

Pimicikamak Okimawin

A Sustainable Relationship with Manitoba Hydro

Objective

The purpose of this discussion paper is to explore with Manitoba Hydro a foundation for a new relationship. Such a relationship should be mutually respectful and sustainable. It should support the relations of both parties with Crown governments.

Background

Manitoba Hydro's presence in Pimicikamak territory began with unannounced flooding of Sipiwesk Lake in the 1960s and continued amid growing fear and outrage. Information provided in the 1970s led to the Northern Flood Agreement but soon proved to grossly understate impacts. Since then trust all but disappeared and the relationship became increasingly hostile.

In 1999, the Supreme Court of Canada interpreted section 35 of the *Constitution Act 1982* in *Delgamuukw vs. British Columbia* as requiring the Crown to consult with aboriginal peoples as a condition precedent to steps that could affect exercise of their aboriginal or treaty rights. 'Some cases may even require the full consent of an aboriginal nation'.¹ But the role of consent in aboriginal relations did not begin with section 35 or the *Delgamuukw* decision. Indeed consent has long been a foundational principle of civilized relationships.

Last year Canada withdrew its objection to the *United Nations Declaration on the Rights of Indigenous Peoples* (having been one of four countries that voted against it in 2007). Former Supreme Court Justice Frank Iacobucci observed that: 'An important tenet of *UNDRIP* is the consultation of indigenous peoples "in order to obtain their free, prior and informed consent."' ²

Canada has not enacted (and may never enact) *UNDRIP*'s provisions into Canadian law, though the courts may consider and apply them.

Canada's current federal government has embraced *UNDRIP* as public policy. As Professor Dwight Newman recently observed, the government's articulation of *UNDRIP*'s provision for consent says it will *seek* to obtain consent.³

Setting aside problems of when consent may be required, Justice Iacobucci depicted consent as an opportunity, saying that it can 'provide a foundation for a more respectful and mutually beneficial relationship.'

Pimicikamak has long shared this view.

Legal Context

Manitoba Hydro's presence in Pimicikamak territory ultimately rests on rights under Treaty 5. In 2014 Pimicikamak citizens confronted that presence at Jenpeg. The raw legal underpinning that secures Manitoba Hydro's unwanted presence is its access to armed force through an injunction. In the 2014 confrontation, Manitoba Hydro came up against the realization that to seek an injunction would not secure

its critical infrastructure. In 1976, apprehending this same vulnerability led Manitoba Hydro's President and CEO Leonard Bateman and Premier Ed Schreyer to embrace the Northern Flood Agreement (an insight their successors soon forgot).

The NFA was intended to provide a foundation for civil relations, so that Manitoba Hydro could become a good (if not entirely welcome) neighbor. After forty years of financial expense and human cost, the clear verdict is: It failed. Surveying the wider scene in Canada it is clear this failure is not limited to the NFA. There is growing recognition that the Canadian legal system, with its rights-based paradigm, is unable to produce the reconciliation various tribunals advocate; is a source of increasing uncertainty that inhibits investment; and has little capacity to improve indigenous peoples' lives.

That is, the existing legal context is part of the problem and cannot be expected to yield a solution.

Policy Context

The pivotal policy issue for Manitoba Hydro is not whether it may need Pimicikamak's consent for its operations because Canadian law may require it; it is whether seeking consent will benefit the corporation.

If Manitoba Hydro does not value consent it will need to devise an alternative basis for a sustainable future in Pimicikamak territory.

The Opportunity

Consent based on Pimicikamak law—as now embedded in Canadian law—offers a new (though also very old) way to achieve reconciliation and certainty. While this discussion paper focuses on Manitoba Hydro's operations the opportunity exists for Pimicikamak to offer the same approach to other developments. (For example, Tolko expressed active interest in seeking consent to its operations throughout Pimicikamak territory before selling its Manitoba business.)

Even more widely, where legally valid consent of an aboriginal people can be achieved it can offer means to manage business uncertainties and to break legal logjams that currently inhibit investment and development in much of Canada. It also provides incentive to invest in survival of those indigenous peoples that still survive.

This is the kind of fundamental makeover that Manitoba Hydro needs if it is to achieve a sustainable future for its infrastructure and operations in the North. It is not without uncertainties for all concerned; but it seems less uncertain than the alternatives.

Authority

In the modern government of Pimicikamak, the Executive Council exercises the entire executive authority of the nation. Subject to Pimicikamak law (including the implications of Treaty 5) it has the power—and indeed the responsibility—to take all actions required for protecting Pimicikamak. Thus it could in principle (following consultation among its citizens) issue a valid Executive Council Order consenting to specified actions in its territory subject to conditions consistent with its protection.

However, in present circumstances consenting to any of Manitoba Hydro's operations would be controversial. Consultation would be unlikely to achieve national consensus and could inflame a tense situation. Foreseeably it would be said (with justification) that the Executive Council should first seek express authority to take such steps. This could come from a resource management law or from national policy. Both have been contemplated and discussed for more than a decade.

Practical Considerations

Based on past experience enacting a resource management law would take years from inception and call for resources that are not presently available. A national policy focused on consent might be achieved much sooner and at low cost. In the modern government of Pimicikamak the Four Councils⁴ has plenary authority to make national policy though it too may choose to first engage in consultation.

A key question for citizens and the Four Councils would be Manitoba Hydro's intentions. It would make no sense to expend scarce resources unless Manitoba Hydro would value formal consent and would cooperate in developing workable technical conditions.

If granted, such consent would supplant section 35 consultation and all of its associated uncertainties.

Precedent

For both Pimicikamak and Manitoba Hydro, a decision to take this new path cannot be taken lightly. There are two obvious questions: Will it work? And how? A precedent may help to answer them.

In early 1994 both of Telesat Canada's *Anik E* satellites were damaged by a solar flare. By 1996 their performance had deteriorated irreversibly, affecting transponders that carried much of Bell Canada's cross-Canada broadcasting and telephone traffic. Bell Canada set out to build a trans-Canada fiber-optic cable (known as *Bell FOTS*). Geography dictated that it must transit Treaty 3 territory.

In response to a formal request from Bell Canada's President, Grand Council Treaty #3 undertook to develop a resource management law that would give the Executive Council clear authority to consent to building and operating the cable in its territory for a twenty-year term. The consent's validity would hinge on Bell Canada's complying with specified conditions. With extensive public consultation, making this national law (*Manito Aki Inakonigaawin*) took two years; Bell Canada paid certain costs (totalling about \$1M). The Executive Council issued the consent in 1998. Reportedly, Bell Canada has since fully observed the conditions including paying a 5% tax on phone revenues from Treaty #3 territory.

The Bell FOTS example shows that indigenous legal consent can work and illustrates some aspects of how it can work. More complex issues are involved between Pimicikamak and Manitoba Hydro; it may be desirable to begin with a specific well-defined subject such as a transmission line. The Jenpeg to Cross Lake line could make for a good start as the issues are well-defined and familiar to local people.

A Choice

For Manitoba Hydro obtaining consent would secure a sustainable situation for its operations in Pimicikamak territory. For Pimicikamak granting consent subject to reasonable conditions would be a key step in implementing its national policy on survival (Heal the land; heal the people; heal the nation) and renewing its relationship with the Crown (*A New Relationship*). Does anyone have a better alternative?

¹ *Delgamuukw vs. British Columbia*, [1997] 3 S.C.R. 1010, per Lamer, C.J, at para 168.

² F. Iacobucci, “The path to reconciliation with indigenous peoples starts with consent”, *The Globe and Mail*, July 13, 2016, p. A11; <https://www.theglobeandmail.com/opinion/the-path-to-reconciliation-with-indigenous-peoples-starts-with-consent/article30888197/>

³ D. Newman, “Ottawa’s sly change on consent may damage Indigenous relations”, *The Globe and Mail*, August 3, 2017; <https://www.theglobeandmail.com/opinion/ottawas-sly-change-on-consent-may-damage-indigenous-relationships/article35863756/>

⁴ The Four Councils is a single council comprised of all the members of the Women’s Council, the Elders Council, the Youth Council and the Executive Council. It determines Pimicikamak national policy, which has the weight and effect of customary law.

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