The Law Is Not Your Friend

Michael B. Henry

Published in Municipal I - Planning Matters: Navigating a Rapidly Changing Municipal and Planning Landscape. Institute of Continuing Legal Education, Ontario Bar Association, Toronto, 2008

The choice of title for this paper no doubt would seem an odd choice given that it has been prepared for an audience of lawyers. An explanation is clearly required. When I was invited to make a presentation for the Ontario Bar Association I wondered what I could say that would be of use to lawyers. What could I, as an archaeologist, offer to practitioners of the law with respect to Consultation with First Nations? Then I realized that perhaps what was wanted was a perspective that was outside of, but nonetheless related to, the application of the law to the practice of Consultation. What follows then, is a personal perspective based on my experiences dealing with First Nations Band Councils, organizations, and individuals.

Before I proceed, it might be helpful to give some brief indication of how I came to be involved in these matters. My working relationship with First Nations people began very early in my career. In 1987 I was part of an archaeological research team that conducted work at Sainte Marie-among-the-Hurons. A number of Ojibwa people were employed at this popular tourist attraction as interpreters. The nature of our work on a heritage site of interest to people of a number of cultures and traditions placed me in a situation where innumerable discussions around the interpretation of the past and its implications to people today was a natural by-product of our work. As my career progressed, I had the good fortune to work alongside a number of First Nations individuals who were drawn to the practice of archaeology as a natural extension of their interest in their history. In 1994 I was privileged to be sent to Cat Lake in northwestern Ontario to work with that community in an effort to document the archaeological resources within their community but also to record the oral history of these people through interviews with community elders. Over the past several years the pace of development combined with the rising interest of First Nations people in the preservation of the sites and material remains of their forebears has meant that many archaeologists have had an ongoing and developing dialogue with First Nations individuals, organizations and communities.

This has resulted in a great deal of interaction with two groups in particular have been involved in a number of development projects: the Huron or Wyandot or Wendat (historically derived names that essentially apply to the descendants of a confederacy of Nations once resident in Ontario) and the Six Nations of the Grand (popularly known as the Iroquois). I have worked with the Band Councils and the traditional Confederacies of both groups. This includes work as par of a committee convened by the Council and Confederacy of the Six Nations of the Grand that was established to develop heritage policies and protocols to be used on projects affecting the interests of the Six Nations. Most recently, I was required to provide expert testimony before the Ontario Municipal Board regarding the proposed Big Bay Point Resort Community. In this case, the hearing itself was contested by the Wendat First Nation of Wendake, Quebec on the basis that consultation with them had not occurred.

There seems to be a general perception, even amongst lawyers with whom I have spoken, that the conduct of Consultation with First Nations means that one has to negotiate a settlement with a legally defined governing authority. This is typically understood to mean a band council that is recognized under the Indian Act. This means that one should be meeting with representatives of the Band Councils of the communities involved and that what should properly emerge as a result of this dialog is a mutually binding agreement on what will be done and how this will be accomplished. I don't agree. Consultation is not Negotiation. In my view, Consultation suggests that input be sought from the First Nations on their views regarding any proposed undertaking which may affect their interests. The expressed interests and desires of the First Nations must then be incorporated or addressed as much as possible within the proposed project design. Where this is not possible there must be documentation to show how and why these interests and expressed desires could not be addressed. There is no Treaty and not necessarily any settlement of the issues at the end of a Consultation process.

From my lay person's perspective, the requirement to consult really needs to be understood as a extension or expansion of what is typically done with regard to public notice and stakeholder input. The requirement to consult is meant to ensure that the interests of the First Nations are acknowledged, understood and addressed. And this is where we discover that a strict adherence to, or a narrow reading of the law will likely only bring you more grief. So, while opening a channel of communication with the legally recognized Band Council may satisfy the legal requirement to consult and may be recognized as such by certain courts and government agencies, it will be far removed from the intent of the requirement to consult. To understand why his would be so, we have to talk a bit about the history of First nations relations with the Crown.

The important thing to understand is that the Band Councils that we have today within reserve communities are equivalent in most respects to municipal governments. Their organization and their authority are derived from the Indian Act. It is an imposed structure of reserve government that is not recognized by many people within these communities. The First Nations were allies of the French or British Crowns during the colonial period. The land surrenders that were concluded in the 18th and 19th centuries were the result of negotiations between Crown representatives and representatives of the Bands and Nations that had traditionally occupied these territories. At no time did many of these people feel that they had surrendered their sovereignty or that they subordinated their governments to that of the Crown. In the view of many First Nations then, and with much support and sympathy within the international community, the imposition of the Band Councils as mandated under the Indian Act, was an illegal imposition of the interests of Canada over independent peoples. In fact, the traditional beliefs, practices and government of Canada's First Nations were criminalized by the Canadian government in 1928.

As a result, there exists today, a dual government system on many, if not most, reserves. One is the Band Council recognized by the Crown and the other is the traditional government or council that is supported by some numbers of the community but not

recognized by the government or the courts. To complicate the matter further, there are large numbers of First Nations people who are not resident on reserves, who are not part of the Bands or recognized by them, but who nevertheless have a self-evident interest in matters that affect people of First Nations ancestry. In my area of work that deals with heritage issues and the disposition of the physical evidence and remains of the history of human occupation in the province of Ontario, there is legitimate interest that cannot be defined by Treaty boundaries or Band membership. It is defined by blood descent and by ethnicity and by alliances and definitions of community that pre-exist the arrival of any Europeans on this continent. These relationships were then reordered and redefined by the injection of European powers into the social and political fabric of this continent. The past did not conform to the present arbitrary and politically expedient geographical divisions. There are many issues when we are dealing with the past that can easily have an impact on the interests of the First Nations people across the province and even beyond the boundaries of the province of Ontario or of Canada.

The specific bands or nations who would seem to have an interest in any given situation depends upon the moment of time selected to form the basis of interpreting relationships among the various parties and from what perspective this historical snapshot is viewed. The peoples and cultures involved were never rigidly defined. Their locations and boundaries of their territories changed over time, as did the number of people, the ethnic composition, their technology and modes of life. Therefore, to speak of traditional territory implies a selective ordering of the past, the imposition of a rigid geopolitical scheme that was largely absent. But we have imposed this order on Europe as well. Most people are not aware that most of the "Old Countries" are in fact, at least as organized states popularly known today, are quite new; many younger than Canada. Consider that defining the precise ethnic composition of Canada would be immediately limited in its accuracy to the date of the data used, how the data was collected and the manner in which it was synthesized. All of which have built in flaws inherent in these methods. This form of analysis is further complicated by definitions of ethnicity and who imposes the definition.

Under the Indian Act, the federal government defines who can and who cannot claim status as an Indian. This is a most peculiar and absurd arrangement. Establishing a blood quotient as a means of measuring eligibility in these Nations is not how Nations have traditionally defined themselves, whether you are considering European or Aboriginal Nations. We reserve the right to select people we will include as citizens of Canada from among those who wish to become Canadians. Historically, the First Nations operated much the same way. Historically, like Canada and most other nation states today, you were automatically a citizen if you were born within that Nation. Historically, as now, membership implies expected patterns of behavior and conformity to the laws, duties and obligations that citizenship implies. Also, then as now, punishments within the community or exile from it were methods employed by the Nation to deal with those who failed to meet the requirements of its members.

The people of Wendake, Quebec are descendants of the Huron Confederacy that once occupied the southern Georgian Bay area. Obviously then, they would have an interest in

projects which might have an impact on ancestral sites such as ossuaries or villages that were once occupied by their ancestors. However, the people of Wendake are not the only descendants. There are three other communities today that have claims of equal legitimacy as descendant band communities. Among these is the Anderdon Wyandot Nation of Michigan. These people formerly had reserve lands along the Detroit River in Ontario. The Crown took these lands from them during the 18th and 19th centuries. They were the last independent Huron Nation to reside in Ontario. If we look at the treaties surrendering lands west of London, Ontario, we will find that this Nation was one of the signatory First Nations groups. They are the only Huron descent group with land claims filed in the province of Ontario. And yet, because Wendake is the only Huron descent group with a recognized band council within the geographic limits of Canada, it is asserted by some that only they have any legal basis to assert any rights over Huron heritage matters. Wendake, by contrast, has no land claims or treaty rights within the province of Ontario. To further complicate this matter, there are yet other Huron descendants resident in Ontario. It is estimated that approximately 300 are members of the Six Nations of the Grand. Their ancestors had joined this other Iroquois confederacy when the Huron Confederacy disbanded in 1649. Do they not also have an interest, and therefore a right to speak, on matters that affect their ancestral sites? What of the number of Wendat descendants who are not part of any of these formally constituted communities? Many Huron descendants have moved back to their traditional homeland to be near their ancestral sites to watch over and protect them. Have these people not demonstrated, perhaps more so than the above-noted communities, their personal interest and commitment to issues that affect their heritage? If then, one chooses to speak only with the band council of Wendake, it is likely to earn the enmity of all these other groups, many of whom have been much more active in taking measures to safeguard heritage sites.

Adding to this complication is the fact that the geographic areas of historical occupation of the Huron were previously occupied by other First Nations groups and following their departure were occupied anew by yet other First Nations. Who then has an interest when it comes to matters of heritage and ancestral sites? In my own view, the current occupants with Treaty or Aboriginal rights as defined under the Constitution Act have an interest to the extent that, at a minimum, traditional protocol between nations demands that they be informed of the interest of the historically related groups and that any such groups wishing to assert an interest over their ancestral sites must at least have consent of the current occupants to do so. The implied understanding then, is that the resident Nations do not surrender their legitimate claims to territory or rights by allowing the exercise of interests on the part of other First Nations with respect to ancestral sites. I think a clear distinction can and must be made with respect to heritage versus territory, hunting and fishing rights, or other cultural activities associated with existing occupations. In this way it is hoped that emerging conflicts between Nations or interested parties can be avoided.

Another recent complication adding to the complexity of consultation is the emergence of individuals proffering claims to represent numbers of First Nations and Bands. Perhaps more than any other factor, this trend coupled with a willingness on the part of other

parties to utilize this easy way out, has the potential to engender serious long-term conflicts amongst all parties involved in the consultative process. In my view the use of self-appointed intermediaries claiming to represent a number of First Nations communities and groups will almost inevitably lead to more unnecessary conflict. Almost any First Nations community with whom I have dealt, whether band council or traditional confederacy, is quite protective of their autonomy and reserve absolutely unto themselves the right to make their own decisions. Anyone purporting to speak for any community or organization ought to be able to demonstrate the fact with appropriate letters of introduction or through a Band Council Resolution. My advice would be that anyone entering into a consultative process establish direct personal contact with representatives from each band, traditional council, and organization involved. Be wary of anyone who is willing to make autonomous decisions. It is nearly a universal practice for both band councils and traditional groups that their representatives have no decision making authority; they act only as vehicles of communication relaying the content of consultation meetings to the people they represent and then delivering the decisions of these people with supporting documentation to the consultation meetings. Using simple solutions to complex problems will not produce viable solutions and will likely only lead to bigger problems.

The distinction between the traditional and band council people is perhaps the most important amongst a myriad of divisions that currently exist within First Nations communities. This division is not strictly political in nature. This is important to understand because building bridges between these two groups is not merely a question of finding a compromise solution to a particular problem. The division is based on systems of belief and world views that are seemingly incompatible. At the root of this division is how the world and our relationship to it are defined. So, while the band council and its supporters may appear progressive and willing to participate within the mainstream of Canadian society, to the traditional people, the manner of living of the dominant society is contrary to the their core beliefs.

It is important that any consultation process include efforts to communicate with the traditional elements of First Nations peoples. One very good reason why this is important is because in most cases where there has been action taken to stop projects through occupation and/or demonstration, it has been the traditional faction that has been the flashpoint. This is true of the most noteworthy actions undertaken in recent times including Oka, Ipperwash, and Caledonia. Limiting the dialogue to recognized band councils may address a narrow reading of the requirements to consult but it is unlikely to safeguard your interests or those of your clients from potential disruptions brought about by militant resistance. Band Councils for the most part have neither the time, nor the inclination, nor the resources to launch these sorts of actions. They are busy with the day-to-day business of managing a community.

But what is the source of the apparent rise in the militancy of the First Nations? The suggestion by some that it would be more appropriate if they followed legitimate and approved channels and methods to seek redress for their grievances before resorting to disruptive and illegal forms of protests belies a misunderstanding of the situation in

which they have found themselves. For example, with respect to the Haldimand Tract in which the lands occupied in Caledonia are situated, this land was given to the Six Nations in recognition of their longstanding alliance and military aid to the Crown. The fact of the matter is that they have attempted to deal with the dispute over this land through government channels and the courts, and even resorting to direct petitions to the sovereign head of state at various times over the past 200 years. Sadly, this story is not unique. Peter Jones, an Ojibwa who became perhaps the most prominent Methodist missionary in North America of the 19th century, was heavily engaged throughout his adult life in filing petitions, meeting with government officials, and arranging audiences with the various lieutenants governor of Ontario and Queen Victoria herself in an effort to seek redress for the wrongs committed against a number of Ojibwa communities. For many First Nations people, all of these failed efforts have naturally led to the perfectly reasonable conclusion that the government and the courts will never deliver justice to them. These injustices are not limited to colonial history or the early history of the Dominion of Canada.

Most Canadians would be surprised to discover that the land on which the reserves are situated is managed in trust by Indian and Northern Affairs. Under this arrangement, the federal government has sold or leased mineral rights, timber rights, and fishing rights to commercial interests. They have leased land to homebuilders and cottagers and granted the right to collect municipal taxes to adjacent municipalities, not the reserve communities. And so, while the government may have long ago curtailed the outright seizure of First Nations land, the end result is the same; the land base is perpetually shrinking and what is left is devoid of resources which could be used to either sustain the population or which could be used for reserve based commercial undertakings. In addition, Indian Affairs has required that any proposed business ventures originating within these communities receive approval from Indian Affairs. Indian Affairs then dictates the details of how such enterprises should be administered, even going so far as to appoint the managers and employees. Most such ventures fail. All of the above obviously feed into a cycle of poverty, depression and the much chronicled attitudes of hopeless despair. This in turn feeds the popular fiction that Native people are lazy which serves to minimize their employability outside of the reserves.

These are just a few reasons why the Indian Act has been deservedly criticized by the international community as narrowly racist and genocidal in its intent. It has been around since the late 19th century with one major revision in the 1950s. However, this particularly statute has not been without its fans. When the apartheid regime in South Africa sought to put a friendlier face on its oppression of the black population of that country, they borrowed bureaucrats from Indian and Northern Affairs. It would be inadvisable to employ the Indian Act as the basis for any legal position you might take or to use it in support of your position. It is unlikely to gain you any friends or win you any support.

Apart from the purely practical consideration of avoiding property occupation, demonstrations and potentially damaging press coverage, it is only appropriate that any interested descent groups and individuals have an opportunity to raise concerns with

respect to their heritage. There is no copyright on the inheritance of language, tradition, custom and beliefs from the past. No Band Council, Traditional Confederacy or individuals have an exclusive claim to the past. It is the common inheritance of all descendants and none should be excluded from voicing their concerns and their ideas.

Although the requirement to consult, when applicable, states that the interest of First Nations is to be defined by them, it is nevertheless a peculiar thing to observe that there seems to be a concerted effort on the part of many persons and agencies to define who has an interest and even who is to be recognized as a First Nations person with a right to express their interest. I say this is peculiar because, in my experience with other stakeholder consultations, this mania for precision in defining eligibility to speak and limitation of the scope of consultation does not generally occur. There seems to be a desire to minimize the number of people or groups involved when it comes to First Nations consultation. This pattern of behavior, I believe, only serves to underscore the distinction between consultation and negotiation. If we are truly interested in achieving through consultation a solution that best addresses the needs of all, then it seems obvious to me that consultation should be as broad as possible and that nobody with a declared interest ought to be excluded.