to collectively held Aboriginal rights that reflect ancestral Indigenous ties to territory. Though effective, the Crown's assertion of sovereignty remains contested and incomplete because of the existence or potential for existence of 'Aboriginal title'. This is especially true in areas not covered by treaties or in lands under claim.

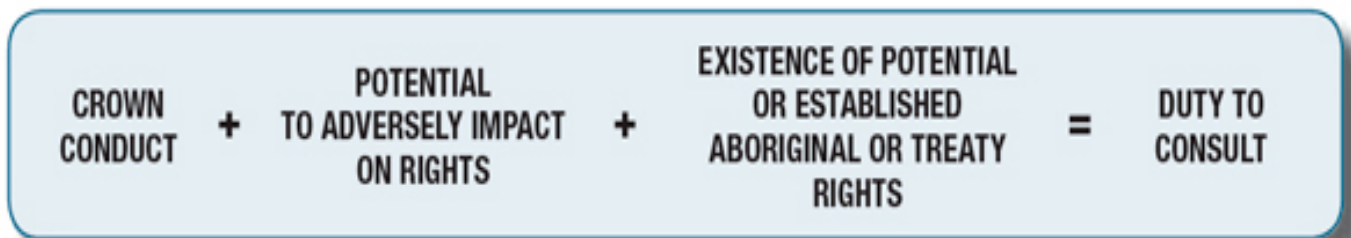
The repatriation of the *Constitution* would also lead to a new era in Crown-Indigenous relations. In 1982, Aboriginal and Treaty rights were entrenched in s. 35(1) of the *Constitution Act*. This section of the *Act* states "the existing Aboriginal and Treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed." The *Act* further defines 'Aboriginal peoples' as including "the Indian, Inuit and Métis peoples of Canada."^x Backed by the constitutional recognition of Aboriginal and Treaty rights, courts have raised the principle of the honour of the Crown to be a centrepiece of Indigenous law. In *Taku River v BC* the SCC characterized this section of the *Constitution Act* as a mandate for reconciliation.^{xi}

The term "reconciliation" as employed by the SCC implies the existence of two sets of interests – those stemming from s. 35 rights and those stemming from other societal rights and interests. Both have legitimacy and, when in conflict, require "reconciliation" through respectful, fair and good faith dealing. According to the SCC, "the Crown must act honourably in defining the rights guaranteed by s. 35 and in reconciling them with other societal rights and interests."^{xii} The Duty to Consult, then, is a check on Crown action, reviewable by a court, to come to just terms with the rights and interests of Indigenous peoples in the context of other societal needs. As per *Haida*, "balance and compromise are inherent in the notion of reconciliation."^{xiii}

Understanding the Duty to Consult

The test for triggering the Crown's Duty to Consult has three elements:

- 1) Crown conduct or decision;
- 2) Crown knowledge of existing or potential Aboriginal and Treaty Rights; and
- 3) The potential impingement of rights.



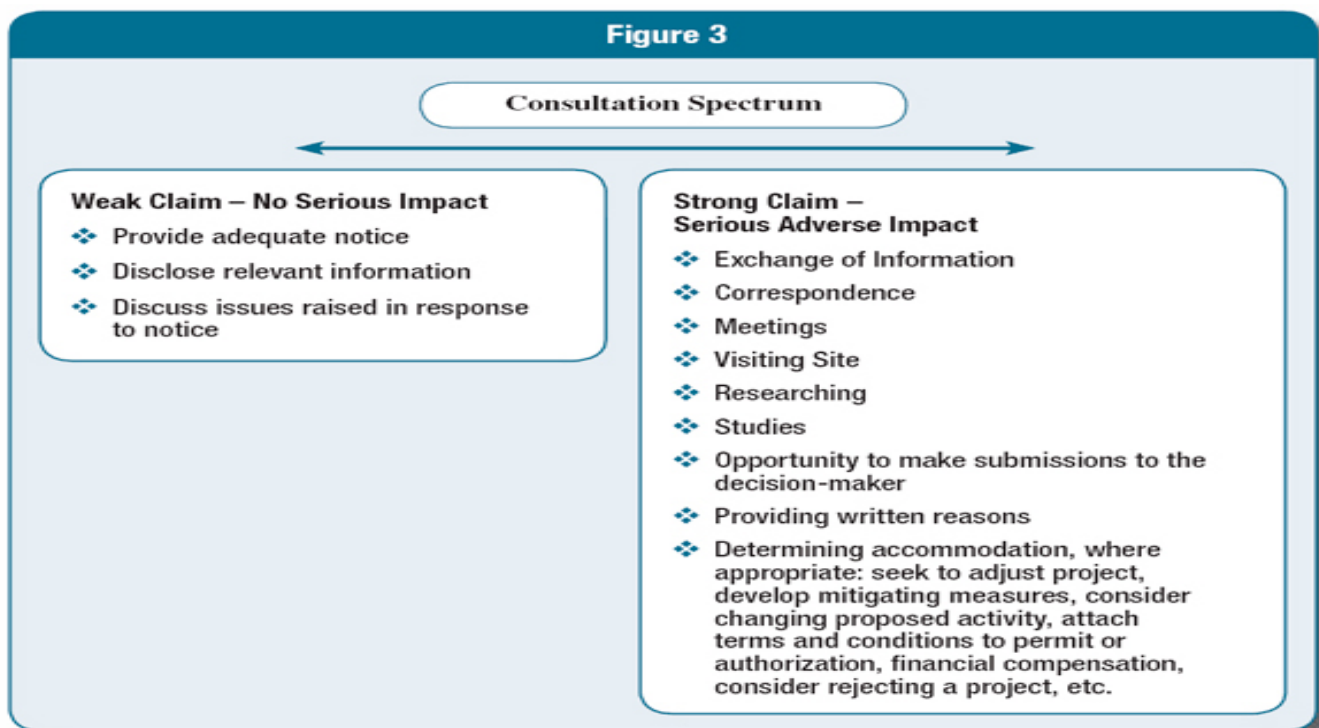
In cases where the Duty is triggered, the need to maintain the honour of the Crown and the goal of reconciliation require the Crown to undertake a process of fair dealing that includes meaningful consultation with the Indigenous community asserting rights. Underlying this requirement is the principle that the Crown has an obligation to maintain the lands on behalf of the relevant Indigenous community given the potentiality of Aboriginal title over the lands in question.

The Duty to Consult would be frustrated in its purpose if it did not imply the need to consider action flowing from consultation. The Duty to Consult implies the give and take of bargaining – even hard bargaining. Out of the give and take of bargaining arises accommodation. Accordingly, the Duty to Consult carries with it a corresponding Duty to Accommodate the rights and interests of Aboriginal

peoples, where appropriate.^{xiv} Consultation and Accommodation require good faith on both sides and an equitable balance of resources so that all parties can effectively communicate their interests.

In *Haida*, the SCC conceptualized a spectrum to demonstrate what the Duty requires in particular circumstances. What the Duty requires is largely dependent on the results of a 'strength of claim' assessment:

"At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required."^{xv}



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Notably, the Courts have ruled that the existence of the Crown's Duty to Consult and Duty to Accommodate do not give the impacted Indigenous community the power to veto a proposed project. Instead, consultation and accommodation can be used to achieve just settlements. The court can enforce such behaviour through judicial reviews of Duty to Consult processes assessed against two standards, namely correctness and reasonableness. Further, it is the proposed project's potential impact that is at issue, not historical grievances or the collective impacts of past projects on the land.

Municipal Governments and the Duty to Consult

A challenge when it comes to implementing the Duty to Consult is the complex nature of government in the present. Federal and provincial legislatures have delegated statutory authority to numerous administrative bodies to aid in the duties of governing. Many of these bodies have the statutory authority to make final decisions on project proposals independent of the Crown's ministers. In these circumstances, the administrative body holding the statutory authority is acting on behalf of the Crown.

In *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*, 2017, the Supreme Court ruled that in cases where "a regulatory agency exists to exercise executive power as authorized by legislatures [...]" the regulatory agency becomes the vehicle through which the Crown acts. Further, the Court states that "while ultimate responsibility for ensuring the adequacy of consultation remains with the Crown, the Crown may rely on steps undertaken by a regulatory agency to fulfill the Duty to Consult." A key factor for consideration on whether a regulatory agency has the capacity to fulfill the Duty is "whether the agency's statutory duties and powers enable it to do what the duty requires in particular circumstances." ^{xvii} The Crown must also clearly indicate that the regulatory agency is carrying out the Duty on its behalf.

The question arises whether this framework for Crown agents applies to municipal governments. In *Haida*, the court ruled that "third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate." Further, "the honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown." ^{xviii}

The implications of this statement from Canada's highest court and its application to municipal governments remains subject to debate. At issue is whether municipal governments are crown-entities, like the regulatory agencies described in *Clyde River*, or whether they are third parties like those described in *Haida*. If municipal governments fit the *Clyde River* description, another key question is whether the municipal order of government has the authority and capacity "to do what the duty requires in particular circumstances." ^{xix}

As mentioned, Ontario has taken a position that municipalities have a Duty to Consult in some circumstances. ^{xx} The province has gone as far as to assert that municipal governments in Ontario have an independent responsibility for the Duty to Consult. As put forward in this discussion paper, AMO respectfully disagrees with this long-standing provincial position.

There is no Canada-wide or Ontario-specific legislation or judicial ruling confirming that municipal governments are independently responsible for the Crown's Duty to Consult. Provincial courts and decision-makers in other provinces have clearly ruled against a municipal Duty to Consult. They have argued that it is unreasonable to expect municipal governments as non-Crown corporate entities with limited authority, capacity and resources to fulfill the constitutional Duty in the same manner as a Crown.

Procedural Aspects of the Duty to Consult

The Supreme Court did rule in *Haida* that the Crown may delegate procedural aspects of the Crown's Duty to Consult to a project proponent or third party. In these cases, the third party is asked to implement and carry out the Duty to Consult process with support from the Crown. Notably, third parties retain the right to decline participation in Duty to Consult proceedings.

While third parties can decline to carry out procedural aspects of the Crown's Duty to Consult, practicality and good neighbourliness suggest it is advisable for third parties to participate. Engaging in procedural aspects of the Duty to Consult advances reconciliation, prevents litigation and ensures that municipal governments and other third parties have a say on Duty to Consult proceedings that impact their interests. If the proponent refuses to engage in consultation, then the Crown must or the project fails.

The Crown also remains responsible for determining what is reasonable in terms of financially supporting the impacted Indigenous community and the third party. In *Saugeen v Ontario*, the Ontario Divisional Court ruled that "ultimately the decision on funding is the Crown's, as part of its design and implementation of a consultation process, and its decisions on funding issues will be reviewed on a standard of reasonableness."^{xxi}

Further, the Crown needs to provide a workable framework for implementing the Duty to Consult and the Duty to Accommodate. According to the Ontario Divisional Court, "[Duty to Consult] issues must be approached systemically and comprehensively; the government "may not simply adopt an unstructured administrative regime" in response to the Supreme Court's conclusion respecting the duties to consult and accommodate."^{xxii}

In *Brantford v Montour, 2010*, the Ontario Superior Court of Justice confirmed that Ontario's municipal governments can carry out procedural aspects of the Duty to Consult. The Court also confirmed that the Crown can rely on statutory municipal planning processes to fulfill its Duty. This applies where the strength of claim is on the light end of the spectrum. Ultimately, responsibility for the Duty to Consult process and funding remains with the Crown. The Ontario Court has also indicated that it is "doubtful" that municipal governments have an independent Duty to Consult because they are not the Crown.^{xxiii}

The Planning Process and Indigenous Consultation

Municipal instruments, such as Official Plans and Zoning By-laws, and provincial instruments, including the Provincial Policy Statement (PPS) and plans like the "Niagara Escarpment Plan", regulate land use planning. Overarching is the *Planning Act* and regulations that prescribe the process for making planning decisions and appeals.

Provincial land use planning rules prescribe how planning-related consultations must take place. Consultation with impacted parties is a requirement under the *Planning Act* since the early 1980s. At a minimum, major planning decisions require municipal governments to give advanced notice, hold a public meeting and make relevant documents available to the public. Municipal governments may also post signs on the impacted property and post information on their websites to keep the public informed and to allow for public comment.

In addition to the public, municipal governments will contact various agencies and external parties to gather their input. Once input is collected, staff prepare a planning report that addresses the concerns raised by external parties and the public. The report to council also provides professional planning advice on how the municipality should proceed to be consistent with local plans and provincial requirements.

The *Planning Act* encourages early involvement of impacted parties and the use of mediation techniques to resolve any conflicts. If public consultations dramatically change a planning proposal, the process may start again.

In 2014, the *Provincial Policy Statement* was refreshed with three new sections on Indigenous consultation:

- 1) Section 1.2.2 states that “planning authorities are encouraged to coordinate planning matters with Aboriginal communities.”
- 2) Section 2.6.5 indicates “planning authorities shall consider the interests of Aboriginal communities in conserving cultural heritage and archaeological resources.”
- 3) Section 4.3 states that the “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.”^{xxiv}

At the time, AMO asked the province for clarification on the proposed new language and for a toolkit to support municipal governments in building relations with Indigenous neighbours. The then-Ministry of Municipal Affairs assured that the addition of these sections under the PPS is not the same as Crown's Duty to Consult. On resources and supports, the Province did not respond to AMO's requests despite provincial commitments to develop materials.

Since then, the planning process continues to focus on engaging the public and impacted agencies when applications are under review or as part of the routine renewal of planning documents. Some municipal governments have worked with neighbouring First Nations to create notification systems and other protocols to address municipal-Indigenous engagement over land use.

The former Ontario Municipal Board (OMB) has also touched on the Duty to Consult. In *Burleigh Bay Corporation (BBC) v North Kawartha, 2017* the board “confirm[ed] the general and established principle, [...] that the Duty to Consult and Accommodate the rights and claims of First Nations is a duty of the Federal or Provincial Crown and not third parties such as the BBC [a private proponent], or the township.”^{xxv}

Current State in Ontario

Currently, the Ontario government maintains a webpage describing its approach to the Duty to Consult. A document titled ‘Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal and Treaty Rights’ is available through the site.^{xxvi} These ‘Guidelines’ were never finalized. They were published in 2006 in draft form. The Guidelines contain no mention of municipal governments. They are the only provincial tool currently available to the public and to the municipal order of government on the Duty to Consult. The webpage also indicates that Ontario's approach to consultation is under review.^{xxvii} This review began before the 2018 provincial election. At the time of the writing of this paper, it is unclear whether the new Progressive Conservative government will continue this initiative and clarify how the Duty to Consult is to be implemented in Ontario.

In AMO's view, Ontario's approach to the Duty to Consult evolved quickly in the final months of the previous provincial government. These changes occurred without legislative amendments and with limited consultation with impacted partners. During the review process, provincial ministries began asserting the existence of an ‘independent municipal duty to consult.’ The provincial off-loading of ‘procedural aspects of the Duty to Consult’ onto municipal governments by line ministries without provincial coordination, funding, resources or adequate guidance also became common.

AMO responded to this shift in policy by requesting a full discussion with the Ontario government. We argued that municipal governments in Ontario are not the Crown and are subject to numerous

provincial approvals and appeal processes as 'creatures of the province'. Municipal governments have at least 280 pieces of provincial legislation that they must adhere to along with countless regulations. A lack of knowledge and information on Indigenous claims, helpful guidance from the province, financial resources and capacity also prevent municipal governments from assuming this Crown Duty.

AMO continues to request a deeper discussion between municipal governments, the Crown and rights-bearing Indigenous communities to determine how the Crown's Duty to Consult can be pragmatically and thoughtfully implemented. Any Duty to Consult process involving a municipal government needs to recognize municipal capacity and resource constraints along with the Crown's ultimate responsibility for fulfilling the Duty.

In fall 2017, AMO created an Indigenous Relations Task Force to address uncertainty around the Duty to Consult and to advance municipal-Indigenous relationship-building across Ontario. The taskforce includes elected representatives and staff from municipal governments in rural, northern, urban and small town Ontario.

Another key component of AMO's advocacy on the Duty to Consult has been to urge the Province to consider approaches and best practices from other provincial jurisdictions.

The Duty to Consult in Other Canadian Jurisdictions

British Columbia

BC's highest provincial court has ruled against British Columbian municipal governments having an independent Duty to Consult. In *Neskonlith Indian Band v Salmon Arm*, 2012 the British Columbia Court of Appeal (BCCA) provided three key reasons for this positioning.

Firstly, the Court stated that municipal governments lack the 'remedial powers' and authorities necessary to implement the Duty to Consult and Accommodate. More specifically, the Court stated that "as the third order of government, municipal councils are simply not in a position to, for example, suspend the application of bylaws or the terms of [Official Community Plans], grant benefits to First Nations or indeed to consider matters outside their statutory parameters."

Secondly, the Court indicated that "local governments lack the authority to engage in the nuanced and complex constitutional process involving 'facts, law, policy and compromise' referred to in" existing Canadian jurisprudence on the Duty to Consult.

Finally, and perhaps most notably, the BC court ruled against an independent municipal Duty to Consult stating that such a Duty would be "completely impractical" because "municipal governments lack the practical resources to consult and accommodate." In saying so, the Court pointed to the varying sizes of municipal populations and municipal property tax bases. It also indicated that the day-to-day work of municipal government would become "seriously bogged down" if fulfilling a Crown-like Duty to Consult became necessary to advance municipal decision-making.^{xxviii}

Although BC municipal governments do not have an independent Duty to Consult, they may nonetheless be delegated procedural aspects when municipal business triggers the Duty as per *Haida* and other SCC decisions.

To provide clarity, the BC government specifies that the Duty may only apply to land and resource decisions that affect Indigenous interests such as:

- 1) Boundary changes;
- 2) Official Community Plan changes;
- 3) Regional Growth Strategies; and/or
- 4) Planning decisions that impact Indigenous archeological sites.

When municipal activity triggers the Duty, the province treats municipal governments in a way comparable to other third parties while recognizing their reliance on limited property taxpayer dollars.

Prior to delegating procedural aspects of the Duty, the BC government considers “a number of factors in determining whether to involve the proponent in the consultation, including the capacity of the proponent to manage engagement activities.”^{xxix} When appropriate, the BC government can choose not to delegate procedural aspects of the Duty onto a third party in recognition of their limited resources and capacity.

To assist municipal governments and other third parties, the BC Government provides numerous publically available guides on relationship-building and on how it implements the Duty to Consult. These resources include a guide for local governments on First Nations engagement. The BC government also provides sample notification letters, a sample engagement log, sector specific guides (i.e. environmental assessments, major mines, clean energy projects) and various mapping tools.

Another best practice from BC is the provincial Crown's clarification in various public documents that it retains ultimate responsibility for the Duty to Consult. The BC government also makes it clear that provincial staff are at the ready to support third parties. In its guide for local governments, BC explicitly indicates that government staff are available “to discuss and support specific local government engagements” with Indigenous communities.^{xxx} The adoption of a similar approach to the Duty to Consult in Ontario would greatly benefit Ontario's municipal governments.

Alberta

Alberta's municipal governments do not have an independent Crown-like Duty to Consult as a matter of provincial policy.

Instead, the province's centralized “Alberta Consultation Office” is charged with implementing the Crown's Duty to Consult and the Duty to Accommodate. In instances where procedural aspects of the Duty are delegated to a municipal government, the Alberta Ministry of Municipal Affairs is responsible for providing the municipality with support and assistance.^{xxxi}

Similar to BC, numerous publically available guides are available to municipal governments and other third parties to provide clarity. These documents explain that when procedural aspects of the Duty are delegated, the provincial Crown remains responsible for pre-consultation assessments, notification requirements, response and consultation adequacy assessments, accommodation and reporting follow up. They also clarify that procedural aspects of the Duty will only be delegated when the scope of consultation required is on the light end of the spectrum. In Alberta, private lands are not subject to the Duty to Consult.^{xxxii}

Alberta's public resources on the Duty to Consult also indicate that third parties are not required to abide by First Nation consultation protocols that go beyond provincial requirements. Alberta's policy on the Duty to Consult only applies to provincial Crown lands and to specific activities on these lands.^{xxxiii}

Nova Scotia

The "Canada-Nova Scotia Memorandum of Understanding (MOU) on Cooperation Regarding the Duty to Consult" was signed in October, 2012. This MOU was the first of its kind in Canada. The MOU identifies municipal governments as "third parties."

The MOU states that "third parties do not have a duty to consult" but that "there may be circumstances where it is beneficial to include third parties in consultation-related activities and/or specific consultations." The MOU also commits both the provincial and federal Crowns to "jointly develop[ing] engagement opportunities for third parties [...] and delivering] information sessions [...] aimed at strengthening a third party's capacity around consultation and accommodation." ^{xxxiv}

Saskatchewan

The provincial Crown of Saskatchewan is the only province other than the Ontario government that maintains its municipal governments have an independent Duty to Consult. Saskatchewan's approach to the Duty to Consult varies from Ontario's in a number of key ways.

According to its *Consultation Policy Framework*, "municipalities may have a duty to consult whenever they independently exercise their legal authority in a way that might adversely impact the exercise of Treaty and Aboriginal rights and/or traditional uses on unoccupied Crown land or other lands to which First Nations and Métis have a right of access." In cases where the provincial Crown retains final approval authorities, the municipal government acts as a proponent and may be delegated procedural aspects of the Duty.^{xxxv}

Notably, in the Saskatchewan Framework, the Duty only applies to unoccupied Crown land or other lands where there is a right of access to engage in particular activities (i.e. licensed hunting during hunting season on Crown lands designated for this activity). Lands that are leased by the Crown are treated as 'privately-owned lands' and the right of access only applies if there is consent from the lessee.^{xxxvi} Private lands themselves are not subject to the Duty to Consult unless the project proposed for these lands impacts unoccupied Crown lands, Crown lands where there is a right of access or reserve lands in the general vicinity.

The *Consultation Policy Framework* further clarifies that the Crown provides funding for First Nations and Métis communities to engage in consultations on a project-by-project basis. A comparable initiative in Ontario would greatly help Indigenous and municipal governments as well as other third parties. According to Saskatchewan, existing municipal land use planning processes "may be relied upon by the Crown to satisfy, in whole and in part, the Duty to Consult." ^{xxxvii} This suggests that municipal governments can fulfill their independent Duty to Consult in Saskatchewan by engaging First Nation and Métis communities through regular land use planning processes.

Unlike Ontario, Saskatchewan's approach to municipal governments is accompanied by initiatives aimed at increasing municipal-Indigenous engagement. Further to a publically available proponent handbook and a finalized *Consultation Policy Framework*, the Province also has an Office of the Provincial Interlocutor for First Nation and Métis Relations. The key functions of this office include:

- 1) Aboriginal intergovernmental relations with all orders of government;
- 2) Engagement and facilitation of practical approaches with and between governments, First Nations, Métis and other stakeholders; and
- 3) Policy advice and support to ministries.

One of the initiatives coordinated by the Provincial Interlocutor is the First Nation and Métis Community Engagement Project Fund. Municipal governments can apply for funding under this program to pursue relationship-building opportunities in the community.

Towards a Process that Works for Communities

Ontario's municipal governments are looking to build and maintain strong relationships with neighbouring Indigenous governments. When it comes to the Duty to Consult, we need a clear, practical process that reflects municipal capacity, resource and funding constraints. Municipal governments also need jointly developed guidance on the municipal role in the Crown's Duty to Consult and a provincial partner willing to facilitate municipal- Indigenous engagement.

We can learn from best practices in other jurisdictions to begin working towards a framework that works for the federal and provincial Crowns as well as Ontario's Indigenous communities and municipal governments. In depth discussions with all impacted parties will be necessary to determine a practical, affordable and respectful way forward.

In this section, we briefly outline a few items for provincial consideration in these discussions.

Determining Policy Application

Other Canadian provinces such as Saskatchewan and Alberta clearly define when a project will trigger the Duty to Consult. This provides clarity and timely direction to all impacted parties before a potential project is proposed. For example, in Alberta, the Duty to Consult only applies to land use decisions on Crown lands. In Saskatchewan, the Duty applies to unoccupied Crown lands and on Crown lands where there is a right of access. Privately owned lands are not subject to the policy unless a project may affect Crown or reserve lands in the vicinity. BC goes even farther and identifies specific municipal activities that trigger the Duty, namely: boundary changes, official plan changes, Indigenous archeological sites and regional growth strategies.

Clearly determining policy application in a way that reflects that Aboriginal and Treaty rights are grounded in land and that respects private ownership of land will be key moving forward. To avoid the Duty 'boggling down' the day to day work of municipal government, specific municipal land use activities should be clearly identified as potential triggers for the Duty to Consult. These activities and triggers should be determined following consultations with all impacted parties. Developing a clear set of trigger points or thresholds will benefit municipal governments, First Nations and the Métis.

A common concern is the quantity of notifications sent by municipal governments to their Indigenous neighbours. Clarifying notification expectations will address this issue and make sure that First Nation and Métis communities receive only project proposals of potential interest. This approach will increase Indigenous governments' capacity to respond to critical proposals. They will be less bogged down by less relevant notifications sent by their municipal neighbours out of an abundance of caution.

Determining Duty to Consult policy application as it relates to municipal activities will be key to make sure proceedings remain feasible for municipal governments and to obtain clarity for all impacted parties. It will also clarify whether municipal activities that might trigger the Duty are subject to provincial approvals or are appealable.

Municipal Governments as Third Parties

The province legislates and regulates Ontario's municipal governments intensively. For this reason, the municipal activities most likely to trigger the Duty and the interest of Indigenous neighbours involve ministerial approvals (i.e. boundary changes, quarry licences, etc.). The requirement for provincial approvals in most, if not all, potential Duty to Consult proceedings involving municipal governments eliminates the rationale for asserting that an independent municipal Duty to Consult exists. Further, a large quantity of land subject to municipal jurisdiction is privately owned and already impacted by past development activity.

Creating or asserting an 'independent Duty to Consult' for municipal governments also assumes that the municipal order of government has insider knowledge about Aboriginal rights and Crown-Indigenous relations. This is not the case. Municipal governments lack expertise on the Duty to Consult and have no access to information on legal requirements in existing treaties and ongoing or potential land claims. In fact, treaty implementation discussions and land claim negotiations generally exclude impacted municipal governments. This exclusion leaves municipal governments without information on developments that could potentially affect municipal jurisdiction within the meaning of the *Municipal Act*, including the property tax base.

Since Ontario's municipal governments are subject to numerous provincial approvals and lack funding, knowledge and expertise on Crown-Indigenous relations, they should be treated as unique third parties with respect to the Duty to Consult. Municipal governments are unique third parties in the sense that they are decision-makers bound by numerous provincial legislative and regulatory constraints.

Provincial policy should also reflect that municipal governments are different from other third parties. Private-sector proponents are motivated by profit incentives and may be willing to fund Indigenous participation in consultation because they can afford it. Municipal governments rely on a limited property tax base and are responsible for stretching these funds to maximize the value of their services and programs for local taxpayers. There is little room in municipal project budgets for unexpected expenditures and cost overruns that may result from the Crown's Duty to Consult and the Duty to Accommodate. Moreover, municipal governments cannot be reasonably expected to fund Indigenous participation in Duty to Consult proceedings as they are trying to obtain a provincial licence or provincial approval necessary to fulfill a statutory requirement imposed by the Government of Ontario.

Acknowledging that the Duty to Consult is the ultimate responsibility of the Crown and not municipal governments will also make sure Crown-Indigenous relations are not negatively affected by provincial offloading to municipalities.

Leveraging Land Use Processes to Avoid Duplication

The municipal role in the Crown's Duty to Consult should be developed leveraging existing land use processes to avoid duplication and to streamline proceedings for all impacted parties. Such an

approach would reflect the judicial ruling in *Brantford v Montour, 2010*, which was upheld by the Ontario Court of Appeal, and align with Duty to Consult frameworks in other provincial jurisdictions. Since Duty to Consult proceedings have in the past been assessed through the Ontario Municipal Board (i.e. *BCC v North Kawartha, 2017*), it may be useful to similarly leverage the new Local Planning Appeal Tribunal (LPAT) in these processes. The LPAT may be well placed to assess whether the Duty has been met through a municipal government's existing land use processes.

An Enduring Provincial Role

Since the Duty to Consult and the Duty to Accommodate fall within Crown jurisdiction, the province should reaffirm to its municipal and Indigenous partners and other stakeholders that it will remain responsible for fulfilling this constitutional obligation. Canadian courts have ruled that the honour of the Crown cannot be delegated and this judicial position should be clear to all parties.

Further, the Ontario Crown has a value-adding role to play in providing impacted third parties with information, advice, guidance and facilitation support. Best practices from the Alberta and BC Crowns demonstrate the value in pursuing this ongoing provincial Crown role.

For example, the Alberta Crown retains responsibility for pre-consultation assessments; notification requirements; response and consultation adequacy assessments; accommodation; and reporting follow up. It only downloads the Duty onto a third party when the scope of the Duty is determined to be on the 'light end' of the consultation spectrum. The BC Crown assesses whether it is reasonable to expect a municipal government or other third party to fulfill the Duty based on its size and ability to manage consultation activities. Either of these practices would greatly benefit Ontario's municipal governments.

By creating a more centralized approach to the Duty to Consult, the Alberta and BC Crowns also reduce ministerial silos. In Ontario, each line ministry has a different process for fulfilling and delegating the Crown's Duty to Consult. This is confusing and results in navigation challenges for municipal governments and other third parties, especially given the absence of guidance materials. The implementation of a uniform, transparent, whole of government approach is preferred.

Information Sharing and Communications

As mentioned, one of the key reasons municipal governments lack the capacity to fulfill an independent Duty to Consult is because they are not privy to important historical information, legal analyses and current developments regarding land claims and/or treaty implementation.

The Crown is presumed to know its treaties and its land claims. Ontario municipal governments are not aware of information kept from them due to Crown-Indigenous confidentiality. While full access to this information is out of scope for municipal governments, it may be useful to develop information-sharing mechanisms so that municipal governments are privy to discussions that affect municipal jurisdiction as outlined in the *Municipal Act*.

The creation of a forum for municipal participation in the Algonquin land claim negotiations serves a positive model. This forum enabled municipal governments to learn about the land claim process and to advocate for municipal interests in the negotiations. In AMO's view, all impacted parties benefited from the inclusion of municipal representatives.

Another existing initiative worth considering is the Grand River Notification Agreement (GRNA). The GRNA establishes formal channels of communication between its signatories for agreed-to activities occurring within a geographically defined notification area.

The Agreement was initially signed in 1996 by the City of Brantford, the County of Brant, Haldimand County, Six Nations of the Grand River, the Mississaugas of the Credit River, the Grand River Conservation Authority and the federal and Ontario Crowns. It establishes non-binding protocols and expectations on these signatory parties to provide notification on decisions affecting land use, economic development and the environment. Notably, the GRNA outlines the content, timing and process for providing notice to other signatories.^{xxxviii}

The GRNA should be evaluated to determine whether it is a useful model to facilitate communication between municipal governments, rights-bearing Indigenous communities and the Ontario and Federal Crowns. The implementation of similar agreements across Ontario may support the fulfillment of Duty to Consult proceedings involving municipal governments. This may be especially helpful in the Williams Treaties settlement agreement area in central and eastern Ontario as implementation is in its initial phase.

Financial and Resource Needs

Similar to Crowns in other jurisdictions, the Ontario Crown is well placed to finance consultation activities when this need arises. Relying on the municipal property tax base to finance Indigenous participation in the Crown's Duty to Consult proceedings is not a viable alternative to this provincial role. Municipal governments face significant financial and capacity constraints. They also have limited revenue sources. Ontario's municipal governments should not be directed to finance the Crown's Duty to Consult when procedural aspects are delegated to a municipality.

The Ontario Crown should also consider providing capacity building and relationship-building supports to municipal governments to facilitate reconciliatory activities on the ground. Making sure these relationships are in place may help the Crown meet the Duty to Consult upstream before expensive proceedings or legal action is initiated.

We also highlight the clear need for Indigenous governments to have access to appropriate funding, resources and supports so that they can meaningfully respond to any notification they receive that may have an impact on a verified or asserted Aboriginal or Treaty right. This follows a key determination in *Saugeen v Ontario*, 2017: "to have meaningful participation in consultations, a First Nation must have sufficient expertise and resources."^{xxxix} The Crown should fund these supports since it is a Crown responsibility.

Further, the provincial Crown has a role to play in developing guidance on the Duty to Consult for all third parties. Like other provincial governments, Ontario should develop and refine, through consultation, guidance documents, templates, maps and other resources to clarify its Duty to Consult policy. Any guidance materials directed at the municipal order of government should be co-developed with AMO and individual municipal governments. Co-developing guidance materials with AMO on the municipal role in the Crown's Duty to Consult would be a good way to start.

Recommendations for Provincial Action

To further the practical implementation of the Crown's Duty to Consult and the Duty to Accommodate on the ground, AMO puts forward the following recommendations for the Ontario government's consideration:

Clarify Responsibility for the Duty to Consult and the Duty to Accommodate

1. The Province should recognize its constitutional Crown obligations by acknowledging in policy and practice that Ontario is responsible for fulfilling the Duty to Consult and the Duty to Accommodate with Indigenous communities when it comes to matters falling within provincial jurisdiction, including in instances involving municipal activities;
2. The Province should acknowledge that, as non-Crown entities, municipal governments do not have an independent Duty to Consult nor to Accommodate. However, if municipal governments are to be delegated procedural aspects of the Duty, and a municipal government agrees to this delegation in a specific circumstance, the municipal role in the process must align with clear municipal responsibilities and decision-making authority. The Province should also ensure that the municipal government has the capacity and supports necessary to carry out the procedural aspects required to fulfill the Crown Duty;
3. The Province should clarify that Sections 1.2.2 (under 'Coordination'), 2.6.5 (under 'Cultural Heritage and Archaeology') and 4.3 (under 'Implementation and Interpretation') of the "Provincial Policy Statement, 2014" are not the same as the Crown's Duty to Consult;

Establish a Practical Process with Municipalities and Indigenous Governments

4. The Province should convene a tri-lateral forum with municipal governments and Indigenous leadership to discuss and determine the design and implementation of Duty to Consult and Duty to Accommodate processes initiated by municipal activities in Ontario;
5. The Province, in meaningful consultation with Indigenous governments and municipal governments, should adopt a centralized, uniform, whole-of-government approach to the delegation of procedural aspects of the Duty to Consult, where appropriate and where the municipal government has agreed to the delegation. This will ensure there is consistency in implementation across provincial ministries and clear, timely expectations for all parties involved;
6. The Province, in meaningful consultation with Indigenous governments and municipal governments, should explicitly acknowledge the financial, capacity and knowledge constraints facing municipal governments when developing whole-of-government protocols for the delegation of procedural aspects of the Duty to Consult;
7. Any protocol involving the delegation of procedural aspects of the Duty to Consult to municipal governments should explicitly outline the ongoing role of the Ontario Crown in terms of providing facilitation support, guidance and reasonable financial resources to the involved parties, including impacted municipal governments;
8. The Province, in consultation with Indigenous governments and municipal governments, should identify specific instances, thresholds, and land-use activities that would initiate the Duty to

Consult in a manner similar to British Columbia and Alberta so that clear expectations for all impacted parties are outlined before the commencement of planning processes or project development;

Provide Necessary Funding, Resources and Supports in DTC Proceedings

9. If the Province, against municipal advice, does move forward with creating an Independent Duty to Consult for municipal governments in certain circumstances, the Province should provide municipalities with clear protocols, ongoing provincial facilitation support, appropriate training and guidance, information-sharing and adequate financial resources. This will ensure municipal governments are prepared to implement the delegated Duty properly and respectfully. The provincial Crown could begin this work by co-developing guidance materials with AMO on procedural aspects of the Duty to Consult that is specific to municipal governments;
10. Further to providing municipal governments with adequate financial resources, guidance and supports to carry out procedural aspects of the Duty to Consult, the Province should provide Indigenous governments with funding and supports to enable meaningful Indigenous participation in Duty to Consult proceedings;

Promote Municipal-Indigenous Relationship-building and Inter-local Cooperation

11. Further to establishing clear and reasonable protocols and supports for municipal governments on procedural aspects of the Duty to Consult, the Province should provide training, resources and relationship-building opportunities to encourage municipal-Indigenous relationship-building and cooperation; and

Involve Municipal Governments in Land Claim and Treaty Implementation Scenarios

12. In land claim and treaty implementation scenarios, the Province and the involved First Nations should establish a procedure to convene a roundtable of affected municipal governments so that municipal perspectives are considered in the negotiation and implementation processes.

End Notes

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- ⁱⁱⁱ Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73.
- ^{iv} Truth and Reconciliation Commission of Canada. "What is Reconciliation?" *Vimeo*. Accessed Summer 2018. <https://vimeo.com/25389165>
- ^v Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69.
- ^{vi} University of British Columbia. First Nations Studies Program. "Royal Proclamation, 1763." *Indigenous Foundations*. Accessed Summer 2018. https://indigenousfoundations.arts.ubc.ca/royal_proclamation_1763/
- ^{vii} Fine, Sean. "Chief Justice says Canada attempted 'cultural genocide' on aboriginals." *The Globe and Mail*. 28 May 2015. <https://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/>
- ^{viii} Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313.
- ^{ix} Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 256
- ^x *Constitution Act, 1982*. <https://laws-lois.justice.gc.ca/eng/Const/page-16.html#h-52>
- ^{xi} Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550, 2004 SCC 74.
- ^{xii} *Ibid.*,
- ^{xiii} Haida Nation v British Columbia, 2004.
- ^{xiv} *Ibid.*,
- ^{xv} Haida Nation v British Columbia, 2004.
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- ^{xviii} Haida Nation v British Columbia, 2004.
- ^{xix} *Ibid.*,
- ^{xx} Government of Ontario. Ministry of Municipal Affairs. *Municipal-Aboriginal Relations: Case Studies*. Canada: Toronto, 2009. Accessed Summer 2018. <http://www.mah.gov.on.ca/AssetFactory.aspx?did=6775>
- ^{xxi} Saugeen First Nation v. Ontario (MNR), 2017 ONSC 3456.
- ^{xxii} *Ibid.*,
- ^{xxiii} City of Brantford v. Montour et al, 2010 ONSC 6253.
- ^{xxiv} Government of Ontario. Ministry of Municipal Affairs and Housing. *Provincial Planning Statement*. Canada: Toronto, 2014.
- ^{xxv} Burleigh Bay Corporation v. North Kawartha (Township), 2017 OMB, PL150313. <http://www.omb.gov.on.ca/e-decisions/pl150313-Oct-06-2017.pdf>.
- ^{xxvi} Government of Ontario. Ministry of Indigenous Affairs. *Draft Guidelines for Ministries on Consultation with Aboriginal Peoples related to Aboriginal Rights and Treaty Rights*. Canada: Toronto, 2006. <https://www.ontario.ca/page/draft-guidelines-ministries-consultation-aboriginal-peoples-related-aboriginal-rights-and-treaty#section-0>.
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- ^{xxviii} Neskonlith Indian Band v. Salmon Arm (City), 2012 BCCA 379.
- ^{xxix} Province of British Columbia. *Guide to Involving Proponents When Consulting First Nations*. Canada: British Columbia, 2014.
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