First Nation–Municipal Land Use Planning Tool

Introduction

A wild fire tore through the Municipal District of Lesser Slave River in 2011. Without respect for the land rights of Sawridge First Nation or the Town of Slave Lake, the fire laid waste to both communities. Literally rebuilding from the ashes, the First Nation and municipal governments created the Lesser Slave Lake Region Tri-Council responsible for regional land use planning and adopted a joint Tri-Council Regional Growth Plan[1]. The Plan notes that:

> *Collaboration across jurisdictional boundaries is becoming increasingly important as a mean to effectively manage limited resources. Benefits to the region include economic prosperity, environmental health and residents' quality of life. There are many growth management issues, such as transportation, business retention and expansion, watershed management, affordable housing, among others, that transcend municipal boundaries... A collaborative approach provides a "single point of entry", which is easier to navigate for developers, employers and industry groups looking to work within the region and decreases the inter jurisdictional competition for limited development opportunities. Collaboration signals to the private sector that the area is a good place to invest.*

Town of Slave Lake Mayor Tyler Warman said of their work: "We had a chance to sit down and have good conversation, develop some trust, that really lead to different initiatives and economic development was one of them." Chief Roland Twinn of Sawridge First Nation added: "If we can pool our resources, pool our intellectual knowledge, we can come up with some unique solutions ... Muster your courage; take that leap of faith. The other levels of government aren't actually the enemy — they can become your best allies."

MYTH

Joint land use planning is too complicated and takes too long.

FACT

It took Slave Lake and Sawridge First Nation less than four years from devastating wildfire to completed growth plan.

What is Joint Land Use Planning?

Joint municipal–First Nation land use planning is about working together to create a seamless and sustainable strategy for managing human use of the local landscape.

A sustainable land use plan is built through sharing and cooperation, mutual respect for and recognition of municipal and Indigenous rights and obligations, and mutual responsibilities to each other, the land, and future generations.[2] Through reconciliation, it creates a lasting bond between communities, a healthier environment, sustainable economic development, and a better world for all our relations who follow through reconciliation. There are many examples of municipalities and First Nations making land use plans together, for example in the development of shared infrastructure[3] or joint economic development[4].

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1 *Federation of Canadian Municipalities, Community Economic Development Initiative (FCM CEDI) https://www.fcm.ca/home/programs/community-economic-development-initiative/participating-communities/alberta.htm*

2 *See: Report of the Royal Commission on Aboriginal Peoples, http://www.collectionscanada.gc.ca/webarchives/20071115053257/; http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html or https://www.aadnc-aandc.gc.ca/eng/1307458586498/1307458751962; Report of the Truth and Reconciliation Commission http://www.trc.ca/websites/trcinstitution/index.php?p=890*

3 *Federation of Canadian Municipalities Community Infrastructure Partnership Program, https://www.fcm.ca/home/programs/community-infrastructure-partnership-program.htm*

4 *FCM CEDI https://www.fcm.ca/home/programs/community-economic-development-initiative.htm*

Joint land use planning between First Nations and municipalities is a journey through a forest of federal, provincial, territorial, municipal, and Indigenous land use planning laws and policies. This tool provides a map of this jungle of laws and shares real life stories about how the systems can work together in practice. Treaties, Supreme Court of Canada (SCC) decisions, and the United Nations *Declaration on the Rights of Indigenous Peoples* (the Declaration) serve as helpful signposts along the way. Many people know part of the road, the route through their own jurisdiction, but this is a road that municipalities and First Nations must walk together. By building trust, awareness and understanding, municipalities and First Nations can forge a new path. We encourage you to proceed with patience, teamwork, and open hearts and minds with a view to reconciliation and future generations.

Municipal Land Use Planning Law and Policy

Municipalities are legal structures created by the province or territory to act on their behalf on local issues. As such, the authority of a municipality is limited to what is described in the provincial or territorial law that creates the municipality.

Municipal Acts

Every province and territory has a law that creates municipalities and gives them power to act on behalf of the province or territory on local issues, for example the Nova Scotia *Municipal Government Act, 1998*, Quebec *Municipal Powers Act*, the Yukon *Municipal Act*, or the BC *Community Charter*.[5] These laws usually include powers related to land use, for example authority to create official land use plans, adopt zoning or other land use by-laws, and manage local public works such as bridges, municipal roads, water infrastructure, etc.

Provinces and territories may also have passed legislation specific to large cities that may affect land use planning, for example, the *City of Winnipeg Charter* which, among other things, provides the city council with authority to manage flood waters within city boundaries. The regulations issued under these laws provide additional details on the operation of the legislation, for example there may be regulations on subdivision of land. A review of the founding laws for municipalities will provide important information on the legal capacity of municipalities to develop land use plans, including the process for public engagement and the process to appeal land use decisions.

Municipal *Planning Acts*

In addition to land use related powers under general legislation, some provinces and territories have specific land use planning laws for municipalities. This includes the Northwest Territories *Community Planning and Development Act*, Ontario *Planning Act*, or the Newfoundland and Labrador *Urban and Rural Planning Act, 2000*. This legislation provides additional direction to the municipalities on the objectives, content, and processes for creating, amending, and appealing municipal land use plans.

ACTION ITEMS

Identify the municipal legislation that applies in your province or territory.

Hold a joint Q & A with the municipal planners – or other officials – so everyone understands the municipal process and requirements.

[5] *Newfoundland and Labrador: Municipal Affairs Act, Municipalities Act, 1999, Urban and Rural Planning Act, 2000*
Prince Edward Island: Municipalities Act, Planning Act
Nova Scotia: Municipal Government Act
New Brunswick: Municipalities Act, Urban and Rural Planning Act, 2000
Quebec: Municipal Code, Municipal Powers Act, Cities and Towns Act of Quebec, Act Respecting Land Use Planning and Development,
Ontario: Municipal Act, 2001, Planning Act Manitoba: Municipal Act, Planning Act
Saskatchewan: Cities Act, Planning and Development Act, 2007
Alberta: Municipal Government Act
British Colombia: Community Charter, Local Governments Act Yukon: Municipal Act, Northwest Territories: Charter Communities Act and Cities, Towns and Villages Act, Community Planning and Development Act
Nunavut: Cities, Towns and Villages Act, Planning Act

Other Provincial or Territorial Legislation

Land use plans may also be affected by other provincial or territorial laws, for example to protect the environment and cultural heritage sites, for the construction of roads, or directing mining, forestry, or oil and gas development. There may be legislation affecting land use in a particular area; for example the Ontario *Greenbelt Act, 2005*, which protects environmentally sensitive land from urban development, or the BC *Agricultural Land Commission Act*, which creates authority to designate land solely for agricultural purposes. Provinces and territories may also have regional, district, or intermunicipal land use plans which may take precedence over municipal land use plans, and which should be taken into consideration in the joint land use planning process.

Official Land Use Plans

Every province and territory requires municipalities to adopt a land use plan for their jurisdiction. Some provincial or territorial governments must approve the plans (e.g. PEI, Yukon) others do not (e.g. Alberta). These official land use plans direct development within the municipality including for parks, residential areas, industrial zones, or commercial centers. They may also identify areas of "non-conforming use" — specific sites where the use of the land, usually for historic reasons, does not fit with the neighbourhood. Once adopted, official plans have the effect of law and specific processes must be followed to amend or appeal their application.

ACTION ITEM
Review any existing official land use plans together and discuss.

While it is possible to get lost in the weeds of municipal land use planning laws, the path has been used many times before and is clearly marked. But, there are two more sources of law to be considered — federal law and First Nations' laws, the traditional laws by which the Haida, Mi'kmaq, etc., governed themselves. In developing joint land use plans, municipalities and First Nations will have to consider and accommodate these additional sources of law. This is where the journey gets really interesting as we are treading into sometimes uncharted territory.

Federal Law and Policy

Because the federal government is responsible for "Indians and lands reserved for Indians" under section 91(24) of the Constitution, federal law comes to bear on First Nations land use planning. Under federal law, First Nations generally hold two forms of authority over land use: 1) statutory and 2) treaty or inherent rights. For example, First Nation Band Councils established under the *Indian Act* hold statutory powers to manage land use on reserve. First Nations may also hold either treaty or inherent rights to manage lands within their treaty or historic national boundaries.

This section reviews statutory powers and treaty and inherent rights to land and land use decision-making authority.

Indian Act

The *Indian Act*, first adopted in 1876, outlines the authority held by First Nation Indian Bands to manage reserve lands. Much in the same way that provincial municipal laws operate to create municipalities, the *Indian Act* created First Nation Indian Bands — the over 630 communities into which the approximately 60 original First Nations were divided.

ACTION ITEM
Hold a joint Q & A on the Indian Act.

Reserves are established under the *Indian Act* and are land held by the federal Crown for the use and benefit of First Nation Indian Bands. Section 81(1) of the *Indian Act* sets out the by-law making authority of the Band Council, which includes some land use related powers, including zoning by-laws, environmental protection, and the construction and maintenance of watercourses, roads, bridges, ditches, fences, and other local works. These by-laws apply only on reserve.

As an economic development strategy, First Nations may designate reserve lands for lease or another interest in the land to others. The First Nation retains title in the land. For example, land was designated for a lease to a petrochemical plant at Aamjiwnaang First Nation at Sarnia, Ontario, and a 99-year lease for condos on Tsleil-Waututh First Nation at Vancouver, BC generating significant revenue for the reserve and supporting the local economy[vi].

Certificates of possession (CP) are allotments of land to individuals on reserve. They are used to provide some private property rights in reserve lands and sometimes stimulate economic development. They are used in varying degrees across the country and not all First Nation bands have issued them. The limitations on the authority of First Nation Band Councils to determine land use generally, and on CP lands specifically, can make it challenging for a First Nation Band Council to manage or direct use of the CP lands, for example, prohibiting the dumping of waste on the CP lands if the land is being leased for that use by the CP holder.

The *Indian Act* does not apply to First Nations operating under modern treaties, and the land use provisions of the *Indian Act* do not apply to First Nations managing land use on reserve under the *First Nations Land Management Act*.

First Nations Land Management Act (FNLMA)

Currently, 58 First Nation bands manage reserve land under the authority of the FNLMA. This legislation, adopted in 1999, removes approved First Nations from the operation of the land management provisions of the *Indian Act*, and expands their authority to direct the use of reserve land. These powers include the development, conservation, protection, management, use, and possession of First Nation land. This includes zoning, subdivision, and environmental assessment and protection. Each FNLMA First Nation must adopt a land code approved by community vote before they may exercise the powers under this Act. The land code will include general rules and procedures for use and occupancy of reserve land.

First Nations Commercial and Industrial Development Act

This law allows the development of regulations beyond what is permitted under the *Indian Act* to manage complex commercial and industrial enterprises, including oil and gas development, wood processing plants, or land strata title for condominiums on reserves. At present, only six First Nations are approved under the legislation.[7]

MYTH

First Nations' reserves are a drain on the local economy

FACT

In Atlantic Canada alone, reserves generate $1.14 billon for the economy including $63 million in tax revenue.

ACTION ITEM

Identify any designated or CP lands in your province.

[6] *See for example the results of the study in Atlantic Canada on the benefit to the local economy, http://www.cbc.ca/news/canada/nova-scotia/atlantic-canada-indigenous-economy-report-1.3555164*

[7] *Backgrounder—First Nations Commercial and Industrial Development Act, https://www.aadnc-aandc.gc.ca/eng/1100100033561/1100100033562*

Additions to Reserves, Treaty Land Entitlement and Special Claims

From time to time the federal government will agree to make an addition of land to a reserve, which may or may not be adjacent to existing reserve boundaries. There are a number of reasons that land may be added to a reserve, including remedying historic mistakes in the original surveys, to fulfill treaty obligations, to add land purchased by the First Nation, or to accommodate First Nation population growth.

ACTION ITEM

Joint Q & A on the land management regime on reserve and any expected changes.

The Treaty Land Entitlement[8] and Specific Claims[9] are specific processes established to ensure First Nations receive all lands to which they are entitled under treaties and other agreements. The federal "Additions to Reserve" policy outlines the process for adding reserve land.[10] These are all lengthy processes, as they require research, review, and approval of the claim, negotiation of a settlement or a hearing of the evidence and decision, selection of lands from federal or provincial crown lands or purchase from a willing seller, environmental assessment of the lands, etc.

There are over 120 urban reserves across Canada, many of which have been established through additions to reserves. They can often serve to support economic development.[11] Examples include the urban reserve of the Muskeg Lake Cree Nation at Saskatoon, which has brought new commercial development to an abandoned rail yard in the city, the four star hotel and cultural centre on the Huron-Wendat First Nation urban reserve near Quebec City that has generated 300 jobs, or the hotel and business park at Membertou First Nation, which generates revenues of over $100 million per year[12]. Building a respectful working relationship with the municipality to collaborate on tax implications and municipal services has been part of their success.

Treaties and Inherent Rights

Thus far we have examined on reserve land use management. However, First Nations also may hold either treaty or inherent rights to land that may influence land use beyond reserve boundaries. The municipality and First Nation are encouraged to carefully consider what authority and responsibilities they each have over the territory under discussion. The road may take some interesting twists here.

ACTION ITEM

Is there a treaty in your region? If yes, hold discussions to reach consensus on its effect on land use planning.

There are two broad types of treaties between First Nations and the Crown — historic treaties and modern treaties[13]. In modern treaties, also called comprehensive treaties, the rights and interests between the Crown and First Nations are clearly expressed, making the path relatively straightforward. Examples of these modern treaties are the comprehensive land and self-government agreements with the Nisga'a in western BC and with the Eeyou Istchee in northern Quebec. The Eeyou Istchee and the municipalities in that territory are breaking new ground, jointly managing land use on shared lands. A first of its kind in Canada, the new regional government accords the First Nation and the municipality an equal position on the council.[14]

[8] *Backgrounder—Treaty Land Entitlement, http://www.aadnc-aandc.gc.ca/eng/1100100034822/1100100034823*
[9] *Backgrounder—Specific Claims, https://www.aadnc-aandc.gc.ca/eng/1100100030291/1100100030292*
[10] *Backgrounder—Additions to Reserve, https://www.aadnc-aandc.gc.ca/eng/1332267668918/1332267748447*
[11] *Backgrounder—Urban Reserves https://www.aadnc-aandc.gc.ca/eng/1100100016331/1100100016332*
[12] *http://aptn.ca/news/2015/06/26/boosting-first-nation-economies-part-reconciliation/*
[13] *Backgrounder—Comprehensive Claims, https://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578*
[14] *Eeyou Itchee—Jamesian Regional Government, http://www.greibj-eijbrg.com/en/).*

Historic treaties include the Peace and Friendship Treaties in the Maritimes, the pre-Confederation treaties in Ontario, the numbered treaties across the prairies, and the Douglas treaties on Vancouver Island. Each of these treaties is different. Some, such as the Peace and Friendship Treaties, do not address land rights at all. Others, such as the pre-Confederation, numbered and Douglas treaties clearly address land rights, but there are lingering questions about the validity and interpretation of these treaties generating uncertainty between the parties. Treaties do not just apply to the First Nations, they apply to everyone in the treaty territory and thus both First Nations and municipalities have rights and obligations under the treaty.

If land use planning is taking place in a treaty territory, municipalities and First Nations are encouraged to engage in frank and respectful conversation about the implications of the treaties. Reference should be had in these discussions to the principles for treaty interpretation:

1) treaties are solemn promises, sacred in nature;
2) the honour of the Crown is at stake and no appearance of "sharp dealing" will be sanctioned;
3) any ambiguities or doubtful expressions in the wording of the treaty must be resolved in favour of the Indians and any limitations which restrict the rights of Indians under treaties must be narrowly construed; and
4) the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown, including evidence of a clear and plain intention on the part of the government to extinguish treaty rights.[15]

Where there are no treaties for land, First Nations retain inherent title to their traditional national territory and exclusive authority to determine the use of the lands and receive the benefits of those lands. Indigenous land rights survived European colonization and remain valid unless settled by treaty[16]. Indigenous inherent land rights include the right to exclusive use and occupation of the land in a manner that does not damage the lands for future generations[17].

The Crown owes a fiduciary duty to Indigenous peoples when dealing with Indigenous inherent title lands, including the obligation to obtain the consent of the First Nations for the use of the land. This is not merely a right of first refusal with respect to Crown management or usage plans. Rather, it is the right to proactively use and manage the land".[18] Where there is no consent, the Crown must justify its encroachment on those rights under section 35 of the *Constitution Act, 1982*[19], including through the duty to consult discussed below.

Sorting through treaty obligations and inherent title can be a particularly challenging part of the journey. The municipal and First Nations partners must stay strong and united to find their way through the often emotionally charged issue of land ownership and its implications for land use planning.

The City of Pitt Meadows and Katzie First Nation (BC) provide an example of a positive way forward. The City of Pitt Meadows is located on the inherent title lands of Katzie First Nation. The First Nation is in treaty negotiations with the province and federal government. The communities have established an excellent working relationship which allows them to pursue their day-to-day responsibilities in a frank, respectful, and cooperative manner, despite the uncertainty of land ownership. For example, they came together to object to provincial plans for a gravel quarry in the territory.

MYTH
All land ownership issues have been settled with First Nations.

FACT
There are about 100 treaties under negotiation across Canada currently. Where there is no treaty, the First Nation has sole authority to decide on use of the land and receive the benefits of the land.

ACTION ITEM
Jointly consider the implications of inherent title if it applies in your territory and how it will be respected.

[15] *R. v. Badger, [1996] 1 S.C.R. 771*
[16] *Calder v. Attorney General of British Colombia, [1973] S.C.R. 313*
[17] *Delgamuukw v. British Colombia, [1997] 3 S.C. R. 1010*
[18] *Tsilhqot'in Nation v. British Colombia, 2014 SCC 44*
[19] *Tsilhqot'in Nation v. British Colombia, 2014 SCC 44*

Municipalities and First Nations can find a way forward that does not involve the time and money of litigation or yet another lecture from the courts that consensus building, consultation, and accommodation is the way to resolve these issues, not litigation.

Duty to Consult

The Crown has a legal duty to consult with First Nations before enacting laws, policies, programs, or projects that may affect First Nations' rights and take measures to accommodate them.[20] Whether municipalities owe a duty to consult remains an open question of law at this time. Technically speaking, only the federal, provincial, and territorial governments represent the Crown, not municipalities. Municipalities exercise delegated authority on behalf of the province or territory, but the Crown cannot delegate the duty to consult. Thus, municipalities perhaps do not owe a legal duty to consult, which was the finding of the BC Court of Appeal,[21] but in Ontario, by policy, the province has delegated procedural aspects of consultation to the municipalities, while retaining the overall duty.[22]

Municipalities and First Nations should get legal advice on this subject. Consider, however, if municipalities and First Nations are walking the path of land use planning together, there will be plenty of opportunity for discussion. If these discussions are pursued in good faith and with an eye to respecting each other's rights and our collective responsibility to care for the land and future generations, the spirit of the duty to consult will be fulfilled even if the legal duty does not apply.

MYTH

Only First Nations have obligations under the treaties.

FACT

Because it takes two to treaty, we are all treaty people: we owe duties to each other under the treaties.

ACTION ITEM

Hold joint discussions on the duty to consult: What does it mean? What are our expectations? Who has to be involved? What is our process?

Indigenous Land Use Planning Law and Policy

First Nations had environmental and land use laws prior to contact and these laws and legal systems survived the arrival of Europeans and the imposition of the sovereignty of the Crown[23]. First Nations retain the inherent right to self-government unless it is has been explicitly extinguished. Both First Nations' and Canadian legal perspectives must be considered when determining Indigenous rights and title to land.[24] As noted earlier, First Nations have an obligation to use inherent title lands in a fashion that does not destroy the ability of the land to sustain future generations or cost them the benefit of the land.[25] While municipalities have no similar obligation in law, it is logical and socially responsible to act accordingly. Finding the balance between the needs of those alive today and the needs of future generations is the very essence of a sustainable land use plan, and a common legal theme in First Nations' laws.

First Nations' laws are traditionally recorded in wampum belts, totem poles or petroglyphs, transmitted through political structures, tales and proverbs, ceremony, feasts, songs, dance, or poems, and often held by the elders or other wisdom keepers.[26] Each Indigenous nation has its own laws and legal traditions.[27] Many First Nations are working to record their traditional laws and have developed land use plans for their reserve lands and traditional land use maps for their traditional territory including trap lines, calving grounds, sacred sites, and villages or camps.

ACTION ITEM

Learn about local traditional First Nation laws, and determine together how those laws will influence joint First Nation–Municipal land use planning.

20 *See: R. v. Sparrow, [1990] 1 S.C.R. 1075; Haida Nation v. British Colombia (Minister of Forests), 2004 SCC 73; Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74; Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69*

21 *See: Neskonlith Indian Band v. Salmon Arm (City), 2012 BCCA 379*

22 *Ontario Municipal Aboriginal Relations: Case Studies http://www.mah.gov.on.ca/Page6054.aspx*

23 *Mitchell v. M.N.R., 2001 SCC 33*

24 *Delgamuukw v. British Colombia, [1997] 3 S.C. R. 1010; Tsilhqot'in Nation v. British Colombia, 2014 SCC 44*

25 *Delgamuukw v. British Colombia, [1997] 3 S.C. R. 1010; Tsilhqot'inTsilhqot'in Nation v. British Colombia, 2014 SCC 44*

26 *John Borrows, Indigenous Legal Traditions in Canada, Washington University Journal of Law and Policy, Vol 19, p 167, 2005.*

27 *See for example: Sakej Henderson, Aboriginal Tenure in the Constitution of Canada, Carswell, 2000; Her Majesty The Queen in Right of Canada, Justice Within: Indigenous Legal Traditions, Queens Printer, 2006 http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12-06/www.lcc.gc.ca/default-en.asp@lang_update=1; John Borrows, Indigenous Legal Traditions, Report for the Law Commission of Canada, 2006 http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12-06/www.lcc.gc.ca/default-en.asp@lang_update=1*

Exploring First Nations' traditional laws can be an exciting part of the journey for everyone. Municipalities will have a unique opportunity to learn about traditional First Nations' legal culture and traditions, and First Nations will have the opportunity to revitalize their traditional laws and their application in modern society. How we blend municipal and First Nations laws is largely uncharted territory. Learning about traditional First Nations' laws on the environment and land use may open new avenues to explore.

The United Nations Declaration on the Rights of Indigenous Peoples (The Declaration)

The result of over 25 years of negotiation, the Declaration is a non-binding international agreement adopted by the United Nations in 2007 as "the minimum standards for the survival, dignity and well-being of Indigenous peoples"[28]. Included are rights to self-determination, self-government of internal and local affairs, to not be forcibly removed from their lands, and the recognition, observation, enforcement of treaties, agreements and constructive arrangements.

Of particular note in the context of land use planning are the rights of Indigenous peoples to participate in decision making that affects their rights through their own decision making institutions and obligation on governments to "consult and cooperate, in good faith, with Indigenous peoples ... to obtain their free, prior and informed consent before adopting and implementing legislation or administrative measures that might affect them."

First Nations also hold rights to their traditional lands and waters; the right to maintain and strengthen their spiritual relationship with the land and waters and "uphold their responsibilities to future generations in this regard"; the right to environmental protection of their lands; the right to keep their territories free of hazardous waste without their free, prior, and informed consent; and the right to determine and develop priorities and strategies for development and use of their lands, as well as the requirement to obtain their free prior and consent for any project that affects their lands. Canada has committed to implementing the Declaration without objection.

ACTION ITEM

Jointly reflect on the Declaration and explore how it can be implemented together.

[28] *United Nations Declaration on the Rights of Indigenous Peoples Article 43*

Conclusion

Although disaster brought them together, Slave Lake and Sawridge First Nation used the opportunity to create a new community that draws from their collective strengths. Other municipalities and First Nations can learn from their experience and that of more and more communities working together to create a joint land use plan that ensures the well-being of future generations. We hope this tour through First Nation–Municipal land use planning law and policy has helped to prepare your community for the journey ahead. We wish you great success.