THOMPSON DORFMAN SWEATMAN

Consultation With First Nations Stakeholders

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Building Relationships

Introduction

Over the last three decades, consultation with stakeholders has become one of the key aspects of planning natural resource development in Canada. Forestry, mining, water power and oil and gas statutes, designed originally as property law regimes to permit energy and other natural resources on and under Crown and privately-held land to be developed and brought to market, have evolved into and alongside regulatory regimes which mandate environmental protection as a key element in development.1

It has become accepted that regulatory permission to implement a resource development project is normally contingent on the completion of an environmental assessment process. At the same time, environmental assessment has evolved from a technical assessment of the ability of the environment to absorb new emissions or other forms of pollution into a multi-disciplinary approach in which public consultation has become an essential element. Public consultation requirements are embedded in the regulatory landscape stretching across the country, including iterations of federal requirements from the Environmental Assessment and Review Process Guidelines Order adopted in 1984 through the recent amendments of the Canadian Environmental

Assessment Act (2003), to provincial requirements, including Ontario's Environmental Assessment Act, which has been in effect since as early as 1975, and Manitoba's environmental licensing regime under The Environment Act passed in 1987-88.

Gradually, as a result of converging developments in the implementation of statutory requirements for environmental impact assessment, administrative law applying the duty of fairness to administrative as well as judicial decisions and, since 1982, constitutional obligations to Aboriginal peoples, the nature, quality and timeliness of consultation has assumed ever-increasing importance in the natural resource planning environment. The involvement of Aboriginal peoples is often critical both to the completion of regulatory processes and to success in defending the decisions of regulators from legal challenges. Developers are searching for models which can take account of and ensure compliance with all requirements which, at the end of the day, are likely to be found to apply.

The recent Supreme Court of Canada decisions in Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73 ('Haida') and Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74 ('Taku') have once again made it clear that, while the special Constitutional duty of the Crown to Aboriginal peoples cannot be fulfilled by developers, it is in the interests of developers that early, meaningful consultation become an essential element in any best practice planning model. As one commentator has observed, it 'is a major challenge to develop consistent and understandable approaches to the interface between

aboriginal rights and interests, and the social and economic interests of the larger' society, of which aboriginal people form a part'.2

The proliferation of statutory and Constitutional consultation requirements, the development of the concepts of Aboriginal title and rights and treaty rights and interests, and the increasing expectations of environmental public interest groups have made the development planning landscape a complicated maze in which to operate. Activities described by the various persons involved in the planning and assessment process as 'consultation' can include every variation from the provision of information in a pamphlet and the consideration of written comments received in reply, to a commitment to achieve consensus, for example when Reserve land is being taken, before carrying out the development.

This paper will generally consider some of the highlights of the Aboriginal consultation experience in Manitoba, with a focus on hydro-electric development in northern Manitoba over the last 50 years. It will review some aspects of the evolution from resource planning in the 1950's, with little or no consultation, to consultation models that include co-proponent relationships with First Nation partners. It will consider the importance of establishing good working relationships with First Nations and Aboriginal communities and some mechanism to help build such relationships. It will also describe some of the effects of one such new relationship on the recent performance of environmental impact assessment of a proposed future development.

Brief History of Development and Associated Consultation

Hydro power in Northern Manitoba has been regarded as a major provincial resource in Manitoba since early in the 20th century. It was the subject of numerous Federal and Provincial studies starting as early as the 1940's and led to the development of generating stations commencing in the 1960's.

The first of these generating stations, at Grand Rapids near the mouth of the Saskatchewan River, involved creating a significant forebay at Cedar Lake with backwater effects into Moose Lake and the Summerberry Marsh area. Development of that plant required the taking of some reserve land from two Cree Nations, Mosakahiken and Chemawawin, and the consequent consultation, including the negotiation of an agreement relating to the taking of the reserve land, the relocation of one of the communities, works to address potential impacts and the provision of business and alternate harvesting opportunities. The consultation and negotiation process was undertaken by a Committee, with representatives of both Manitoba and Manitoba Hydro, and the affected First Nations. Since reserve land was being taken, the process necessarily involved Canada.

The Grand Rapids Project also affected other First Nations and off-Reserve communities, whose residents were primarily Aboriginal, located in and around the impacted lakes and water bodies. The level of consultation with these other First Nations and communities did not equate to the process of consultation and negotiation undertaken with the First Nations from whom reserve land was being taken.

The next major hydro-electric development was the Kelsey Generating Station on the Nelson River, upstream of Split Lake. This plant resulted in an impoundment of Sipiwesk Lake, which was used by members of the Cross Lake First Nation as well as residents of other Aboriginal communities. It also had some effects downstream in areas used by the Split Lake (now Tatasweyak or TCN) Cree located on Split Lake. The development of Kelsey did not require the taking or using of any reserve land and there was minimal consultation in comparison to circumstances where reserve land was required.

In 1966, the Province of Manitoba and Canada entered into an agreement to plan and develop high voltage direct current ('HVDC') transmission lines to transmit power from the north to the larger population centres in the south. This agreement contemplated the future development of a number of large hydro-electric plants on the lower Nelson River as well as the development of the Churchill River Diversion ('CRD') and Lake Winnipeg Regulation ('LWR').

CRD was designed and constructed to divert water from the Churchill River into the Nelson River. It involved the construction of a control structure at Missi Falls at the outlet of Southern

Indian Lake, where it flows into the Lower Churchill River and the construction of a channel from the South Bay of Southern Indian Lake to the Rat and Burntwood River systems which empty into the Nelson River at Split Lake. The diversion also involved the construction of an additional control structure at Notigi, upstream of Nelson House, to control the discharge of diverted water down the Burntwood River and into the Nelson River system.

LWR was planned and constructed as a means of controlling water levels on Lake Winnipeg, a major commercial fishery and recreation resource within the Province. It involved a series of channels designed to increase the potential outflow from Lake Winnipeg into the Nelson River as well as a control structure and small generating plant at Jenpeg with the capacity to control approximately 80% of the outflow from Lake Winnipeg. LWR was designed to permit the regulation of water levels on Lake Winnipeg between a low of 711 feet ASL and a high 715 feet ASL, to reduce the frequency and severity of upstream flood and drought events. Between those two elevations, which are within the normal historic range of Lake Winnipeg levels, the Province licensed Manitoba Hydro to regulate Lake Winnipeg for the production of hydro-electric power to meet the needs of Manitobans.

LWR and CRD were very major undertakings and were the subject of a great deal of public participation, scrutiny and debate. The Lake Winnipeg, Churchill and Nelson Rivers Study Board was commissioned by Canada and Manitoba to undertake a detailed process of consultation and environmental review of the projects.

The Study Board undertook its task and produced a significant, multi-volume report and a summary document entitled The Summary Report of the Lake Winnipeg Churchill Nelson River Study Board published in April, 1975. The summary report states in its introduction:

The governments of Canada and Manitoba, recognizing the overall interest and conflict over the use of the water and related resources, initiated the Lake Winnipeg, Churchill and Nelson Rivers study. The study was intended to determine the effects which the regulation and diversion projects are likely to have on other water and related resource uses, to indicate ways in which the projects may prove beneficial to such other uses, to recommend modifications in the design and operation of the works, and to recommend remedial measures where considered necessary to lessen undesirable effects.3

And further

The government of Manitoba decided in 1966 to proceed with developments to harness the potential energy of the Nelson River and to add to that potential by diverting a major part of the Churchill River flow into the Nelson River. The hydroelectric development program included a generating station at Kettle Rapids, a high voltage transmission line from the Nelson River to Winnipeg, regulation of the outflow from Lake Winnipeg and diversion of

substantial flow from the Churchill River into the Nelson River.4

The Study itself arose out of and was authorized by a joint Canada/Manitoba Agreement dated August 24, 1971. Pursuant to that Agreement, the Study Program had to 'consist of studies to determine (a) the effect on the water regime, (b) the effects on the uses of water or related resources; and (c) the social implications'5 of the proposed development.

One of the major components of the Study Board was consideration of the impact on Northern communities, including the communities of South Indian Lake, Split Lake, Nelson House (now Nisichawayasihk or NCN), Cross Lake and Norway House. Four of those were First Nations on-Reserve communities, while one, South Indian Lake, was an off-Reserve community primarily made up of members of the Nelson House First Nation. The study involved the review and analysis of significant data and published information about those Aboriginal communities and consultation with Aboriginal representatives of those communities. The development and operation of these two major projects (LWR and CRD) were closely considered and predicted impacts, including impacts on the Aboriginal people residing in the area, were analyzed and documented in the Study Board Report.

The public debate surrounding CRD led to a major design change, from a high level to a mid level diversion, in an effort to lessen predicted impacts. The Community of South Indian Lake was an early, and strong, opponent of CRD as a consequence of their concern about the impoundment of Southern Indian Lake. Other Aboriginal communities and, in particular, the Nelson House, Norway House, Cross Lake, Split Lake, York Factory and Fox Lake Bands also resisted the proposed developments. Ultimately, when it became clear that the projects would likely require the taking or using of some Reserve lands, Canada became involved in support of these Bands and the Northern Flood Committee ('NFC') was established by five of those six First Nations to fight the projects.

In an effort to address the concerns of the five First Nations, representatives of the Province of Manitoba and the Manitoba Hydro-Electric Board sat down with representatives of Canada and the NFC to negotiate. As a consequence, the Northern Flood Agreement ('NFA') was signed in December 1977 and was subsequently ratified by the First Nations, the Governments and the Corporation.

In the processes and negotiations leading to the NFA, and in the agreement itself, there was a recognition of the interests of the five NFA First Nations in the project area, and of the need to address their concerns and issues.

The NFA recognized and contains provisions that gave voice to the need for consultation in relation to major developments. Article 9 of the NFA, and in particular sections 9.1 and 9.2, outline future requirements for consultation. Those sections provide:

9.1 Hydro shall give written notice to each Band Council and to the Regional Director General of Indian Affairs (Manitoba Region) regarding its plans and/or its intention to prepare plans for future developments affecting the Rat or Burntwood or the lower Churchill Rivers, or the Nelson River, or any tributary thereto or lake thereon, which may affect any one or more of the residents of the Reserves.

9.2 Hydro shall not make any decisions in respect to any such future developments unless and until a process of bona fide and meaningful consultation with the communities has taken place.

There is, interestingly, some similarity between the language of Article 9 of the NFA and the standard for consultation with Aboriginal communities arising from cases dealing with issues under Section 35 of the Constitution Act, 1982. One significant difference is that the NFA provided for the First Nations to look to the project proponent rather than to the Crown to undertake that consultation.

Implementation of the provisions of the NFA proved difficult, with significant differences of view amongst all of the parties in terms of the scope of, and responsibility for fulfilling, the obligations of the agreement. The only implementation mechanism in the NFA is an arbitration process, which did not prove to be effective in addressing the significant, multi-faceted issues facing the parties to that Agreement. Instead of resolution, that process resulted in claims being filed and adversarial positions being developed and advanced.

To that point, the record of cooperative, pro-active consultation with Aboriginal communities about hydro-electric development in northern Manitoba, although consistent with applicable practice at that time, would not meet today's standards. As a consequence, some of the early developments proceeded without the developer having the level of understanding about impacts on First Nations and Aboriginal communities that would be the norm today. Generally, if the taking or using of Reserve land was required, the level of consultation increased, but even then, development often proceeded with First Nations viewing such development as alien; as something they had little or no control over and as damaging to some of their interests.

Hydro-electric development was a direct cause of significant change to Aboriginal people in Northern Manitoba. It was also an agent or catalyst for change through such mechanisms as the influx of workers, the increased accessibility and the sudden increased opportunities to participate in the wage economy.

Coincidentally Hydro development also occurred in a period of significant unrelated change and increasing concerns in the lives of these same people. Serious issues caused by conditions such as high unemployment, the lack of adequate housing, the lack of a good water supply, the increasing on-Reserve populations, the increasing availability of mass

media, the effects of the residential school system and of welfare on traditional harvesting activities and on family structures and relationships, were all impacting the lives of those same Aboriginal people.

As with all change, there were both positive and negative effects on the people in the north. However, since some of the more visible negative signs of change were associated with hydro-electric development, it became a lightening rod for discontent. Even in those situations where agreements had been reached with affected First Nations, there was often dissatisfaction with the perceived failure of those agreements to address growing problems, rightly or wrongly, attributed to the hydro-electric developments.

It became quite apparent that if relationships with Aboriginal communities in the North were to improve, the grievances from the past needed to be addressed.

Addressing the Past

In the late 1980's, Manitoba Hydro took steps to resolve the grievances of the First Nations and Aboriginal communities around the Grand Rapids forebay. It commissioned reports from independent experts and, based on those reports, began funded negotiations with each community. Final adverse effects agreements were concluded and signed in 1990 and 1991 with almost all of the communities and First Nations located around the Grand Rapids forebay.

Also in the late 1980s, the NFA parties began negotiation of a 'Global Settlement' addressing and resolving all issues under the NFA. These global negotiations led to the 'Proposed Basis of Settlement' that was initially endorsed by all of the parties but subsequently rejected by four of the five NFA First Nations. The one First Nation that continued to believe that this approach was in its best interest was Split Lake Cree Nation. Its then Chief indicated that no amount of money could fully compensate his First Nation and its people for what had happened, but it was time to move on and put the past behind them.

As a consequence of that decision, the Split Lake Cree First Nation entered into a comprehensive negotiation of all the outstanding issues between it, Canada, Manitoba and Manitoba Hydro arising out of the development of the hydro-electric projects and the NFA. That negotiation resulted in a Comprehensive Implementation Agreement entered into in 1992. The 1992 Agreement has proven to be a very significant and positive factor in Manitoba Hydro's continuing relationship with the Split Lake (Tataskweyak) Cree Nation.

At about the same time, negotiations began between the Community Association of South Indian Lake ('CASIL'), the Province of Manitoba and Manitoba Hydro, absent Canada, in an effort to resolve the effects of CRD on the NCN members and other residents of South Indian

Lake. That negotiation also concluded in an agreement, which together with remedial works and infrastructure and previous agreements entered into with the South Indian Lake resource harvesters, provided a significant package of benefits, compensation and programs.

Over the course of the next five years, Comprehensive Implementation Agreements (CIAs) were negotiated and concluded with York Factory (1995), Nelson House (1996) and Norway House (1997). Although each of the CIAs was unique, there were common themes as they were all based on implementation of the NFA. In each of them, the NFA Article 9 provisions relating to consultation about future development were refined into more specific and useful processes.

In total, across its system, Manitoba Hydro was able to successfully conclude more than 20 major agreements, not including specific agreements with associations of resource harvesters, such as Fur Councils, Trappers Associations and Associations of Commercial Fishermen6. In addition, Manitoba Hydro undertook major remedial works such as the weir at the outlet of Cross Lake and the Churchill weir, both of which were designed to help restore water levels affected by hydro-electric development.

The process of addressing the past is ongoing, but a lot has been accomplished. Not all issues have been resolved and there continue to be negative, although more muted, feelings towards hydro-electric development and those involved in that development. Successful negotiations and concluded adverse effects agreements are not a panacea, but addressing past grievances has proven to be a necessary first step in building positive relationships with First Nations and Aboriginal communities.

Consultation Processes in the CIAs

As referenced, each of the CIAs included provisions relating to future development that replaced the general language of Article 9 of the NFA. Although the actual provisions vary somewhat between agreements, they generally relate to future development defined as:

Future Development means:

1. the construction of any portion or parts of the Project not physically constructed at the Date of this Agreement; and
2. all major redevelopment or reconstruction of any Existing Development;

which has a reasonable likelihood of having a material and continuing physical, chemical or biological impact upon a water body within the Resource Management Area.7

The Resource Management Area ('RMA') reference is to an area of traditional use, coincident

with the Registered Trapline Areas associated with each of the Cree Nations. Under the CIAs, the Province of Manitoba agreed to establish the RMAs for resource management and planning purposes. Each RMA has a board with half of the members appointed by the Province and the other half appointed by the First Nation. Those Boards act under the CIAs as well as under provincial municipal and planning legislation and The Northern Affairs Act in the same manner as the Boards of Planning Districts do elsewhere in the Province. In addition, pursuant to the CIAs, the Province, while retaining its decision-making authority, refers applications for land use permits in the RMAs to the relevant Board for advice and comment.

The provisions in relation to 'Future Development' provide for annual meetings and for a consultation process involving the First Nation that generally include:

1. the provisions of maps and descriptions of potential sites showing the extent of inundation and describing anticipated impacts on water levels and flows;
2. identification of areas of particular concern or importance to the First Nation and potential positive and negative effects;
3. studies and investigations to assess potential effects and design modifications which could eliminate or alleviate adverse effects;
4. design and costing of possible mitigatory and remedial works;
5. consideration of practical and reasonable ways in which the First Nation might benefit from such Future Development;
6. developing a proposal to compensate for residual adverse effects; and
7. consideration of employment and business opportunities which could arise from such work.8

The CIA consultation process provided, where practicable and reasonable, for joint studies. They require funding of the First Nation's participation in the process based on agreed budgets and they provide for First Nation cooperation to identify areas of concern and importance to the First Nation, to facilitate the gathering of information from and communication with members.9

In addition to the planning processes, there are provisions for the development of an agreement to address any impacts of the proposed development on the First Nation, including an arbitration process.10

From the perspective of resource developers, planning processes like these, although potentially onerous, can be very useful in understanding potential impacts and avoiding unanticipated future mitigation and compensation costs.

Improved Relationships

Attending to past grievances through adverse effects agreements, providing mechanisms for ongoing involvement with the First Nation, monitoring to ensure implementation of

agreements that have been reached and providing for future consultations, all assist in building relationships with First Nations and Aboriginal communities.

In the case of Manitoba Hydro, its relationships improved to the degree that by the late 1990's it began discussions about potentially partnering with Tataskweyak Cree Nation, in relation to the potential Gull/Keeyask Development and with Nisichawayasihk Cree Nation, in relation to the potential Wuskwatim Development.

In October of 2000, an Agreement in Principle ('AIP) was entered into between Manitoba Hydro and the Tataskweyak Cree Nation outlining the basic understanding for developing a limited partnership and a Joint Keeyask Development Agreement. The partnering arrangement in relation to Keeyask has been expanded to include three other Cree Nations, War Lake, with its own AIP, and York Factory and Fox Lake, who are party to a partnering process agreement. In September of 2001, Manitoba Hydro concluded an AIP with the Nisichawayasihk Cree Nation in relation to partnering on the Wuskwatim Project.

The AIPs relating to partnering are different to some degree. However, in each case there are provisions relating to the need for cooperation in consultation with members, the sharing of Aboriginal knowledge, the mutual interest of the parties as co-proponents in the environmental assessment of the proposed project consistent with all legal and technical requirements and the sharing of information necessary to complete the environmental assessment ('EA') process and the Environmental Impact Statement ('EIS').11

Although these processes have not been completed, it is apparent that the new relationships have already been altered in a way that appears to have been beneficial from an environmental assessment and development perspective.

The Advancement of the Wuskwatim Proposal

As yet, of the potential projects which are the subject of First Nations consultation processes and potential partnering arrangements, only the Wuskwatim projects have been selected for commencement of a regulatory approval process. The Wuskwatim generating station would be located about 45 kilometres southwest of Thompson and 55 kilometres southwest of Nelson House at Taskinigup Falls on the Burntwood River, near the outlet of Wuskwatim Lake. New transmission lines would link the Wuskwatim generating station with the Manitoba Hydro grid. The sites of the generating station and much of the transmission line, although not on Reserve land, are inside the Nelson House RMA, and well within the traditional resource harvesting areas used by the Nisichawayasihk Cree Nation.

The Wuskwatim generating station, if built, would be the first new hydro-electric generation capacity developed in Manitoba since the 1340 MW Limestone Generating Station

commenced producing power in about 1990.12

Its purpose would be initially to generate surplus power for sale in the export market, and ultimately, as Manitoba's own need increases, to provide for domestic supply. Manitoba Hydro's planners have stated that they expect that this export sale of 200 megawatts (MW) of hydro-electric power would displace new development of fossil fuel-generated alternatives, thereby creating an environmental benefit in relation to greenhouse gas generation.13

Consistent with the principles set out in the AIP, the Nisichawayasihk Cree and Manitoba Hydro jointly have undertaken project planning, environmental assessment and participation in the regulatory approval process. On December 7, 2001, the proponents filed applications for environmental licenses with Manitoba Conservation. Although there had been consultation with regulators prior to that date, this filing kicked off the formal environmental regulatory review processes by both the federal and provincial authorities. Pursuant to the Canada-Manitoba Agreement on Environmental Assessment Cooperation, Manitoba involved Canada in its review of the applications and together the two jurisdictions, under the leadership of a Project Administration Team comprised of federal and Manitoba officials, directed a cooperative environmental review process.

After a public consultation process, on April 29, 2002, the Project Administration Team issued Guidelines for the preparation of Environmental Impact Statements for the Wuskwatim proposals. These EISs were filed, reviewed by regulatory officials and their Technical Advisory Committee, and by the public, and additional filings were provided in response to specific questions by the regulators. In March and April of 2004, the Manitoba Clean Environment Commission held public hearings to consider the views of the public and, in September of 2004, issued a report recommending approval of the environmental license applications. The release of the Comprehensive Study Report prepared by federal responsible authorities is expected shortly. Throughout these public regulatory processes, Manitoba Hydro and the Nisichawayasihk Cree have worked collaboratively as co-proponents of the projects.

The involvement of the Nisichawayasihk Cree has had a variety of effects on both the environmental assessment and the regulatory review. These effects include process and substantive changes in the planning of the proposed projects and changes in the nature and quality of the information that has been and likely will continue to be developed.

Effects on Project Description

The first - and likely what will be judged to be one of the most significant - effects of the involvement of the Nisichawayasihk Cree occurred very early in the planning process. By the time the AIP was signed on September 25, 2001 and the environmental license applications were filed on December 7, 2001, a preliminary decision had been made to select design

criteria which would provide for a 'low head' rather than 'high head' design.

As reported in the Wuskwatim Generation Project Environmental Impact Statement14, in 1997, consistent with the consultation provisions in the 1996 CIA, Manitoba Hydro and the Nisichawayasihk formed a Working Group to consult on potential future development. By 1998, planning had reached the stage at which design options for Wuskwatim were to be considered. The first round of environmental planning involved the selection amongst these design options. In late 1998 and early 1999, the Working Group discussed the merits of the low head and high head options.

Preliminary engineering studies revealed that up to 350 megawatts of power could be achieved in harnessing the power of Taskinigup Falls. However, to create sufficient head to generate the full 350 megawatts (MWs) would have resulted in the flooding of 140 square kilometres of land behind the dam. The preliminary studies showed that a lower head design would reduce the generating capacity of the station, but would still be technically and economically feasible, and would greatly reduce flooding behind the dam.

A decision was made to consider only the design option that provided for a capacity of 200 MWs of power, which results in a reduction of new flooding to less than 1/2 of one square kilometre. The decision to consider only a low head design became part of the information submitted to the Nisichawayasihk Cree for their consideration in the referendum by which they later approved the AIP (in September 2001). Both potential partners thus gave up some economic benefit, while achieving greater environmental protection.

Effects on Environmental Impact Assessment

Joint Process

The next step in the Manitoba Hydro - Nisichawayasihk Cree process was to plan the elements of the environmental assessment. In 1999, after consideration of the various models of participation, the Nisichawayasihk Cree decided to work together with Manitoba Hydro to retain one team of consultants to manage the environmental assessment of the projects.15 Therefore, throughout the environmental assessment process, the Environmental Management Team has reported to both Manitoba Hydro and the Nisichawayasihk Cree and has taken direction from a management team, comprised of members from each, making decisions by consensus.

The Nisichawayasihk Cree, Manitoba Hydro and the Environmental Management Team worked together to develop study plans, conduct consultation with Nisichawayasihk Cree members and other potentially affected communities, and carry out the studies. In addition

to the community consultation, led by a team of Nisichawayasihk elders and other members, the teams of study scientists doing field work (such as engineers studying flow regimes and sedimentation, rare plant botanists, large mammal biologists, fish biologists and archaeologists) included Nisichawayasihk members who had traditional knowledge of the issues under study.

As the route of the transmission lines was being planned, the teams comprised of consultants and Nisichawayasihk members also involved contacts with other communities to find and seek the assistance of other persons with local and traditional knowledge specific to the areas covered by the alternative routes.

Resolution of Discrepancies between Engineers' Predictions and Predictions of Elders: Participation of Elders in Planning Mitigation and Follow-up Monitoring

Several examples illustrate the effect of the contribution of Nisichawayasihk Cree on environmental planning and the quality of the information that has been achieved in the environmental assessment. One example, explained at the Clean Environment Commission hearings by the water resource engineer who was one of the four Environmental Management Team leaders, occurred when the team was studying and attempting to predict the extent to which debris would be mobilized by the construction and operation of the new facility. The engineers' predictions did not match the expectations of the elders who had been observing the behaviour of the river from the time prior to the Churchill River Diversion.

In the course of the assessment, the engineers and the elders discussed their differing expectations and arrived at a plan to monitor the situation as it occurs during construction and collectively agree on the mitigation measures to be undertaken if the elders' predictions prove to be accurate. As explained in the hearing:

We didn't have to decide who was right, we couldn't decide who was right. Instead we agreed on an impact management strategy to deal with either scenario.16

The approach used by the proponents thus appears to have yielded the benefits both of obtaining the best information available and providing a means to reach agreement with affected persons about matters which might otherwise have proved contentious.

Incorporation of Sources of Unique Information

At other times during the assessment, the quality of the assessment benefited from information provided by the Nisichawayasihk Cree which would not have been available by other means. In researching heritage resources in areas that could be affected, for example,

by flooding, routing of the transmission lines or establishment of construction camps, much of information that was used to plan the avoidance of adverse effects would not have been obtainable except through the participation of the Nisichawayasihk Cree. As reported in the EIS, '[m]any aspects of NCN's history have been passed down verbally from generation to generation, thus preserving important cultural and physical heritage knowledge'.17

Traditional Knowledge and Western Science as Support for Each Other

In other examples, it was found that traditional knowledge and western methods supported each other. In cross examination at the Clean Environment Commission hearings, the biologist who was the team leader for bio-physical studies reported in detail on the variety of western scientific methods used to collect information about large mammals in the study region. He also described the collection of information by the Nisichawayasihk Cree in consultation in their community. This included the participation of a 'very large portion of the entire [Nisichawayasihk community living at] Nelson House.' These members 'filled out calendars on a daily basis to provide information on resource harvesting,' including harvesting of caribou, which received extensive scrutiny by environmental public interest groups at the hearings.18

The witness reported that in their initial discussions with elders, the biologists were told that there were about 200 caribou in the relevant area. He reported in summary that:

After we conducted two years of fairly expensive aerial surveys, the number that the biologists came up with was 200, which was exactly the same as what we were told before we started. The radio collars that are put on caribou are quite expensive and they are tracked by air. The traditional knowledge study that was done with about 66 NCN elders, if you take the map that is provided by them in regard to where the animals are at certain times of the year and their movements throughout the system, and you overlay that with the relatively expensive radio tracking work, they are almost identical.19

The value of the contribution of the cooperative process to the quality of information obtained was acknowledged by the public interest group's cross examiner in the follow-up to these comments.

Effectiveness of Testimony at Public Hearings

The participation of the Nisichawayasihk Cree as co-proponents at the Clean Environment

Commission hearings also included cross examination of opponents of the proposals. When one environmental public interest group called a university professor to speak in opposition to the proposals based on his belief that development of this nature is inimical to Aboriginal culture, cross examination of this witness by a representative of the Nisichawayasihk Cree illustrated the professor's lack of specific knowledge of the Nisichawayasihk Cree, their culture and their physical environment.20 In the result, his testimony was given little or no weight by the Commission in its report.

Managing Contradictions between Aboriginal and Western Approaches

In addition to these advantages, the Wuskwatim proposals also provided direct experience with some of the difficulties that can arise as a result of differences between traditional Aboriginal practices and regulatory requirements concerning environmental assessment. One example that was illustrated at the Clean Environment Commission hearings is the contradiction between the way in which information about the environment and other traditional knowledge is treated by Aboriginal people and the expectations of Western science that the data supporting environmental assessment conclusions all will be disclosed for public review. It was explained by the proponents that while much or most of the traditional knowledge that was collected was not set out in detail in the reports, it was embedded in the conclusions that were reached by the Environmental Management Team and the proponents.

At the hearings, the Environmental Management Team described some of the types of traditional knowledge which had to be kept out of the reports. Some of this information was confidential in a way that is readily understood in Western culture. For example, the need to protect information about the locations of animals from inappropriate exploitation of the resource was understood as similar to the need to protect intellectual property, proprietary or business information in an industrial culture. However, much traditional knowledge, for example about sacred practices, was not commercially or economically useful to others, but still was not disclosed in the Environmental Impact Statements.

In response to challenges by Commission members and others, the Environmental Management Team attempted to explain the withholding of such information:

The point has been made that there is not a lot of information spelled out in the document on traditional knowledge . So from the point of view from somebody who worked on this, let me assure you that at times where we were dealing with certain issues , our team would get access to maps and things, records and information that NCN would have, that was only being allowed to be used by us for the purposes of discussion in trying to resolve certain

issues. Certainly, they had no desire to have it published. Even reference to the dancing circle, we were asked not to refer to in some of our sections .

There [were] workshops and involvement of elders in some in-depth ways that NCN did independently of reporting on it here, but they did it as a pilot project on traditional knowledge. And they have all of that information internally, and they keep it.

So, maybe from the point of view of environmental practice, if you had someone, if you have situations where the person is not a proponent, or co-proponent, this may cause some very interesting issues as to how you document this . That is a comment on the practitioner's point of view of the issues of getting the information, paying attention to it, and then reporting on it. So anybody else - - the last step seems to be very difficult, given the confidentiality and people's desire to protect what is very important to them .

The elders were quite generous in terms of some confidentiality issues here, because of the nature of who we were and who [we] were working with. They might not be as generous if we weren't dealing with a co-proponent. 21

This confidentiality issue was one of several issues which it might be anticipated will arise with more frequency in development proposals which involve to greater and lesser degrees cooperative relationships with Aboriginal communities.

Conclusions in the Public Hearing Report

The Clean Environment Commission reproduced in its report the observation stated by a Nisichawayasihk Cree witness in testimony at the hearings:

A landmark of the Environmental Impact Assessment process for Wuskwatim has been the use of local and traditional knowledge for the first time in assessing the impact of a hydroelectric generating and transmission project in Manitoba. This information is in addition to the scientific information that is usually at the core of the environmental impact statements.22

In recommending approval of the Wuskwatim license proposals, the Clean Environment Commission appears to have given considerable weight to the participation of the Nisichawayasihk Cree in the environmental impact assessment process. The report provides the following summary of activities undertaken to use traditional knowledge to inform the impact assessment:

NCN members shared TSK [traditional scientific knowledge] about the local area through a

variety of mechanisms [including] interviews with resource harvesters, Elders and others. A committee of community representatives guided the interview process and established principles and guidelines on how TSK should be collected and used. Along with other sources of information, TSK was used to identify, assess and mitigate adverse effects. It was used in the selection of alternatives, siting of infrastructure and interpretation of the importance of effects. The NCN community consultants commented that they participated in joint NCN/MH committee meetings, offered their own TSK, and helped collect information from others about sacred sites, use of the land and understanding of the environment near each of the alternative routes. The consultants undertook a formal process of interviewing Elders and resource harvesters about their TSK of the RMA and recording the information on tape, on maps and in writing.23

Although the Commission subjected the proponents to some criticism for failing to adequately identify in the Environmental Impact Statements their reliance on traditional knowledge, it appears, in the final analysis, that the Commissioners appreciated the role played by the relationship between Manitoba Hydro and the Nisichawayasihk Cree and that they accepted as worthwhile the trade-off of ability to publicly disclose all data for access to information that otherwise wouldn't have been shared. The report states that the Commission:

appreciates that TSK contributed to decisions by MH/NCN in the design and future construction and operation of the Projects. It is noted that the 1996 NFA Implementation Agreement and the proposed partnership agreement may have served to facilitate this. The Commission also acknowledges that TSK was practiced in the identification of burial locations, sacred sites, ceremonial areas, as well as the selection of appropriate mitigation and that TSK will be used in environmental protection plans.24

Thus, the Commission has acknowledged that the relationship building effort undertaken by Manitoba Hydro and the Nisichawayasihk Cree has been effective in developing and articulating the type of information that generally is sought in a consultation effort.

CONCLUSION

Consultation with potentially impacted First Nations and Aboriginal Communities is a significant part of the planning process for any resource-based development. That consultation is mandated by law and regulatory requirements, but it is also essential to prudent planning for resource developers. Where there is the potential for a proposed undertaking, such as a road, to impact on treaty or Aboriginal rights, there is a consultation obligation imposed on the Crown, but this does not mean the developer can simply rely on the Crown process and not consult directly about potential effects and how they are best addressed.

Consultation should not be seen as just a required step but as a real and substantial contributor to a developer's understanding of the risks and costs associated with its project. Failure to do it right can lead to the development being delayed or even stopped and, after the fact, can result in significant and unexpected claims being filed for compensation. The whole purpose of planning is to identify not just opportunities and how best to maximize them but also costs and risks and how they can be avoided or mitigated.

No planning process is perfect and hindsight will invariably reveal flaws. The same is true of consultation and the role that it plays in planning. Nonetheless, no prudent developer would proceed to invest in, or commit to a project, without a reasonable level of planning and that necessarily means a reasonable level of consultation where there are potentially impacted people.

Consultation is of course a two-way street. It only has value where both parties to the consultation participate, and that value increases with the degree of effort, openness and candour that the parties to the consultation are willing to invest. It may be rare that such processes will achieve, or be required to achieve, the level of an 'honest dialogue'25 , but good consultation does require more than a willingness to listen; it requires a willingness to understand.

Unfortunately there are a number of impediments to good consultation. First, it takes time and an investment of resources, often before there is a real likelihood that the development will proceed. From the perspective of the potentially impacted First Nations or Aboriginal communities there is little incentive to spend time and effort on such issues and, in a lot of circumstances, there is a fundamental lack of trust. Where there have been previous developments and existing grievances, there may be no willingness to even consider a new development, potentially bringing more of the same problems.

To undertake good consultation with a First Nation, the existence of a good working relationship is a major benefit. This type of relationship needs to be built and fostered. In this paper we have considered the importance of such a relationship and some ways to try to achieve it. Where there are past grievances, they need to be addressed. This does not always mean a fully satisfactory resolution, but it always means an honest willingness to listen, to try to understand, and then to be open about ways in which such a grievance might be addressed.

Where practical, establishing mechanisms, procedures or a table through which there is regular and meaningful contact between the First Nation and the developer is a good idea. These contacts can be an early warning sign of problems developing in the relationship. They can be used to introduce and meet new employees of the developer and new leaders of the Aboriginal community. They can be a source of ideas for business as well as social interaction.

However such tables develop, and whatever matters they deal with, the informed developer will take great care that whatever it says at that table is as truthful and candid as possible. Where confidentiality concerns prevent information being shared or where uncertainties exist about future actions, the developer should ensure those are identified as qualifications and limits on what is being discussed.

To the extent possible, overly broad and general statements of good intent should be avoided unless they are clearly qualified and not taken as promises that are subsequently seen as broken. It is important that any promise made at such a table is deliverable and delivered.

Frankness is another touchstone. Both parties need to be able to bring difficult and troubling issues to the table. If all such a table does is provide a place to talk about the 'good stuff,' there is still value to having the table, but that value is limited.

Where such a table or other established channel of communication exists, it is much easier to introduce the potential for a new project and the need for consultation about such project. Where such a table is functioning well, the representatives of the parties are often able to assist each other in understanding how best to communicate their ideas with the larger 'communities' they represent. There is a recognition that in neighbour relationships, a problem for one's neighbours is very often a problem for oneself.

A key to a successful table is obviously good communication, but what is too often overlooked is that communication with others who do not have the same language, the same culture, the same experiences and the same interests is very difficult. How does an Aboriginal Elder raised in an oral tradition of communication and a consensus style of decision-making, communicate his or her Aboriginal knowledge, about the importance of an activity to his or her culture and sense of well being, to a non-Aboriginal person who was born and raised in an urban setting with representative, hierarchical decision-making and who is formally trained as a professional engineer. Similarly, how does that engineer, trained to communicate important technical information in writing, credibly communicate his or her professional opinion that the particular activity being described by the Elder will not be impacted by the proposed project. Such communication is not easy even when there is a good table with some level of trust.

It takes time, it takes resources, it takes commitment and often it takes a sense of humour to bridge these gaps and make progress. Further, since these relationships tend to be long term and since people keep moving within corporations and to some degree within First Nations, a good relationship requires a documented corporate memory and good succession planning.

Consultation of the type described in this paper is an important and meaningful step in resource development. It should not just be seen as an obligation, but as an opportunity. If

the Wuskwatim project proceeds, it will be one of, if not, the first hydro-electric generation project to be carried out with the full participation of a First Nation in partnership with a Crown corporation. Time will reveal whether this approach is fully successful, but some benefits have already materialized. Hopefully time will prove this to be a good approach and it will become a positive precedent, but not a rigid template, for more partnering initiatives in the area of resource development.

Co-author Sheryl Rosenberg has retired from Thompson Dorfman Sweatman LLP as of December 31, 2023.

Footnotes

1 See the description of the origins of environmental protection statutes in Elaine L. Hughes, Alistair R. Lucas and William A. Tilleman, eds., Environmental Law and Policy, 3rd. Ed. (Toronto: Emond Montgomery, 2003) at pages 163 - 165 and 215 - 218.

2 Kathleen C. Murphy, 'Consultation with Aboriginal Communities in Resource Management: Resources, Rules and Reasons' (Paper presented to the Isaac Pitblado Lectures, 2001), Practising Law in an Aboriginal Reality (N.p., 2001) 145. See also Robert J. Adkins & Elissa A. Neville, 'Aboriginal & Resource Based Economic Development: An Overview of Recent Trends and their Implications for the Business Lawyer' (Paper presented to the Isaac Pitblado Lectures, 1999), Business Law & Litigation: Trend-Spotting for the 21st Century (N.p., 1999) 25.

3 Canada/Manitoba, Lake Winnipeg, Churchill and Nelson Rivers Study Board, Summary Report (N.p., 1975) at 3.

4 Ibid.

5 Ibid at p 61-2.

6 See the answer submitted on April 8, 2004 by Manitoba Hydro to Undertaking 55 made on March 25, 2004, to the Manitoba Clean Environment Commission at the public hearing concerning the Wuskwatim Generating and Transmission Projects. See also 'Aboriginal Relations' online: Manitoba Hydro http:// http://www.hydro.mb.ca .

7 See e.g. The Nelson House Comprehensive Implementation Agreement online: Manitoba Hydro http:// http://www.hydro.mb.ca .

8 Ibid.

9 Ibid.

10 Ibid.

11 Agreement in Principle to guide discussions and arrangements concerning the Wuskwatim/Notigi Projects and the Wuskwatim/Notigi Transmission Facilities between NCN and Manitoba Hydro, online: Manitoba Hydro http:// http://www.hydro.mb.ca and Agreement in Principle regarding the potential future development of the Gull Rapids Hydro-Electric Generating Station, online: Manitoba Hydro http:// http://www.hydro.mb.ca .

12 'History and Timeline,' online: Manitoba Hydro http://www.hydro.mb.ca/about_us/history/history_timeline.html

13 Manitoba Clean Environment Commission, evidence of Ed Wojczynski, Transcript Vol. 19 pg 4527-8.

14 at Volume 1 page 4-4 to 4-8

15 Summary of Understandings between Nisichawayasihk Cree Nation and Manitoba Hydro with respect to the Wuskwatim Project, October 2003 [unpublished] at p. 6.

16 Manitoba Clean Environment Commission Public Hearing, evidence of George Rempel, Transcript Vol. 16 p 3859.

17 Wuskwatim Generation Project Environmental Impact Statement, April 2003, online: Manitoba Hydro http://www.hydro.mb.ca/issues/transmission_projects/wuskwatim_manitoba.shtml at p. 10-1.

18 Manitoba Clean Environment Commission, evidence of Stuart Davies, Transcript Vol. 19 p 4606.

19 Ibid.

20 Manitoba Clean Environment Commission, Transcript Vol. 8 pp 1979 - 1989.

21 Manitoba Clean Environment Commission, Transcript Vol. 22 pgs. 5427-5430.

22 Manitoba Clean Environment Commission, Report on Public Hearings: Wuskwatim Generation and Transmission Projects, online: Manitoba Clean Environment Commission http://www.cecmanitoba.ca/reports/pdf/RespectingWuskwatimGeneration .pdf .

23 Ibid.

24 Robert J. Adkins & Elissa A. Neville, 'Aboriginal & Resource Based Economic Development: An Overview of Recent Trends and their Implications for the Business Lawyer' (Paper presented to the Isaac Pitblado Lectures, 1999), Business Law & Litigation: Trend-Spotting for the 21st Century (N.p., 1999) 25. See also The Canadian Centre for Management Development, 'A Strong Foundation- Report of the Task Force on Public Service Values and Ethics,' chaired by John C. Tait, Q.C., December 1996 at 3.
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