

**RETHINKING “DUTY”:  
THE CITY OF TORONTO, A STRETCH OF THE HUMBER RIVER,  
AND INDIGENOUS-MUNICIPAL RELATIONSHIPS**

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*As urban centres are increasingly the predominant sites of human activity, neglect of Indigenous-municipal relationships has far reaching consequences affecting all our lives. This article asks how cities, in their relationships with Indigenous people, can look beyond uncertainty about their existing legal obligations to build relationships that may serve as the basis for subsequent legal agreements. The article focuses on activities led by Indigenous people taking place in an urban park space in Toronto. It examines the municipal government’s response and its more recent approach to relationship building, arguing that recognition of Indigenous law is necessary for an Indigenous-municipal relationship centred on reconciliation.*

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**I. INTRODUCTION**

The legal relationships between Indigenous peoples and municipalities has most largely focused on the duty to consult and accommodate. The significant population of Indigenous peoples who live in urban areas, and the many concerns that Indigenous and non-Indigenous peoples share, require a broader legal conversation. These shared concerns include the environment, land use, housing, social services, and many more, and modern municipalities do make attempts to address Indigenous-specific needs in these areas; however, Indigenous-

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municipal relationships have implications that far exceed the technocratic and siloed ways in which Canadian systems generally approach these broad areas of concern — implications not only with regard to Indigenous people, but all people. In many ways, Indigenous people exist in the margins of cities (or Canada, or any modern nation, although this is changing<sup>1</sup>), and this marginalization has much to do with the ways in which Indigenous knowledge and perspectives are generally marginalized. However, Indigenous concerns include deeply principled relationships with all life and everything conceivable, since all layers of reality are inseparable from Indigenous cultural perspectives. These principled relationships are reflected through Indigenous laws, which in turn have profound implications for how all law, and all relationships, may unfold in large urban centres, which are increasingly the predominant sites of human activity everywhere. Neglect of Indigenous-municipal relationships and of the consequences of municipal action on Indigenous peoples is an oversight affecting all our lives and all layers of being around us. Questions of Indigenous-municipal relations and the law are therefore urgent, and this urgency has motivated the authors to contribute to conversations on Indigenous and Canadian law in the municipal context.

Despite the importance of Indigenous-municipal relationships, cities have fewer legal obligations in respect of Indigenous peoples and First Nations than any order of government. Under the *Constitution Act, 1867*, municipalities may only exercise the authorities granted by provinces.<sup>2</sup> Canadian law understands provincial and federal governments as the “Crown,” while considerable uncertainty remains as to the role of municipalities in the unfolding of Indigenous-Crown relationships. Several authors have examined the applicability of legal principles such as the honour of the Crown to municipalities, which includes an obligation to consult with Indigenous peoples.<sup>3</sup> This article contributes to these and other questions by asking how cities, in their relationships with Indigenous peoples, can look beyond existing legal principles to build relationships that may serve as the basis for subsequent legal agreements.<sup>4</sup> We focus on activities led by Indigenous peoples taking place in an urban park space within the City of Toronto, including ceremonies and the planting of traditional foods and medicines; on the ways in which the municipal government has reacted to these activities; and on the potential for new kinds of legal relationships.

In considering these questions, this article adopts the vocabulary of comparison and contrast, which we understand to include the shared or conflicting understandings of law amongst a plurality of Indigenous and non-Indigenous traditions.<sup>5</sup> We begin the article by first setting out our perspectives as an urban Indigenous scholar and educator and a non-Indigenous lawyer and scholar considering the meaning of the law and the role of the city

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<sup>1</sup> See especially Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); John Raulston Saul, *The Comeback* (Toronto: Viking, 2014).

<sup>2</sup> (UK), 30 & 31 Vict, c 3, s 92(8), reprinted in RSC 1985, Appendix II, No 5.

<sup>3</sup> See e.g. Felix Hoehn & Michael Stevens, “Local Governments and the Crown’s Duty to Consult” (2018) 55:4 *Alta L Rev* 971; Shin Imai & Ashley Stacey, “Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on *Neskonlith Indian Band v Salmon Arm (City)*” (2014) 47:1 *UBC L Rev* 293.

<sup>4</sup> The term “Indigenous peoples” includes all of the following: First Nations, “bands” as defined by the *Indian Act*, RSC 1985, c 1-5, other Indigenous governments, Inuit, Métis, and other Indigenous peoples, whether members of bands or possessing status under the *Indian Act* or not.

<sup>5</sup> John Borrows, “Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation” (1994) 28:1 *UBC L Rev* 1 at 6.

in relation to Indigenous processes of land restoration, ceremony, and governance in city parks. The article then offers a case study that showcases a relationship between Indigenous peoples and the municipal government concerning the planting of traditional foods and medicines and the conducting of ceremony along Toronto’s Humber River, including key events with city actors. The goal here is to identify disconnects amongst the parties and the differing interpretations of law that resulted.<sup>6</sup> The article next details the City of Toronto’s more recent approach to Indigenous-municipal relationship building and governance, including the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*, the establishment of an Indigenous Relations Office, and the training of staff on Toronto’s Indigenous history.<sup>7</sup> The article concludes that the City of Toronto’s adoption of *UNDRIP* offers a hopeful model if implemented with respect and reciprocity.

This article builds on existing scholarship by: first, bringing the relationships of Indigenous peoples and municipal governments into sharper focus; and second, by exploring relationship building beyond Canadian law’s definition and jurisdiction. In our view, there is considerable capacity for Indigenous and municipal governments to rethink their relationships in respect of urban parks in a manner that recognizes their respective histories, shared interests, and Indigenous environmental expertise and laws. Parks are a crucial site of Indigenous-municipal relationships given that they are deemed to be “public” land: they are used in various ways, they are often close to water, and there is a history of innovative governance and property relationships.<sup>8</sup>

Our objective is to understand how cities can enable or impede the recovery by urban Indigenous peoples of their relationships with land and water, with “place” in the deepest possible sense. While this article focuses on Toronto, we believe it has broader relevance to Indigenous-municipal relationships everywhere. The article proposes that legal reinvigoration can, and indeed must, proceed in cities, which are creating and experiencing increased environmental crises.<sup>9</sup> We suggest that embracing new forms of Indigenous-municipal relationships should not be seen as a charitable act or merely as a remedy for past wrongs, but a necessary step for cities, where most people now live.

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<sup>6</sup> See John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

<sup>7</sup> GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/295 (2007) 15 [*UNDRIP*].

<sup>8</sup> See e.g. *Te Urewera Act 2014* (NZ), 2014/51. Te Urewera is a former national park in New Zealand. It was disestablished as a national park in 2014, when it was replaced by a legal entity name Te Urewera. Section 3 includes the following provisions:

- (1) Te Urewera is ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure, and remote beauty;
- (2) Te Urewera is a place of spiritual value, with its own mana and mauri;
- (3) Te Urewera has an identity in and of itself, inspiring people to commit to its care;

...  
 (9) Tūhoe and the Crown share the view that Te Urewera should have legal recognition in its own right, with the responsibilities for its care and conservation set out in the law of New Zealand. To this end, Tūhoe and the Crown have together taken a unique approach, as set out in this Act, to protecting Te Urewera in a way that reflects New Zealand’s culture and values.

<sup>9</sup> See Jocelyn Stacey, “Climate Emergencies and the Rule of Law,” *CBA National* (9 April 2019), online: <[www.nationalmagazine.ca/en-ca/articles/law/opinion/2019/climate-emergencies-and-the-rule-of-law](http://www.nationalmagazine.ca/en-ca/articles/law/opinion/2019/climate-emergencies-and-the-rule-of-law)>.

## II. A MINDFUL METHODOLOGY: APPROACHING THE QUESTION TOGETHER

This article uses a mixed-methodological approach that centres Indigenous knowledge as essential to exploring the themes that are raised. We acknowledge our own gaps in understanding, and our commitment to listening and learning. We also draw from semi-structured interviews and doctrinal analysis, the latter of which includes case law and legislation.<sup>10</sup> Knowledge of Indigenous resurgence and renewal along a stretch of the Humber, and of the relationship between Indigenous peoples engaged in this renewal and city actors, comes directly from one of the authors. As scholars committed to honouring Indigenous processes, we first set out our perspectives and relationships to this topic.

Doug Anderson: *Ahnii. Ottawa Ndobinjibaa. Bungee Métis endau. Neenda nokee Owíichiwe*.<sup>11</sup> I am introducing myself as best I can in *Anishinaabemowin*, which is an original language of the place I call home, Toronto. It is a language that has, until fairly recently, been a part of my own heritage, although this link was extinguished around the same time my extended family left their long-standing territory in central Manitoba in the mid-twentieth century. While I am classified as “Métis” by the Government of Canada, my eldest uncle told me that this was not really our term for ourselves, and that our people and their manner of speaking were commonly known as Bungee in their time, which refers to the people of mixed Anishinaabe (Saulteaux, or Plains Ojibwe) and Scottish/ Orkney ancestry, along with a mixture of other peoples (including northern Plains and James Bay Cree, reflecting our peoples’ strong relationship with the Hudson’s Bay Company). My mother’s family is mostly English from British Columbia. My father’s generation was the last to speak a “Creole” language unique to the “English half-breeds” over the course of several centuries during the peak of the fur trade.<sup>12</sup> In the early 1960s, my father and his brother and sister all migrated to the Ottawa area from Manitoba, seeking work. Before that, my grandparents had left the shores of Lake Manitoba (Kinesota, Reedy Creek, Alonsa) when my father was young, also looking for work, although the family would return to these territories when they could. My oldest uncle moved to a rural area south of Ottawa. My father and aunt moved nearby and eight of us cousins grew up in close proximity. In typical modern Canadian fashion, my generation continued to scatter across the country seeking work, and I came to Toronto as a youth for that reason. So I have been born, raised, and lived my whole life far from the territories of my own nation. But as with my father and uncle, the need to maintain a connection with land and water has stayed with me from a young age, and I have also spent my whole life in close relationship with Indigenous people of this territory as well as other Indigenous people here who, like me, are part of a traumatized diaspora.

All my life, I have lived and acted in the realm where Indigenous and Canadian peoples struggle to coexist and share the places where we live. Finding through experience that

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<sup>10</sup> For examples of authors who use Indigenous methodologies, see Leanne R Simpson, “Anticolonial Strategies for the Recovery and Maintenance of Indigenous Knowledge” (2004) 28:3/4 *American Indian Q* 373; Deborah McGregor, “Coming Full Circle: Indigenous Knowledge, Environment, and Our Future” (2004) 28:3/4 *American Indian Q* 385.

<sup>11</sup> *Anishinaabemowin* to English translation: “Hello, I am from Ottawa. I am Bungee Métis (Scottish Métis from Manitoba). My work is to be a helper and advisor to the leaders.”

<sup>12</sup> See Jennifer SH Brown, “Métis, Halfbreeds, and Other Real People: Challenging Cultures and Categories” (1993) 27:1 *History Teacher* 19.

Canada is generally unable (so far) to respect, act in meaningful relation to, or even understand Indigenous perspectives, I have increasingly been compelled to find ways to support the assertion of Indigenous principles, responsibilities, and rights in relation to Canadian society. I am not an Indigenous leader, but rather a kind of “civil servant,” in the sense that I look to those I consider leaders (the various resurgent Indigenous cultural authorities of Southern Ontario), and try to follow their direction, although this role is not formal and I cannot speak on anyone’s behalf but my own. For this reason, I introduce myself here as *Owiichiwe*, which could be translated roughly as helper, rather than *Ogima*, which implies a leader.

Alexandra Flynn: My heritage is mixed European, although I have no connection to the lands and spaces across the ocean of my long-ago blood ancestors. Indeed, much of my biological father’s history remains unknown to me. Instead, I have deep roots in the cultural and institutional bedrock of this settler nation, whose ancestors and myself have participated in and benefited from the long colonial history that saw the displacement of Indigenous peoples and their governments. All of my grandparents came to Canada escaping poverty elsewhere, living on and claiming Treaty 6 lands as farmers and grain elevator workers. My maternal grandparents moved regularly across Saskatchewan seeking new work and, later in their lives, adopted a little boy during the Sixties Scoop, who experienced considerable racism and was torn from his Indigenous heritage. I was raised by my mother, a social worker, who worked mainly in northern towns and cities including Iqaluit, Nunavut and Churchill, Manitoba. My childhood memories include time spent on the land, camping and riding skidoos, and participating in ceremony. I was and am fortunate to learn from Indigenous knowledge keepers, Elders, and from aunties and uncles. Until recently, I did not appreciate the extent to which I benefited from these teachings with little reciprocity given in return.

In my adult years, I have lived in big cities like Toronto, Vancouver, and New York, escaping from tall buildings and cement with my family as often as possible. I began my career working as a lawyer representing First Nations on land management and contract matters, with band councils as clients. Now, as a scholar, I study the laws that bind and enable cities, and the governance models that local governments create. I believe that there is no talking about municipalities without a thorough acknowledgement of the Indigenous people and communities here long before Europeans and other settlers arrived, and who continue to exercise Indigenous laws. I see it as my responsibility, and also a privilege, to listen, to better understand the Indigenous communities, histories, and laws of the places I conduct research in and call home. This article hopes to contribute to an understanding of the legal role of cities in relation to Indigenous communities by moving beyond Canadian law structures to ask the preliminary question: as Indigenous and non-Indigenous peoples, how can we live and move forward together, with respect and reciprocity, and how can laws (Indigenous and Canadian) help to move us forward?

### III. INDIGENOUS LAW AND UNSIGNED AGREEMENTS IN A CITY PARK

This article focuses on a park located in Toronto.<sup>13</sup> The land where the park is located has a complex and sometimes contested history in recent centuries. The nations with a history on the site during these recent centuries include: the Michi Saagiig Nishnaabeg (Mississauga Ojibwe), including the Mississaugas of New Credit and Treaty 13; the Haudenosaunee Confederacy; and the Wendat and Petun Nations, although the latter two were driven out or adopted into the first two nations during the period of disease and war that swept the region in the 1600s. The Michi Saagiig Nishnaabeg explicitly claim the longest relationship with the area, at least according to well-regarded Michi Saagiig Nishnaabe Elders.<sup>14</sup> People from other Indigenous communities have been arriving and living here from diverse places for a long time, and this diversity of Indigenous people found here has increased significantly as the City of Toronto has grown. The area is said by many to be subject to the Dish With One Spoon Wampum Belt Covenant: a treaty agreement between the Haudenosaunee Confederacy and the Ojibwe and allied nations to peaceably share and care for the resources around the Great Lakes.<sup>15</sup> In recent times, newer, non-Indigenous people from around the world have made this place home and called it Toronto, within a province, within a federation — another collection of layered assertions of sovereignty. Cities are crucial sites of displacement, as they were almost always Indigenous communities first, rich with access to resources and central to transportation. The displacement of Indigenous communities in cities served to further the economic objectives of non-Indigenous peoples, a fundamental and often omitted part of Toronto's history.<sup>16</sup>

The context for Indigenous land-based cultural resurgence in Toronto is complex, and cannot be adequately described here. Briefly put, two distinct Indigenous confederacies still predominantly hold a more recent and current relationship with what is now called Toronto, these being the Anishinaabek and the Haudenosaunee (Six Nations Confederacy).<sup>17</sup> Both confederacies have longstanding and contemporary relationships with the region of southern Ontario,<sup>18</sup> although it is said that the Michi Saagiig Nishnaabeg (a part of the larger Anishinaabek nation) have had the longest relationship with the region, and that the emphasis on “Iroquoian” (Haudenosaunee) peoples arises from an early European bias.<sup>19</sup> Various covenants and treaties have been in place in the area, from times long preceding the arrival of Europeans to agreements involving the most recent people residing there, the Michi

<sup>13</sup> The Indigenous name “Tkaronto” is increasingly being used to refer to Toronto, and according to Indigenous languages scholar John Steckley, initially comes from the Mohawk name for what is commonly known as the Atherley Narrows, between Lakes Couchiching and Simcoe, where 4,000 years ago a fish weir was built: Jeff Gray, “A Defining Moment for Tkaronto,” *The Globe & Mail* (17 October 2003), online: <[www.theglobeandmail.com/news/national/a-defining-moment-for-tkaronto/article18432992](http://www.theglobeandmail.com/news/national/a-defining-moment-for-tkaronto/article18432992)>. Subsequently, the French mispronounced it as Toronto and then used that name for a training camp at the mouth of the Humber River: TEDx Talks, “TEDx Humber College — Dr. John Steckley,” online (video): <[www.youtube.com/watch?v=Q50ZJWc1uyE](https://www.youtube.com/watch?v=Q50ZJWc1uyE)>.

<sup>14</sup> See Gidigaa Migizi (Doug Williams), *Michi Saagiig Nishnaabeg: This is Our Territory* (Winnipeg: ARP Books, 2018).

<sup>15</sup> Victoria Jane Freeman, *‘Toronto Has No History!’: Indigeneity, Settler Colonialism and Historical Memory in Canada’s Largest City* (PhD Thesis, University of Toronto, 2010) [unpublished].

<sup>16</sup> See Coulthard, *supra* note 1.

<sup>17</sup> See Heather Jeanne Dorries, *Rejecting the “False Choice”: Foregrounding Indigenous Sovereignty in Planning Theory and Practice* (PhD Thesis, University of Toronto, 2012) [unpublished].

<sup>18</sup> See Freeman, *supra* note 15.

<sup>19</sup> Migizi, *supra* note 14.

Saagiig Nishnaabeg.<sup>20</sup> An Elder who lived near the river featured in this article had a Mohawk<sup>21</sup> mother and an Anishinaabe father who was born and raised in Toronto in the early 1900s, in a community of Michi Saagiig Nishnaabeg who had never left Toronto, and who simply continued to reside there as the city had grown around them.<sup>22</sup> There are also many other Indigenous people who have been here and left or been absorbed into the above nations (most notably the Wendat and Petun),<sup>23</sup> or who have landed here from other places across the Americas, from the Arctic to Argentina and Chile.

The City of Toronto has one of the highest Indigenous populations amongst Canadian cities, estimated at 70,000, although many researchers believe that the actual number is much higher.<sup>24</sup> Based on a City of Toronto study, 67.1 percent of Indigenous peoples in the city were North American Indians, 26.8 percent were Métis, and 1.4 percent were Inuit.<sup>25</sup> As with most other Canadian cities, this population is rising, with urban Indigenous peoples constituting the fastest growing segment of society.<sup>26</sup> At one time, it was assumed that Indigenous peoples living in cities were just passing through — either pursuing temporary work or fleeing problems on reserves, which were their “real” homes.<sup>27</sup> However, for many urban Indigenous people, the city is their home. Urban Indigenous peoples living in cities share a history with their families and friends living on reserves, including a commitment to the land, but their daily realities, identities, and experiences are distinctly urban.

For some time, Indigenous people in Toronto have been recovering and practicing their cultural traditions, and some never stopped, even when they were banned under Canadian law.<sup>28</sup> Urban Indigenous agencies formally incorporated under Canadian law have been finding officially approved ways to hold ceremonies in the city, in and around buildings, land, and water.<sup>29</sup> To do this requires significant bureaucratic challenges that are not possible

<sup>20</sup> *Ibid.* See e.g. Great Law of Peace, Pre-contact Anishinaabe Inokinogewin, Dish With One Spoon Covenant, Kuswenta (Two-Row) Belt, Nanfan Treaty of 1701, Royal Proclamation of 1763, 1764 24-Nation Belt, Treaty 13, and the “Toronto Purchase” (Freeman, *supra* note 15 at 33).

<sup>21</sup> The Mohawks are one of the nations in the Haudenosaunee Confederacy.

<sup>22</sup> Personal communication, Jay Mason, Mohawk/Michi Saagiig (2015–16).

<sup>23</sup> Personal communication, Seth Laforte, Mohawk (2016). See also Migizi, *supra* note 14.

<sup>24</sup> The City of Toronto’s 1999 Task Force on Community Access and Equity estimated Toronto’s Aboriginal community between 65,000 and 100,000 with the majority in the downtown core: Joseph P Pennachetti, “Staff Report Action Required – Development of an Urban Aboriginal Strategy for Toronto” at 2, online: <[www.toronto.ca/legdocs/mmis/2009/ex/bgrd/backgroundfile-21490.pdf](http://www.toronto.ca/legdocs/mmis/2009/ex/bgrd/backgroundfile-21490.pdf)>.

<sup>25</sup> Alan Meisner, “Census Highlights – Release of the 2006 Census on Persons of Aboriginal Identity” at 2, online: <[www.toronto.ca/legdocs/mmis/2009/ex/bgrd/backgroundfile-23008.pdf](http://www.toronto.ca/legdocs/mmis/2009/ex/bgrd/backgroundfile-23008.pdf)>.

<sup>26</sup> “Aboriginal Peoples in Canada: Key Results from the 2016 Census,” online: <[www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm](http://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm)>.

<sup>27</sup> Evelyn Peters & Chris Andersen, “Introduction” in Evelyn Peters & Chris Andersen, eds, *Indigenous in the City: Contemporary Identities and Cultural Innovation* (Vancouver: UBC Press, 2013) 1 at 3.

<sup>28</sup> The information in this section was drawn from one of the authors based on observations and conversations, beginning as a young person living in Toronto, watching cultural phenomena unfold in locations like gymnasiums after a hundred years more or less in hiding [Personal Knowledge from Observation and Conversation]. Margaret Kovach notes that Indigenous methodologies are “fluid, non-linear, and relational”: Margaret Kovach, “Emerging from the Margins: Indigenous Methodologies” in Leslie Brown & Susan Strega, eds, *Research as Resistance: Critical, Indigenous, and Anti-Oppressive Approaches* (Toronto: Canadian Scholars’ Press, 2005) 19 at 27. See also Camilla Brattland, Britt Kramvig & Helen Verran, “Doing Indigenous Methodologies: Toward a Practice of the “Careful Partial Participant” (2018) 2:1 ab-Original 74; Lynn F Lavallée, “Practical Application of an Indigenous Research Framework and Two Qualitative Indigenous Research Methods: Sharing Circles and Anishnaabe Symbol-Based Reflection” (2009) 8:1 Intl J Qualitative Methods 21. Interviews with City of Toronto officials were obtained further to university ethics approvals.

<sup>29</sup> Personal Knowledge from Observation and Conversation, *ibid.* This particular knowledge comes from talking with various people over the years, knowing the history of how urban Indigenous agencies have put ceremonial lodges and fires on their sites.

for most people to meet.<sup>30</sup> Furthermore, while these agency-based ceremonial sites are vital to the community, Indigenous people may not always find it convenient or appropriate to make use of them, for a variety of reasons.<sup>31</sup> Many people living in Toronto cannot easily leave the city, and so people also independently find ways to restore their relationships with the urban spaces where they live, in ways that are not defined under Canadian legal frameworks or municipal bylaws.<sup>32</sup> For example, some people have lit ceremonial fires on the beaches of Lake Ontario and elsewhere across the city, or planted medicines and food.<sup>33</sup> When challenged by city workers, Indigenous people have stood their ground, and so far municipal authorities have tended to stand aside, unsure of how to respond.<sup>34</sup> Indigenous placenta burial ceremony has taken place in quiet corners of parks (many urban Indigenous and other people keep their children's placentae in the freezer for years and even decades, having limited to no ability to return to their original territories).<sup>35</sup> Diverse other ceremonies and even ceremonial structures have been raised and used at various neglected sites, most notably along Toronto's Rouge and Humber rivers, and more are beginning to appear.<sup>36</sup> In addition to ceremonial activities, traditional harvesting activities have also been taking place, including fishing, medicine gathering, traditional agriculture, and much more.

In 2013, along the Humber River — which runs through Toronto's west side — Indigenous peoples began what was initially perceived by city officials as a kind of eco-restoration project, with significant implications for Indigenous-municipal relationships and agreements. The sites in question, about 50 acres in total, are overrun with invasive plants and littered with garbage and have been mostly neglected for over 60 years. The main users seem to be sporadic hikers and dog walkers. People of diverse backgrounds also fish there. Sometimes people sleep there, some have built small structures, and places along the river and in the forest have long been sites for bonfires and parties. There is a cat cemetery, and one Korean-Canadian family quietly farmed a large area near the river for decades, building a shrine, palisades, and a well,<sup>37</sup> until authorities finally noticed them and tore it all down. Quite a few Indigenous people live in the area, and have done so continuously since long before Toronto became a colonial city in 1834, albeit in traumatized and marginalized ways in recent times.<sup>38</sup>

This article cannot claim to represent the City of Toronto's perspective, but based on conversations and correspondence,<sup>39</sup> what was happening in the "eco-restoration project" was fairly straightforward for the City of Toronto: a community group was applying to plant some Indigenous plants on property officially managed by the City of Toronto's Parks, Forestry and Recreation (PFR) Division and owned by the Toronto and Region Conservation

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<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.* See also Alex McKeen, "Indigenous Activists Call Queen's Park Ceremonies a 'Birthright,'" *Toronto Star* (9 June 2017), online: <[www.thestar.com/news/gta/2017/06/09/indigenous-activists-call-queens-park-ceremonies-a-birthright.html](http://www.thestar.com/news/gta/2017/06/09/indigenous-activists-call-queens-park-ceremonies-a-birthright.html)>.

<sup>35</sup> Personal Knowledge from Observation and Conversation, *ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Jake Schabas, "Secret Garden in Eglinton Flats," *Spacing Toronto* (24 July 2009), online: <[spacing.ca/toronto/2009/07/24/secret-garden-at-eglinton-flats/](http://spacing.ca/toronto/2009/07/24/secret-garden-at-eglinton-flats/)>; Spacing Magazine, "Secret Garden at Eglinton Flats" *Flickr*, online: <[www.flickr.com/photos/spacing/sets/72157621682856403/](http://www.flickr.com/photos/spacing/sets/72157621682856403/)>.

<sup>38</sup> See Personal Knowledge from Observation and Conversation, *supra* note 28.

<sup>39</sup> *Ibid.*



Authority (TRCA) (“managed” and “owned” refer here to Canadian legal frameworks and agreements, and do not reflect Indigenous understanding or perspectives).<sup>40</sup> Under the City of Toronto’s requirements, a certain type of agreement and understanding would need to be made that acknowledged the authority and responsibility of the City of Toronto’s and TRCA, protected them in relation to liability concerns, and ensured quality of the overall project in relation to certain standards held for eco-restoration projects (such as approved plant lists, adherence to bylaws regarding everything from cutting trees to types of tools permitted, and a list of other requirements).

All of these municipal requirements make sense in their own narrow municipal context. However, Indigenous people who have a relationship with the area are living out this relationship in ways that municipal officials are simply not equipped to manage or address. This inability goes beyond the actions and omissions of individual city officials and reflects a general lack of awareness of what is at stake for Indigenous people engaged in diverse activities along the Humber. Indigenous people involved in the area do not see their recently increased engagement in this area as an environmental activity or project so much as a way to renew and strengthen their relationships with and responsibilities for the land and water and all the layers of being surrounding it. Indigenous engagement in the area transcends any Canadian conception of asserted jurisdiction.<sup>41</sup> At the same time, the City of Toronto’s government has policies in relation to parks and their management that contradict Indigenous understanding, suggesting a profound schism in understanding was inherent in the project from the beginning.<sup>42</sup>

After approaching the City of Toronto about planting on the site (certain funds supporting the purchase of Indigenous plants — meaning plants that have their origins in the geographic region and were known and used by Indigenous peoples — required approval from the City of Toronto), it quickly became apparent that the process of working formally on the site was an onerous one, especially for grassroots people unaffiliated with any agency. Several events and experiences substantiate the procedural and relationship challenges. Unpaid grassroots community members sat in several meetings with city and TRCA officials over a period of many months, and various letters and numerous emails were also exchanged, with “approval” coming late in the season (so that planting could not commence until July, when the risks to the plants’ survival were much higher). The Indigenous people involved had never considered themselves as needing the City of Toronto’s approval, but did see the value in establishing a positive relationship, not to mention being able to access certain funds that could support the planting activities.<sup>43</sup>

When the project began, Anishinaabe and Haudenosaunee elders conducted ceremonies involving fire. Those people involved were very conscious of the many ancestors who had been present on the site over many generations (of course, it is known that many Indigenous people have always been present there, and there is even physical evidence of their presence

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* As it turns out, many of the Indigenous people involved came to feel that they would have been better off without the money and the conditions attached to it, framed as it all was by perspectives that could not even begin to appreciate an Indigenous understanding of relationship to place.

in the ways the older trees in the forest have been marked). One Haudenosaunee advisor who conducted a prayer ceremony on the site in 2013 had also been involved in the identification of Haudenosaunee peoples' remains and cultural artifacts at an archaeological site (a large Seneca<sup>44</sup> village) downstream.<sup>45</sup>

After the first year, local Indigenous people informed the City of Toronto of their desire to celebrate the work with a ceremonial fire.<sup>46</sup> City officials advised that a formal request be submitted, which was done as a courtesy, and this request was rejected.<sup>47</sup> At around the same time, city officials could see that the Indigenous people involved were serious about working on the land, since hundreds of plants had been installed over several large areas (although the city officials involved apparently remained unaware of the deeper nature of the relationship with the site). The City of Toronto offered to develop a more formalized agreement similar to others that had been signed with various citizens' groups over the years. Up to that time, the work had been done on the basis of a letter of approval from the City of Toronto.<sup>48</sup> The agreement offered by the City of Toronto raised concerns with the network of Indigenous people involved because it failed to consider the unique nature of their relationship with the site.<sup>49</sup> After consulting with a young Indigenous legal student, the Indigenous communities decided to submit a version of the agreement that referenced the temporary and evolving nature of the agreement, and the importance of the principles outlined in the *UNDRIP* and the Ontario *Human Rights Code*.<sup>50</sup> The City of Toronto never responded formally to this version. The work continued for some years without a formal agreement, on the basis of communications regarding plant lists.

At around the same time (after the first year of intensive planting), various Indigenous Elders and community members (and one in particular who is from the territory under the Williams Treaty) made it clear that ceremonies and fires did not require any formal approval from the City of Toronto — as long as high Indigenous standards for safe fires lit for ceremony were maintained.<sup>51</sup> Various people from diverse Indigenous grassroots contexts (often not even in communication with one another) began to increasingly use the “eco-restoration” sites in different ways (and local Indigenous people had already been using the sites in some of these ways already). For example: women have been holding regular full moon ceremonies near the water; three purification lodges were built over a number of years and used numerous times; various other ceremonies such as naming ceremonies, placenta burial, storytelling, and diverse other activities have been held there; the ethical and sustainable harvesting and processing of plants, fish, and animals has been taking place; a

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<sup>44</sup> The Seneca are one of the original nations in the Haudenosaunee Confederacy.

<sup>45</sup> Personal Communication, Haudenosaunee advisor William Woodsworth (2013), a Mohawk architect involved in the process of advising on the remains found at the Teiaigon Seneca village site.

<sup>46</sup> See Personal Knowledge from Observation and Conversation, *supra* note 28.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*; *Human Rights Code*, RSO 1990, c H.19.

<sup>51</sup> Personal Knowledge from Observation and Conversation, *ibid.* For example, in addition to ceremonial protocols not detailed here, people were advised to ensure the fires were not too large, that they were not a place for drug or alcohol consumption, that the fire pits be lined with fireproof materials, that certain kinds of wood that send out many sparks not be used, that there should always be a responsible fire keeper present who remains with the fire until it has been thoroughly extinguished, and so on. In general, Indigenous standards for fires meet or exceed the requirements of city officials. It is notable that other, unrelated fires lit by local non-Indigenous people regularly take place in the vicinity that break all these requirements.

24 foot teaching lodge<sup>52</sup> was erected; and many ceremonial fires have been lit for diverse purposes, some lasting all night.<sup>53</sup> This urban Indigenous cultural resurgence is directly related to the progress made in bringing parts of the area back in the direction of holistic ecological balance. The area has been inoculated with hundreds of plants holding cultural significance for Indigenous peoples, and various Indigenous Elders and cultural knowledge keepers have been visiting the area and advising in various ways. Unlike typical Canadian tree-planting exercises, a large area is being holistically reinvigorated on the basis of Indigenous cultural existence and responsibilities, rather than any typical Canadian sense of “environmental stewardship.”

After several years without a written agreement, the City of Toronto government again offered several options for agreements, but essential issues remained. For example, at one point, a municipal business services official offered an agreement defining the network of Indigenous people involved as “tenants,” which no Indigenous people in that network would consider signing. Later, a Parks Access Agreement was suggested, but this referenced mandatory bylaws prohibiting not only fires, but also everything from the movement of stones and dirt to swearing on the property.<sup>54</sup> So, as the years went by, Indigenous ceremonies continued with some awareness on the part of city officials but no formal approval. Finally, in 2019, a Municipal Licensing and Standards (MLS) officer took down the teaching lodge, being unaware of the vague, unspoken “don’t ask don’t tell” understanding between parts of the City of Toronto bureaucracy and the Indigenous people involved. The City of Toronto was directly challenged by community members to respond to their concerns about this action. Surprisingly (for Indigenous people involved, and with support from the City of Toronto’s Indigenous Affairs Office), city officials offered an apology at a meeting and three MLS staff came to help rebuild the lodge with community members. Nevertheless, official obstacles remain to arriving at any formal agreement in the foreseeable future; for one thing, insurance concerns for the City of Toronto cannot simply be ignored, from the City of Toronto’s point of view, and yet there is currently no clear legal mechanism for absolving the City of Toronto of any potential liabilities that could arise — although addressing this concern over time seems more like a matter of a legal mechanism serving as a kind of exemption.

More significantly (and this is ultimately what prevents specific exemptions like the one suggested above), city officials are not equipped to institutionally acknowledge the long-standing covenants and laws that apply to this area of the Humber, or to build in holistic responsibilities for things like the well-being of future generations (a kind of “liability” that far exceeds anything that might arise from the mere accidental injury of one or another litigious individual).<sup>55</sup> Addressing these obstacles to any agreement challenges the strict contours of Canadian law and the City of Toronto’s limited understanding of Indigenous law, as discussed next.

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<sup>52</sup> This lodge was not a permanent structure, and was built of bent saplings and jute twine.

<sup>53</sup> See Personal Knowledge from Observation and Conversation, *supra* note 28.

<sup>54</sup> City of Toronto, By-law No 854-2004, *To adopt a new City of Toronto Municipal Code Chapter 608, Parks, and to repeal various by-laws of the former municipalities relating to parks* (30 September 2004).

<sup>55</sup> See Freeman, *supra* note 15.

#### IV. MUNICIPALITIES AND THE DUTY TO CONSULT AND ACCOMMODATE

Indigenous peoples have long challenged the embedded ideals and technicalities of Canadian law to assert their rights, through legal actions and otherwise.<sup>56</sup> In terms of judicial achievements, the affirmation that the Crown owes a duty to consult and accommodate Indigenous communities under section 35(1) of the *Constitution Act, 1982* was a major legal achievement.<sup>57</sup> The duty means that federal and provincial governments, as the Crown, can neither ignore assertions of Aboriginal rights and title, nor refrain from proactively engaging with Indigenous peoples when contemplating action that may infringe on their rights. There remain many critiques of the limitations and concerns with the duty to consult as a conceptual and legal tool to address Indigenous rights, including its incompatibility with the principles of reconciliation.<sup>58</sup>

Arguments based on the duty to consult and accommodate have not been raised, at least not to date, for protection of the planting and ceremonial activities along the Humber. There has been no decision of the City of Toronto to prohibit planting and ceremonies and, if there were, duty to consult and accommodation arguments would invoke questions of ongoing occupation and use by a specific Indigenous community and assertions of harm resulting from a prohibition from planting and conducting ceremony, as well as procedural requirements related to the duty.<sup>59</sup> However, even if the duty hasn't been raised in discussions with the City of Toronto, the duty to consult has been a focal point for understanding Indigenous-Crown relationships, so understanding its application to municipal governments helps in the conceptualization of a new way of looking at Indigenous-municipal relationships. It helps us to ask whether there is capacity within Canadian law to have respectful, reciprocal relationships.

#### A. THE DUTY TO CONSULT AND ACCOMMODATE

In Canada, “reconciliation” is one of the fundamental purposes of protecting Aboriginal rights.<sup>60</sup> Consultation and accommodation are mechanisms that are used to work toward reconciliation.<sup>61</sup> Aboriginal and treaty rights of First Nations are recognized and affirmed under section 35(1) of the *Constitution Act, 1982* and have been given additional context

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<sup>56</sup> Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 1999); Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough, Ont: Broadview Press, 2005).

<sup>57</sup> Section 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>58</sup> See e.g. Lorne Sossin, “The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights” (2010) 23 Can J Admin L & Prac 93; Jacob Damstra, “Heroic or Hypocritical: Corporate Social Responsibility, Aboriginal Consultation, and Canada’s Extractive Industries Strategy” (2015) 25:1 Transnat’l L & Contemp Probs 153; Karen Drake, “The Trials and Tribulations of Ontario’s *Mining Act*: The Duty to Consult and Anishinaabek Law” (2015) 11:2 JSDLP 183; Chris W Sanderson, Keith B Bergner & Michelle S Jones, “The Crown’s Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty” (2012) 49:4 Alta L Rev 821; Mariana Valverde, “‘The Honour of the Crown is at Stake’: Aboriginal Land Claims Litigation and the Epistemology of Sovereignty” (2011) 1:3 UC Irvine L Rev 955; Lindsay Galbraith, “Making Space for Reconciliation in the Planning System” (2014) 15:4 Planning Theory & Practice 453.

<sup>59</sup> *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.

<sup>60</sup> *R v Van der Peet*, [1996] 2 SCR 507.

<sup>61</sup> Galbraith, *supra* note 58 at 455.

through the courts.<sup>62</sup> The Supreme Court of Canada has ruled that the Crown must act “honourably” toward First Nations. This means, in particular, that the Crown must consult and accommodate if land or other rights will be affected. This obligation is exclusively held by federal and provincial governments, although certain procedural obligations may be delegated to “third parties.”<sup>63</sup> The Supreme Court has adopted a spectrum analysis to assess the degree of consultation owed. One spectrum examines the rights that the Indigenous community has in respect of the land, which includes its history and continual occupation; a second spectrum examines the effect that a proposed government action would have on the Indigenous community in question.<sup>64</sup> While the Constitution recognizes and affirms Aboriginal rights, many scholars and activists have noted that barriers to meaningful exercise of those rights present one of the most pressing access to justice issues of our time.<sup>65</sup>

Under section 92 of the *Constitution Act, 1867*, provincial governments are responsible for municipal institutions and matters of a local or private nature, which includes the development of planning policies.<sup>66</sup> Until recently, the Province of Ontario did not provide any requirement that municipalities undertake Aboriginal consultation prior to making planning decisions. In 2020, the Province of Ontario released an updated version of the Provincial Policy Statement (PPS), a document that addresses land-use planning policies and decision-making abilities. Section 4.3 states that it “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*.”<sup>67</sup> In addition, PPS section 1.2.2 states “[p]lanning authorities shall engage with Indigenous communities and coordinate on land use planning matters.”<sup>68</sup> Section 2.6.5 more specifically addresses heritage by stating “[p]lanning authorities shall consider the interests of Aboriginal communities in conserving cultural heritage and archaeological resources.”<sup>69</sup> These policy statements are not enshrined in provincial legislation setting out municipal powers and responsibilities and have had limited traction when raised at quasi-judicial planning bodies.<sup>70</sup>

## B. MUNICIPALITIES AS A CROWN?

To date, provincial courts and quasi-judicial tribunals have consistently argued that a municipality has no independent constitutional duty to consult First Nations whose treaty and other interests may be affected by municipal decision-making. In *Neskonlith Indian Band v. Salmon Arm (City)*, the Neskonlith were unsuccessful in their petition to the British Columbia Supreme Court regarding a permit for development issued in a flood plain beside

<sup>62</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*].

<sup>63</sup> *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 [*Clyde River*]; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41 [*Chippewas*].

<sup>64</sup> *Haida*, *supra* note 62.

<sup>65</sup> See Fraser McLeod et al, “Finding Common Ground: A Critical Review of Land Use and Resource Management Policies in Ontario, Canada and their Intersection with First Nations” (2015) 6:1 Intl Indigenous Policy J 1; Clara MacCallum Fraser & Leela Viswanathan, “The Crown Duty to Consult and Ontario Municipal-First Nations Relations: Lessons Learned from the Red Hill Valley Parkway Project” (2013) 22 supp Can J Urban Research 1.

<sup>66</sup> *Supra* note 2.

<sup>67</sup> *Provincial Policy Statement, 2020*, OC 229/2020 (*Planning Act*), s 4.3, online: <files.ontario.ca/mmah-provincial-policy-statement-2020-accessible-final-en-2020-02-14.pdf>.

<sup>68</sup> *Ibid*, s 1.2.2.

<sup>69</sup> *Ibid*, s 2.6.5.

<sup>70</sup> See e.g. *Cardinal v Windmill Green Fund LPV*, 2016 ONSC 3456 (consultation of Indigenous peoples may be adequate if regular community consultations include Indigenous participants).

their reserve.<sup>71</sup> The appellants argued that the duty to consult Aboriginal communities is a legally binding covenant because municipalities can negatively affect Aboriginal rights or interests. The respondents, who succeeded in the appeal, stated that the honour of the Crown was nondelegable, so the duty remained entirely with the Crown. The British Columbia Court of Appeal agreed that municipalities do not have the resources or mandate to have an obligation imposed upon them to consult potentially affected Aboriginal communities.<sup>72</sup>

Kaitlin Ritchie argued that, were municipalities to take on that duty, it would water down the nation-to-nation relationship, undermining the treaty and other relationships established between the Crown and Indigenous nations.<sup>73</sup> Janna Promislow endorsed the rationale given by the courts that municipalities should not have a duty to consult, because their decisions would not be considered final (given provincial oversight in municipal decision-making), so there can be no effective remedy for First Nations.<sup>74</sup> This, she argues, leads to too much division in the decision-making process, which would ultimately impair the ability to meet reconciliation objectives. In contrast, Shin Imai and Ashley Stacey took issue with the question of whether there is a municipal duty to consult, arguing that it creates a precedent by implying that some bodies do not have any obligation for constitutional burdens, and therefore may ignore any restrictions that could be imposed upon them.<sup>75</sup> They suggest that the *Haida* decision was never intended to mean that only the Crown has the right to consult and accommodate Aboriginal peoples; rather, it meant that everyone must adhere to the principles of consultation and accommodation. Felix Hoehn and Michael Stevens argue that, given the evolution of municipal autonomy, and as a result of recent Supreme Court of Canada jurisprudence regarding the duties of third parties acting as an arm of the Crown,<sup>76</sup> municipalities do in fact hold the duty to consult and accommodate.<sup>77</sup> In short, there remains ample confusion and debate on the proper role of municipalities in the context of consultation.

While municipalities may or may not have a duty to consult and accommodate as the Crown, provinces can delegate the procedural obligation to consult with Indigenous communities, while retaining the ultimate responsibility to ensure that the duty has been properly exercised. Even where provinces have not formally delegated the duty to consult to municipalities, like in Ontario, there remain many examples of partnerships, agreements, and relationship building amongst Indigenous and municipal governments.<sup>78</sup> For example, Christopher Alcantara and Jen Nelles have provided some examples of the many hundreds of municipalities that already engage in consultations that affect Aboriginal communities and their interests.<sup>79</sup> While the authors did not specifically explore the meaning of consultation or the duty to consult more broadly, they found that Indigenous–municipal agreements are

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<sup>71</sup> 2012 BCSC 499.

<sup>72</sup> *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379 [Neskonlith CA].

<sup>73</sup> Kaitlin Ritchie, “Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation” (2013) 46:2 UBC L Rev 397.

<sup>74</sup> Janna Promislow, “Irreconcilable? The Duty to Consult and Administrative Decision Makers” (2013) 22:1 Const Forum Const 63.

<sup>75</sup> Imai & Stacey, *supra* note 3.

<sup>76</sup> *Clyde River*, *supra* note 63; *Chippewas*, *supra* note 63.

<sup>77</sup> Hoehn & Stevens, *supra* note 3.

<sup>78</sup> Fraser & Viswanathan, *supra* note 65.

<sup>79</sup> Christopher Alcantara & Jen Nelles, *A Quiet Evolution: The Emergence of Indigenous-Local Intergovernmental Partnerships in Canada* (Toronto: University of Toronto Press, 2016).

created largely without the guidance or resources of federal or provincial governments. There is also legal scholarship that explores the agreements between First Nations and Crown governments, including co-management agreements over shared resources.<sup>80</sup> First Nations and municipalities have signed numerous agreements including relationship building protocols, joint land use plans, and community economic development plans.<sup>81</sup> While conflicts inevitably arise, simple goodwill and common sense among neighbours is also clearly possible. This is where the greatest promise lies, as we will see below.

### C. INITIAL STEPS OF INDIGENOUS-MUNICIPAL RELATIONSHIP BUILDING IN THE CITY OF TORONTO

First Nations and municipalities have long been forming relationships and agreements with varying degrees of legal formality.<sup>82</sup> Municipal boundaries often conflict with Indigenous lands, including reserves and traditional territory, and with First Nations caught between the decisions of multiple municipal governments.<sup>83</sup> Since this article focuses on a park within Toronto, this section broadly outlines the specific measures taken by the City of Toronto municipal government. Over the last ten years, the City of Toronto has introduced a number of measures to include Indigenous perspectives in its governance model and to start building relationships with Indigenous communities. The efforts began slowly. Toronto’s Indigenous leaders, particularly those serving on the Indigenous Affairs Committee, have been instrumental in achieving change. For example, the securing of a unanimous vote by City Council for a monument on Nathan Philips Square happened because a member of the Indigenous Affairs Committee was “asking for updates and saying, ‘I want it to be reported back at the next meeting what they’ve done.’”<sup>84</sup> According to a city councillor, “that’s a good strategy around here, because ... when something’s happening off the side of someone’s desk it just tends to take forever.”<sup>85</sup> These Indigenous leaders are disproportionately tasked with leading Toronto’s strategies and efforts. As the councillor noted, “what we don’t want to do is just keep going to those individuals and making their lives miserable, because it’s a lot of work.”<sup>86</sup>

In 2008, the City of Toronto struck an Aboriginal Affairs Committee comprised of up to 28 service provider organizations and one member of City Council. Reporting through the Executive Committee to City Council, the Aboriginal Affairs Committee’s mandate is: to provide advice to City Council on the elimination of barriers faced by Indigenous people in the city; to liaise with external bodies on barriers to participation in public life and to the achievement of social, cultural, economic, and spiritual well-being of Indigenous people; and, to address specific issues faced by the Aboriginal community, develop options for council’s consideration, and make recommendations.<sup>87</sup> In 2009, the City of Toronto began

<sup>80</sup> See e.g. Deborah Curran, “‘Legalizing’ the Great Bear Rainforest Agreements: Colonial Adaptations Toward Reconciliation and Conservation” (2017) 62:3 McGill LJ 813. Please note the significant research that challenges the reciprocal nature of co-management agreements.

<sup>81</sup> Alcantara & Nelles, *supra* note 79.

<sup>82</sup> *Ibid.*

<sup>83</sup> See Coulthard, *supra* note 1.

<sup>84</sup> Interview of Toronto City Councillor by Alexandra Flynn (12 July 2019) [Interview].

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> City Council, Item Ex 16.14, “Terms of Reference – Aboriginal Affairs Committee,” online: <[www.toronto.ca/legdocs/mmis/2008/ex/reports/2008-01-08-ex16-cc-dit14.pdf](http://www.toronto.ca/legdocs/mmis/2008/ex/reports/2008-01-08-ex16-cc-dit14.pdf)>.

to develop an Urban Aboriginal Strategy, which concluded the following year.<sup>88</sup> In this strategy, the City of Toronto affirmed recognition and respect for the unique status of and cultural diversity among Aboriginal communities of Toronto, including recognition of their inherent rights under the Constitution.<sup>89</sup> It also committed to supporting Aboriginal rights to self-determination by working inclusively with Aboriginal communities in Toronto to achieve “equitable outcomes.”<sup>90</sup>

Following consultations with Indigenous communities, the City of Toronto introduced several policy measures, including a statement of commitment, recognizing that many Indigenous people living in Toronto are affected by historical and contemporary injustices that continue to have profound impacts on most, if not all, aspects of life, and acknowledging the contributions of Indigenous people to the success and vitality of the city.<sup>91</sup> City Council also agreed to provide a “strategic platform for pro-active intergovernmental relations” on urban Aboriginal issues, respond when issues related to urban Aboriginal people arise, and ensure that Indigenous perspectives formed part of departmental policy, planning, and service delivery through the Toronto Public Service. The City of Toronto identified measures to specifically address seven distinct goals and commitments to be fulfilled in relation to Indigenous peoples, including employment, economic development, housing, health, and education.<sup>92</sup>

The Truth and Reconciliation Commission’s (TRC) final report was released in 2015.<sup>93</sup> Other actions were spearheaded around this time at Toronto City Hall. In 2014, City Council proclaimed the Year of Truth and Reconciliation in the City of Toronto. Council adopted an ongoing ceremony at City Council meetings, the establishment of an Aboriginal Affairs Office, and a public campaign to educate residents.<sup>94</sup> The following year, City Council endorsed the 94 Calls to Action from the TRC report and requested development of concrete actions to fully implement the calls to action that explicitly recognize the role of municipal government.<sup>95</sup> These measures included: the adoption of cultural competency training for the Toronto civil service;<sup>96</sup> a ten-year capital project to incorporate Indigenous place-making in

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<sup>88</sup> City Council, Item Ex 33.5, “Development of an Urban Aboriginal Strategy for Toronto,” online: <app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2009.EX33.5>.

<sup>89</sup> Aboriginal Affairs Committee, Item AA 11.1, “Draft City of Toronto Statement of Commitment to Aboriginal Communities in Toronto: Building Strong Relationships, Achieving Equitable Outcomes,” online: <app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2010.AA11.1> [“Draft Statement”].  
<sup>90</sup> *Ibid.*

<sup>91</sup> Joseph P Pennachetti, “Staff Report Action Required – Statement of Commitment to Aboriginal Communities in Toronto – Towards a Framework for Urban Aboriginal Relations in Toronto,” online: <www.toronto.ca/legdocs/mmis/2010/ex/bgrd/backgroundfile-30866.pdf>.

<sup>92</sup> “Draft Statement,” *supra* note 89.

<sup>93</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).

<sup>94</sup> Committee Decision, Item Ex 39.10, “Aboriginal Year of Truth and Reconciliation and Establishment of Aboriginal Office,” online: <app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2014.EX39.10>.

<sup>95</sup> City Manager, Item Ex 14.1, “Report for Action – Fulfilling Calls to Action from Truth and Reconciliation Commission Report,” online: <www.toronto.ca/legdocs/mmis/2016/ex/bgrd/backgroundfile-91816.pdf> [“Fulfilling Calls”].

<sup>96</sup> City Council, Item MM 29.6, “Implementing Indigenous Cultural Competency Training in the Toronto Public Service,” online: <app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.MM29.6>.



Toronto’s parks;<sup>97</sup> and, a roadmap and report card regarding the implementation of plaques to commemorate Indigenous places.<sup>98</sup> In addition, City Council adopted the *UNDRIP* in 2013.<sup>99</sup> Following the release of the TRC report, the City of Toronto acknowledged Article 11 of *UNDRIP*, which protects cultural traditions and customs, through the work of Heritage Preservation and many other divisions that do environmental assessments requiring consultation with Indigenous peoples of the area, as part of the “City staff’s legal duty to consult.”<sup>100</sup> Toronto City Council was one of the first governments — local, provincial, or federal — to adopt *UNDRIP*.<sup>101</sup>

These policies serve as a backdrop to the agreements (or lack thereof) with Indigenous peoples along the Humber River. In some ways, the City of Toronto can be considered a leader in its engagements with Indigenous peoples and communities — for example, by having an advisory committee and, especially, by adopting *UNDRIP* long before the federal or provincial governments.<sup>102</sup> At the same time, the City of Toronto’s decisions happened without a larger vision of the relationships and include little financial commitment.<sup>103</sup> As one city councillor stated regarding why particular policies were passed by City Council:

[W]e don’t need new money [to introduce Indigenous staffing], it’s there. Someone in parks is doing Indigenous work, so [use] them. They can keep doing Indigenous works in parks, but they’re doing it out of an Indigenous office now. And we have a coordinator position already, just bump them up. There’s someone in the police that’s already [there]... like, just take those existing resources and pool them together.<sup>104</sup>

So long as the measures asked of City Council do not involve significant resources or challenge the City of Toronto’s other obligations, including insurance, they may not be considered too controversial.<sup>105</sup>

City officials are engaging in these activities not because they see themselves as having a duty to consult per se, but because “there is a sense of duty that we have got to do something.”<sup>106</sup> That something relates to service provision. As one city actor stated,

we all know instinctively that the Indigenous population of Toronto has higher representation in groups that are struggling and people that need support. And who better to deliver services to those individuals than the Indigenous community? Why would we line ourselves up for failure by not including them in the decision-making about how to run those services?<sup>107</sup>

<sup>97</sup> Gilbert Ngabo, “Toronto Parks to Reflect Indigenous History,” *Toronto Star* (13 November 2017), online: <[www.thestar.com/news/gta/2017/11/13/toronto-parks-to-reflect-indigenous-history.html](http://www.thestar.com/news/gta/2017/11/13/toronto-parks-to-reflect-indigenous-history.html)>. See also Re: AA 12.5, “Our Common Grounds: Incorporating Indigenous Place-Making in Toronto’s Parks and Public Realm,” online: <[www.toronto.ca/legdocs/mmis/2017/aa/bgrd/backgroundfile-108701.pdf](http://www.toronto.ca/legdocs/mmis/2017/aa/bgrd/backgroundfile-108701.pdf)>.

<sup>98</sup> Aboriginal Affairs Committee, Item AA 12.4, “Telling Toronto’s Stories: Strengthening the Indigenous Voice,” online: <[app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.AA12.4](http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.AA12.4)>.

<sup>99</sup> “Fulfilling Calls,” *supra* note 95 at 4.

<sup>100</sup> *Ibid.*

<sup>101</sup> At the time of writing, only the Province of British Columbia had passed an *UNDRIP*-related legislation (see Bill 41, *2019 Declaration on the Rights of Indigenous Peoples Act*, 4th Sess, 41st Leg, British Columbia, 2019, (assented to 28 November 2019), SBC 2019, c 44).

<sup>102</sup> *Ibid.*

<sup>103</sup> Interview, *supra* note 84.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

Significantly, the City of Toronto has not to date focused on land ownership and governance, for example by transferring lands to Indigenous communities, or forming agreements with corresponding funding to manage spaces like parks.<sup>108</sup>

## V. LAW AND RELATIONSHIP BUILDING

Urban Indigenous peoples do not fit neatly in any of the official Canadian boxes when it comes to recognized Indigenous rights. The particular challenges for urban Indigenous populations include political agency and representation, despite high populations and numerous Indigenous service providers (mostly social service and arts and cultural agencies).<sup>109</sup> Therefore, we must find legal solutions that broaden the usual conversations. We wonder here whether the legal gaps provide an opportunity for finding a vocabulary where ideas like “rights,” “title,” “honour,” and so on, can recover their original, inherent meanings in relation to higher levels of understanding, transcending and containing both Indigenous and Canadian perspectives. We wonder if shared understandings could then lead to the development of a formal agreement, one that is able to absorb and reflect the holistic and rapidly shifting context.

### A. WHY TERMINOLOGY MATTERS

Building on existing strengths and positive developments is the best place to start. Good will and a sense of wanting to do what is right are more helpful than the assertion of various conflicting legal concepts and strategies. For this reason, it may be helpful to begin with the idea of the now loaded and problematic term, “reconciliation.” This term was not legally defined and, therefore, had the potential to avoid the limiting legal terminology of courts and tribunals, case law, legislation, regulation, and policy. Indeed, when the broader principles that lie at the heart of reconciliation arise in more formal settings, plain and heartfelt language seems to rise through (or in spite of) all the technical language and considerations of the law, in ways that reflect what might be called the *spirit* of the law.<sup>110</sup> The broader notion of a fluidity in the idea of coming together means, potentially, transcending Indigenous and non-Indigenous divisions and conflicting interpretations, and informing (and perhaps transforming) the conversation from above or from within. Retired Justice and Senator Murray Sinclair has said, “[r]econciliation turns on one very simple concept: I want to be your friend and I want you to be mine.”<sup>111</sup> However, realizing this simple concept is

<sup>108</sup> *Ibid.*

<sup>109</sup> *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 263.

<sup>110</sup> See especially the concluding words of the majority judgment in *Delgamuukw v British Columbia* at the Supreme Court: “Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) – ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.’ Let us face it, we are all here to stay” ([1997] 3 SCR 1010 [*Delgamuukw*] at para 186). We acknowledge the many scholars who point out, rightly, the limits of the law inherent in *Delgamuukw*, including Dale Turner, “Indigenous Knowledge and the Reconciliation of Section 35(1)” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 164. See also Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018).

<sup>111</sup> Donna Carreiro, “Beyond 94: Where is Canada at with Reconciliation?” *CBC News* (19 March 2018), online: <[www.cbc.ca/news/indigenous/beyond-94-truth-and-reconciliation-1.4574765](http://www.cbc.ca/news/indigenous/beyond-94-truth-and-reconciliation-1.4574765)>.

much bigger than most of us suppose.<sup>112</sup> We wonder how the law leaves room for this potential.

The challenge is not merely related to achieving equity. Indigenous issues in relation to Canada, at their core, are not equity issues, which are most often institutionally restricted to the popular and legal vocabulary of “rights” — the right not to live in dire poverty, the right not to be subjected to racist discrimination, the right to harvest fish in clean water, the right to one’s territories, and so on.<sup>113</sup> Even if these rights were somehow addressed (as they should be, and are still not), reconciliation would not necessarily have occurred, nor can it occur with only these kinds of aims in mind. People can coexist on a relatively equitable worldly status without being friends, and have even gone to war with many rights well in place on both sides.

True friendship as we understand it requires something much higher than material well-being, or a mere declaration of respect or affection. True friendship stems from deep in our hearts, and involves a very real mutual understanding as the basis for reciprocally meaningful actions. And so reconciliation requires something much higher, or more inward, than anything that any Canadian court currently seems to have the capacity to address. Canadian legal systems speak the language of rights mostly at an externalized and compartmentalized material level: What do (or did) people own or occupy? How can we prove it? Who says so, or has said so in the past, so that we know it to be true, whether this is in a written form or an oral tradition? How does the behaviour of one actor affect or transgress the rights of another? And even, how much do the interests of one weigh compared with those of the other? Canadian courts seem less interested, to say the least, in matters of the heart and spirit. As long as we remain in these lower realms of law, many decisions can be overturned and any human interpretation of a decision may easily contradict any other. Even “final” decisions at the highest level, as with *Delgamuukw*, are interpreted in radically different ways on the ground and in lower courts, depending on diverse human perspectives.

Spirituality lies at the inmost core of Indigenous perspectives on the law and rights, and frames all our human laws in relation to transcendent principles, which are often referred to by diverse Indigenous people as “Original Instructions.” Consider for example the *First Nations Water Declaration* in Ontario issued by the Chiefs of Ontario, which begins by referencing our placement here by the Creator, emphasizing our responsibilities and gifts (both given to us and held by us, and needing to be shared), the importance of our ceremonies, the principle of respect, the spirit of the waters, our relationships with those waters in every direction, our sacred instructions to protect the gift of water, and so on, finally arriving at the idea of Indigenous human rights midway through the document.<sup>114</sup>

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<sup>112</sup> *Ibid.*

<sup>113</sup> Personal Knowledge from Observation and Conversation, *supra* note 28.

<sup>114</sup> First Nations Water Policy Forum, *Water Declaration of the First Nations in Ontario*, resolution 08/187 (Toronto, 15–17 October 2008), online: <[www.afn.ca/uploads/files/water/08-10-00.pdf](http://www.afn.ca/uploads/files/water/08-10-00.pdf)>. It is notable that this declaration comes through political actors who represent not merely “traditional” perspectives, but the full range of people living as Status Indians in their territories, and so is far from being the most radical statement on this kind of theme; in the context of these territories at least, this declaration is issued through a rather “mainstream” entity.

The Canadian view on rights very often forces Indigenous people into a kind of zero-sum game, pitting different human groups against one another in a struggle over what might more properly be called privilege rather than rights and leaving other, non-human levels of being almost completely out of the equation, unless they are considered as some adjunct of *human* rights.<sup>115</sup> Even modern attempts to recognize the rights of nature are generally limited to human and “ecological” (such as, material versus spiritual) perspectives.<sup>116</sup> Indigenous views begin by centering us in ways that transcend the struggle over who owns what or who controls how much in mere human or material terms, into a realm where we are all given gifts and responsibilities by the Creator, extending in every direction, and which, when respected and practiced, will help ensure that we and future generations will continue to benefit.

Canadian governments have not yet begun to truly understand Indigenous communities and languages. In contrast to New Zealand, for example, Canadian governments operate almost completely outside of higher laws, such as the need for reciprocity in all things, and reduce everything to the level of who is entitled to what.<sup>117</sup> There may be apologies between humans, some acknowledgment of the other’s trauma, the assignment of money and so on; but these acts proceed from within a system that is merely human, and which still neglects any deeper meaningful mutual connection and understanding, not only with Indigenous people, but also with the whole world, and with the Creator. The modern world myopically limits our circle of relationships to the human level, and even at this radically reduced level we cannot really see the other person as sacred, as we would our own child or brother or mother,<sup>118</sup> or a beloved friend. On this basis we are unlikely to deeply consider how the other feels, thinks, and is motivated to move in this world, and *then* stand by them in a meaningful relationship. At best, we currently have a superficial and fragile friendship and a limited capacity for relationship building.

## B. INDIGENOUS LAWS AND SETTLER LEGAL SYSTEMS

Indigenous laws are not primitive manifestations of law, nor can they be met through belated acts of social justice.<sup>119</sup> The City of Toronto could not possibly compensate for the horrors that have already taken place. Nor is the question of how Indigenous peoples are

<sup>115</sup> Personal Knowledge from Observation and Conversation, *supra* note 28.

<sup>116</sup> There is no room in this article to address the recognition of the “rights of nature” and the implications for Canadian park spaces. For more on this topic, see e.g. Cristy Clark et al, “Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty Gritty of Governance” (2018) 45:4 Ecology LQ 787; Jeremy Lurgio, “Saving the Whanganui,” *The Guardian* (29 November 2019), online: <[www.theguardian.com/world/2019/nov/30/saving-the-whanganui-can-personhood-rescue-a-river?CMP=Share\\_iOSApp\\_Other](http://www.theguardian.com/world/2019/nov/30/saving-the-whanganui-can-personhood-rescue-a-river?CMP=Share_iOSApp_Other)>.

<sup>117</sup> In New Zealand, the rights of nature under Māori jurisprudence are much more advanced when it comes to consultation. Settler governments must establish and maintain opportunities for Māori to contribute to decision-making processes. Before making any significant decision relating to land or a body of water, local authorities must by law take into account “the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred sites], [valued flora and fauna,] and other taonga [cultural treasure]” (*Resource Management Act 1991* (NZ), 1991/69, s 6(e)).

<sup>118</sup> The use of terms such as “brother,” “father” and so on in covenants and treaties has profound meaning; see Francis Jennings et al, eds, *The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and Their League* (Syracuse: Syracuse University Press, 1985).

<sup>119</sup> John Borrows, “Indigenous Legal Traditions in Canada” (2005) 19:1 Wash UJL & Pol’y 167; Val Napoleon & Hadley Friedland, “Indigenous Legal Traditions: Roots to Renaissance” in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 225.

consulted in municipal planning a mere matter of rights or treaties as conceived under western legal concepts. If we are to address urban issues in a meaningful way, then we are also looking at resolving interconnected crises — environmental, economic, social, intellectual, and spiritual — in ways that radically and holistically challenge all our human systems. What is really at stake is how we may all survive in sustainable ways for generations to come, regardless of our human status as Indigenous or non-Indigenous.

Friendship is not only about accepting another’s point of view, but also being able to admit when one is wrong, and being able to change one’s own perspective and actions accordingly. This will mean stepping outside of established Canadian law and legal frameworks, and understanding and integrating with Indigenous laws *in spirit*, for example, at the level of their highest principles. For example, in many Indigenous cultures there are laws of non-interference or taking only what you need, rooted in natural law.<sup>120</sup> The law is explained in stories, which requires openness to reasoning and knowledge beyond what is found in Canadian jurisprudence. The idea that stories are the basis for law may seem baffling to many today, but on serious reflection, we can see that even at the most mundane levels, the law is driven by stories. As John Borrows notes, the law is *in the stories*,<sup>121</sup> which in turn are valuable precisely because they are symbolic and reflect higher intellect and integrated understanding of the universe, rather than being narrowly prescriptive.<sup>122</sup> Each person’s interpretation and every layer of being is seen as having truth, as part of the truth. As Elder Harry Bone says, “we can’t speak by ourselves.”<sup>123</sup>

Traditional Indigenous laws are ultimately everyone’s laws.<sup>124</sup> It is in the interest of all to consider how Indigenous laws and practices can inform the healthy evolution of the legal system. Borrows highlights the integration of economic and ecological factors in site plan development. Ideas of designing to scale (using only what you need), replenishing and restoring the natural surroundings in the area of development after its construction (leaving gifts in respect for the taking of the things formerly living there), and having a plan for future care of the site after its construction (placing a good person to watch over the things you have changed) are only a few of the many Indigenous legal principles that can apply to land use planning.<sup>125</sup>

*Anishinaabe nibi inaakonigewin* (Anishinaabe water law) serves as a rich framework for how Indigenous and settler legal systems might come to act in friendship. Anishinaabe legal scholar Aimée Craft’s report on *Anishinaabe nibi inaakonigewin*<sup>126</sup> affirms the importance

<sup>120</sup> Napoleon & Friedland, *ibid*.

<sup>121</sup> John Borrows, “Living Between Water and Rocks: First Nations, Environmental Planning and Democracy” (1997) 47:4 UTLJ 417 at 428–29 [Borrows, “Living Between Water and Rocks”]. Borrows explains that: “Indigenous laws sometimes find their expression in traditional stories, which are a primary source to discover precedents guiding environmental and land-use planning. These narratives often pre-date the common law, have enjoyed their persuasiveness for centuries, and have yet to be overturned or extinguished from the tribal memory” (*ibid* [footnotes omitted]).

<sup>122</sup> Aimée Craft, *Anishinaabe Nibi Inaakonigewin Report: Reflecting the Water Laws Research Gathering conducted with Anishinaabe Elders* (Winnipeg: University of Manitoba’s Centre for Human Rights Research & the Public Interest Law Centre, 2014) at 20, 22–23 [Craft, *Anishinaabe Nibi Inaakonigewin Report*].

<sup>123</sup> *Ibid* at 18.

<sup>124</sup> Borrows, “Living Between Water and Rocks,” *supra* note 121 at 463.

<sup>125</sup> *Ibid*.

<sup>126</sup> Craft, *Anishinaabe Nibi Inaakonigewin Report*, *supra* note 122.

of higher laws and spiritual realities as the framework for human laws.<sup>127</sup> The document supports the importance of relationships as the basis for obligations, responsibilities, and “rights,” and the elders stress that “Anishinaabe ... laws are centered on relationships.”<sup>128</sup> Our responsibility “to each other and the land”<sup>129</sup> must be lived, *is the law*, and this law is “all around us.”<sup>130</sup> The laws we need to follow unfold and breathe, as alive as everything around us.<sup>131</sup>

*Anishinaabe nibi inaakonigewin* illustrates how laws extend far beyond “ecological” or “human rights” and touch on everything conceivable in our world. For example, democratic legitimacy has the potential to benefit from a deep relationship with Indigenous laws. Borrows, an Anishinaabe scholar, observes the potential of Indigenous laws and perspectives for reinvigorating governance and democracy in general.<sup>132</sup> The emphasis by many Indigenous laws on processes that support the broader sharing and understanding of information is in contrast to modern Western tendencies to remote governance and technocratic decision making that is imposed without general understanding.<sup>133</sup> As Borrows and others have noted, Indigenous accounts of law have particular benefit to settler society, including the way in which such laws adopt a multi-generational approach to decision making. Borrows states that “[p]lacing Indigenous accounts of law within and beside ‘western’ interpretations of contemporary customary law encourages more inclusive democratic conversations, neither separate from nor entirely included within more formal rule-based discourses.”<sup>134</sup> This is just one example of how Indigenous law is increasingly relevant and applicable in any modern context.

### C. THE INADEQUACY OF THE DUTY TO CONSULT

Working towards city recognition and embrace of the inner meaning or spirit of Indigenous laws can help transcend a Canadian tendency to rely on reductive interpretations of the duty to consult. The decision in *Neskonlith CA* reflects a lack of engagement with Indigenous rights in understanding the roles and actions of local governments.<sup>135</sup> Saying that municipalities have no resources or mandate to grapple with the duty to consult and are not the Crown focuses on the jurisdictional boundaries created under the Canadian Constitution. The priority accorded to “resources” and “mandate” at their lowest, most mechanical level is a bureaucratic abdication of responsibility and relationship found in Indigenous laws. If we are to be friends, then the whole conversation must be raised above this bureaucratic level, for all our sakes.<sup>136</sup>

<sup>127</sup> *Ibid* at 44.

<sup>128</sup> *Ibid* at 18.

<sup>129</sup> *Ibid* at 12.

<sup>130</sup> *Ibid*.

<sup>131</sup> *Ibid* at 9.

<sup>132</sup> Borrows, “Living Between Water and Rocks,” *supra* note 121.

<sup>133</sup> Craft, *Anishinaabe Nibi Inaakonigewin Report*, *supra* note 122 at 9. Elders in Craft’s report refer very specifically to seven sacred principles for leaders and to governance processes for selecting leaders that are governed by natural law and involving clan mothers. They emphasize the importance of key people hearing and understanding what is being decided on.

<sup>134</sup> Borrows, “Living Between Water and Rocks,” *supra* note 121 at 429.

<sup>135</sup> Hoehn & Stevens, *supra* note 3 at 988.

<sup>136</sup> *Ibid* at 984 (highlighting the *Neskonlith CA* ruling and the link between municipal failure to consult and a lack of capacity, with the court describing municipalities as varying greatly in size and tax-base, and as being generally concerned with the regulation of privately-owned land, with Crown land and natural resources remaining within the purview of the Province).

City governments can and do make final decisions in areas like parks management.<sup>137</sup> In these and other areas of action, the courts are increasingly showing deference to municipal decisions through principles such as subsidiarity and cooperative federalism. As the Supreme Court of Canada has noted:

The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities.... The “benevolent” and “strict” construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes.<sup>138</sup>

The honour of the Crown, interpreted generously, “will not leave its application dependent on whether a government has direct constitutional authority.”<sup>139</sup> Covenants and treaties can offer a path forward for relationship building. For example, in Toronto, we may ask: How do we all approach the Dish with One Spoon Treaty and share the territory in a sustainable manner? Even if this agreement could be argued (as it most certainly would by some) as historically or regionally limited in its applicability, we can still ask how we might all renew such an agreement, or enter into new covenants reflecting the same higher principles. The conversation can transcend the usual limitations Canada places on Indigenous knowledge as an adjunct considered mainly in relation to endlessly disputed numbered treaties and other territories considered narrowly, and move into a place where that knowledge is seen as part of the whole legal environment, and of every scrap of land and drop of water and breath of air around us.<sup>140</sup> None of this would need to abandon or radically revise existing treaties; indeed, it has been well argued that Indigenous interpretations of existing treaties already differ from Canadian interpretations in the ways being suggested above, and that they have differed in these ways since the treaties were made.<sup>141</sup> These kinds of questions would shift the ways in which agreements, like those along the Humber, are worded and negotiated.

## VI. MOVING FORWARD: INDIGENOUS LAW AND THE HUMBER

The City of Toronto has taken some positive steps in its workings with Indigenous peoples along the Humber, largely by listening and moving slowly. Approaching a legitimate agreement reflecting real friendship, however, is more than environmental assessments and heritage, and preoccupations with insurance and plant names. It requires giving municipal teeth to Indigenous laws by recognizing *UNDRIP*.

<sup>137</sup> *City of Toronto Act, 2006*, SO 2006, c 11, Sch A.

<sup>138</sup> *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 at para 6 [citations omitted].

<sup>139</sup> Hoehn & Stevens, *supra* note 3 at 996.

<sup>140</sup> Borrows, “Living Between Water and Rocks,” *supra* note 121 at 443.

<sup>141</sup> Aimée Craft, *Treaty Interpretation: A Tale of Two Stories* (Draft Chapter of LLM Thesis, University of Victoria, 2011) [unpublished].

A recognition of Indigenous laws in the City of Toronto would fundamentally ask how we may all come to sit together in the city, including treaty holders for the territory from nearby reserves, as well as diverse Indigenous and non-Indigenous people living in the city itself. It would articulate what it means to establish a deeply balanced relationship with our place, in ways that offer a taste of how Indigenous perspectives are an essential element in the process, of demonstrable benefit to all people. Such a process need not move through any legislated or adversarial approach, but rather by setting aside areas where new relationships may emerge and become culturally embedded over time — grown from within communities rather than imposed from outside of them.

Several steps are needed. First, there would need to be recognition that Indigenous laws exist, and that these laws derive from natural laws.<sup>142</sup> If we recognize this, then we are absolutely under the same authority, rather than one being under the other's jurisdiction. Second, we would ask which Indigenous laws inform today's contexts, and how they can be recovered within these contexts in ways that address common concerns. Broadly put, how can our shared presence in this part of the world become part of a sustainable and balanced way of living? Finally, we would need to establish a way for both Indigenous peoples concerned as well as Canadian municipal officials and all people living in the city to adapt their diverse perspectives toward this common framework in ways that respect their realities. We would need to renew covenants that have been broken or have lain sleeping for many decades, even centuries.

There are obvious challenges to recognizing Indigenous laws in Toronto. This daunting work cannot be done all at once. Canadian society and systems in general are very detached from the possibility of referencing the principles that underlie Indigenous laws in any public forum, most especially in relation to education and policy-making. The events and processes unfolding along the Humber River offer an important example of how to start.

In Toronto, many of the measures introduced to promote reconciliation do not substantively address colonialism. The City Statement of Commitment focuses on the usual array of issues Canadian governments typically attempt to address through the standard equity lens — silos of concern defined completely by Canada: employment, economic development, housing, health, and education. Even support for opening ceremonies is usually not about nation-to-nation relationships so much as being taken at the level of a kind of mere mechanical formality, or culturally sensitive practice. The Indigenous Affairs Office's Year of Truth and Reconciliation and so on are also not bad developments in themselves, but have very little to do with substantial reconciliation if the bigger questions of how we are to survive and share the territories where we live is not addressed. Similarly, the training of city staff on Toronto's Indigenous history is necessary, but is more of a sensitivity and equity exercise, and less of a recognition or respect for Indigenous laws, nor does it set a path forward that displaces the centrality of the City of Toronto's authority.

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<sup>142</sup> See Lindsay Keegitah Borrows, *Otter's Journey through Indigenous Language and Law* (Vancouver: UBC Press, 2018).



The City of Toronto’s adoption of *UNDRIP* is very significant, however, although to one city official, “no one realizes what it means.”<sup>143</sup> *UNDRIP* Articles 25 and 26 are particularly important, and clearly assert the right of Indigenous peoples to “maintain and strengthen their distinctive spiritual relationship with their traditionally owned or *otherwise occupied and used* lands ... and to uphold their responsibilities to future generations in this regard.”<sup>144</sup> These articles emphasize the importance of spiritual relationships and responsibility. To be meaningful, the adoption of *UNDRIP* must be more than a mere endorsement of principles and, instead, must serve as the basis for a renewed relationship with Indigenous peoples in the city.

Indigenous peoples are occupying and using a small stretch of the Humber River in a manner that is grounded in Indigenous law, at least, to the extent possible, given the fallout from Canadian policies of genocide and assimilation, including revitalizing the natural ecosystem of the area, lighting fires, and conducting ceremonies. Indigenous peoples in Toronto have been invited and encouraged by Anishinaabe Elders and ceremonialists from the territory to light fires, and have asked with tobacco, and received the Thanksgiving Address of the Haudenosaunee people in support of their presence there. Indigenous peoples are modeling responsibility to the Humber with future generations in mind. No one is parked on anyone’s valued property, and those involved have occupied sites that are considered as public property under Canadian laws, albeit neglected by local authorities for at least 60 years, filled with waste, and overrun with invasive species. In this urban setting, with the land, water, plants, birds, animals, fish, ancestors, descendants, and spirit, Indigenous peoples are relating to place according to Indigenous laws, to the best of their ability.

Before any agreement is signed between Indigenous peoples and the municipal government, there must be an explicit acknowledgment of Articles 25 and 26 of *UNDRIP*, together with mention of the specific covenants and treaties that apply. First Nations, including the Michi Saagiig Nishnaabeg, must be very specifically and intentionally involved. On this basis, Indigenous-led processes and resurgence along the Humber River and in other urban parks can be used as a kind of model or precedent for how the recognition of and movement back toward higher laws can be applied. Other colonial legal systems have afforded legal recognition of such areas.<sup>145</sup> Spaces of legal recognition for urban Indigenous spaces like the ones along the Humber River can serve as sites for the practice of Indigenous laws. In making this recognition explicit, small but significant microcosms of reconciliation can be built, seeds that can grow naturally across the urban landscape.

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<sup>143</sup> Interview, *supra* note 84.

<sup>144</sup> *Supra* note 7, art 25 [emphasis added]. Article 25, *ibid*, states that: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.” Article 26, *ibid*, states:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

<sup>145</sup> See reference to “*res divini juris*” in William Smith, ed, *A Dictionary of Greek and Roman Antiquities* (London, UK: John Murray, 1875) sub verbo “*dominium*,” cited in Bill Thayer, “*Dominium*,” online: <penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA\*/Dominium.html>.

## VII. CONCLUSION

This article has explored the urgency of Indigenous-municipal relationships and the uncertain legal obligations that cities have in relation to Indigenous peoples and First Nations. Presently, provincial and federal governments are considered to be the Crown, and municipal governments are simply creatures of the province, meaning that a municipal responsibility to carry out the procedural requirements of the duty to consult and accommodate may be delegated by provinces. Considerable uncertainty remains as to the municipal role in relation to Indigenous peoples under the law; but municipal authorities also have a less remote relationship to urban Indigenous neighbours than large provincial or federal branches of Canadian government, and so may have a better chance at true friendship. This article challenges municipalities to look beyond existing legal principles to build reciprocal, respectful relationships with Indigenous peoples and communities. We focus on activities led by Indigenous peoples taking place in an urban park space within the City of Toronto, including the planting of traditional plants and the presence of various ceremonies, the ways in which the municipal government has reacted to these activities, and the potential for new kinds of legal relationships.

We suggest that the City of Toronto's approach to Indigenous-municipal relationship building and governance through the adoption of *UNDRIP* is especially meaningful in moving forward, in particular Articles 25 and 26, which assert the right of Indigenous peoples to maintain and strengthen their distinctive spiritual relationship with traditionally owned or otherwise occupied and used lands, and recognize Indigenous responsibilities to future generations, which includes future generations of all urban people. As applied to the park space explored in this article, these sections of *UNDRIP* offer a lens through which Indigenous peoples and communities and municipal governments may rethink their relationships in a manner that recognizes their respective histories, shared interests, and Indigenous environmental expertise and laws. In doing so, the City of Toronto can enable Indigenous peoples to continue their work in recovering and maintaining their relationships with land and water, with place in the deepest possible sense. If this can be achieved, however modestly at first, it can deeply inform and influence how our children and grandchildren may still come to live in more sustainable ways, in balance with all things that surround us, and in harmony with laws that have been in place since the beginning of this world.