



CITY OF HAMILTON
HEALTHY AND SAFE COMMUNITIES DEPARTMENT
Children's Services and Neighbourhood Development Division

TO:	Chair and Members Emergency and Community Services Committee
COMMITTEE DATE:	August 17, 2020
SUBJECT/REPORT NO:	Municipal-Indigenous Relationship Building related to City-Initiated Archaeological and Natural Heritage Assessments (HSC20030) (City Wide)
WARD(S) AFFECTED:	City Wide
PREPARED BY:	Shelly Hill (905) 546-2424 Ext. 4081
SUBMITTED BY:	Grace Mater Director, Children's Services and Neighbourhood Development Division Healthy and Safe Communities Department
SIGNATURE:	

RECOMMENDATION(S)

- (a) That the City of Hamilton continue to facilitate, and fund Indigenous monitoring of City-initiated archaeological assessment work, as set out in the Indigenous Archaeological Monitoring Policy attached as Appendix "A" to Report HSC20030, until such time as Municipal-Indigenous agreements are prepared as per Recommendation (b) of Report HSC20030;
- (b) That Urban Indigenous Strategy staff be directed to lead discussions between City staff and Indigenous communities to develop corporate-wide approaches for engaging with each community on City-initiated archaeological assessment work, which may include the negotiation of Municipal-Indigenous agreements, and report back to Council for review and approval; and,
- (c) That Urban Indigenous Strategy staff be directed to lead discussions between City staff and Indigenous communities to investigate opportunities to improve how the communities are engaged in City-initiated natural heritage assessment work, including the potential to facilitate and fund Indigenous monitors, and report back to Council with recommended approaches for review and approval.

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OUR Mission: To provide high quality cost conscious public services that contribute to a healthy, safe and prosperous community, in a sustainable manner.

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EXECUTIVE SUMMARY

The City of Hamilton acknowledges Indigenous peoples as the original peoples of this land. Indigenous peoples have an inherent and rights-based interest in the archaeology and heritage of their ancestors and assert Aboriginal and Treaty Rights over lands, waters and resources within their traditional territories. Local First Nations and Indigenous communities want to participate in archaeological and natural heritage assessments on their traditional territories in order to continue to steward their cultural and natural resources. Preliminary engagement with the Haudenosaunee, the Mississaugas, and the Huron-Wendat indicate a desire from each Indigenous community to improve existing Municipal-Indigenous relationships, including how they are involved in these assessment processes.

The recommendations of this Report align with the actions of the Council-endorsed Urban Indigenous Strategy, which call on the City to: improve how the City works with Indigenous communities when conducting archaeology; show respect for, and incorporate, Indigenous traditional ecological knowledge in municipal practices; and, improve meaningful consultation on municipal projects, plans and approvals. This Report directs staff to continue to facilitate and fund Indigenous monitoring of City-initiated archaeological assessments, allowing Indigenous communities to participate meaningfully in the work taking place on their traditional territories. Staff are also directed to work with Indigenous communities to develop corporate-wide approaches that improve upon how the City engages, and involves, Indigenous communities in City-initiated archaeological and natural heritage assessment work.

Finally, this Report provides legal analysis on statutory municipal consultation and the concept of 'duty to consult' as it relates to Indigenous involvement in the archaeological and natural heritage assessment processes. While courts have found that municipalities are not bound by the 'duty to consult', being an obligation of the Crown, in the context of archaeological assessment, courts have found that municipalities must consult early, give Indigenous people meaningful opportunities to participate, and be funded by the municipality.

Alternatives for Consideration – N/A

FINANCIAL – STAFFING – LEGAL IMPLICATIONS

Financial: N/A

Staffing: N/A

Legal: N/A

HISTORICAL BACKGROUND

In 2002, with the onset of the construction for the Red Hill Valley parkway, the City of Hamilton and the Six Nations community came together in a collection of agreements intended to preserve the Haudenosaunee interest in the Valley (Report PW04055). The intent of the Hamilton-Haudenosaunee Red Hill agreements was to foster long-term relationships and to create a plan for the Valley that reflects the best thinking of both peoples.

Under the Joint Stewardship Agreement, the Joint Stewardship Board was formed to ensure cooperation and successful continuation of the environmental management plans for the Red Hill Valley. The Medicine Plants agreement resulted in a medicinal plant program and strategies for their protection. The Economic Opportunities agreement provided for partnerships between Hamilton and the Haudenosaunee on ecological restoration work in the Valley, focusing on native plant material. A newly created Haudenosaunee enterprise was awarded a post-construction contract to create, enhance and restore hundreds of hectares of habitat in the Valley. The intent of which was to continue to produce plant material that extends beyond the Red Hill Valley Project and into parks and streetscapes managed by the City of Hamilton. The Burials and Archaeology agreement provided for Haudenosaunee involvement in the archaeological assessments, including a permanent presence during all work, setting a standard for future archaeological work. These agreements laid the groundwork for Municipal-Indigenous collaboration on archaeological and natural heritage matters moving forward.

Since the Red Hill Valley project, the City of Hamilton has taken steps to sustain existing, and build new, Municipal-Indigenous relationships through:

- Collaboration with the Haudenosaunee on the Joint Stewardship Board;
- Preparation of the Archaeology Management Plan in consultation with the Mississaugas of the Credit, the Haudenosaunee at Six Nations and the Huron-Wendat at Wendake;
- Providing training to City staff on the “Municipal Duty to Consult”, presented by Legal Services staff in 2014, including an overview of relevant legislation and caselaw related to Indigenous and treaty rights;
- Council’s acknowledgement of Indigenous peoples as the original peoples of this area and endorsement of the Urban Indigenous Strategy; and,
- Facilitation and funding of Indigenous monitoring of City-initiated archaeological assessment work with the Haudenosaunee, Mississaugas and Huron-Wendat.

More recently, Indigenous communities have requested that the City facilitate and fund Indigenous monitoring of archaeological assessments earlier in the process than

currently required by provincial legislation. For example, the Mississaugas of the Credit First Nation (MCFN) released the Standards and Guidelines for Archaeology in 2018, providing direction to archaeologists working on Treaty Lands and Traditional Territory of the MCFN as to how the First Nation expects to be engaged throughout the process, including involvement in the archaeological assessment process as early as Stage 1 to determine if the area being assessed holds cultural heritage value or interest to their Nation.

The City also began receiving requests from Indigenous communities to be involved in projects that include natural heritage components, including specialized/earlier notices, project meetings and funding of Indigenous monitoring of the assessment work to ensure they have adequate capacity for their meaningful participation in these projects, also referred to as capacity funding. For example, the MCFN's Consultation and Accommodation Protocol sets out a process for their involvement in environmental assessments and environmental decision making. Currently, staff engage with Indigenous communities as part of the Environmental Assessment process, but do not facilitate or fund Indigenous monitoring of City-initiated natural heritage assessments, including: terrestrial assessments, such as botanical inventories and bird, amphibian and reptile surveys; and, aquatic assessments, such as fish community and habitat assessments.

To proactively address these requests from Indigenous communities, an internal working group was established in 2019, led by Urban Indigenous Strategy staff and comprised of staff from various City departments and divisions. Focusing first on archaeological assessments, the working group identified challenges with existing processes, developed a work plan to guide the development of a corporate policy and process, began preliminary discussions with some Indigenous communities to better understand their history and rationale for early engagement, and conducted preliminary analysis of the costs associated with Indigenous engagement. An interim Indigenous Archaeological Monitoring Policy (attached as Appendix "A" to Report HSC20030) was developed to standardize the Indigenous engagement process for City-initiated archaeological assessment work and endorsed by the Senior Leadership Team in January 2020. The interim policy is intended to be used until a corporate-wide strategy for Indigenous engagement on City-initiated archaeological assessments is developed in partnership with each Indigenous community.

The working group has also conducted a similar review of the City's natural heritage assessment processes and identified a need to address these requests consistently across the corporation.

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS

The recommendations of this Report are consistent with municipal and provincial policy.

Municipal Policy Framework

The Council-endorsed Urban Indigenous Strategy (2019) is the City's response to the Truth and Reconciliation Commission of Canada: Calls to Action and identifies implementation actions related to the themes of land, people and spirit. The Strategy's actions relevant to the City conducting archaeological and natural heritage assessments include:

- Improve meaningful consultation with urban Indigenous residents and First Nations communities on municipal projects, plans and approvals;
- Continue to improve how the City works with First Nations when conducting archaeology. This will include identifying how to educate the public on the rich archaeological history in Hamilton; and,
- Show respect for traditional ecological knowledge (TEK) by including Indigenous voices in environmental leadership and incorporating TEK in municipal practices.

The Council-approved Archaeology Management Plan (2016) (Report PED16108) outlines the City's roles and responsibilities to ensure the management of archaeology is systematic, consistent and transparent across the City's jurisdiction. The Plan commits the City to engage and maintain a dialogue with Indigenous communities on matters involving Indigenous archaeology, including entering into agreements and facilitating Indigenous monitoring of City-initiated archaeological assessment work. The Plan also includes a First Nations Consultation and Engagement Protocol to assist the City of Hamilton where municipal actions may affect the interests of Indigenous peoples. Key aspects of the Protocol include: circulating information to Indigenous communities on City activities, initiatives or directives that may affect their interests; involving Indigenous communities as early as possible in the process; and, City staff managing a municipal project should be responsible for all communication with Indigenous communities and the negotiation of accommodations or other agreements related to the project.

Provincial Policy Framework

Archaeology in Ontario is administered by the Ministry of Heritage, Sport, Tourism and Culture Industries under Part VI of the *Ontario Heritage Act*, which outlines priorities, policies and programs for the conservation of archaeological resources. The Ministry has issued Standards and Guidelines for Consultant Archaeologists, which set out policies and protocols for conducting archaeological assessment work in Ontario, including guidelines for engaging Indigenous communities during the archaeological fieldwork process and for reporting on that engagement.

The Provincial Policy Statement (2020) highlights the unique relationship Indigenous communities have with the land and its resources, recognizes the role Indigenous communities have in land use planning and development, and acknowledges the contribution of Indigenous communities' perspectives and traditional knowledge to land use planning decisions. The PPS encourages planning authorities "to build constructive, cooperative relationships through meaningful engagement with Indigenous communities to facilitate knowledge-sharing in land use planning processes and inform decision-making." Relevant PPS policies include:

- Planning authorities shall engage with Indigenous communities and coordinate on land use planning matters. (PPS, 1.2.2);
- Planning authorities shall engage with Indigenous communities and consider their interests when identifying, protecting and managing cultural heritage and archaeological resources. (PPS, 2.6.5); and,
- 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. (PPS, 4.3)

The *Ontario Environmental Assessment Act* requires engagement with Indigenous communities as part of Municipal Class Environmental Assessments (EAs). The Ministry of the Environment, Conservation and Parks (MECP) advise that local Indigenous communities should be contacted as part of the Species at Risk screening process.

Legal Framework

Municipal consultation is required by several statutes or Ministerial guidelines that apply to city-initiated projects requiring archaeological or natural heritage assessments, as described above, including the *Ontario Heritage Act*, the *Environmental Assessment Act*, the *Planning Act* and Provincial Policy Statement, and the *Funeral, Burial and Cremation Services Act*. The 'Duty to Consult' is a principle which, while not binding on municipalities, informs how statutory municipal consultation with Indigenous groups should be undertaken. The level of consultation required is determined, in part, by the potential severity of infringement on Aboriginal rights, title, or treaty rights. There is limited caselaw relating to consultation for archaeological assessment and the required threshold of consultation such activity requires. The Local Planning Appeal Tribunal, formerly the Ontario Municipal Board, has held that there is a less onerous duty to consult in the context of archaeological assessment than in respect of more entrenched Aboriginal rights such as land claims. However, this analysis will depend on the facts of a given project.

The MCFN's Standards and Guidelines for Archaeology offer a framework for expanded consultation relating to archaeological assessment and the MCFN's Consultation and

Accommodation Protocol relating to natural heritage assessment. Standards for consultation issued by Indigenous communities have been held to be important sources to be considered in determining the scope of consultation. The scope of consultation under statutes and within the broader 'Duty to Consult' is to be determined by the Crown or relevant municipality on a case by case basis, informed by the potential adverse impact of a proposed activity on an Aboriginal interest. In this context, based on the limited caselaw concerning municipal archaeological assessment, it is likely that a court or tribunal would find that consultation by a municipality must be undertaken as early as possible in the process, give the Indigenous group the opportunity to be involved, and be funded by the municipality.

With respect to natural heritage assessment, the threshold question of whether a given natural heritage assessment is likely to infringe Aboriginal rights is likely different from the archaeological assessment framework. More work will need to be done by staff to evaluate the potential threshold and scope of Indigenous consultation relating to natural heritage assessment.

RELEVANT CONSULTATION

Internal

The inter-departmental working group described above consisted of staff who conduct Indigenous engagement as part of their projects, assist in the administration of said work, or develop and implement related policy, including:

- City Managers Office: Community Initiatives;
- Corporate Services: Capital Budgets & Development Finance, Legal Services, Procurement;
- Planning and Economic Development: Growth Management, Planning, Tourism and Culture; and,
- Public Works: Asset Management, Strategy, Continuous Improvement and Quality, Design, Forestry, Hamilton Water, Landscape Architectural Services, Parks and Cemeteries.

Additional staff were engaged through an internal e-mail survey of Indigenous engagement practices and updated throughout the process, including: Facilities; the West Harbour Team; members of the Environmental Assessment Working Group; and the Indigenous Relations Staff Circle. The inter-departmental working group provided updates on this process to the Senior Leadership Team in April 2019, December 2019 and January 2020.

External

Staff have engaged in preliminary discussions with Indigenous communities regarding their involvement in City-initiated archaeological assessments, including meeting with the following representatives over the course of fall 2019 to summer 2020: the Haudenosaunee Development Institute; the Department of Consultation and Accommodation (DOCA) of the Mississaugas of the Credit First Nation (MCFN); the Huron-Wendat First Nation at Wendake; and, the Six Nations Land and Resources Office. Staff also kept the Aboriginal Advisory Committee and the Urban Indigenous Strategy Coordinating Circle informed of this process as part of their regular UIS updates.

ANALYSIS AND RATIONALE FOR RECOMMENDATIONS

Local First Nations and Indigenous communities have asserted their interest in participating in archaeological and natural heritage assessments, including monitoring work associated with projects in their traditional territories. The City of Hamilton's acknowledgment of traditional Indigenous territory needs to be demonstrated beyond words. The City should consider the requests of the MCFN and other Indigenous groups for improved or expanded consultation relating to archaeological and natural heritage assessment. Engaging Indigenous communities early in the assessment process can help foster positive working relationships and help avoid expensive project delays, lack of cooperation, negative publicity, conflicts and legal disputes. The City should ensure that Indigenous communities have capacity to adequately participate in consultation and engagement. Courts have found that where a duty to consult exists, it includes an obligation to fund consultation.

The inter-departmental working group found that the level and form of Indigenous engagement in City-initiated assessment work varies across the corporation. There is a lack of clarity in policies related to capacity funding Indigenous monitoring, which has raised concerns amongst staff managing municipal projects that require archaeological and natural heritage assessments, including: the risk associated with individual staff negotiating with First Nations on behalf of the City; confusion regarding the legal requirements of 'Duty to Consult' and determining what reasonable accommodation is; and, the challenge of estimating, and keeping to, project budgets when capacity funding Indigenous monitoring.

Caselaw relating to Indigenous consultation, with respect to archaeological and natural heritage assessment, supports a robust, meaningful, and effective framework that takes into account Indigenous frameworks for consultation. Guidelines for expanded consultation issued by the MCFN, and anticipated consultation requests by other Indigenous communities received through the working group, should be reviewed and

considered in light of the potential for adverse impact by City-initiated projects on Aboriginal interests. In the context of archaeological assessment, there is a significant (but not high) potential for adverse impact. In the context of natural heritage assessment, the potential impact should be identified and reviewed by City staff and discussed with Indigenous communities.

The Indigenous Archaeological Monitoring Policy provides an interim approach for facilitating and capacity funding Indigenous monitoring of archaeological assessments. However, the City does not currently have a policy for addressing requests for Indigenous monitoring of natural heritage assessments, or Indigenous involvement in natural heritage assessments conducted outside of the Environmental Assessment (EA) process. The City of Hamilton's Indigenous partners have identified a desire to improve and build upon existing Municipal-Indigenous relationships and engagement practices. Each community has expressed unique priorities and needs related to how the City interacts with, and engages them, on City-initiated assessment work in their traditional territories, necessitating unique responses on behalf of the City. Although the Métis Nation is not currently recognized as having traditional territory in the City of Hamilton, staff will explore any requirements for consultation under the *Ontario Environmental Assessment Act* and engage with the Métis Nation of Ontario, as necessary, as a part of this relationship-building process.

This Report is the first step in acknowledging the need to proactively build Municipal-Indigenous relationships with each of our Indigenous partners and provides direction for staff to begin discussions in areas of common and mutual interest related to the stewardship of cultural and natural resources. These actions are a step towards respectful and meaningful coordination with our Indigenous partners that addresses the Calls to Action laid out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the implementation actions identified in the City of Hamilton's Urban Indigenous Strategy and Archaeology Management Plan.

As per the Report recommendations, the Urban Indigenous Strategy staff will lead an inter-departmental working group of staff in discussions with each Indigenous community to develop corporate-wide approaches that expand and improve upon how the City conducts engagement. This process will explore opportunities to build and strengthen existing relationships with our Indigenous partners, improve project outcomes, provide capacity for their meaningful involvement and facilitate the sharing of important historical and cultural knowledge. Any anticipated impacts to project budgets and timing that may result from expanded engagement will also be reviewed as part of this process.

This Report recommends that Council endorse the Indigenous Archaeological Monitoring Policy as an interim approach and the starting point for improving

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engagement with Indigenous communities on City-initiated archaeological assessments. This Report also recommends that the City investigate opportunities to improve how Indigenous communities are engaged as part of natural heritage assessments initiated by the City, including the facilitation and capacity funding of Indigenous monitoring. Improvements to be explored with the City's Indigenous partners may include the negotiation of collaborative relationship agreements addressing:

- Stewardship board models;
- Communication protocols;
- Fee schedules;
- Opportunities for repatriation of Indigenous archaeological artifacts;
- Processes for addressing Indigenous archaeological burial sites;
- Medicine Plants; and,
- Economic opportunities related to ecological restoration.

The negotiation of Municipal-Indigenous agreements will be made in the context of the treaties with the Crown, but the agreements themselves will not be treaties, and will not affect treaty rights.

Any resulting Municipal-Indigenous agreements will be brought forward to Council for consideration and approval. Any changes in municipal policy will be reflected in updated plans and protocols, such as the Archaeology Management Plan. Training and information should be provided to City staff managing municipal projects that require archaeological and natural heritage assessment work and Indigenous engagement, including updated training on "Municipal Duty to Consult" from Legal Services staff.

ALTERNATIVES FOR CONSIDERATION

None

ALIGNMENT TO THE 2016 – 2025 STRATEGIC PLAN

Community Engagement & Participation

Hamilton has an open, transparent and accessible approach to City government that engages with and empowers all citizens to be involved in their community.

Culture and Diversity

Hamilton is a thriving, vibrant place for arts, culture, and heritage where diversity and inclusivity are embraced and celebrated.

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APPENDICES AND SCHEDULES ATTACHED

Appendix "A" to Report HSC20030 – Indigenous Archaeological Monitoring Policy
(2020)

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