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First Nations and Planning

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News of the Caledonia blockade caused me to reflect on my high school days spent in Caledonia in the 60's. One of my chums was from the Six Nations Reserve. In the late 1980's I began consulting work for Treaty organizations in northwestern Ontario. Since that time, I have had the good fortune to work for Bands across the north and would like to draw upon these experiences and those of Natural Resources Working Group members to identify approaches planners might take to planning issues so as to deal creatively with the tensions that lead to the blockage.

Historically, Ontario treats Reserves as a Federal responsibility. In the early 90's, the Sewell Report on the Planning Act identified three innovative examples of First Nation planning for involving First Nations in planning efforts. These included the Windigo and Shibogama efforts in northwestern Ontario and the Temagami effort in northeastern Ontario. Due to lack of support from the Province after 1995, none of these joint planning efforts were concluded successfully.

Closer to home, Michael Sullivan reported in a 2005 OPPI Journal article on a visioning session for Beausoleil First Nation on Christian Island which I attended and assisted others in undertaking. In reviewing municipal planning documents to provide context, I learned municipal planning instruments identified the Reserve as Federal lands and designated it as natural heritage feature. There was no co-ordination of transportation services between the Reserve community and surrounding municipality even though it was a topic of considerable interest to the Reserve's large island and resort communities.

There was also no discussion of issues of mutual interest or strategies on how municipal and Band governments might co-ordinate their planning efforts, notwithstanding the Band's successful intervention at an Ontario Municipal Board hearing in opposition to a recreational development approved by the municipality adjacent to the Reserve.

Municipalities need constructive planning guidance to address these issues. But the Provincial Policy Statement 2005 is silent on this subject. While Planning Act regulations and Ministry of Natural Resources Public Lands Act policies address notification of First Nations of municipal and Crown lands planning decisions, these are insufficient because the notification is comparable to the level of stakeholder input any stakeholder might have as opposed to that involvement expected of another government, albeit a government of a different jurisdiction than a municipal council.

There is sufficient experience from court and administrative tribunal decisions to identify appropriate planning principles. The basic principle that should be followed is that consultation is required. The level of consultation should be proportional to the potential impact a project may have on the Reserve or traditionally used Crown lands off Reserve. Depending upon the impacts projected, design and mitigation measures may be required to address the impacts and, depending upon the circumstances, First Nation consent may be required. No project may take place on a Reserve or plan be enforced upon Reserve lands without the approval of the Band.

The primary duty to consult First Nations rests with the Crown, Canada and Ontario. As creatures of the Province, municipalities are required to consult with First Nations when municipal or private sector projects or plans are proposed and potential impact on First Nations may result. Generally, First Nations prefer to deal with Canada and Ontario, but increasingly, more interaction with municipal governments occurs. Several Natural Resource Working Group members have worked with municipalities where consultations with First Nations occurred.

The challenges faced included substantially different social, cultural and spiritual perspectives involving land and natural resource use especially where land use disputes off Reserve occurred, different administrative and decision making procedures from those used by municipalities, and issues arising from the need to expand Reserves for physical, economic,

social and cultural development. Reticence was often encountered. Unfortunately, we are still dealing with the scars of the historical baggage of a colonial era in which the original inhabitants of this Province were viewed as third class citizens.

Here is our analysis of what can be done using three generic situations. The first involves those circumstances where a project or plan is being devised on private lands adjacent to or close to a Reserve located in an organized municipality in southern Ontario. The second situation involves circumstances where a project or plan is being devised on Crown lands within an organized municipality in northern Ontario. The last situation involves remote Reserves outside organized municipalities where a project or plan is being devised on Crown lands in the far north.

Case Study 1: Organized Municipalities in Southern Ontario

With respect to Reserve lands and communities, as a rule of thumb, consultation with First Nations needs to be proportional with the potential impact the project or plan may have on the Reserve. For projects which may involve minimal impact, the notification provided for in the Planning Act regulations may suffice. For larger projects and land use plans (i.e., official and secondary plans) which may involve more substantial impact, more substantial First Nation involvement in the decision making is required and substantive measures to address identified concerns may need to be incorporated into the implementing planning instruments.

Depending upon the nature of the potential impact, First Nation consent may be required. For example, if the project or plan may potentially impair air or water quality (or other resources) on the Reserve, Band consent is required in the development approvals, if the impact can be appropriately addressed to everyone's satisfaction. Another example is the disposition of native gravesites. Where aboriginal grave sites are uncovered off Reserve, local First Nation consent is required before the remains can be disturbed.

Provincial and municipal policies and plans do not apply to Reserve lands. Many Provincial and municipal planning instruments show planning designations on Reserve lands. These designations have no authority, are intrusive and lack respect.

There are subjects within the Provincial Policy Statement 2005 which can be addressed in co-ordination strategies and implementation measures between Reserve and municipal governments (Policy 2.1, Coordination), where appropriate and agreed to by the municipality and the First Nation. These should be the basis of co-ordinated planned actions where municipal decisions can support planned Band activities on Reserve and vice versa provided agreement is reached between both governments.

Case Study 2: Organized Municipalities in Northern Ontario

With respect to Reserve lands and communities, the same consultation requirements discussed in Case Study 1 apply. In addition, where municipal and Provincial Ministry projects and plans may affect Provincial Crown lands used for traditional hunting, fishing, trapping and gathering, consultation with the affected First Nation whose traditional lands may be affected is required, and depending upon the scale of the potential effect, substantive measures may be required to address the impacts.

Furthermore, where an active land claim is undergoing negotiation between the affected levels of government, and that claim identifies lands and waters as the subject or partial subject of the claim and the remedy for damages sought in the claim, decisions on projects or plans on these lands should take the claim into account and consultations should occur with the First Nation before decisions are made. This may lead to planned accommodations and adjustments to address the claim on Crown and patented lands for uses such as cottage development where development on private and public lands may require co-ordination.

Irrespective of location within the Province, land claims need to be settled fairly and in a timely fashion. Municipal planned actions should support the settlement processes and implement the agreements. Canada and Ontario should help work out with the First Nations and municipalities, as part of the land claim settlement process, what the structure should be for ongoing consultation and decision making on land use and resource management matters to achieve fair and timely settlements.

Case Study 3: The Far North

The far north can be distinguished from the previous case studies. With the exception of Moosonee, there are no organized municipalities. Crown lands predominate and these lands are administered and planned for by the Ministry of Natural Resources under Public Lands and Provincial Parks Acts. Aboriginal communities (both Reserve and off-Reserve) are the predominant settlements. But no provisions are made by the Province for administering and planning Crown lands in a manner supportive of these communities.

The far north is also distinguished because Treaty #9, which covers most of the Province north of 51st parallel is unique among the numbered treaties in that both Ontario and Canada are signatories to the Treaty. No other numbered Treaty in Ontario or Canada is signed by a Provincial government. First Nations have tried at various times to affect planning decisions on Crown lands beginning with planning in the Reed track, the Draft West Patricia Land Use Plan, the Royal Commission on the Northern Environment, the District Land Use Guidelines for Red Lake, Sioux Lookout, Geraldton and Moosonee and Lands for Life. Generally, the results are unsatisfactory.

In addition to provisions for consultation, Provincial plans should support the planned growth and development sought by First Nations by allocating Provincial Crown lands and resources for community use and by involving First Nations in Crown as decision makers in Crown land and resource planning and application, especially on traditionally used lands and waters off Reserve.

These measures are intended to guide planners towards more productive relationships between municipalities and First Nations. First Nations governance structures are a work in progress and the co-ordination of planned activities will be a learning process. A learning process and constructive interaction are, however, preferable to confrontation.

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