

Aboriginal Lands and The Crowns – Impacts and Consultations

By Gaile Whelan-Enns

Manitoba Aboriginal communities are justified when they feel bombarded by crown licensing actions with little notification, short time lines, and poor information. In Manitoba, where we operate *without* an environmental bill of rights, environmental assessment regulation, or environmental commissioner, frustration is common when a community is affected by a crown land use license. We are also operating without transparent consultation standards for Aboriginal Peoples.

All open crown lands in Manitoba are likely aboriginal traditional territory. Few people would debate that Aboriginal peoples occupied and used these lands and waters to live, trade, hunt, hold gatherings and councils, worship, and travel freely, until treaty times.

Many parts of what is now Manitoba are still intact, and lack impacts from industrial and urban development. This makes Manitoba a rare, valuable, remarkable territory. Other areas in our province show the consequences of development decisions made before planning, and consultations. Yet the pattern of Aboriginal communities being left out of decision making, could be taken as the silent policy.

Over twenty Manitoba First Nations have treaty land entitlement (TLE) land selections ongoing, through the TLE agreement with the Manitoba crown, or through separate agreements. Ottawa is also a party to these agreements. The time line on land selections, responses from both crowns, and transfer of selected land to the First Nation can be many years, while other land use decisions continue. Treaty land entitlements relate to lands *never provided under the treaty or taken inappropriately under the treaty*. Other land transfers to First Nations are compensation for loss of land due to flooding, or other impacts. Instances of the federal crown simply leasing or removing reserve lands have been identified across Canada. The several treaties which Manitoba First Nations made with Canada include different land quantum for reserve, and traditional lands. Those land quanta dwindled with subsequent treaties, and as the treaties moved north.

Ottawa, Manitoba Hydro, and Manitoba are all parties to the Northern Flood Agreement (NFA) from the 1970s. As Manitobans should know, the NFA is based in the dramatic damage from the Churchill River Diversion, and dams in northern Manitoba. The geographic scope of the traditional territories or resource areas under the NFA is a huge portion of our province. The master agreement and individual community agreements are modern day treaty, with each new agreement

requiring a further Act or law of our Canadian parliament. Compensation, especially lands compensation under the NFA, is not yet complete. Hydro impacts continue.

While this article is not meant as legal information or advice, it is evident that decision making about crown land use must involve affected communities. Real impacts, and other problems, can arise if notification, information and consultation are late or missing from the process. Canada's courts have been clear in providing standards and definitions for meaningful consultation with First Nations since our Constitution finally included Aboriginal rights in 1982

One irony is that these steps and standards are obvious in any city or municipality in Manitoba. If a level of government wishes to zone land, build a new road or bridge, change where or which businesses can operate, or allow industrial resource extraction, then Council takes the required steps of notification, information, and consultations or hearings prior to a decision.

Manitoba Policy

The Manitoba government has a 2007 draft paper regarding consultations standards with regard to Aboriginal people. Posted on the Aboriginal and Northern Affairs web pages, it appears to still be out for comment. There are, according to the Manitoba government website, at least eight departments involved in consultations policy, or application of consultation standards.

A new consultations fund was announced in January 2010 with the Assembly of Manitoba Chiefs to host upcoming roundtable discussions. The Manitoba government press release and backgrounder from the January announcement says:

“In the Haida (2004), Taku (2004) and Mikisew (2005) cases, the SCC ruled 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.”

(SCC is the Supreme Court of Canada)

“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.”

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

“Subsection 35(1) of the Constitution Act,



1982, provides “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

A participation fund to support First Nation capacity to participate in consultations was announced at the same time. To date there is little information about how this fund will provide independent capacity and resources.

Staff units in two Manitoba government departments are tasked with consultations responsibilities. The Manitoba Conservation Aboriginal Affairs goals and objectives include:

“Assist in the development of a policy and procedure for consultation with First Nations and other Aboriginal communities.”

“Develop, with Aboriginal people, a strategy for the development of agreements between Aboriginal people and Manitoba Conservation.”

An April 2008 press release announcing a new consultations staff unit in Aboriginal and Northern Affairs Manitoba further specifies:

“The mandate and role of the Crown-Aboriginal Consultation Unit is to facilitate

Crown-Aboriginal consultations for the provincial government on proposed large-scale projects, as well as developing an overall government strategy on Crown-Aboriginal consultations and providing education and training on consultation policy and guidelines to government departments and First Nations and Métis communities. The unit is contained in the Department of Aboriginal and Northern Affairs and works with other departments on Crown consultation issues.”

Manitoba's Treaty Commission reminds us that we are all treaty people. We are all party to the treaties, all of us are affected by their consequences. Then surely reconciliation and respect are the basis for government to government relations and ideally for relations in all our communities.

Our Manitoba government knows it is late in the day. Manitobans expect our government to soon put standards, and measures in place with First Nations that ensure no further loss of rights, and a future with better decisions for Manitoba Aboriginal Peoples and traditional lands.

