

The Duty to Consult and the Urban Indigenous Strategy¹

The Duty to Consult and Federal, Provincial, Municipal Actors

The duty to consult and, where required, accommodate is a part of a process of fair dealing and reconciliation. The courts have confirmed that reconciliation, in this context, means the ongoing process of reconciling pre-existing Indigenous rights and title to the lands and resources with asserted Crown sovereignty.

The duty to consult and accommodate is a legal duty, grounded in the honour of the Crown. It is triggered in circumstances where: 1) the Crown has knowledge, real or constructive, of a potential Aboriginal or treaty right and 2) contemplates conduct that might adversely affect that right.

The “Crown” includes federal, provincial, and territorial governments. Third parties, like companies or industry, do not independently owe a duty to consult, but may be delegated certain procedural aspects of the duty (e.g., providing information about a project, holding meetings, gathering concerns, etc.). The Ontario Government has previously said that municipalities may owe a duty to consult in certain circumstances.

What is ultimately required in order to fulfill the duty to consult (and, where required, accommodate) varies with the circumstances. The key question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal peoples with respect to the interests at stake.

The Urban Indigenous Strategy and Advancing Reconciliation

As outlined above, consultation is a part of the ongoing process of reconciliation between Indigenous and non-Indigenous peoples and governments. While fulfilling the legal duty is one way to advance this goal, other avenues, including those developed directly with Indigenous peoples and outside formal legal processes, can also be an important way to advance reconciliation and maintain positive, ongoing relationships.

The Urban Indigenous Strategy (UIS) can be seen as one of these other avenues that is aimed at advancing reconciliation between the City and urban Indigenous residents and partners. It is uniquely tailored to the needs, priorities, and circumstances of Indigenous and non-Indigenous residents, as well as the City’s statutory authority, plans, and powers. For example, UIS Action #16 - “Raise local Indigenous flags permanently at City Hall” is specific to the City’s infrastructure and authority rather than something that would engage Federal or Provincial plans or powers.

In addition, some of the UIS Actions also are closely linked to recommendations made to all governments for how to advance reconciliation with Indigenous peoples. For example, UIS Action #1 includes to “Develop guidance and policy tools for senior leaders and staff about the United Nations Declaration on the Rights of Indigenous

¹ This summary should not be considered legal advice or relied upon as such. It is provided as a brief overview of these topics only and is not intended to answer whether there is a duty to consult or accommodate over any particular decision, action, or initiative, including those related to the Urban Indigenous Strategy.

Peoples” (UNDRIP). This aligns with the Truth and Reconciliation Commission, which called on all governments—Federal, Provincial, Territorial, and Municipal—to adopt UNDRIP as the framework for reconciliation.²

While other areas of the UIS do relate more to topics that have engaged duty to consult responsibilities (e.g., UIS Action #19 about improving work with First Nations on archaeology assessments), the UIS adopts a forward looking approach that aims to “improve” or “increase” opportunities for working together. In this way, it avoids one of the criticisms of the duty to consult, which is often viewed as only focused on minimizing impacts rather than restoring or advancing positive, holistic relationships.

Both the legal duty to consult and the UIS Actions can have important roles to play in advancing reconciliation with Indigenous peoples and partners in the City.

² Truth and Reconciliation Commission of Canada, Calls to Action, Call #43, available at: https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf.