

## MANITOBA'S CONSULTATION PROCESS IN RESPECT OF THE WUSKWATIM DEVELOPMENT

### 1. The Legal Framework

Section 35 of the *Constitution Act, 1982*<sup>1</sup> recognizes and affirms existing treaty and aboriginal rights. While the full extent of these rights are not yet clear, Manitoba is committed to respecting the practices, traditions and customs that are integral to the distinctive culture of aboriginal peoples.

While the *Constitution* ensures that treaty and aboriginal rights will be respected, it is also true that these rights are not absolute.<sup>2</sup> Sometimes, given the need for economic development and regulation of a modern society, there will be a compelling reason to infringe these protected rights. If an infringement will result from government action, then there is an obligation on government to seek to minimize the impact. In order to ensure that government is fully informed about the impact of its proposed action on aboriginal communities and so that it can take steps to minimize that impact, the courts have directed the Crown to undertake a meaningful or good faith consultation process prior to any such action.

### 2. Consultation is a Requirement of the Crown

It is the Crown that owes an obligation to abide by the treaties and to respect constitutional rights. Thus, it is the Crown, rather than the proponent, that bears the responsibility to consult under s.35 of the *Constitution Act, 1982*. In the case of Wuskwatim the provincial and federal Crowns have undertaken a consultation process since both levels of government have decision-making responsibilities if this project is to proceed. The responsibility of Manitoba arises through the licensing of Crown lands, waters and water power under *The Water Power Act* in respect of the generating station and through the issuance of rights to use Crown lands under *The Crown Lands Act* for the transmission lines.

Consultation processes under statutory frameworks may supplement the process but do not relieve the Crown of its constitutional responsibility.

### 3. Good Faith Consultation

The Crown is constitutionally obligated to engage in good faith consultation whenever any proposed governmental action may infringe a treaty or aboriginal right. By definition, consultation is a process of two-way communication in which information is exchanged. The additional requirement of acting in good faith obligates the Crown to not only listen to the concerns, but to seek to mitigate them if that is reasonably possible. Ultimately, the goal of consultation is better decision-making on the part of the Crown.

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<sup>1</sup> *Constitution Act, 1982*, s. 35.

<sup>2</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Badger*, [1996] 1 S.C.R. 771.

#### 4. The Communities are the Rights Holders

Aboriginal and treaty rights are collective rights.<sup>3</sup> This means that they belong to the community as a whole and not to any individual member. Thus, the obligation on the Crown is to identify the individual communities that may be affected by a governmental decision, to determine what rights that community has and to assess the impact of the proposed action on that community.

#### 5. The Wuskwatim Consultation Process

Manitoba and Canada are presently engaged in an extensive consultation process in respect of the Wuskwatim development (see attached materials). An intergovernmental and interdepartmental multi-member steering committee is overseeing the process. Nine First Nations and ten aboriginal communities in northern Manitoba were contacted concerning their desire to participate in the process. To date, Seven First Nations and seven Northern Affairs communities have indicated that they wish to be consulted in respect of this project. A three-phase process has been developed in order to ensure a respectful and effective methodology. The first phase of the process involved contacting the communities in order to ascertain interest in the process. The second phase entails developing a consultation protocol and undertaking the consultation according to a mutually agreed upon plan. Generally, but not exclusively, this involves community meetings. Both the federal and provincial Crown have indicated that they will hear from communities in respect of any anticipated impacts regardless of whether these impacts may infringe treaty or aboriginal rights. The third phase of the process will be to return to each community with a written summary in order to ensure that the concerns have been properly documented and to consider how these concerns might be addressed. Manitoba Hydro and government experts will be involved in this phase in order to provide some guidance on possible ways to mitigate or alleviate the concerns.

Once the consultation process is complete a report will be compiled. At the provincial level, this report will be provided to the Minister of Water Stewardship, the minister responsible for licensing decisions under *The Water Power Act* and the Minister of Conservation, the minister responsible for the decisions under *The Crown Lands Act* for consideration by the executive branch of government. It is ultimately the decision of the Lieutenant Governor in Council as to whether it will issue the licences that permit the Wuskwatim project to proceed and if so what conditions will be attached to address impacts on aboriginal and treaty rights or other identified concerns.

#### 6. The Clean Environment Commission Process

Consultation under s.35 of the *Constitution Act, 1982* is only one way that is available to the Crown to ensure better quality decisions. A hearing under *The Environment Act* is another way for the Crown to obtain information in respect of major developments.

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<sup>3</sup> *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Powley*, [2003] S.C.J. No. 43.



The terms of reference for the C.E.C. hearing in respect of Wuskwatim clearly contemplate that the hearings will deal with issues of environmental, socio-economic and cultural impacts. The Commission is directed to hear from the public, including aboriginal people, in respect of these issues and to propose measures to mitigate or manage any adverse effects. In this respect the mandate of the C.E.C. closely parallels the Crown's aboriginal consultation mandate. This ensures that the issues identified by the aboriginal community will be fully explored. However, the processes are separate and arise out of different concerns. The consultation by the Crown arises out of a constitutional duty that is owed to aboriginal communities by virtue of s.35 of the *Constitution Act, 1982*; the C.E.C. process is a statutory process that is directed at determining what is in the interests of Manitobans generally.

While it is true that the C.E.C. has been given a mandate to investigate environmental, socio-economic and cultural issues, it is equally true that it is not within the mandate of the Commission to inquire into the constitutional issues surrounding aboriginal consultation nor into the sufficiency of the Crown's consultation process. Neither *The Environment Act* nor the terms of reference have delegated any such power to the Commission. Unless provincial legislation clearly delegates such matters to administrative tribunals the jurisdiction in respect of constitutional issues resides in the courts.<sup>4</sup>

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<sup>4</sup> *Paul v. B.C. (Forest Appeals Commission)*, [2003] S.C.J. No. 34.