

Seven Themes of First Nation-Crown Relations “Giving Life to the Treaty Relationship in the 21st Century”

Customary Law and Consultation: Prior to contact with Europeans, relations between the Nations and peoples of Turtle Island were guided by customary inter-tribal and intra-tribal protocols and practices. These Customary Laws, which are practiced to this day, form the foundation of First Nations' expectations, standards and values for relations and consultations between Nations, clans and families.

Relations During and After Treaty: The making of Treaties to recognize and reconcile the original Aboriginal title is consistent with ancient customary inter-tribal and intra-tribal protocols. The Treaties establish a relationship and commitment - *“for as long as the sun shine, the grass grows and the waters flow”* - between the Treaty Nations to consult each other whenever the Treaty promises may be affected by the actions and decisions of either the Crown or the First Nations.

The Crown's Duty to Consult: The recognition and affirmation of Treaty rights in the *Constitution Act, 1982* has resulted in the Supreme Court of Canada's recognition that upholding the "honour of the Crown" and achieving a reconciliation of the original Aboriginal title are continuing obligations of the federal - and provincial - governments. The Supreme Court and other courts have confirmed the constitutional duty of the Crown to consult, justify and accommodate a Treaty First Nation whenever an action or decision of the Crown may infringe or adversely affect an aboriginal or Treaty right.

Crown-First Nation Consultation Process: The duty to consult is grounded in the honour of the Crown. Treaty First Nations and governments must now engage in a process to identify any infringements or adverse effects of aboriginal or Treaty rights through the process as set out by the Supreme Court of Canada and other courts. Of central importance to this process is the documentation of the Traditional Knowledge and the traditional land use and occupancy information of Treaty First Nations. Treaty First Nations and governments must establish Crown-First Nation Consultation Protocols in order to provide a clear process for where a First Nation demands the conduct of the consultation process and or where the Crown request that a First Nation engage in the consultation process.



Justification and Accommodation: Aboriginal and Treaty rights may only be infringed where there are constitutionally valid reasons for doing so. The Supreme Court of Canada has established standards to be followed during a Crown-First Nation consultation process to determine whether any potential infringement of aboriginal and Treaty rights may be justified. Where any potential infringement may be found to be justified, the effect of these infringements on First Nations must be accommodated. Accommodation measures can include the negotiation of Impact and Benefit Agreements and Revenue Sharing as well as terms and conditions to be included in permits and licences issued under federal and provincial laws. Accommodation measures can also include innovative “legacy” measures that provide long-lasting benefits to affected First Nations that may be unrelated to the nature of the proposed decision or action.

Implementing Accommodation Measures: First Nations and the Crown must also be consult to ensure that measures to prevent infringements or to accommodate justifiable infringements are being implemented and are effective. First Nations and the Crown will need to work together to establish effective non-derogation provisions in laws and to reform of legal frameworks to provide for both the protection of aboriginal and Treaty rights and for the implementation of accommodation measures.

Establishing Relationships with the Governments: As symbolized by the handshake depicted on the Treaty Medal, there must be an effective and ongoing relationship between the Crown and Treaty First Nations in order to give life to the Treaty relationship in the 21st Century.

Consultation and Accommodation: Meeting the “Bare Minimum Requirements”

York Factory First Nation Community Consultation and Accommodation Meeting
September 15, 2010 - York Factory First Nation, York Landing, Manitoba

Issue:

- ▶ A review of Supreme Court of Canada decisions addressing the honour of the Crown and the Crown-First Nation consultation and accommodation process reveals what may be described as “the bare minimum requirements” of the Crown-First Nation Consultation and Accommodation process.
- ▶ In many cases, Manitoba may not meet these “bare minimum requirements” in the engagement of First Nations in, and in the conduct of, the consultation and accommodation process.
- ▶ As acknowledged by Manitoba, *“(t)he failure of the Crown to engage in meaningful consultations may result in any laws passed, actions taken or decisions made in the absence of consultation being declared invalid”*.

Background:

- ▶ In respect of Manitoba’s duty to engage, consult, justify and accommodate - at a bare minimum - Manitoba must:
 - a) provide notice;
 - b) directly engage the affected First Nation;
 - c) provide the affected First Nation with information:
 - i) that details Manitoba’s proposed decision or action;
 - ii) that identifies how Manitoba proposes to address and accommodate the interests of the affected First Nation;
 - iii) that identifies the scope of Manitoba's understanding of the potential adverse impact of the proposed decision or action on the affected First Nation's interests;
 - d) explicitly solicit the affected First Nation's response to the notice and information;
 - e) listen carefully to the concerns of the affected First Nation;
 - f) attempt to minimize the adverse impacts on the rights of the affected First Nation;
 - g) where an infringement of a right is identified, the consultation must proceed to the analysis of justification established by the Supreme Court of Canada in *R. v. Sparrow*;
 - h) where an adverse impact or an infringement will occur and can be justified, to accommodate the adverse impact or infringement; and
 - i) advise the affected First Nation how Manitoba will address and accommodate any impact or justifiable infringement.
- ▶ Manitoba often incorrectly proceeds on the basis that any perceived or actual non-response by a First Nation to a request for comment by a specified deadline justifies a determination by Manitoba that there is no adverse effect or impact requiring accommodation and that Manitoba may act. Manitoba does not routinely provide a First Nation with information identifying Manitoba's understanding of any potential adverse effect on an affected First Nation's interests, whether or not a First Nation responds to a request for comment.
- ▶ After a decision is made, Manitoba often fails to advise the affected First Nation how Manitoba will specifically address and accommodate any adverse effect or impact.

Recommendation:

- ✓ **That York Factory ensure Manitoba and Canada follow each step of the Supreme Court’s “bare minimum requirements” of the consultation and accommodation process.**