External Consultation
and
Duty to Consult

Indian and Northern Affairs Canada | Affaires indiennes et du Nord Canada

Chronological no. 13

File reference no. 2013/2014

BAND COUNCIL RESOLUTION

NOTE:

The words "from our Band Funds" "capital" or "revenue", whichever is the case, must appear in all resolutions requesting expenditures from Band Funds.

Cash free balance

The council of the THESSALON FIRST NATION

Province

Capital account $

Date of duly convened meeting D 28 M 10 Y 13

Revenue account $

DO HEREBY RESOLVE:

WHEREAS, Thessalon First Nation is desirable in our relationship with the Crown, that we should maintain a pragmatic reciprocal and effective process of consultation and accommodation and;

WHEREAS, Thessalon First Nation has been in the process of developing its own External Consultation Document within the First Nation Community and;

WHEREAS, Thessalon fully supports the development of the External Consultation Document.

THEREFORE BE IT RESOLVED, that Thessalon First Nation the attached External Consultation Document dated July 15, 2013 is approved as of October 8, 2013.

Quorum Chief & 3 Councillors	(Chief)	
(Councillor)	(Councillor)	(Councillor)
(Councillor)	(Councillor)	(Councillor)
(Councillor)	(Councillor)	(Councillor)

FOR DEPARTMENTAL USE ONLY

Expenditure	Authority (Indian Act Section)	Source of funds ◯ Capital ◯ Revenue	Expenditure	Authority (Indian Act Section)	Source of funds ◯ Capital ◯ Revenue
Recommending officer			Recommending officer		

CONTENTS

Introduction: Historical, Legal and Political Background

The Thessalon First Nation has adopted a principled approach to reciprocal consultation and accommodation with the federal, provincial, and municipal governments. This paper provides detailed information for those governments on Thessalon's rights and claims, and proposes specific paths to effective consultation about and accommodation of them.

In 2004, the Supreme Court of Canada decided the case of the *Haida Nation v. British Columbia (Minister of Forests)*. The court said that, when a provincial government proposed resource development in an area where there were existing claims of aboriginal rights and title,[1] it was not "business as usual." Things changed when the Crown became aware of a claim. The Crown had a duty to consult the aboriginal people involved. It could not delegate that responsibility to anyone else. The stronger the claim, the deeper the duty to consult became. Where the claim was "established," or where treaty rights were involved, the Crown's obligation was no longer just consultation; it had to "accommodate" those rights.

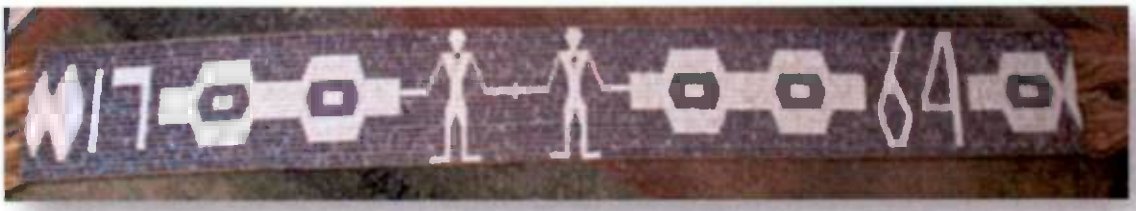
> The honour of the Crown infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (Haida Nation)

In the 2006 *Mikisew Cree* case, the Supreme Court confirmed that these obligations extended to the federal Crown, and to treaty rights. In these cases, the source of the obligation was the honour of the Crown, a distinct and reinvigorated basis of legal duty. In 2013, the Supreme Court reaffirmed the stand-alone nature of the honour of the Crown in the *Manitoba Métis* decision.

---

[1] Haida claims to their archipelago homeland, Haida Gwaii, had been recognized by federal and provincial governments to some extent for over a century, but no treaty or other resolution was in sight. The courts had recognized Haida rights in the *Meares Island* case, but the executive branches of the federal and provincial governments still would not act.

For the Ojibway[2] (Anishinaabe) people of the watershed of Lake Huron, these requirements are not new. They have been part of their relationship with the Crown for over two hundred fifty years. The political relationship originates in the 1764 Treaty of Niagara. The relationship, known as the Covenant Chain, is based on the principles of respect, trust, and friendship. It is symbolized by a massive wampum belt that was given to the Anishinaabeg by the Imperial Superintendent General of Indian Affairs, Sir William Johnson. According to the terms of the Treaty, our governments should have been engaged in an active conversation all along. Now, because consultation has been mandated and defined by the courts, what ought to have been a political process has become very much a legal one.



George Hammell's reproduction of the 1764 Covenant Chain wampum belt.

The relationship is not frozen in time. It is an organic, living, evolving relationship. The 1836 treaty that addressed the islands in Lake Huron specifically mentioned the Niagara Council. The 1850 Lake Huron Treaty, which dealt with the mainland watershed of Lake Huron, was made within the context of the Covenant Chain relationship.

> In the case of a treaty the Crown, as a party, will always have notice of its contents. (Miklsew Cree)

The Supreme Court of Canada in the *Mikisew Cree* case said that there are both substantive and procedural treaty rights. The right to be consulted by the Crown about developments that could affect substantive rights is a distinct procedural right. Where a substantive treaty right exists, the Crown must not only consult the affected indigenous nation, it must take steps to accommodate that right. From an Ojibway perspective, this is

[2] Ojibway, Ojibwe, Ojibwa, and (in the south and the United States) Chippewa are one part of the larger Anishinaabe nation, which also includes the Odawa (Ottawa) and Potowatomi people.

nothing new: it is exactly what was intended by the people who created the respectful, trusting, and friendly relationship at Niagara.

The obligation to consult and accommodate is also described in the *United Nations Declaration of the Rights of Indigenous Peoples*. Canada confirmed its support of UNDRIP on November 12, 2010. The Declaration states:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. (Article 19)
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (Article 32)
>
> Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements. (Article 37)

The U.N. declaration has been approved by most of the nation-states of the world. However, Canada was one of the last to approve it (and one of only four to initially vote against it), and Canada's support has been lukewarm at best.[3] While the Declaration is a statement of international law, it is not binding in Canadian courts, and is not legally enforceable. That doesn't mean it can be ignored: Canadian governments, federal and

[3] Canada's statement of support mentioned a number of areas it doesn't really support, but said Canada "believes the principles are consistent with the Government's approach to working with Aboriginal peoples." UNDRIP was approved in the U.N. in September, 2007. Canada's support came in late 2010.

provincial, have adopted its standards as ones to which they aspire, and to which they say they already adhere.

Since the *Haida* decision, Canadian courts have tried to refine and define what "consultation" means. The cases tend to set minimum standards, not optimum conditions. Meanwhile, it has become clear that federal and provincial governments are often not very good at consulting. They are not used to doing it. The rules are not yet well defined. For both levels of government, the involvement of several departments and ministries sometimes leaves a gap into which the obligation to consult disappears. Governments are tempted to download most of the responsibility to proponents.[4] Indigenous communities are often not very good at being consulted, either, because they are not yet used to being genuinely consulted, and their own rules are still not clear. In a time of fiscal constraint, there are fewer resources on all sides to make consultation work.[5]

The Covenant Chain relationship requires reciprocity. In the context of modern consultation, it means the Crown must have notice of rights and claims;[6] indigenous people must receive notice of matters early and effectively; indigenous people must respond to proper notice in order to engage in meaningful consultation. Where an indigenous community proposes to engage in development that may affect Crown rights, it, too, should be obliged by the terms of the relationship to give timely and effective notice to the Crown.

In *The Devil's Dictionary*, Ambrose Bierce defined "consultation" as "seeking approval for a course already decided upon." Bierce's work was an exercise in cynicism and sarcasm. Yet his point is well taken: to be respectful, consultation must be meaningful. It

---

[4] Some governments suggest that they would delegate only procedural and not substantive parts of consultation to the proponents. The problem with this is, of course, that consultation is itself a process...

[5] Many of the concerns of indigenous peoples might be addressed in environmental assessments. But the federal government in 2011 did away with most requirements for federal environmental assessments. In one year, the number of federal EA's dropped from over 3,000 to under 100.

[6] The Crown is always deemed to have notice of the terms of treaties, since it is a party to the treaties.

must happen early enough in any process to affect the decisions that could be made, including, sometimes, the decision not to proceed at all.

> Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it. (Mikisew Cree)

To be effective, an indigenous response to a notice of proposed development, or to a proposed change in law or policy, must address the issues directly and specifically. There must be genuine, thoughtful content. We cannot allow the responses to become a repetitious litany of complaints. If all we do is complain, people will stop listening.

Thessalon's government does not have an assured annual consultation budget, yet to engage in serious consultations requires dedication of people, time, and money. The people and companies proposing the developments expect to profit from them. The federal and provincial governments contemplating the developments will also profit through tax revenue and development fees. There is a principle in resource and real estate development that the developer ought to pay the costs incurred by governments that must consider whether to allow the development to proceed. In some cases, this is considered to be covered by taxes. In some cases, this principle is satisfied by charging the developer a fee for the expense incurred by the governments. In other cases, responsibility for doing the necessary studies through independent consultants – biologists, archaeologists, fluvial geomorphologists – is delegated to the developer. Thessalon does not have the legal authority to impose set fees on the process of consultation. It does not have the money to engage experts. Without resources to accompany the process, the consultation will be ineffective and frustrating. The cost of consultation should be clear at the beginning. It is integral to any effective process.

We suggest a hybrid consultation funding formula. An annual sum, to be reviewed periodically, will cover the cost of consultation on smaller issues and general policy and legislative change. Other proposals, policies or laws[7] which may have a serious adverse impact, or which would occur within Thessalon's Reservation or adjacent to the Reserve, may require specific funding to cover the cost of expert reviews or reports, and more extensive responses. Where Thessalon becomes a party to a hearing, separate funding for that role must be identified. Since timing is affected by the proponent's needs, there must be an efficient funding process.

In Anishinaabe tradition, authority is always accompanied by responsibility. Human beings are only one part of the circle of life. We have been given responsibility to maintain and protect the fragile ecosystems that support us, and that we share with many other living beings. As human beings, we consider, too, that we are not alone: we bear the lessons and warnings of our ancestors, and we consider, in all our decisions, the impact on the unborn future generations. We cannot be short-sighted or selfish.

The nature of North American business requires most developers to be responsible to their corporate shareholders, and this promotes thinking that is relatively short-term and profit-oriented. We know that the individuals who control and direct the corporations are also well-meaning citizens and human beings who acknowledge a broader sense of responsibility, even as they fulfill their directors' and shareholders' expectations. Our consultation process can help restore a balance between public responsibility and private profit.[8]

---

[7] For the sake of convenience, we will refer to proposals, projects, undertakings, proposed policies, and proposed laws together as "proposals." For the sake of variety, we also use the neutral term "matters."

[8] We are concerned that this is especially true when resource development takes higher priority as a cure for economic hard times. The rush to shale gas fracturing ("fracking") before the technology's impact on groundwater is well understood is a current example.

We are not above seeking benefits from development. We, too, will ask "what's in it for us?" We are entitled to do that by the terms of our treaty relationship with the Crown, which contemplated that we would have a fair share of the profits taken from the land. But it is not our only consideration. Unlike a corporation, we cannot move on when the development is finished, the mine depleted, the forest cut. "Us" is not just the people, and not just the people alive today: the land defines us, makes us who we are, and remains our legacy to our future generations. Because we will live with the consequences of development, we are entitled to expect a high standard of responsibility.

We wish there were an English word other than "resources" to define the things that comprise our land. It would make it easier to explain that we do not believe these things were placed here only for our exploitation. It would make it easier for us to explain why our attitude toward any aspect of the land is one of gratitude, not of desire. In our thinking about any proposal, we will require careful environmental protection.

When we acknowledge the circle of life, we consider any proposal from the perspective of an entire ecosystem. We do not consider a species of fish in isolation; we consider the waters it lives in, the things it eats, the things that eat it in turn, and the things that depend upon it in other ways. We find it useful to consider the boundaries of any ecosystem, and what comes into the system and what leaves it. Our treaty territory and our traditional territory have natural boundaries. Our reservation and reserve have surveyed, artificial boundaries. In considering the impact of any proposal, we will generally adopt an ecosystem and watershed approach. As the Cayuga philosopher Dan Hill said, we all live downstream from somebody.

The Crown's Obligations

Consultation and accommodation is expensive, time-consuming, and often frustrating. All levels of government – federal, provincial, municipal and aboriginal – are facing real fiscal constraints. Inevitably, the federal and provincial governments look for ways to lighten their burden. In proposals for development or natural resource extraction, the proponent stands to profit most. It makes sense, financially and administratively, to have the proponent carry the expense and trouble of consulting and accommodating.

However, downloading the burden of consultation to the proponent does not comply with the law, nor with the honour of the Crown. Where the Crown's governments have a fiduciary relationship with aboriginal peoples, developers have none: they are guided, in their dealings, by self-interest. Governments carry treaty obligations. Developers do not. Governments are not accountable to corporate shareholders; they are not motivated by private profit. In *Haida*, the Supreme Court said:

> The duty to consult and accommodate flows from the Crown's assumption of sovereignty over lands and resources. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development.[9] However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated."[10]

We prefer to deal with the Crown directly. The Crown has a relationship with us, and a set of legal obligations.

---

[9] In Ontario, the provincial government has signed an agreement with Hydro One Networks Inc. that delegates the procedural aspects of consultation and accommodation to Hydro. But Hydro is owned by the provincial government and in some laws is treated as a provincial agency.

[10] One of the major challenges in "consultation" is determining the depth of consultation: who decides how strong the claims or rights are? Would the government set the requirements, and the proponent then fulfill them? What is "procedural," anyway?

1. Territories and Rights: Defining the Intensity of Consultation

Canadian courts have said that two major factors determine where a matter stands on the "spectrum of consultation." One is the nature of the rights and claims: the more established or powerful the rights, the deeper the consultation. The other is the effect of the proposal:[11] the more it might affect the rights, the more consultation is required. Often, matters will become the subject of deeper consultations according to their level of risk and the potential harm to the environment that they represent.

Many aboriginal and treaty rights are considered to be "site-specific." They, like the people, are closely linked to the land. Most of the proposals about which we expect there will be consultation and accommodation will also be site-specific, and the depth and scope of the interactions will be determined by the nature of the land affected. The more connected we are with that land, legally and spiritually, the more influence we will require.

However, some matters will be general rather than local. Changes in laws and policies about land use, resource use, and the environment may affect all of Thessalon's territory and people. These often require Thessalon to respond on a policy level, rather than addressing site-specific concerns. It is harder to define which provincial laws and policies must be subjects of consultation or accommodation. The Ontario *Environmental Bill of Rights* provides some guides to environmental consultation. Social and cultural impacts are more difficult to identify with precision: no laws provide guidelines to measure them.

There are dozens of kinds of dispositions of land and resources, and each can vary in intensity, impact, and size. The danger in trying to create permanent, authoritative lists of the kinds of notice and consultation that ought to accompany each kind of disposition is

[11] Words like "matter" and "undertaking" are neutral and do not contain some of the presumptions that their counterparts, "issue" and "development," might carry. Where we can find words without unintended legal or emotional baggage, we ought to use them.

that, inevitably, things will be left out; things will not be anticipated; things will change. Anishinaabe people learned this in "land claim settlements." Initially, we thought that the only kind of map that counted was one that showed "private land" and "Crown land." Instead, there are dozens of interests in Crown land. Traplines and hiking trails, prospecting rights and mining concessions; hydroelectric rights and easements; cottage leases and trappers' cabins; waste dumps and abandoned waste dumps; forest cutting licenses and land use permits; renewable energy licenses and historic sites; roads and canoe portages; bait fish licenses and summer camps; zoning by-laws and by-laws regulating activities. We learned that different provincial ministries evaluate and issue different kinds of permits. The federal government can also be deeply involved: who would have guessed that ducks and geese are federal, moose and deer are provincial, and fish are federal but are administered by Ontario under an 1890s agreement that nobody can find? We learned that a permit that transfers one thing – the right to build a mill, for example – can lead to other legally enforceable expectations (a right to cut enough timber around the mill to make it economically viable, for example). A fishing license issued for five years creates a legal expectation of renewal, because the holder has had to invest so heavily in equipment and compliance. Prospecting leads to staking, which leads to mining. Allocation of public resources leads to private rights and entitlements. We learned that some dispositions may seem to be limited in their area of impact, but carry with them large buffer zones; the extreme example is a nuclear reactor, with its ten-kilometre buffer zone where no dwellings may be located.

Some kinds of development have lasting impact on the land and its resources. A forest can take two or three generations to regenerate after it has been clear-cut for timber. Careless or superficial replanting will leave tree farms or plantations rather than functioning ecosystems; replanting overstory without understory leaves many animal species without habitat. Mining removes ore permanently, and inadequate remediation leaves environmental problems for generations to come. If taking the time to consult or accommodate means a delay, the balance of inconvenience favours that delay. The trees

will continue grow, and the minerals will stay in the earth while the consultation process is completed.[12] We owe it to our grandchildren to move prudently.

Making comprehensive lists is fraught with dangers, because we will certainly leave some things out, and underestimate the impact of others. Perhaps the best we can do to begin with is describe the *kinds* of dispositions we are concerned about, and give some examples, while warning that we are still learning, and the lists will become clearer and more complete over time. It may be equally useful, and easier, to make lists of the kinds of things that we do *not* need notice of, and do not want to be "consulted" about. Small transactions, private family transactions, and transactions that have no impact on the land or its resources are those we would not want or need to bring into our process.

> An established Aboriginal or treaty right is an Aboriginal right or treaty right that has been recognized expressly through treaties or the courts.
>
> An asserted Aboriginal or treaty right is an Aboriginal right or treaty right that has been asserted by an Aboriginal community, but has not been proven in court or included expressly in a treaty.
>
> Ontario Draft Guidelines for Ministries, 2007
> Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaties, pp. 6-7

We do not use the term "asserted rights." Some governments have used it so widely that it has left the public with the impression that Aboriginal and treaty rights are not real. Calling our carefully researched rights "asserted" is like claiming that "evolution is only a theory." Words are meaningful, and can be misused.

---

[12] Both the *Meares Island* and *Haida Nation* cases recognized the consequences of development without consultation in the face of powerful aboriginal rights. In *Haida*, the Supreme Court noted: "The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled."

The Thessalon First Nation has four distinct kinds of territory within which the Crown must consult about proposed developments. We can describe them clearly and succinctly. We have treaty hunting, fishing, and annuity rights in the entire Lake Huron watershed; we have special responsibilities to care for our traditional territory; we have a treaty reservation that is the subject of a powerful land claim; and we have a small reserve that we use and occupy intensively.

Treaty hunting and fishing rights are well established: they must be "accommodated." While the courts have not yet defined the concept fully, we understand it to mean that proposed undertakings must make room for these rights. The same is true of the treaty reservation. The claim to the 104 square miles of reservation land excluded from the 1852 survey engages the honour of the Crown. We believe Thessalon's rights in that land must be accommodated. Accommodation requires a different kind of conversation than consultation. It is not just a matter of moving a few notches along a spectrum.

a. The Lake Huron Watershed

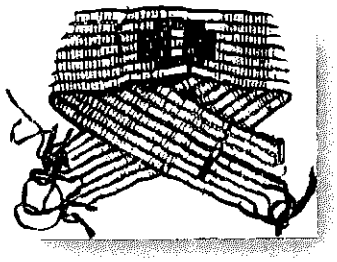
The Lake Huron Treaty of 1850 covers the northern part of the watershed of Lake Huron (on the Canadian side) and Georgian Bay. The participating Ojibway communities share the right to hunt and fish everywhere within this "treaty area."[13] The terms of the treaty document maintain the right to hunt and fish on all Crown land, and on all land sold or leased by the Crown to individuals or companies of individuals and occupied by them.

The watershed on the north shore of Lake Huron extends from Batchewana Bay on Lake Superior (the Batchewana Ojibways are part of the Lake Huron Treaty, and not the Lake

[13] In 1850, some of the Ojibway people around the lake had moved to Manitoulin Island. In every one of the five Manitoulin communities, there are people who share in Lake Huron Treaty rights. Thessalon was a participant in the 1836 Manitowaning Treaty, which set apart all the islands in Lake Huron as a home for all Indians who wished to reside there. We all have serious doubts about the validity of the 1862 transaction surrendering most of Manitoulin Island for sale.

Superior Treaty) up to the height of land between Lake Huron, Lake Superior, and Hudson's Bay. On the east, the treaty document states that the land affected is "as far east as is claimed by them" (speaking of the Lake Huron Ojibway people). Historically, this extends to the height of land between Georgian Bay and the Ottawa Valley, since the latter is the territory of the Algonquin Nation. The southern boundary of this territory is at Penetanguishene.[14]

Shared hunting and fishing rights predate the 1850 Treaty. They are covered by a treaty between indigenous nations from James Bay to Florida, from the Mississippi to the Atlantic. The metaphor of the land as a bowl of beaver tail stew with a single wooden spoon predates the arrival of Europeans. It means that the land feeds us all, and that we will not have disputes over hunting or fishing for food (knives, with their sharp edges, were not permitted in the symbolic bowl, because they might cut someone, and we must avoid bloodshed).[15]



The Dish with One Spoon Wampum Belt
(now kept at the Six Nations Grand River Territory)

[14] Ojibway communities in the 19th century tended to have an inland and lakeshore component. For the people of Wasauksing (Parry Island), its inland people were the Muskoka people, who lived at Port Carling. It is hard to set precise traditional boundaries at the south end of the Lake Huron treaty area.

[15] Ontario courts recognized the aboriginal right to share hunting grounds in two cases: *Shipman* [2007] ONCA 338 and *Meshake* [2007] ONCA 337. It is less clear how this metaphor extends to commercial fishing and trapping. Traditionally, these more intensive activities required that anyone entering the territory of another community should first seek permission before trapping or doing any commercial-scale fishing.

b. Thessalon's Traditional Territory

In 1849, Alexander Vidal[16] and Thomas Anderson[17] were appointed Crown commissioners to inquire into the rights of the Lake Huron and Lake Superior Ojibways. They concluded that the Ojibway people were indeed aboriginal to the territory, that they had not entered into any treaty surrendering their land rights, and that each band had its own well-defined territory. Their official report, dated December 5, 1849, provides a helpful explanation of the Ojibway tradition about community territories:

> The claim of the present occupants of this tract derived from their forefathers, who have from time immemorial hunted upon it, is unquestionably as good as that of any of the tribes who have received compensation for the cession of their rights in other parts of the province; and therefore entitles them to similar remuneration...
>
> [Each band] possessing an exclusive right to and control over its own hunting grounds; the limits of these grounds especially their frontages on the lake are generally well known and acknowledged by neighbouring bands; in two or three instances only, is there any difficulty in determining the precise boundary between adjoining tracts, there being in these cases a small portion of disputed territory to which two parties advance a claim.

The Chiefs of Thessalon described their traditional territory in 1847:

> The Chiefs told [Provincial Geologist Alexander] Murray that their Band's ancient territory had extended from the Paw-ka-sa-ka-se-gon (Echo) River on Lake George to the Grande Batture; and that the Thessalon River and chain of lakes beyond it were the highway to their hunting grounds.[18]

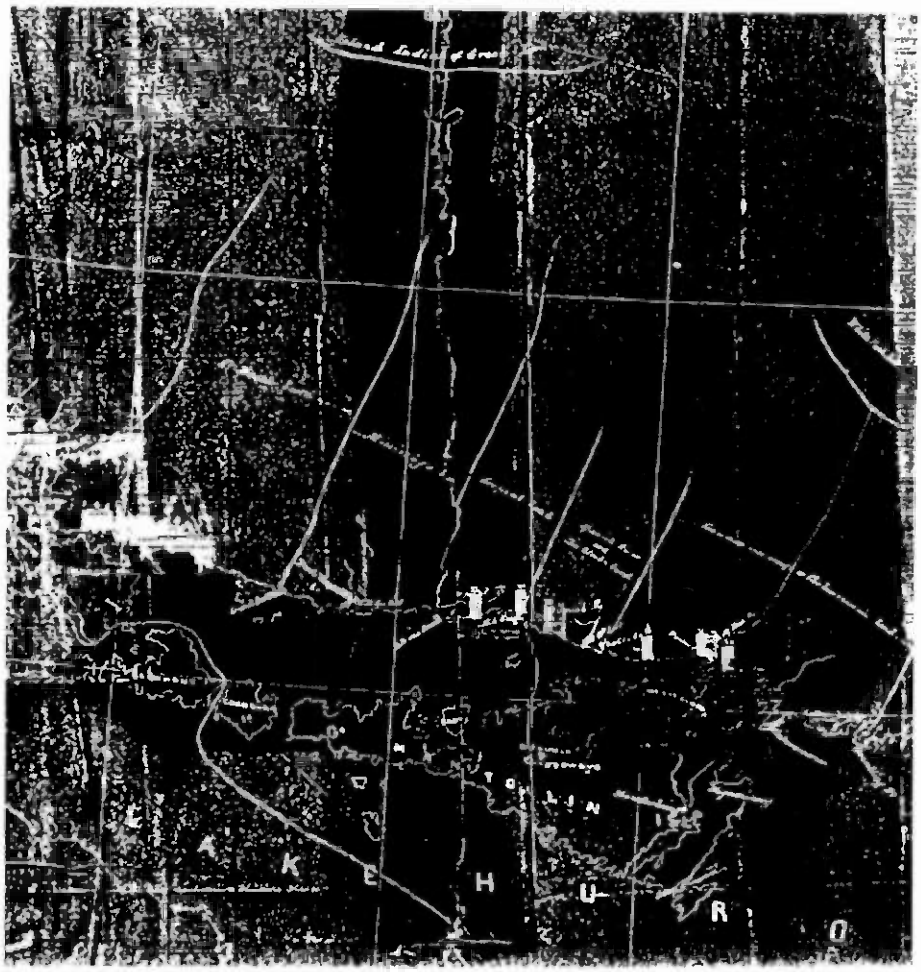
---

[16] Vidal was a land surveyor and banker. He had been chased out of Garden River in 1847 while attempting to survey a mining location within that Ojibway community's territory.

[17] Anderson was in his seventies. He had been an employee of the Imperial Indian Department for most of his life. His wife was Ojibway. His son Augustus was a missionary to the Ojibways at Garden River.

[18] *The Lake Huron Treaty of 1850*, James Morrison, for the Royal Commission on Aboriginal Peoples, Ottawa, 1994, citing NAC RG10 v. 168 p. 97701-02.

The eastern and western boundaries of Thessalon's traditional territory are also set out in the map that accompanied the Vidal-Anderson commission report.



Map attached to the Vidal-Anderson Commission Report. The traditional territory of Thessalon is labeled "St. Joseph Band" because of Thessalon's long and close connection with St. Joseph Island. According to oral tradition, the "inland Indians of Green Lake" are linked to the Mississauga First Nation.

Each Ojibway community has special authority and responsibility within its traditional territory. Where a community accepts and exercises that authority, Thessalon will acknowledge it. As our boundaries with our neighbours, Mississaugi to the east and Garden River to the west, are formally reaffirmed, the nature and scope of consultation and accommodation required along the North Shore of Lake Huron will become more precise.

c. The Thessalon Reservation

In its land provisions, the 1850 Lake Huron Treaty resembled earlier Ojibway land transactions between the Crown and the Ojibway people in southern Ontario. The Treaty provided that the Ojibway title to a large area was surrendered, while the Ojibway Chiefs and Bands made specific reservations that remained unsurrendered.[19] The the treaty document states that

> ...they the said Chiefs and Principal Men, on behalf of their respective Tribes and Bands, do hereby fully, freely, and voluntarily surrender, cede, grant, and convey unto Her Majesty, her heirs and successors for ever, all their right, title, and interest to and in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed, which reservations shall be held and occupied by the said Chiefs and their Tribes in common, for their own use and benefit.

While the Crown Treaty Commissioner, William Robinson, had told the Chiefs that they could retain "reasonable reservations,"[20] the task of writing down the description of the reservations was left to John Keating, who had been an Indian Agent in southern Ontario. This was significant: the Chiefs used the Ojibway word *tibadahgun* to describe the measure of distance they intended. They understood the word to mean a "league," a measure they had learned from French-Canadian voyageurs. A league is three miles long. But Keating, less familiar with local use of words, translated the word as a "mile." For most of the Lake Huron and Lake Superior reservations, the territory described in the treaty documents is one-ninth what the Chiefs had reserved at the time of the treaties.[21]

---

[19] This is different from post-1867 land treaties, which provided that all the land was surrendered, and that commissioners and surveyors would arrive later to set out the "reserves," usually on the basis of a formula linked to population. In those later treaties, the reserves were created when they were surveyed.

[20] Because the nature of title described in the 1850 Treaty is not the same as the terms of the definition of an "Indian reserve" in the *Indian Act*, we deliberately use the term "reservation" to describe the land reserved in the Treaty, especially because that is the word that is used in the Treaty itself.

[21] Thessalon's reservation, described as four by four miles in the document, was intended to be four by four leagues. Since a league is three miles, the difference is between twelve by twelve and four by four.

The Province of Canada sent John Dennis to survey the reservations in 1851.[22] He surveyed four reservations, but came into conflict with the Chiefs about two of them – the Chiefs wanted three times the lake frontage written in the treaty document, and Dennis was unwilling to diverge so significantly from the document.[23] The next year, the provincial Government sought to avoid the problems by sending John Keating to help with the surveys. Thessalon was the second reservation to be surveyed. At Thessalon, Keating and Dennis understood what had happened. Keating wrote:

> [At] Point Thessalon...the Indians were assembled to meet us, and insisted that they had intended Leagues not miles, that miles they knew nothing of and that they had already addressed Captain Ironside on the subject; which he had indeed mentioned to me. I was myself fully aware that such was the case. Mr. Dennis also knew that in all cases the distances are determined by voyageurs and we did not hesitate to extend the Reserve to meet their requirements in this I trust we shall have your approbation.[24]

In his final report to Colonel Robert Bruce, the Superintendent General of Indian Affairs, Keating wrote:

> ...Mr. Dennis and myself were satisfied...that in all cases where the word mile occurs the Indians intended leagues the only mode of measurement known to the Canadians from whom they have derived what knowledge they possess of distances. The word in their vernacular meaning simply a measure (Tiba e gaud). Assured however that the real intention of the Treaty was to give to the parties at

---

[22] As Dennis' survey party was leaving, the Governor General received a petition from the Chiefs of Point Grondine and the French River, accompanied by a pipe and a tobacco pouch. The Chiefs asked that the reservations be surveyed according to the locations they had described, rather than through the use of miles, a measure of distance "which is unknown to us."

[23] At a third reservation, Point Grondine, the Treaty document referred to "the small lake Nessinassung" as being within the reservation, and the only lake with a similar name, Lake Mahzenazing, would have been within the reservation had it been surveyed in leagues instead of miles. Chief Kicheposkissegun did not accompany the survey party inland. The claim has since been settled by Ontario and Canada.

[24] Public Archives of Ontario, A-1-1, Letters received, Vol. 66.

> the time of its execution the tracts they severally indicated, we thought ourselves bound to admit this interpretation when claimed. We therefore felt less difficulty in departing from the strict letter of description.[25]

John Dennis, the surveyor, wrote:

> [The Thessalon Ojibways] explained thro' Mr. Keating that at the Treaty the distance of four miles was entered for four leagues which they had intended, asserting that they did not know what a mile was. The French League being the only measure of length they ever refer to. As Mr. Keating was the gentleman who translated and wrote the descriptions on that occasion referred to - and is now satisfied that he misunderstood the word used by them to indicate the measure of length they desired - accordingly put that interpretation upon the Treaty.

Dennis sent his own official report to the Surveyor General. He confirmed the mistranslation in the treaty document, and that he and Keating had become aware of it at Thessalon:

> In the settling the outline of this reserve at this place the Band expressed much dissatisfaction with the size of the tract as set forth in the Treaty, declaring that it was the League they intended on that occasion as the measure of distance and that they were ignorant until informed afterwards what a mile was, and stated that if they were confined to the 4 miles frontage they would lose the sugar bushes of the Band. Mr. Keating upon this statement and recollecting that the League is the only Measure of length usually referred to in that Region expressed his conviction that in making the description of the tract reserved was had mistaken the term. We therefore gave the Band the frontage they desired and which proved to be about 10 miles.[26]

---

[25] Public Archives of Ontario, A-I-1, Letters received, Vol. 66.
[26] Ontario MNR Survey Records Field Note Book #828, 1853.

There are two profound problems with the 1852 survey of the Thessalon Reservation. First, while the lakeshore boundary was adjusted, it was only to ten miles, and not the twelve miles that a boundary in leagues would have been. We believe the ten miles represents the minimum the Chiefs were willing to accept in 1852, not the four-league (twelve mile) reservation that was made in 1850. The surveyors were not sent to engage in new negotiations with the Chiefs, they were to lay out the reservations the Chiefs had intended in 1850. We are convinced the Chiefs reserved the twelve miles along the lakeshore that was intended in the treaty making.

Second, and even less comprehensible, though the surveyors knew the Chiefs intended leagues and not miles, the eastern and western boundaries were surveyed as four miles rather than four leagues. The Chiefs got most of the lake frontage they desired, but not the inland area. At first we thought this was because the lead surveyors failed to notify a second survey party, which was responsible for the more difficult inland surveys. But the documents show that the decision to follow the mistranslated treaty document rather than the Chiefs' wishes was made by the lead survey party. There is no satisfactory explanation for this.

The result is three different descriptions of the Thessalon reservation. The treaty document describes a reservation of 16 square miles. The 1852 survey resulted in a reservation of 40 square miles. In the 1850 Treaty, the Chiefs in 1850 reserved 144 square miles.

In 1997, Thessalon formally notified the Crown of its position that the reservation is the land intended to be retained in 1850: *the claim covers 104 square miles.*[27] That is what we call "the Thessalon Reservation."

---

[27] After ten years of research and consideration, the federal government accepted the claim with respect to 60 square miles. It maintained that if the Chiefs were willing to accept ten rather than twelve miles along the lakeshore, then they must have intended ten rather than twelve miles inland, as well. Thessalon believes that the ten miles along the lakeshore were the result of unauthorized bargaining by the survey party. As for the inland lines, in 1850, Anishinaabe distances were generally calculated by how long they took to travel,

d. The Thessalon Reserve

The present Thessalon Reserve covers two square miles, not the 40 square miles that were surveyed in 1852. What happened?

In 1859, Richard Pennefather, the young Superintendent General of Indian Affairs, went to Sault Ste. Marie to distribute the Lake Huron Treaty annuity money to the communities of the north shore. At Batchewana, he handed out the annuity money and got the consent of the people he met to a surrender of the entire Batchewana Reservation. This "Pennefather Treaty" provided that all the Batchewana lands would be sold; the Batchewana Ojibways would receive the proceeds; and they would move to the Garden River reservation east of Sault Ste. Marie. The Garden River people were not consulted about the prospect of Batchewana people moving onto their land. The following day, Pennefather travelled to Garden River and handed out the annuity money there. He got a surrender of three-quarters of Garden River. The land was to be sold, and the Garden River Ojibways would get the proceeds. Pennefather did not tell the Batchewana people that the reservation they had agreed to move to had just become one-quarter the size it was when he had made his deal with them the day before, nor did he tell the Garden River people the Batchewana people were coming. The next day, Pennefather travelled to the mining location at Bruce Mines, and, after distributing the treaty annuity money, secured a surrender of the entire Thessalon reservation from the sixteen people he met, with an agreement that the Thessalon people would move to Garden River and receive the proceeds of the sale of their lands.

---

and inland travel was not the same as canoe travel along the lakeshore. The difference between twelve by twelve miles and ten by ten miles is 44 square miles. Negotiations began on the basis that the amount of land involved could be addressed at the negotiating table. Canada later changed its position on this, and the negotiations foundered. The Ontario government rejected the claim, without giving clear reasons. Why would the federal government accept a 60-square mile claim instead of 100 square miles? Because it considered the 40 square miles surveyed in 1852 to have been surrendered in 1859.

There are serious problems and issues with the three 1859 "Pennefather Treaties." The treaty party travelled by horse and buggy on difficult roads, going between Batchewana, Sault Ste. Marie, Garden River, and Bruce Mines in three days, while distributing the annuity money in each place. It is hard to believe there was any time left for meaningful negotiations. Bruce Mines is 25 kilometres from Thessalon. The meetings were called for the purpose of dispensing treaty money, not for a land surrender. In 1860, there was a petition from Thessalon: it stated that the Thessalon Ojibways knew nothing of the surrender and had not agreed to it; that the Métis had done it without their knowledge. More people signed the petition than there had been participants in the surrender. Of the surrender participants, at least two of the sixteen were from Manitoulin Island;[28] four were women[29] (women were not allowed to vote at that time).[30] There is no record of anyone from Thessalon moving to Garden River.[31]

The people of Thessalon continued to live in their fishing village at Thessalon Point. When that land was sold, in the 1880s, they petitioned for a reserve nearby, and two square miles was set aside in the more infertile, sandy eastern end of the surveyed, 40-square mile reserve. Some families lived on the Point until the 1950s.

We do not consider the 1859 transaction valid. We recognize that the present occupants of the land have been there for over a century, and that the land was bought in good faith from the Government of Canada. We respect their right to remain on the land. They are our neighbours. We are all here to stay. Our problems with the 1859 transaction have to be resolved with the federal and provincial governments. In doing so, we know we can count on our neighbours' support.

---

[28] Their names appear as Manitoulin residents in the 1860 Canada census.

[29] Their names ended in *–ekwe*, "woman," indicating that these were women's names.

[30] The law governing surrenders at the time required that the surrender meeting be conducted according to the Indians' rules.

[31] When Batchewana people sought to move onto Garden River, the Garden River people objected, saying that they had not agreed to this. The result was the creation of the small "Rankin Location," where many Batchewana Band now live. Some families stayed at Batchewana Bay. No similar location was established for Thessalon, because there is no record of Thessalon people moving to Garden River, or trying to.

2. Consultation and Accommodation in Each Category of Land

Thessalon's rights and claims are different in each of the four categories of land described above. The intensity of notification, consultation and accommodation is therefore also different for each kind of land.

Rather than seek to describe the specific nature of notification and consultation with respect to each of the four categories, we will describe in general terms what we expect to be consulted about, and the form the consultation should take, and we will leave the specifics of the consultation terms and classes to the attached draft agreement.

a) In the Lake Huron Treaty Territory:

Thessalon has two kinds of established treaty rights that must be accommodated. The first is the right to hunt and fish on all Crown land and all unoccupied private land. The second is the right to an annuity that is to increase in proportion to the provincial government's profits from the land. These are established, clear treaty rights. They are not "claims." They are not just the subject of "consultation." They are rights to be "accommodated."

While there have been several court decisions about the meaning of "consultation," there has been almost no guidance as to what "accommodate" means, legally. The Government of Alberta suggests that "accommodation can mean efforts to reconcile, adjust, or adapt. In that regard, it will be reflected in the regulatory approval process, which will take into account the efforts of project proponents to address First Nation concerns by making changes to plans and adjusting and adapting projects to minimize impacts."[32] The phrase "minimizing impact" comes from the Supreme Court of Canada's *Mikisew Cree* decision:

---

[32] Like other provincial governments, Alberta seeks to place the burden of consultation on project proponents rather than doing the work itself, as directed by the Supreme Court in *Haida*.

it seems to assume that projects ought to go ahead, even when they affect treaty rights, as long as the impact is minimized. There are no objective legal measurements for this yet.

A dictionary would define "accommodate" as "to fit in with the wishes or needs of." Having constitutionally recognized treaty rights, rights that the courts acknowledge were "bought dearly," we are entitled to have those rights protected, not interfered with. If a project would have serious impact on treaty rights, we have the right to prevent it from proceeding.[33] Accommodation is several degrees deeper than consultation, which in turn requires more engagement than notification.

In both *Sparrow* and *Delgam'uukw*, the Supreme Court of Canada suggested that treaty and aboriginal rights could be legally infringed, though a process of minimization, consultation, negotiation, and compensation would have to be followed. There seems to be an assumption that aboriginal rights can always be compensated for in economic terms. We do not share that assumption.

i) Impact on Game, Fish, and Hunting Grounds

Where a proposed undertaking could have any impact on game or fish populations, or result in the transfer into private hands and the occupation of a significant amount of land, Thessalon must be notified of the proposal at least one year in advance of any provincial or federal permits, licenses, or transfers. Where the proposed undertaking is to occur within the traditional territory of another Ojibway community, Thessalon will defer to that community's leadership and primary responsibility. If that community does not fulfill its responsibility, Thessalon, together with other treaty participant communities, may intervene.

---

[33] The combination of the industrial revolution and the rising middle class changed British society, creating a desire for "progress" that was assisted by the government and the courts. Where resources had been held by the Crown, or held as "commons," they were increasingly made available to entrepreneurs. United States law was transformed between 1780 and 1830 to serve industry. In Ontario, the "family compact" of the 1830s was the beginning of a partnership between business and government that has placed natural resources at the disposal of development ever since.

In 1850, the Ojibway people had an important commercial fishery on Lake Huron. They understood it was reserved to them by the treaty. Within ten years after the treaty, commercial fishing licenses were allocated to non-Ojibway fishermen. By twenty years after the treaty, the fisheries had been devastated. Some fish populations collapsed and have never fully recovered. By the early 20th century, most traditional Ojibway fishing methods, including using weirs and spearfishing, had become illegal. The Ojibway commercial fishery was destroyed. Ojibway food fishers were prosecuted until the 1980s.

The right to harvest game and fish cannot be separated from the duty to protect game and fish populations from destruction or over-exploitation. The treaty right to hunt and fish extends to a right to participate meaningfully in "management" decisions that will have an impact on game and fish populations. Naturally, it also extends to protecting habitat, and protecting the things that the animals and fish live with and upon.

ii) Provincial Profits from the Territory

In the 1850 treaty negotiations, Chief Shingwaukonse of Garden River asked that the land be sold, and that the Ojibway people should receive the proceeds. Commissioner William Robinson replied that the land was "notoriously barren and sterile" and would in all probability never be sold. He proposed instead an annuity that would increase in direct proportion to the provincial government's profits from the land, which he anticipated would come from lumber and mining operations. Robinson was right. Most of the land of the watershed has never been sold. Instead, the watershed of Lake Huron is an area of "Crown land," subject to vast timber licenses for the lumber industry and mining licenses that support lucrative exploitation of nickel, copper, gold, and other minerals.

The 1850 treaty was made with the United Province of Canada, which existed between 1840 and 1867. In 1867, the Dominion of Canada was created as a federal entity. According to the 1867 Constitution Act, the federal Parliament has exclusive authority to make laws about "Indians, and lands reserved for Indians," while the Crown in right of the provinces has ownership of all the land and natural resources in the provinces (subject to existing trust and interests other than those of the Crown). The result was litigation over which level of government, federal or provincial, was responsible for the annuity payments to the Lake Huron Ojibways. The matter was resolved by the Law Lords of the Privy Council in England. The federal government had to pay the annuity, including any increases. But the amount of the annuity was to be determined by reference to the provincial government's profits from the land.

The annuity has been $4.00 since the 1880s. Its value has been eroded by inflation. It has never been connected with Ontario's profits from the land, and it has not afforded the Ojibway people any participation in the prosperity that resulted from opening the land to logging and mining. The Crown, in its discretion, could easily have increased the annuity. It chose not to do so.

The Ojibway people were not parties to the court cases. Instead, the argument was between two levels of Canadian government over which of them was *least* responsible for fulfilling the terms of the treaty. The Supreme Court of Canada noted this. As one of the judges wrote,

> ...had the rights of the Indians been in question here—did that depend on some difficult question of construction or upon some ambiguity of language—courts should make every possible intendment in their favour and to that end. They would with the consent of the Crown and of all of our governments strain to their utmost all ordinary rules of construction or principles of law—the governing motive being that in all questions between Her Majesty and "Her faithful Indian allies" there must be on her part, and on the part of those who represent her, not only good faith, but more, there must not only be justice, but generosity. The wards of the nation must have the fullest benefit of every possible doubt.[34]

The federal government would not be able to fulfill its obligations concerning the treaty annuities unless it has information about the provincial government's profits from the territory. Nor can the spirit of the treaty be fulfilled unless the provincial government ensures that there are reasonable profits collected by the Crown. Thessalon expects the Government of Ontario, in any notification of a proposed development in the Lake Huron Treaty territory, to provide information on the projected provincial government profits from the undertaking. Information should also be provided about the timing and nature of the province's communications with the Government of Canada about these profits.

> Implementation, in the way of human affairs, may be imperfect. However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise. [Manitoba Metis]

[34] *Province of Ontario v. The Dominion of Canada and the Province of Quebec*, [1895] SCR.

b) In Thessalon's Traditional Territory

Thessalon's traditional territory is the area where Thessalon has special responsibilities to protect the land and its ecosystem. For fisheries purposes, for example, Thessalon would be responsible to ensure that developments would not injure habitat. Thessalon would take the lead in consultations about possible impacts of resource development on treaty rights. Thessalon would expect other Lake Huron Treaty Anishinaabe communities to defer to that primary responsibility.

In pragmatic terms, this means that where Thessalon would expect relatively simple notification of proposals in the Lake Huron and Georgian Bay watershed (the Lake Huron Treaty area), Thessalon would expect more detailed descriptions proposals in the traditional territory, and would seek additional specific information on significant projects or changes.

Thessalon has a relatively small population and a large traditional territory. More than half our people live away from the Reserve. In the days when we lived by hunting, fishing, and trapping, a band of about 60 people would require about 100 square miles to support themselves. We would use the land extensively, partly because different areas support different activities (maple sugar bushes, fish spawning areas, and deer yards are some examples), and partly because we would not want to damage the ecosystem by overintensive use (for example, records of the 19th century show a deliberate effort to maintain sustainable harvests of beavers). Preliminary surveys of our use of the territory show extensive fishing by our people, and, in our season, extensive hunting efforts. We know our land, and we continue to use it, live from it, and care for it. There should be no thought that we have abandoned anything.

Some species have become scarce or extinct. Sturgeon are threatened: we avoid taking them. Elk were exterminated by settlers by the late 1800s. We would welcome and participate in their reintroduction. Yet it is not fishing or hunting for particular species that is the treaty right, it is fishing and hunting itself. The courts have said our hunting and fishing was "opportunistic." In a harsh climate, in difficult territory, we survived by taking what was available. That we are not exploiting a particular species today does not mean that we have given up on it. As our population expands, as the climate changes, as our needs change, we may find that we take up those harvests again, or expand them. One important path for us is to protect species that have become rare or endangered, as part of our responsibility for the land and to our own future generations.

c) In the Thessalon Reservation

Canadian courts have described land in which there is aboriginal title as places in which the indigenous people have exercised a right to exclude other people, akin to "modern common law fee simple title." Our ancestors would not have understood this in terms of English feudal law. They would have understood, simply, *ndakimenan*, "this is our land."

With respect to any proposal to develop land, or to dispose of land or rights within the boundaries of the Thessalon Reservation, we expect detailed notices and explanations. We expect the same level of detail as if someone approached a landowner in town with a proposal to do things on his land. We expect to be able, on the basis of that information, to decide whether to actively oppose the proposal, or whether there is enough benefit in it – for us and for the land – to allow it to proceed.

The federal government – the government with exclusive legislative and administrative responsibility for "lands reserved for Indians" – has told us that, for the purpose of negotiations, it considers 60 square miles of our 104 square mile northern reservation to

be "lands reserved for Indians" as that term is defined in the *Constitution Act, 1867.* Canada has accepted the claim for negotiation and settlement.

As of mid-2013, the Government of Ontario has not accepted any part of the claim made by Thessalon. This creates an unusual situation: is the claim "established," since Canada recognizes it, or merely "asserted," because Ontario has rejected it? To be consistent with the honour of the Crown, can Ontario ignore Canada's conclusions? Can the two levels of government maintain different levels of consultation and accommodation? From Thessalon's perspective, the provincial government should follow the lead of the federal government in this matter.

This reservation is our land. We do not have to ask for any permission, approval or license to engage in the development of our own land, or to make laws that govern the use of our land. Our relationship with the Crown's governments with respect to our land is governed by our treaties at Niagara in 1764 and Sault Ste. Marie in 1850.

> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. . . . (Haida Nation).

Some things we may do will affect our neighbours. For that reason we will provide notice to the Government of Ontario, where neighbouring Crown land could be affected, and to the Municipality of Huron Shores and the Town of Thessalon, where lands within their boundaries could be affected. Unless we agree otherwise, notice and information from us will come in the same form, at the same time, and with the same content as notice and information from federal, provincial or municipal governments proposing legislation, policies, or undertakings affecting our reservation.

There is not yet agreement between Thessalon and the Crown about the reservation. Any disposition of resources and especially of land title within the reservation would make the eventual settlement of the "claim" more difficult.

For example, if Ontario sold a cottage lot on an interior lake, the province may later insist that the landowner must have guaranteed road access to the cottage. Claim negotiations would then have to address the cost of maintaining the road and the issue of jurisdiction over the road. The federal and provincial governments might insist that Thessalon provide assurances in the settlement that the cottage owner would not suffer a loss in value of the cottage. A new waste dump within the reservation could be an environmental obstacle to the federal government recognizing the land as a reserve under its "additions to reserves policy." The more land and resource dispositions there are, the more the provincial government could adopt the position that the land is no longer "available" as Indian land at all. The most effective way to avoid these problems is for Ontario to withdraw the reservation lands from all disposition until the claim is resolved. This would also do away with most requirements for consultation or accommodation concerning the reservation lands.

e) In the Thessalon Indian Reserve

According to Canadian law, the use of land in an Indian reserve is a matter of exclusive federal jurisdiction. Land use planning, allocation and zoning, and the regulation of dozens of uses and activities (ranging from bee-keeping and poultry raising to the preservation, protection and management of fish and game) are subject to regulations and by-laws made pursuant to the *Indian Act*. Provincial land use laws simply do not apply.

Undertakings near Thessalon land can have a significant impact on the land itself, and on the enjoyment that people derive from it. The several quarries that line the road along the Thessalon Reserve's northern boundary would not have been allowed beside a residential neighbourhood in a municipality.

The notice required by Thessalon with respect to nearby undertakings should be the same as an adjacent municipality receives under provincial law.

As stated above, Thessalon would provide the Municipality of Huron Shores and the Town of Thessalon with notice of its proposed developments in the same way.

3. The Consultation Process

Consultation about specific proposed projects is quite different in nature from consultation about proposed changes to laws and policies.

We mentioned our approach to understanding natural ecosystems; among other things, we seek to define their boundaries. With respect to a specific project proposal, the boundaries of the territory affected can be drawn on a map. With respect to laws and policies, the boundaries are harder to depict.

Consultation and, where required, accommodation is also an aspect of the creation of policies and laws. The earlier in the process consultation takes place, the more effective it will be, and the less disagreement will result. We suggest consultations about possible changes in policies should begin with an invitation describing, in general terms, the existing policy, the perceived need for change, and the kind of change proposed. The later in the policy development we become involved, the more entrenched the proponents of change may become, and the more they will seek to defend their views rather than engage in an open conversation about the impact of the changes. We still recall the process of 1968-1969, in which Minister Without Portfolio Robert Andras crossed Canada, meeting with Chiefs, all of whom indicated a desire to implement the treaties in a way that would support indigenous self-government and the continuation of indigenous cultures. This was followed in short order in 1969 by a White Paper that proposed the abolition of Indian status, the privatization of reserves, and the assimilation of the people.

The 1969 White Paper galvanized opposition to the federal government's policies, but it was also a lesson ill-learned: a lack of partnership in creating policy or legislative change fosters anger and difficulty.

> Unilateral Crown action...not only ignores the mutual promises of the treaty, both written and oral, but also is the antithesis of reconciliation and mutual respect. (Mikisew Cree)

The six-year process involved in producing the report of the Royal Commission on Aboriginal Peoples in 1994 taught an apparently opposite lesson. There was a great deal of consultation and forethought involved. The report was comprehensive and reflective. It made dozens of recommendations, including a twenty-year plan for fundamentally changing the existing relationship between the Crown and Aboriginal peoples. Almost all of the Commission's recommendations were ignored. Once again, consultation produced a result far different from the expressed wishes of the people who had been consulted.

In contrast, the changes to the *Indian Act* tucked away in the 2012 and 2013 budget bills were not the subject of extensive consultation, and there was no time allotted for comment on them while the law was passed.

We need to know whether a document or notice we receive, or a meeting we have, is part of an official consultation process. In one instance, we wrote to a provincial agency, stating that the paltry information we had received, and the minimal opportunity we had been given to comment on the proposal, should not be considered to be "consultation." In reply, we received a letter indicating that our comments would be added to the agency's file of its consultations with us!

Sometimes we are invited to take part in a public consultation process, as "stakeholders." Where treaty rights are involved, or where the process is conducted by the proponent, we consider this inappropriate. We need a conversation with our treaty partner, the Crown, without intermediaries. We do not want our government-to-government relationship

diluted as a result of our being classed among individuals. No matter how legitimate their stake might be, theirs is not the same as ours. While we may welcome the opportunity to participate in public information sessions, we also assert the right to be informed directly and completely.

While we may choose to join in an environmental assessment process, generally we do not believe that process was designed to accommodate treaty and aboriginal rights. The mandate of environmental review boards does not mention them expressly, and the boards typically view these issues as federal concerns.

a) Identifying the People Involved

Our treaty relationship requires clear paths of communication. That includes recognizing one another's humanity. Quite simply, we need to know each other. In our tradition, we say we need to see your faces, and take you by the hand. As much as possible, we want to meet our counterparts well before we begin to discuss specific undertakings and specific locations, so our relationship can be guided by our humanity, not dictated by the issues. Knowing one another as people helps us avoid positional, adversarial stances.

If we have no agreement with a federal, provincial, or municipal government, the official route to notification is through the Chief. In the absence of a modern agreement, we fall back on the provisions of our treaties, especially the 1764 Niagara agreement. We would notify both the relevant Minister or Mayor, as well as – because of the Treaty relationship – the Governor General, Lieutenant Governor, and Superintendent General of Indian Affairs. However, we recognize that the Chief is both busy and mainly concerned with political matters;[35] that addressing Ministers is not the most efficient way to deal with the

[35] A classic example of how consultation should not happen, in our view, is set out in the *Hiawatha First Nation* court case. Several Chiefs were sent letters about a proposed process for dealing with archaeological sites in the Pickering area. Few of them testified that they had seen or received them. The consultations were being carried out on behalf of the landholder, the Ontario Realty Corporation, through the consulting engineers they had hired, who in turn had hired a large archaeological company, which in turn had hired

federal and provincial governments; and that Her Majesty's personal representatives fulfill mainly ceremonial functions in modern Canada. The absence of an agreement makes notification and notice less efficient and effective.

Our draft agreement provides for communication between designated representatives.

b) Timelines

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met. (Mikisew Cree)

The first event in the consultation process is notice. In principle, notice should be sufficient to allow Thessalon to evaluate the proposal and determine the extent of consultation required. The time afforded to Thessalon must be adequate for the consultation process to work. The more complex the undertaking or policy, or the greater its potential impact, the longer Thessalon should have to consider it. If Thessalon has to engage experts to review a proposal, the time required to find and hire the experts should also be taken into reasonable account.

Diligence requires more than simply the absence of bad faith. [Manitoba Métis]

The sooner notice is provided, the more likely it is that consultation and accommodation will become a part of a planning process useful to all parties, rather than an obstacle. Archaeology is a good example: where archaeological work is conducted well in advance of construction, plans can be changed to accommodate prior burials, but where archaeological work takes place just before construction, accommodation becomes more difficult and more expensive.

In practice, where an application is received for any license or development, we would expect notification of the application within two weeks after the document is received by the government agency, Department, or Ministry involved.

---

two individuals, who then purported to be the founders of an "aboriginal consulting circle." In this case, delegation went far too far, and notification of the Chiefs by letter fell far short of being effective.

In practice, we also believe it is most convenient that, where a provincial statute requires that notice be provided to a municipal government or to a designated individual or body, the same form of notice should be provided at the same time to Thessalon.

c) Content

The most minimal notification would include:

- a short description of the proposal;
- a description of the location and the amount of land involved and affected;
- a map of the same;
- an indication of the authority under which the proposal would proceed;
- dates for the performance of various parts of the proposal, including dates for hearings and decisions;
- the name of the proponent;
- the duration of the proposed project;
- the individuals in the Ministry designated to deal with matters of consultation (and their title, address, telephone number and e-mail).

It would be helpful, even at this minimal level, if the notice were to include a list of the documents and studies available in connection with the proposal. It would also help if there were some communication of the government's preliminary or staff view of possible adverse impacts of the proposal.

The Ontario *Environmental Bill of Rights* defines "adverse impact." It lists eight kinds of such impact. Three of them involve damage to property or rendering property unfit for human use. Several involve human use of the environment, or the conduct of business. Three involve harm to persons, or impact on their health or safety. It is worth defining what "adverse impact" means: where the Crown is aware of potential adverse impacts, it should let us know about them when it provides us with notification. We would add a

couple of provisions: injury or damage to plant or animal habitat; adverse effects on animal or plant health; rendering any plant or animal unfit for use by other animals or plants dependent upon them.

Where the Crown is aware of the potential release of a contaminant into the environment as a result of the implementation of a proposal, it should provide that information at the time it gives notice of the proposal.[36]

The invitation to consult about the development of a policy (as distinct from a site-specific proposal) should be accompanied by copies of existing policies and of any studies undertaken that could explain the basis of the proposed changes.

As additional information, studies, submissions and reviews become available, notice of their existence should be communicated to Thessalon except where Thessalon has indicated that it is satisfied with the notification it has received and needs no further information or consultation.

> Every case must be approached individually. Each must also be approached flexibly, since the level of consultation may change as the process goes on and new information comes to light. [Haida]

[36] The Ontario *Environmental Bill of Rights* defines "contaminant" as "any solid, liquid, gas, odour, heart, sound, vibration, radiation, or combination of any of them resulting directly or indirectly from human activities that causes or may cause an adverse effect."

d) What happens when Thessalon responds?

The framework agreement will provide Thessalon with a general address to which to send consultation responses. The notice of the proposal will identify a specific individual to whom responses should be directed. Thessalon should send its response to both places.

Thessalon's response will generally set out its understanding of the proposed project or policy change, an assessment of the possible impact on Thessalon's interests and lands, and specific recommendations.

If there is a timeline for Thessalon to reply to a provincial notice, then there should also be a timeline for the provincial government's reaction and response to Thessalon's reply.

Thessalon's response may indicate a desire to meet and discuss the issues and recommendations. It may indicate that there is need for further clarification of some aspects of the proposal. A request for a meeting, from either party, should not be denied.

Replies to a consultation response may include a letter indicating the government's actions or reactions to the specific recommendations, with statements showing how the recommendations have been "seriously considered and...demonstrably integrated into the proposed plan of action," or reasons why the recommendation was not implemented. They may include a request for a meeting to discuss the response.

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. (Halfway River and Mikisew Cree).

One way to conclude a consultation process – provided for in the general agreement – is to have a signed agreement, indicating that there is no need for further consultation or

accommodation on the proposal. The agreement may also provide for future consultations when the proposal reaches specific stages: a meeting to discuss the use of local materials in a road when the road reaches the detail design stage, for example. The agreement may also set out mutually agreed-upon principles to be used as the proposal or project proceeds.

e) What happens if Thessalon fails to respond?

Consultation is a two-way street. Once we have been properly notified of a proposed undertaking, policy change, or law, our general agreement should set out a time by which we should respond. However, the deeper and more complex the issues, the more time we will need to fully respond.

There is a parallel in Ontario's court processes. The initial response to a Statement of Claim is not a Statement of Defence, but a preliminary document called a Notice of Intent to Appear. This notice brings the court process to life, and the defendant then has a specific time – which can be extended by the court – to prepare a Statement of Defence.

Where Thessalon is properly notified of a proposal, it should reply to the notice within one month. If it fails to do so, Ontario should be entitled to conclude that Thessalon has no interest in the matter, and the consultation process should be considered at an end.

The initial reply need not be a complete reply to all elements of the proposal. In most cases, it will confirm that Thessalon wishes to engage in an agreed-upon process of consultation about the proposal. The scope and depth of the consultation will be determined by factors set out in the general consultation framework agreement: the geographic proximity of the proposal, and its possible impact on Thessalon's rights, interests and property.

Michael Robinson
Beyond the Forest Wall

The attitude in Indian country was essentially one of respect,
and the question was, How do we actually live that out?
If you read a lot of the literature from Columbus' arrival until now,
you see that the Indians were constantly imploring the Europeans
to rethink their relationship with nature.
"You've got it wrong," we said. "You've got to be fair."
But the European answer was to find the best possible outcome for themselves,
which is, "I make money." And that's more or less still where it is.

Sotsisowah John Mohawk
Paradigm Wars, 2006

4. Draft Consultation Framework Agreement

This sample agreement has been drafted as if the Ontario Ministry of Natural Resources was the principal Ontario government partner for Thessalon in consultations.

Many Ontario ministries and agencies are involved in dealing with land and resources. To consult with them all, we would need agreements with the Ministries of Transportation (for roads); Energy and the Ontario Energy Board (for hydroelectric development and transmission lines); Northern Development and Mines (for mining); the Municipal Affairs (over land use issues in organized territory); Environment, Culture (for archaeology and the protection of sacred places); Government Services (about cemeteries); and several administrative tribunals. The Ministry of Aboriginal Affairs informs all the other ministries about aboriginal issues, but does not take the lead in consultations.

Do we want a dozen consultation agreements? Do we want to deal with a dozen provincial ministries? It would make our work much more complicated. But this is Ontario's structure. It is not going to change just for us. If we need a dozen agreements to make our process effective, we hope that the agreements will at least be compatible with one another.

This Agreement is between

The Thessalon First Nation
("Thessalon")

-and-

Her Majesty the Queen in Right of Ontario
As represented by the Minister of Natural Resources
("Ontario")

Background

Historic Treaty relations and modern Canadian law provide that, where either the Crown or an Anishinaabe community like Thessalon propose to engage in the development of land or resources, or the development of new policies or laws that could affect the other party to the Treaty, they should engage in a respectful and meaningful process of consultation.

Since legal requirements of consultation and accommodation of aboriginal and treaty rights have become deeper and clearer, both the Crown and Thessalon want to agree upon a process to enable them to fulfill their obligations. The Treaty relationship between the Crown and the Thessalon First Nation impels us to do more than the legally required minimum. Meaningful consultation is a respectful conversation that should be helpful to all sides of a matter. The purpose of this agreement is to identify and set out the terms and processes that will govern consultation and accommodation between the governments of Thessalon and Ontario.

Shared Principles

An important aspect of this agreement is to seek to ensure, through consultation and accommodation, that Thessalon's rights and claims are not adversely affected by any laws, policies, or initiatives made by Ontario, or any proposals approved by Ontario. Where there will be adverse effects, we will seek to mitigate or minimize them. We also share fundamental values concerning the natural environment and our historic relationship. This agreement provides opportunities for Thessalon and Ontario to collaborate in considering the following:

(a) the prevention, reduction and elimination of the use, generation and release of pollutants that are a threat to the integrity of the environment.
(b) The protection and conservation of biological, ecological and genetic diversity.
(c) The protection and conservation of natural resources, including plant life, animal life, and ecological systems.
(d) The encouragement of wise management of our natural resources, including plant life, animal life, and ecological systems.
(e) The identification, protection and conservation of ecologically sensitive areas or processes.[37]
(f) Respect for indigenous knowledge, culture and traditional practices to contribute to the sustainable and equitable development and management of the environment.
(g) Respect for Thessalon's right to maintain and protect past, present and future manifestations of Anishinaabe culture, including archaeological and historical sites.
(h) Thessalon's right to traditional medicines and to maintain its health practices, including the conservation of vital medicinal plants, animals and minerals.
(i) Thessalon's right to maintain and strengthen its distinctive spiritual relationship with its traditional lands, territories, waters and other resources and to uphold its responsibilities to future generations in this regard.[38]

---

[37] This part of the list comes from the Ontario *Environmental Bill of Rights.*

[38] These goals are paraphrased from the *U.N. Declaration of the Rights of Indigenous Peoples.*

Definitions

"Contact Information" about an individual, means the telephone number, fax number, mailing address and e-mail address at which that individual can be reached during working hours.

"Council" means the Council of the Thessalon First Nation.

"District Manager" means the District Manager of the Ministry of Natural Resources Sault Ste. Marie District.

"Environment" includes air, land, water, plant life, animal life and ecological systems.[39]

"Hearing" includes a proceeding before a board, tribunal, court or any other decision-making body appointed pursuant to a Statute.

"Instrument" means any document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued under an Act, but does not include a regulation.

"Land" includes any estate, term, easement, right or interest in, to, over or affecting land, including aboriginal rights, treaty rights, aboriginal title and title protected by Treaty.

"Policy" means a program, plan or objective and includes guidelines or criteria to be used in making decisions about the issuance, amendment or revocation of instruments, but does not include an Act, regulation or instrument.

"Proposal" includes a proposed Policy, Statute, Instrument or private or public undertaking, including any proposed disposition of rights or resources.[40]

"Reservation" means the area of land asserted by Thessalon to be the reservation made by the Chiefs in the Lake Huron Treaty of 1850, measuring twelve miles by twelve miles, not including an area of forty square miles covered by the 1859 "Pennefather" transaction, and not including the Reserve, as described in the sketch that is Appendix "A" to this Agreement.

---

[39] There are much more involved definitions: the Ontario *Environmental Assessment Act* defines "environment" as (a) air, land or water; (b) plant and animal life, including human life; (c) the social, economic and cultural conditions that influence the life of humans or a community, (d) any building, structure, machine or other device or thing made by humans; (e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities; or (f) any part or combination of the foregoing and the interrelationships between them.

[40] The *Environmental Assessment Act* includes owners and "persons having charge, management or control of an undertaking" as "proponents".

"Reserve" means the Thessalon Indian Reserve, set apart by the Government of Canada in 1881, as described in Appendix "B" to this Agreement.

"Restoration Plan," in respect of a Proposal, means a plan that provides for the prevention, diminution or elimination of adverse effects of the proposal, and the restoration of all forms of life, physical conditions, the natural environment and other things affected by the Proposal, and the restoration of all uses, including enjoyment, of the resources affected by the Proposal, in a reasonable, practical and ecologically sound manner.

"Statute" means an Act or Regulation as defined in the Ontario *Legislation Act, 2006.*

"Traditional territory" means the area for which the Thessalon First Nation has special authority and responsibility as between Anishinaabe communities, as recognized in the report of Commissioners Vidal and Anderson in 1849, and as described in the map which is Appendix "C" to this Agreement.

"Treaty" includes the Niagara Congress of 1764, the Manitowaning Treaty of 1836 and the Lake Huron Treaty of 1850.

"Treaty Territory" is the area covered by the Lake Huron Treaty of September 9, 1850, described as the watershed of Lake Huron and Georgian Bay, from Batchewana Bay to Penetanguishene.

"Waters" means a well, lake, river, pond, stream, reservoir, artificial watercourse, intermittent watercourse, ground water or other waters or watercourses.

Kinds of Proposal

There is a spectrum of consultation and accommodation with respect to proposals that could affect Thessalon's rights and claims. The following types of Proposal reflect the factors of geographic closeness, intensity of Thessalon rights, and seriousness of potential impact on those rights that define the scope and depth of the consultations and accommodations.

An Exempt Proposal is one that requires neither notice nor consultation. Exempt proposals include:

a) Private land sales;
b) The subdivision of a parcel of land held in fee simple into two lots;
c) Renewal of a Crown cottage or recreational land lease in a location outside the Reservation;
d) Deeds of parcels of Crown land under five hectares in a location outside the Reservation;
e) Renewal of a permit for sustainable energy generation;

A Class I Proposal requires notification to Thessalon as provided in this Agreement. A Class I Proposal will not require further consultation unless Thessalon requests it in writing. Class I proposals include:

A Class II Proposal requires

- Includes an application to use, operate, enlarge, establish, alter, or extend a waste management system or a waste disposal site (as defined in the Ontario *Environmental Protection Act*) in the Traditional Territory or the Reservation.
- A proposal to take more than 30,000 litres a day from any waters in Thessalon's Traditional Territory, Reservation or Reserve.

- A proposal to construct, widen, improve or extend a road, railway or other system of communications.
- A proposal to construct or significantly modify a hydroelectric transmission line.

A Class III Proposal is any proposal for the disposition of land or the right to use or occupy land, mineral rights (including prospecting and exploration licenses), timber rights, fishing rights, water rights, or for the construction or modification of any public work, within the Reservation, but does not include an Exempt Proposal.

In determining whether a Proposal could, if implemented, have a significant effect on Thessalon's rights or claims, the following factors shall be considered:

(a) the extent and nature of the measures that might be required to mitigate or prevent any harm to Thessalon's rights or claims that could result from a decision whether or not to implement the Proposal.

(b) The geographic extent of any harm to Thessalon's rights or claims that could result from a decision whether or not to implement the Proposal.

(c) The nature of Thessalon's interests, as well as private and public interests, involved in the decision whether or not to implement the Proposal.[41]

[41] Adapted from the Ontario *Environmental Bill of Rights*.

Contents of Notices:

a) Exempt Proposal:

No notice shall be required to be given by Ontario to Thessalon in respect of an Exempt Proposal.

b) Class I Proposal:

Ontario shall provide Thessalon with ninety days' notice of a Class I Undertaking. This notice shall consist of:

1) The title (if any) of the Proposal.
2) A concise, clear description of the nature and objectives of the Proposal.
3) A description of the statutory authorization for the Proposal.
4) A description of the location of the Proposal, in both written and map form.
5) What information is available
6) When any disposition is proposed to take place
7) A description of Ontario's consideration of potential impacts on Thessalon's Treaty or aboriginal rights
8) Contact information for the designated individuals responsible for consultation or accommodation with respect to the Proposal.

c) Class II Proposal

In addition to the information to be provided with respect to a Class I Proposal, Ontario shall provide the following to Thessalon with respect to a Class II Proposal:

- Copies of Restoration Plans associated with the Proposal.
- Copies of any studies or assessments conducted by the proponent, the provincial government, or third parties relevant to the proposal and in the possession of Ontario.
- Where the Proposal includes a proposal to take more than 30,000 litres of water per day, or where the Proposal involves the potential impairment of any waters, Thessalon shall receive from Ontario full notice of any hearing

pursuant to the *Ontario Water Resources Act* and Ontario shall support Thessalon's right to be a party to the hearing.

d) Class III Proposal

In addition to providing Thessalon with all the information required in respect of a Class II proposal, Ontario will seek to meet with Thessalon within ten days after notice of a Class III proposal is delivered.

Thessalon's Response

Thessalon will respond to a proposal within one month of receiving it. The initial response may be:

a) notice that Thessalon intends to engage in a full consultation process,

b) a request for additional information or time for Thessalon to determine whether it will seek a full consultation process,

c) recommendations for conditions with respect to the proposal, or

d) notice that Thessalon is satisfied with the initial notification and does not require more information or consultation.

Where Thessalon has requested additional information or time, the parties will agree on a timeline based on the nature and complexity of the proposal, Thessalon's need to consult with its citizens and neighbours, and existing statutory timeframes. The time required may also be affected by whether Thessalon has the financial and human resources to carry out the necessary evaluation and work.

Failure to Respond

If Thessalon does not respond to a notification within a month after receiving it, Ontario will be considered to have discharged its duty to consult with Thessalon.

The Full Consultation Process

Where Thessalon has requested full consultation with respect to a proposal, that process will consist of the following elements and steps:

a) Ontario and Thessalon will agree upon the content and purpose of the process, the financial and other resources required by Thessalon, and a schedule for the preparation of materials and consultation meetings.
b) Ontario will provide Thessalon with all information in its possession relevant to the proposal, subject to its privilege and Ontario's privacy legislation.
c) Thessalon will obtain such technical and professional advice as will assist it to fully review the impact of the proposal on Thessalon's rights and interests, and to participate effectively in the consultation process.
d) Thessalon will conduct a preliminary assessment of the potential adverse impacts and may at this point informally meet with Ontario to identify those impacts and any issues or concerns about them. Thessalon may, before this meeting, prepare and present a preliminary report on the proposal.
e) Considering Ontario's preliminary responses and any additional information provided, Thessalon will prepare a full and final report, including recommendations for steps to be taken to prevent adverse impacts, or to minimize, mitigate, or compensate for them.
f) Ontario and Thessalon will hold a formal meeting to discuss Thessalon's report and recommendations, and will together seek alternatives and formulate means to address Thessalon's concerns. If the parties agree, the proponent may be invited to participate in this meeting, or in a subsequent meeting for the same purpose.
g) Ontario and Thessalon may include legal advice and representation at any stage of the process, as they consider appropriate. Ontario may choose to invite and involve participation of several Ministries. The parties may invite the participation of neighbouring municipalities.

h) The informal and formal meetings will be held in person, in Thessalon or such other location as the parties agree. Other communications may be by teleconference.

i) There shall be no official record or minutes of meetings, but at the end of each meeting, Ontario and Thessalon representatives will initial a summary of the matters about which there was agreement during the meeting, and of the next steps that they have agreed should be taken.

j) The result of the formal meeting may be a written agreement in which Ontario and Thessalon set out their agreements on principles with respect to the proposal, the matters on which there is general agreement but which will be discussed in greater detail at a later stage of the proposal, and matters about which there is not yet agreement, and steps agreed upon with respect to those matters.

k) Ontario will carefully consider each of the matters that remain unresolved after the meetings, and will make its decisions taking into account Thessalon's concerns and the honour of the Crown. With respect to each expressed concern or recommendation, Ontario will indicate what measures or decisions it has taken, and will demonstrate how it has taken Thessalon's concerns into account, including the reasons why it may not have accepted the recommendations, in whole or in part.

If the parties agree that the adverse effects of the proposal would seriously impair Thessalon's rights, but cannot agree about how those effects can be minimized, mitigated or compensated for, Ontario will either not to permit the proposal to proceed, or shall place such conditions and restrictions on its permission as will be consistent with the honour of the Crown and the spirit of the Treaties.

Financial Resources for Consultation

Ontario will provide Thessalon, at the beginning of each fiscal year, and subject to the terms of a funding agreement, $30,000.00 to cover the cost of reviewing and conducting preliminary assessments of notifications and proposals during the year, and of reviewing and providing responses to all Class I proposals of which Thessalon is notified by Ontario during the year.

With respect to a Class II or Class III proposal, where Thessalon intends to review the proposal in detail and prepare a full response, Thessalon will propose a budget for the cost of the review and response, together with a consultation plan and schedule, and will forward its proposal to Ontario. The consultation process may be conducted in stages or phases as the proposal develops over time. The schedule will take into account the time reasonably required by Thessalon and Ontario to complete their process, and also the proposed timelines for activities proposed by the proponent.

Where Thessalon decides to engage the community in consultation with respect to a Class II or Class III proposal, Ontario will pay for up to two community meetings at Thessalon or at Sault Ste. Marie, including reasonable administration costs to prepare for the meeting and provide notice to members; meeting room rental, refreshments, and audio and visual aids; and reasonable honoraria for the meeting's facilitators and participating elders.

Ontario will reimburse Thessalon reasonable travel costs for two representatives at government rates where consultation activities take place away from Thessalon.

Ontario will provide Thessalon with reasonable costs for technical or professional assistance to prepare consultation materials in respect of any proposal and to provide advice to Thessalon.

Accounting for costs to be covered shall be conducted according to Schedule "D" to this agreement.

Benefits to Thessalon

In the case of a proposal for significant resource development or construction on non-private land, Ontario and Thessalon will ensure that consultation will include full discussion of potential economic benefits to Thessalon, including provision for employment of Thessalon members, access to contracts for aspects of the proposal, and resource revenue-sharing. These benefits may be considered, with respect to some proposals, to be part of the mitigation or accommodation measures to be agreed upon.

Delegation of Responsibility

Either party to this agreement may, with the consent in writing of the other party, delegate specific aspects of its responsibilities set out in this agreement to a third party, with respect to any specific proposal. Neither party may delegate any of its responsibilities to any third party without the consent in writing of the other party.

Accommodation

Accommodation goes beyond consultation. It involves Treaty promises which engage the honour of both the Crown and Thessalon. In accommodation, the parties will seek to implement the spirit and intent of the promises and to respect the rights involved.

Ontario shall accommodate Thessalon's rights in the following four situations:

(a) Any proposal that results in economic benefit to the proponent should also provide for profit to Ontario, and Ontario shall account for these profits to Thessalon and to the Government of Canada, so that Canada may fulfill its obligations with respect to Treaty annuities.

(b) Where the proposal could have a significant impact on game, fish or vegetation, or their habitat, within Thessalon's Traditional Territory.

(c) Where there is a proposed disposition of land or resources within Thessalon's Reservation.

(d) Where a proposal could have a significant impact on the Thessalon Reserve.

Thessalon Initiatives

There may be times that Thessalon does not receive notice, or is not invited into a process of consultation, or where Thessalon's rights are not accommodated. Rather than initiate litigation as a first step, our agreements should provide a path for Thessalon to bring its concerns directly to the attention of government officials with the ability to respond and react effectively. Where possible, Thessalon notices will contain information similar to provincial government notices of the same kind of issue.

Thessalon has the jurisdiction to make laws governing the use and allocation of land and resources. Where Thessalon proposes to make a law or issue an Instrument affecting lands, waters or the natural environment within the Reservation, or within its Traditional Territory, Thessalon will provide notice to the Ontario Ministry of Natural Resources in the format required of Provincial notices to Thessalon of Class II Proposals.

When a charge has been laid pursuant to Thessalon law against any individual with respect to the use or occupation of land or waters, Thessalon will provide notice of the charge to Ontario within fifteen days after the charge is laid.

Restoration Plans

As a general rule, any Class II or Class III Proposal must include a restoration plan that will see the adverse impacts, which will have been mitigated during the lifetime of the proposal, remedied, to the extent possible, by dismantling the structures and infrastructures associated with the proposal, recycling those aspects of structure and infrastructure that can be reused, and restoring the land and waters to at least the

environmental condition they were in before the proposal was implemented. With respect to long-lived proposals, the technology for restoration plans may change over time; the plans should be understood to be a minimum standard, and future consultation may result in improved plans originating from technological advances.

Agreements between Thessalon and the Crown with respect to any proposal may include the Crown's agreement to ensure that restoration plans are binding upon the proponent under provincial law.[42]

Hearings

Where a hearing with respect to a Class II or Class III proposal has been set pursuant to a statute, Thessalon shall be given notice by Ontario of the hearing at the same time and in the same form and manner as the applicant or proponent or a municipality, and Thessalon shall have the same right to participate in the hearing as the applicant, proponent or a municipality.

Inspection and Entry

Thessalon may request access to places potentially affected by a Proposal, and Ontario shall facilitate that access, while respecting proponents' rights to private property and privacy. An agreement in respect of a proposal may include provision for Thessalon's right to enter and inspect compliance with conditions, in the company of appropriate Ontario officials.

Emergencies

Where in the opinion of the Minister, the delay involved in providing notice to Thessalon of a Proposal, in allowing time for Thessalon's response, or in considering the response to the notice would result in danger to the health or safety of any person; harm or serious risk of harm to the environment; or injury or damage or serious risk of injury or damage to any property, Ontario may take action to prevent or mitigate

[42] Such orders may be issued pursuant to the Ontario *Water Resources Act*, for example.

the danger, while making its best efforts to comply with the spirit and intent of this agreement.

Where there has been a discharge of a contaminant within Thessalon's Traditional Territory or Thessalon's Reservation, Thessalon shall be notified forthwith by Ontario, as soon as Ontario has itself received notice of the discharge.

Confidentiality, Freedom of Information, and Privacy

The parties recognize that proponents may have concerns about disclosure of proprietary information to competitors, and that companies may be under strict requirements imposed by securities legislation in relation to the public disclosure of information, and those concerns and requirements are to be respected. The parties will seek ways to provide full information to each other while maintaining confidentiality where it is required.

Records of consultations, correspondence and negotiations between Ontario and Thessalon pursuant to this agreement shall be treated as confidential intergovernmental documents and shall not be disclosed to third parties unless both parties agree. Where a request is received by either party pursuant to its access to information laws, the party shall notify the other party of the request and shall seek its views on the release of the information.

Archaeology and the Cemeteries Act

Where archaeological work is required by Ontario law to be conducted in respect of any proposal that would affect Thessalon's Traditional Territory or the Reservation, that work will be identified early and in consultation with Thessalon. The purpose of undertaking archaeological work early is to ensure that the project can be relocated if it encounters archaeologically significant sites. We expect to be able to participate in and actively monitor any archaeological activity that addresses Anishinaabe sites or people.

When aboriginal human remains, burial grounds or cemeteries are found by any person within Thessalon's Traditional Territory or the Reservation, Ontario shall notify Thessalon as soon as practicable of the discovery, and the Minister responsible for the administration of the Ontario *Cemeteries Act* shall designate Thessalon and the Council as the representatives of the deceased for all purposes of that Act. As a matter of basic principle, human remains shall be disturbed as little as possible to determine their identity and cause of death, and shall remain where they were buried, together with any objects buried with the people. Where we agree that the deceased are ancestors of indigenous people other than Thessalon, the Council shall be responsible for identifying, seeking and notifying the appropriate descendants. For purposes of this agreement, partial human remains shall be treated as if they were entire human remains. The Government of Ontario shall not institute an arbitration pursuant to the *Cemeteries Act* in Thessalon's Traditional Territory or reservation without the Council's consent.

Litigation

This agreement shall not be interpreted to limit the right or ability of either party to seek redress or protection in court. While consultations can sometimes be characterized as negotiations, materials used and positions taken in the course of consultations shall not be considered privileged unless the parties agree.

Resolving Concerns

Anishinaabe treaties with the Crown incorporate the most sacred spirit and intent, and the resulting relationship is one of family. The language used in treaty councils is always respectful and never confrontational. We are resolved not to allow our relations to fester into disputes, but rather to bring matters of concern to each other's attention early, so that they may be resolved effectively and without rancor. We believe that if any matter of consultation or accommodation ends up in court, it represents a failure of our honour and respect.

Where a party to this agreement has a concern relating to any proposal, the first step is to notify the other party of the concern in writing. If the concern is not addressed to the satisfaction of the first party within seven days, or if a party requests it, the parties shall meet to discuss the concern and steps to be taken to address it. If either party feels the concern has not been addressed or resolved, that party can refer the matter to mediation. The mediator shall be the President of Algoma University College in Sault Ste. Marie.

Reporting Outcomes

Following the completion of the consultation process, Thessalon and Ontario will jointly produce a final written report, setting out any agreements achieved, decisions made, their conclusions as to potential adverse effects of the proposal, and any measures adopted to address those effects.

Notice

Notice pursuant to this agreement shall be provided by e-mail or registered mail.

With respect to any proposal, Thessalon's response shall be addressed to the person designated as responsible in the notification to Thessalon, and to the District Manager. With respect to any other matter relating to this agreement, Thessalon shall communicate with the District Manager.

With respect to any proposal, and any other matter relating to this agreement, Ontario will address notification to Thessalon's Director of Intergovernmental Relations.

Amendment

This agreement may be amended in writing by mutual consent of both parties.

Schedule D

Principles for Coverage of Costs of Consultations

Coverage of costs for activities for a full consultation process with respect to any proposal under the Thessalon-Ontario Consultation Agreement will be made on the basis of the following understandings:

a) On a monthly basis, Thessalon will provide Ontario an accounting in agreed reporting format of monies expended in the immediately preceding month, with supporting documentation, including a summary of the outcomes and achievements or value to Thessalon that were accomplished as a result of the costs incurred by Thessalon.

b) Thessalon will detail the expenses for individual participants for all meetings. Charges for services and incidental expenses will be claimed at agreed upon rates with necessary supporting information being supplied.

c) Thessalon will include with each accounting:

   i) invoices for the work of technical, professional and legal advisors which Thessalon has directed to be undertaken and which has been completed; and
   ii) a summary of travel expenses, to be covered at the same rates Ontario provides for its employees in similar circumstances.

d) Reasonable travel time billed by professional advisors will be covered by Ontario.

e) All accounts provided by Thessalon to Ontario must be approved by Thessalon's representative with authority for that purpose. Financial reports provided to Ontario will be accepted and used by Ontario as confidential business information of Thessalon and, except as may be required by law, will not be released without Thessalon's consent.