

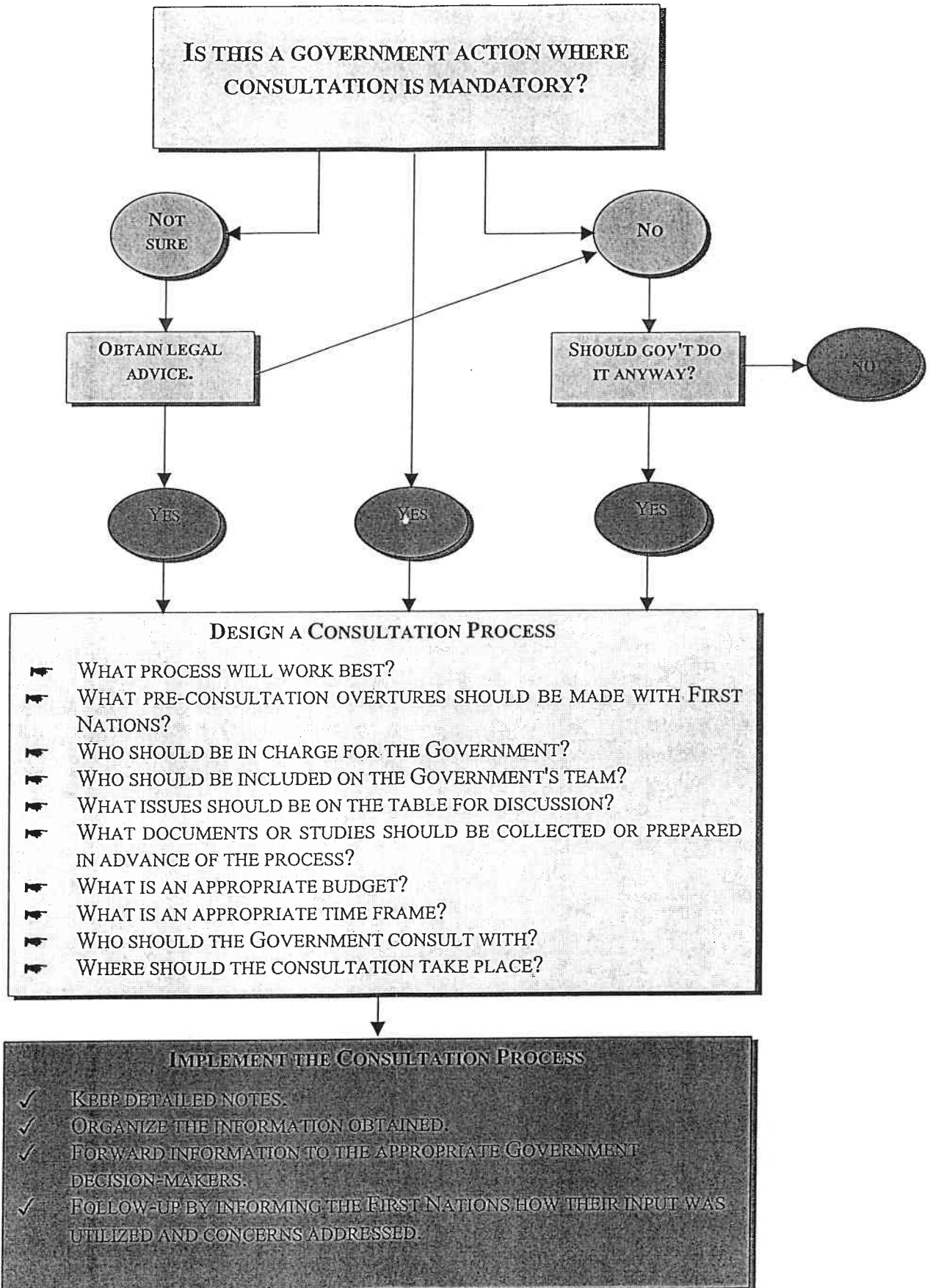
## PART I

### CONSULTATION PRINCIPLES

1. Manitoba Conservation acknowledges that there is a constitutional obligation to consult in a meaningful way with First Nations people when it is of the opinion that any law, regulation or government action may infringe on a treaty or aboriginal right.
2. Consultation will assist Manitoba Conservation in becoming more familiar with the practices, traditions and histories of the First Nation community.
3. The consultation process should be designed in a manner to effectively communicate the questions and issues upon which Manitoba Conservation seeks input and to allow for relevant feedback and should be respectful of the traditions of the First Nation community.
4. In determining the design of the consultation process, the opinions of the affected First Nation communities should be sought.
5. In setting the questions and issues to be discussed during consultation, Manitoba Conservation should be guided by the principle that in non-urgent situations it is consistent with the honour of the Crown that the consultation be broadly based.
6. Manitoba Conservation recognizes that in urgent situations consultation will of necessity be very limited, or in some emergency circumstances even non-existent, but in those situations Manitoba Conservation should consider whether a more extensive consultation is warranted once the urgency or emergency has been resolved.
7. Consultation should occur as early in the decision-making process as possible.
8. Consultation should take place within the First Nation community if this is practical.

9. Adequate resources should be directed to the process in order to ensure that Manitoba Conservation can meet its obligation to engage in meaningful consultations.
10. An appropriate timetable for consultation should be devised in order to ensure that the process is both effective and cost efficient.
11. Manitoba Conservation should share all relevant information before or during consultation and should ensure that any documentation that is shared is in a manageable and understandable format.
12. Consultation should be conducted in the language or languages that best provide for effective and respectful communication.
13. In developing laws and programs, Manitoba Conservation should utilize the information obtained during consultation and should make all reasonable efforts to address the concerns identified by the First Nations.
14. Following consultation, Manitoba Conservation should ensure that the outcome of the consultation is reported to the affected communities. The reporting should include feedback as to how the information provided by the First Nation communities was incorporated into the decision-making process and how concerns were addressed.
15. Consultation should be considered in situations where it is not legally required but is still desirable as a matter of good government.
16. Consultation should be considered a minimum requirement and should not detract from the desirability of entering into other types of arrangements with First Nation communities such as negotiated settlements, consensual arrangements, or co-management agreements.

# CONSULTATION FLOW-CHART



## PART III

GLOSSARY

## ABORIGINAL RIGHT

*A practice, tradition or custom that is integral to the distinctive culture of a particular First Nation and that was practised prior to contact with Europeans. Rights are not universal but are specific to each First Nation community (R. v. Van der Peet, [1996] 2 S.C.R. 507).*

## COLLECTIVE RIGHTS

*Rights which belong to the First Nation community as a whole and not to any individual member. All aboriginal and treaty rights are collective rights (R. v. Sundown, [1999] 1 S.C.R. 393).*

## CONSULTATION

*A process of two-way communication in which the advice and opinions of the consulted party are sought prior to government action (Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010).*

## GOOD FAITH CONSULTATION

*A consultation in which government provides the consulted party with full information in respect of the proposed legislation or decision and seeks to substantially address the concerns of the consulted party (Halfway River First Nation v. British Columbia (1997), 4 C.N.L.R. 45 (B.C.S.C.), aff'd [1999] 4 C.N.L.R.1 (B.C.C.A.); Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010.)*

## INFRINGEMENT OF TREATY OR ABORIGINAL RIGHTS

*A law, regulation or government action that (i) unreasonably limits a right, or (ii) imposes undue hardship, or (iii) denies the rights holders their preferred means of exercising the right (R. v. Sparrow, [1990] 1 S.C.R. 1075).*

## JUSTIFIABLE INFRINGEMENT OF TREATY OR ABORIGINAL RIGHTS

*The ability of government to interfere with rights but only if (i) there is a compelling reason for so doing (ii) if the interference is to the minimum extent possible, and (iii) consultation with the affected First Nation has occurred (R. v. Sparrow, [1990] 1 S.C.R. 1075)*

## MEANINGFUL CONSULTATION

*A synonym for "good faith consultation".*

**NATURAL RESOURCES TRANSFER AGREEMENT**

*A constitutional document that transferred ownership of Crown land from Canada to the Province and merged and consolidated the hunting, trapping and fishing rights originally contained in the treaties (R. v. Moosehunter, [1981] 1 S.C.R. 282).*

**TREATY**

*A legally enforceable solemn agreement made between the Crown and First Nations that has been constitutionally protected since 1982. There are five treaties that were signed with Manitoba First Nations, numbered consecutively from 1 to 5 (R. v. Badger, [1996] 1 S.C.R. 771).*

**TREATY RIGHTS**

*The rights of the people contained in the treaty and those activities that are reasonably incidental thereto. Activities that are "reasonably incidental" are those which allow a right to be exercised in the same manner as it was historically exercised taking into account modern developments (Simon v. The Queen, [1985] 2 S.C.R. 387; R. v. Sundown, [1991] 1 S.C.R. 387)*

## PART IV

### QUESTIONS AND ANSWERS CONCERNING CONSULTATION

#### WHAT IS CONSULTATION?

Consultation is a process of **two-way communication that is something more than mere notification, but less than the requirement of obtaining actual consent**. It is an interactive process in which the advice and opinions of the consulted party are sought and then seriously considered in the design and delivery of government programs. It can include communication about current programs or policies in order to seek feedback on whether changes are warranted. It can also include obtaining relevant information about a matter that might affect a community before the final decision is made in order to improve the quality of that decision.

#### WHAT IS GOOD FAITH CONSULTATION?

When government consults with First Nations there is an additional requirement placed on government to engage in **meaningful or good faith consultation**. **To consult in good faith is to take into consideration the various interests involved, to seek to give the other party every satisfaction that is compatible with one's own interest, and to show that in this regard the consulting party is genuinely concerned to reconcile the interests of the other with its own**. This standard would not be met if the outcome of the consultations were predetermined. Nor would it be met if one party withheld essential information from the other or insisted on acting before there had been a reasonable opportunity to gather essential information. On the other hand, there is no obligation that the parties reach an agreement.

#### WHY IS THE GOVERNMENT OBLIGATED TO CONSULT WITH FIRST NATIONS?

The Manitoba Government's obligations to First Nation people arises out of the treaties that were made between the British Crown, the Government of Canada and First Nations. The treaties, which were required by the British Crown before settlement could proceed in Canada's west, have been constitutionally recognized by **s. 35 of the *Constitution Act, 1982*** and the existing rights within them protected. Certain provisions of the treaties were modified in 1930 by the *Natural Resources Transfer Agreement*. The treaties, together with the *NRTA*, represent solemn promises made by the Crown to First Nations and thus must be afforded great respect.

In addition to treaty rights, **s. 35 of the *Constitution Act, 1982*** also recognizes and affirms existing aboriginal rights. According to the 1996 Supreme Court of Canada case, *R. v. Van der Peet*, an aboriginal right is a practice, tradition or custom that is integral to the distinctive culture of the First Nation society and that was practiced prior to contact with Europeans. While the full

extent of this right as it relates to Manitoba is not yet clear, it may include such practices as harvesting wild rice, possessing eagle feathers, conducting ceremonies and gathering other items for social, spiritual, medical and cultural purposes.

### UNDER WHAT CIRCUMSTANCES CAN THE GOVERNMENT INFRINGE A TREATY OR ABORIGINAL RIGHT?

**While aboriginal and treaty rights must be respected, they are not absolute.** In two important decisions in the 1990's, *R. v. Sparrow (1990)* and *R. v. Badger (1996)*, the Supreme Court of Canada established a test for **justifiable infringement of aboriginal and treaty rights**. The three-part test outlines what will be required of the federal and provincial authorities when their laws interfere with constitutionally protected treaty or aboriginal rights. It may be summarized as follows:

- First, the Supreme Court made it clear that a government cannot interfere with such rights in the absence of a compelling reason such as conservation or resource management.
- Second, even when a compelling reason exists, the manner in which such regulations or restrictions are formulated must be respectful and sensitive to the constitutionally protected rights of the First Nations and must interfere with those rights to the minimum extent possible. This might include giving priority to the treaty rights in relation to other interests and perhaps paying compensation in the event of an expropriation.
- Third, to ensure that any law or decision that may infringe such a right is developed in this respectful manner, the Supreme Court of Canada has dictated that governments must engage in **meaningful consultation** with the affected First Nations. The general guideline provided by the Supreme Court is that consultation must "be in good faith, with the intention of substantially addressing the concerns of Aboriginal peoples whose lands [or other rights] are at issue."

### WHAT ARE THE CONSEQUENCES OF FAILING TO CONSULT?

Consultation with First Nations is constitutionally mandated whenever a government action may infringe on a treaty or aboriginal right. The failure on the part of the government to engage in meaningful consultations in such circumstances may result in any laws passed in the absence of consultation being declared invalid or actions taken being declared null and void.

WILL CONSULTATION ASSIST THE GOVERNMENT IN DEVELOPING BETTER LAWS AND POLICIES?

While it is true that consultation is a legal requirement, it is also true that consultation assists in reaching **better quality decisions** and ones that are more likely to be **accepted by the community**. The advantages of consultation include:

- The ability to explore a range of solutions with those who will be significantly affected by the decision;
- Learning about the needs, wants and concerns of the community;
- Learning more about each others roles and constraints;
- Enabling government to better understand the impacts of proposed actions;
- Enabling the community to take responsibility for the decision by maximizing "ownership" of the decision;
- Building a cooperative and responsive relationship between government and the community to deal with future problems; and
- Demonstrating the transparency and accountability of government processes.

MUST THE FIRST NATIONS PARTICIPATE IN THE CONSULTATION PROCESS?

The constitutional obligation to consult with First Nations rests on government. Government is responsible for organizing and conducting a fair and reasonable consultation process. There is no obligation on the First Nations to participate in the process. However, it must be recognized that if government puts a reasonable process in place then a decision on the part of a First Nation community to decline an invitation to consult or to limit its participation cannot be used as a means to stop an intended government initiative.

While participation by a First Nation in consultation is voluntary, there is certainly an advantage to the First Nation in involving itself fully in the process. It is through this process that the community will be able to influence government decision-making. In order to be effective partners, First Nations can assist government by helping to identify the appropriate groups that should be invited into any particular consultation process, by helping to design a process that is effective, efficient, and culturally appropriate and by being full partners in a two-way consultation dialogue.



### WHAT ISSUES REQUIRE CONSULTATION?

Deciding if an issue requires **mandatory** consultation is an essential first step in the consultation process. Unfortunately, it is one of the most difficult questions to answer, largely because the law is still evolving.

The basic direction from the Supreme Court of Canada is that the Crown has a duty to consult with affected First Nation groups whenever the government proposes any action such as a policy, legislation or regulation that infringes on a treaty or aboriginal right. If there is a possibility of infringement then consultation is desirable in order to determine if a group in fact asserts such an infringement.

Statutes and regulations that deal directly with the rights guaranteed in the *Natural Resources Transfer Agreement* (i.e. the right to hunt, trap and fish for food at all seasons of the year on all unoccupied Crown lands and on any other land to which there is a right of access) clearly fall within the category of decisions that require consultation. There also may be agreements in place that mandate consultation in certain situations. What is less clear are what other decisions require consultation. Until such time as the law in this area is further developed, the best course of action to follow is to seek legal advice on the issue of whether consultation is mandatory. Further, it is important to recognize that as a matter of good government consultation can always take place, even if it is not legally required. Without doubt, undertaking consultation is always the most prudent practice since the failure to consult in situations where the court ultimately rules it was required, may render a decision null and void.

### WHO SHOULD THE GOVERNMENT CONSULT WITH?

Deciding which group or groups of First Nation people should be involved in a particular consultation involves determining who might be affected by the outcome of the decision to be made. Depending on the circumstances, consultation may need to be undertaken on a province-wide basis or on a First Nation or multi-First Nation basis. It is important to remember that treaty and aboriginal rights are communal rights and therefore it is the community and not individuals that must be consulted. It is also important to recognize that tribal councils are voluntary organizations without legal status. It is the individual bands that make up these groups that possess the rights. Thus, consultation with tribal councils should only occur with the consent of the bands.

### WHO SHOULD BE INVOLVED IN THE CONSULTATION PROCESS ON BEHALF OF THE GOVERNMENT?

Since consultation involves the honour of the Crown, it is essential that the government be represented by individuals who respect the consultation process. Further, remembering that the ultimate objective is the free exchange of ideas, it is important that the government

representatives are well trained in facilitating discussion and are sensitive to issues of cultural differences. Also, since the purpose of consultation is to explore alternatives, it is absolutely imperative that those involved in the process be open to new ideas or viewpoints that are brought forward by the community.

It is also important to recognize that the focus of consultation is communication. Often, a personal relationship is extremely valuable in facilitating effective communication. Therefore, it may be very helpful to include individuals on the government team who have developed a positive relationship with the First Nation representatives and who can bring to the consultation table a past history of integrity and fair-dealing. Additionally, since consultation may demand a significant use of time and resources of many people, an on-going relationship may assist in the best utilization of these resources for all parties.

Sometimes, it might also be valuable to involve individuals from other government departments or engage outside professionals to serve on the government team. Outside professionals will be particularly appropriate if the consultation process is relatively complex and includes such things as statistical surveys, workshops, or focus groups.

Given the importance of choosing the right person or team to conduct consultation it is important that this matter be addressed very early in the process.

#### AT WHAT POINT IN TIME SHOULD CONSULTATION TAKE PLACE?

Engaging in an effective consultation process involves a good deal of planning. Thus, the issue should be addressed very early on in the project so that key decisions can be made. These key decisions will include:

- Who will represent the government in the consultation process?
- Which First Nation groups or communities should be notified?
- How should the consultation be conducted?
- What issues should be discussed during the consultation?
- What is an appropriate timetable?
- What is an appropriate budget?

Depending on the complexity of the issues, the actual consultation meetings can be one-time, short-term, or ongoing. Sufficient time must be allocated to conduct these meetings and to give the First Nation representatives an opportunity to consult their constituents and to respond. Thus, consultation should occur as early in the process as possible so as to maximize First Nation input in the ultimate decision. **What is abundantly clear, is that consultation must occur prior to the outcome being determined.**

### HOW IS CONSULTATION CARRIED OUT?

There is no one way to carry out a successful consultation. It can range from a one-on-one meeting to a cross-country commission. The nature of the consultation is directly related to the issues involved. The goal, however, in all consultations is to provide a forum where concerns can be aired and views expressed before a final decision is made by government. Whatever process serves to meet this goal will suffice. Some features that are common to all consultation processes include the need to:

- Be honest and transparent about the process and about the decisions that can be influenced by the process;
- Provide, as a first step, all relevant background information in an organized and concise format and ensure that scientific or technical documents are simplified or clearly explained;
- Provide information well in advance of the consultation meetings;
- Arrange for scientists or technical experts to attend the meetings and provide contact information so that the participants can obtain additional information if required;
- Set out the issues to be discussed so that the process remains focused;
- Move away from discussing fixed positions (which will only become more fixed) and instead explore underlying interests and why the parties hold these positions;
- Make sure that any first draft proposals are obviously incomplete and non-operational so that the participants can have input into them;
- Explore areas of disagreement with a view to reaching a consensus;
- Be respectful of the views and opinions of all participants;
- Follow through on any undertakings in a timely fashion; and
- Make sure that the dialogue is a two-way process that involves both the imparting of information and the gathering of knowledge.

In some situations, it may be necessary to seek professional input to design and implement an effective consultation strategy. An independent facilitator might also prove useful.

### HOW LONG SHOULD THE CONSULTATION PROCESS LAST?

Obviously, the consultation process has to last as long as is necessary to fairly and fully canvass the issues. It should not be allowed to drag on interminably since this is neither effective nor cost efficient. If issues are extremely complex it may be helpful to break them into manageable subsets so that the consultation stays focused. This is especially true in urgent situations. Consultations with respect to short-term solutions to a crisis situation would of necessity be quite

brief. The matter can be revisited in more detail when long-term solutions are contemplated. Setting a realistic timetable, with input from the First Nations should be part of the consultation planning process.

#### WHERE SHOULD CONSULTATION TAKE PLACE?

Since two of the goals of consultation are to demonstrate the transparency and accountability of government and to encourage the community to take "ownership" of the ultimate decision, it is important that the process be accessible to the public. Thus, consultation meetings should be well advertised and should take place at convenient times and in convenient locations. As a general rule, the meetings should be held in the First Nation communities.

#### WHAT HAPPENS IF AT THE END OF THE PROCESS THERE IS NO CONSENSUS ON HOW TO PROCEED?

**While consensus is always desirable, it is not a legal requirement of consultation.** Government still maintains the legislative authority to act unilaterally if consensus cannot be reached. However, in such a situation the government will bear a very high onus to show that it behaved with honour and legitimately made every reasonable attempt to accommodate the First Nations interests.

#### IF THERE ARE STATUTORY HEARINGS OR STATUTORY CONSULTATIONS REQUIRED BEFORE A DECISION IS MADE, DOES THIS ALLEVIATE THE NEED FOR SEPARATE CONSULTATION?

Several statutes provide for the need to hold hearings prior to certain decisions being taken (e.g. *The Environment Act*). The tribunals that conduct these hearings have limited jurisdiction that is defined and circumscribed by the legislation. While First Nation representatives should be encouraged to attend these hearings and to express their views **on matters within the jurisdiction of the tribunal**, attendance at these proceedings **will not** substitute for consultation. There are two main reasons why this is so. First Nation consultation is a constitutional requirement, and therefore, cannot be subsumed into a statutory proceeding that is open to the general public. Second, tribunal hearings are normally conducted in a formal court-like manner. Evidence is presented and a decision is ultimately rendered. Consultation by definition requires **two-way communication** and this is incompatible with the hearing process.

Sometimes a statute will mandate that public consultations occur prior to particular decisions being finalized (e.g. *The Provincial Parks Act*). While it may be convenient to combine the constitutionally mandated First Nation consultation with the statutory process **this should not be done**. The honour of the Crown demands that the views of the First Nation people be afforded special status and combining the processes has the potential to erode this obligation. Therefore,

the consultation process should be designed to ensure that First Nation representatives have an opportunity to present their issues separate and apart from the general public.

#### WHAT FOLLOW-UP SHOULD OCCUR AFTER THE CONSULTATION PROCESS IS COMPLETED?

Two of the purposes of consultation are to solicit community opinions in order that the community will more readily accept the ultimate decision and to demonstrate that government desires to meet the needs of the community. Therefore, it is important that the community as a whole be informed about what went on during the consultation process and how its input was used. The obligation to provide feedback rests with Manitoba Conservation though it is certainly acceptable to delegate this task to the First Nation representatives if this is more appropriate in the circumstances.

There are many ways to give feedback to the community concerning the consultation process including community meetings, formal written reports, and publishing a summary of the meetings in the local newspaper. The feedback should be directed at explaining how the community input was incorporated into the development of the particular law or policy.

#### WHAT ARE THE GOVERNMENT'S OBLIGATIONS IN URGENT OR EMERGENCY SITUATIONS?

In the context of this document, an urgent situation is one where external circumstances dictate a need for a **rapid** government response and an emergency is a situation necessitating an **immediate** response (e.g. a flood or forest fire).

While it is obviously desirable that government laws and policies be developed in a thoughtful and methodical manner, the reality is that sometimes urgent or emergency situations will arise. In such situations, consultation will of necessity need to be curtailed, or in the case of a true emergency, dispensed with all together. The Supreme Court of Canada has recognized this reality and has stated in the case of *Nikal (1996)*, that the scope and nature of consultation must be reasonable given the particular circumstances. Thus, in urgent situations, consultation should be narrowly focused and should be directed to short-term solutions. Once these situations have been resolved, a more extensive consultation process can be initiated to address long-term solutions.

#### WHAT PERMANENT RECORDS SHOULD BE KEPT REGARDING THE CONSULTATION PROCESS?

Whenever a government law or policy interferes with an aboriginal or treaty right, the government may be called upon to justify its actions in court. This will involve explaining to the court, **in detail**, what went on during the consultation process. The court case may occur years or even decades after the consultation actually took place. For this reason, **it is imperative that**

the consultation process be well documented and that the documentation be organized in a convenient manner. All letters, memos, reports, and other materials that were generated throughout the process should be included. Notes should be kept of all meetings. A lawyer reviewing the matter many years after the fact should be able to reconstruct the process with ease. Those involved in the process should be able to review the materials in order to refresh their memory. This will allow them to testify accurately and completely about what occurred. The government bears the onus of proving that the consultation process was fair and appropriate. Vague generalities about what occurred will be insufficient to meet this onus. It is thus important that when planning the consultation process one person be assigned the task of maintaining the "consultation file". It is also imperative that these files be properly indexed and archived so that they may be easily accessed.

#### HOW CAN I LEARN MORE ABOUT CONSULTATION?

Two excellent books on consultation are:

P. Sterne, *Public Consultation Guide: Changing the Relationship between Government and Canadians* (Canadian Centre for Management Development, 1997)

B. McMillan & S. Murgatroyd, *Opening the Door: Improving Decisions Through Public Consultation* (Dark Horse Books, Edmonton, 1994)