

## PROVINCIAL POLICY FOR CROWN CONSULTATIONS WITH ABORIGINAL PEOPLES

### **POLICY STATEMENT:**

The Government of Manitoba recognizes it has a duty to consult in a meaningful way with Aboriginal communities when any proposed provincial law, regulation, decision or action may infringe upon or adversely affect the exercise of a treaty or Aboriginal right of that Aboriginal community. For the purposes of this document and future related documents, Aboriginal peoples include those as defined in Subsection 35 (2) of the *Constitution Act, 1982*. That is, the Aboriginal peoples of Canada includes the Indian (First Nation), Inuit and Métis peoples of Canada.

### **OBJECTIVES:**

The objectives of this policy are:

- To ensure the Government of Manitoba informs itself and gains a proper understanding of the interests of Aboriginal communities with respect to a proposed government decision or action;
- To seek ways to address and/or accommodate those interests where appropriate through a process of consultation while continuing to work towards the best interests of the citizens of Manitoba;
- To advance the process of reconciliation between the Crown and Aboriginal communities.

### **BACKGROUND:**

Subsection 35(1) of the *Constitution Act, 1982*, provides that "the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed. Subsection 35 (2) defines the Aboriginal peoples of Canada as including the Indian (First Nation), Inuit and Métis peoples of Canada.

Canadian courts, including the Supreme Court of Canada, have made judgments clarifying the meaning of section 35. One element of these judgments is the recognition that the Crown has a legal duty to consult with Aboriginal peoples about any action or decision (including enacting a law or regulation) that might affect the exercise of an Aboriginal or treaty right, before taking that action or making that decision. The Crown must also reasonably accommodate concerns about the effects of the decision or action raised in the consultation by the Aboriginal peoples, by attempting to substantially address those concerns. This duty of consultation and accommodation arises out of the principle of the "honour of the Crown"; the Crown is to act honourably and in good faith in its relationships with Aboriginal peoples. One of the main goals of the Crown-Aboriginal relationship is to further the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.

The failure on the part of the Crown to engage in meaningful consultations in such circumstances may result in any laws passed, actions taken or decisions made in the absence of consultation being declared invalid.

### **APPLICATION:**

This policy applies to all provincial government departments and agencies.

### **EVALUATION:**

This Policy will be reviewed periodically to determine if consultation is sufficiently occurring to meet the Crown's obligation to consult.

## GUIDELINES FOR CROWN CONSULTATIONS WITH ABORIGINAL PEOPLES

The following guidelines support the Policy for Crown Consultation with Aboriginal Peoples and are intended to provide a framework for the development of a consultation process with individual Aboriginal communities that will guide consultations, when required. They are subject to change over time as departments discover and understand new information during implementation of the policy.

More detailed working-level procedures for implementation of the policy will need to be established by each department as they undertake their specific consultation processes. Once established, these working-level procedures will be reviewed for best practices and shared with other departments to ensure a consistent approach.

### Assessment

- An initial assessment of the proposed law, regulation, decision or action must be conducted to determine if it will require consultation. The department or branch whose Act authorizes the decision or action has the lead role to consult on behalf of Government; with the support of other appropriate departments.
- Consultation is required with Aboriginal communities where it appears that a proposed Government decision or action might adversely affect the exercise of an Aboriginal or treaty right.
- If consultation is warranted, the appropriate level of consultation should be determined, with assistance from Manitoba Justice if necessary. The nature, scope and content of a consultation may vary from situation to situation depending on the particular circumstances. Factors that influence this are the strength of the case supporting the existence of the right or title and the seriousness of the potential adverse effect. Consultation methods could range from a phone call to a letter, to a meeting, to community dialogue.

### Guiding Principles

- When a consultation process is required, a consultation protocol should be developed jointly by the Government of Manitoba and the affected Aboriginal community to guide the process. The following guiding principles can be used to help design the process and create a protocol. They are not intended to be exhaustive; some or all may be used and other principles may be agreed to as part of the protocol.
  - The consultation process should be designed in a manner to effectively communicate the questions and issues upon which the Government of Manitoba seeks input and to allow for relevant feedback. Consultation should be respectful of the traditions of the potentially affected Aboriginal communities.
  - The consultation process should be designed and developed with participation from Aboriginal communities to ensure the process is mutually acceptable.
  - The Crown should act honourably and demonstrate good faith and openness in conducting consultations.
  - Consultation should occur as early in the decision-making process as possible, before decisions are made and at a strategic planning level, where possible.

- Consultation should take place within the Aboriginal community if this is desired by the community and is practical.
  - Adequate resources should be directed to the process in order to ensure meaningful consultations.
  - The Government of Manitoba should ensure the consultation process is reasonable and workable.
  - An appropriate timetable for consultation should be devised in order to ensure that the process is both effective and cost efficient
  - In situations that require a rapid response, consultation will of necessity be very limited, or in some emergency circumstances even non-existent, but in those situations the Government of Manitoba should consider whether a more extensive consultation is warranted once the urgency or emergency has been resolved.
  - The Government of Manitoba 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.
  - Consultation should be conducted in the language or languages that best provide for effective and respectful communication. Therefore, translation or interpretation may be required.
  - The Government of Manitoba should use the information obtained during consultation and should make all reasonable efforts to address the concerns identified by the Aboriginal communities.
  - The Government of Manitoba should ensure that the outcome of the consultation is reported to the affected Aboriginal communities. The reporting should include feedback as to how the information provided by the Aboriginal communities was incorporated into the decision-making process and how concerns were addressed.
  - Consultation should be considered in situations where it is not legally required but is still desirable as a matter of good government.
  - Consultation should not detract from the desirability of entering into other types of arrangements with Aboriginal communities such as negotiated settlements, consensual arrangements, or co-management agreements.
- If the Government of Manitoba provides a reasonable consultation process and an Aboriginal community chooses not to participate, it may limit the ability of the Aboriginal community to challenge a government action or decision for failure to consult.

### Process Design Considerations

- Where consultation is required, a consultation process should be initiated by the department proposing the decision or action. The following points should be considered in designing the consultation process:
  - what process will work best
  - what pre-consultation communications should be made with Aboriginal communities
  - who should be included on the Government of Manitoba's consultation team
  - what issues should be on the table for discussion
  - what documents or studies should be collected or prepared in advance of the process
  - what is an appropriate budget
  - what is an appropriate time frame
  - who should the Government of Manitoba consult with
  - where should the consultation take place
  - how will the consultation activities be documented
  - how will the information obtained be organized and forwarded to appropriate government decision makers
  - how will the Aboriginal communities be notified regarding how their input was used and their concerns addressed
- Both the process and all information obtained throughout the process about Aboriginal communities' interests should be documented prior to making a decision.

### **EVALUATION:**

The Guidelines will be reviewed periodically to determine if consultation is sufficiently occurring to meet the Crown's obligation to consult.

### **GLOSSARY:**

**Aboriginal peoples:** includes Indian (First Nation), Inuit and Métis; as defined in Subsection 35 (2) of the *Constitution Act, 1982* (Canada).

**Aboriginal rights:** distinctive activities that are a part of a practice, custom or tradition integral to the distinctive culture of an aboriginal group and that continue from traditional practices to the present.

**Accommodation:** the obligation on a government to meaningfully address concerns raised during the consultation by taking steps to avoid irreparable harm or to minimize the effects of the infringement on treaty or aboriginal rights or the adverse effects on the exercise of treaty or Aboriginal rights.

**Consultation:** a process of two-way communication in which advice and opinions of the consulted party are sought prior to government action for the purposes of ensuring that both parties are better informed.

**Infringement of treaty or Aboriginal rights:** a law, regulation, action or decision that (i) unreasonably limits a right, or (ii) imposes undue hardship, or (iii) denies the right holders their preferred means of exercising the right.

**Treaty:** a legally enforceable agreement made between the Crown and First Nations that has been constitutionally protected since 1982. Manitoba First Nations are signatories to seven different numbered treaties (Treaties 1, 2, 3, 4, 5, 6, and 10).

**Treaty rights:** rights established in an agreed treaty between the Crown and a group of Aboriginal peoples and include the right under paragraph 13 of the *Manitoba Natural Resources Transfer Agreement* of First Nations' members to hunt, trap and fish for food at all seasons of the year on unoccupied Crown land and other land to which they have a right of access.