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Moose Management in Manitoba – Time for Change

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Abstract: Much has been written on the relationship between Canada, its provinces and territories and Canada's aboriginal peoples. Aboriginal and treaty rights were entrenched in Canada's constitution (section 35) on April 17, 1982. While treaty and aboriginal rights must be respected it is important to recognize that they are not absolute. The Supreme Court has established principles and outlined circumstances by which a government decision that is apparently an infringement of Aboriginal or Treaty rights may be justified. These are: i) a government cannot interfere with rights in absence of a compelling reason (e.g. conservation, resource management); ii) the manner by which regulations or restrictions are formulated must be sensitive and respectful to the protected aboriginal rights and should interfere with those rights to the minimum extent possible; and, iii) governments should engage in meaningful consultation with the affected aboriginal groups.

Manitoba's moose population has taken a dramatic downhill turn from what was present in the early 90s. This has resulted in the first conservation closure for moose in Canada with more likely on the horizon. This in turn has resulted in staff being engaged in a meaningful consultation process and dealing with the issue of accommodation.

The aforementioned sets the stage for social, political and economic realities that will apply in Manitoba for the foreseeable future and is a heads up for what may lie ahead for other management authorities. Some of these are licensed hunting by residents, hunting by non residents, conservation closures, restricted access and access management all of which are accompanied by significant economic realities. And, there are implications to Aboriginal peoples in that there is a need for their involvement in management programs to ensure the resources are available for future generations.

Introduction (Figure 1)

Manitoba's moose (*Alces alces andersoni*) population was estimated at about 21,000 moose in the early 80's about 35,000 in early 90s and in 2011 likely less than 20,000 (Figure 2) There are about 40 game hunting areas (GHAs) (Figure 3) with moose populations of varying sizes, not all of which have licensed hunting seasons but have been open to harvesting by Rights Based Harvesters (RHU).

Concern is warranted for the sustainability of Manitoba's moose populations especially in the accessible areas and populations in approximately 10 GHAs (Figure 4) have declined over the last decade with some down 95%. Moose hunting in southeast Manitoba was curtailed in 2000 and is adjacent to Minnesota and northwest Ontario where moose populations have experienced significant declines (e.g. MN – 4,000 to about 100) Provincially the annual licensed harvest since the early 80s has been about 1,000 moose (about 95% bulls – on average about 20/GHA). Depressed populations are attributed to disease (winter tick, brain worm and indirectly liver fluke), increased access, weather in concert with winter tick, uncontrolled harvest and predation. A significant die off occurred in the spring of 2002 when about 40% of the population in west central Manitoba succumbed to a combination of winter tick and inclement spring weather lasting until early June. In the southeast the major factor is a deer population with virtually 100% being infected with brain worm.

Wildlife managers have expressed concern about depressed moose populations for some time now and in the last few years this has also caught the attention of some First Nation communities and other stakeholders particularly after results of recent surveys in the Duck Mountain region and GHA 26 became known. Manitoba Conservation (MC) has now embarked on information sharing meetings with various groups and formal consultation and information sharing with RHUs to address concerns. The results to date have been mixed. Some First Nation peoples have asked MC to invoke restrictions on the harvest by their peoples namely a conservation closure whereas others have been expressed concerned about treaty rights – the bottom line is that without the resource, treaty rights are meaningless. MC has advised First

Nations and Métis who are willing to work in partnership with government to ensure the sustainability of populations and have asked for their co-operation in voluntarily reducing or curtailing the moose harvest in GHAs of concern and that without this MC as the management authority will of necessity and for conservation purposes invoke a conservation closure. The Department is also in the process of developing an Aboriginal Engagement Policy of which the suggested goal is to provide staff with an understanding and guidance as to the obligations and opportunities that Manitoba has with Aboriginal peoples with its mandate to manage the environment and resources for all Manitobans. Having stated this, a conservation closure was put in place as of early July 2011 in western MB for the areas referred to as the Duck and Porcupine Mountain and the Swan Pelican. This is the first conservation closure in Canada for moose. Canada's 3 Prairie Provinces (Manitoba, Saskatchewan and Alberta) are governed by *Paragraph 13 of Canada's Natural Resources Transfer Agreement (NRTA)* which reads as follows:

"In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof provided however that the said Indians shall have the right which the Province hereby assures to them of hunting, trapping and fishing at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have right of access".

The NRTA which forms part of the 1930 Constitution Act provides the aforementioned rights but, with these rights comes responsibilities such as conservation and safety. When the level of use is greater than the ability of a resource to sustain that use, then conservation becomes an issue and restrictions become necessary for all fishers and hunters to ensure the survival and sustainability of resources.

DISCUSSION

The intent of this presentation is to bring to the fore some of the issues and concerns from a resource management perspective in terms of relationships with Treaty Indians and Métis in Manitoba and the implications to resource management notably moose. It is not the intent to summarize the multitude of court cases that have had a bearing on where we are today but rather to summarize or present the salient points germane to the issue. The questions being asked are: (Figure 6) What should we do? What can we do? What will we do? And, is there the political will? The bottom line being how are we going to meet the challenge? And, what is a reasonable and appropriate response?

The lack of financial resources to adequately monitor populations has resulted in an inability to detect change. Compounding this has been the uncontrolled harvest by “RHU” (aboriginal peoples) the magnitude of which there is little information. Treaty Rights are those which exist by way of land claim agreements or which may have been acquired whereas Aboriginal Rights are those which are an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right (evolve from historic occupation of the land).

Some aboriginal rights are wild rice harvesting, possession of eagle feathers for ceremonial purposes and yes, hunting. On the other hand, Treaty Rights have evolved from various treaties made by the Crown with First Nations. Where treaties exist, in exchange for releasing their interests in the land, aboriginal peoples acquired various rights which typically include:

- The right to hunt and fish
- An entitlement to reserve lands
- A small annual payment to each member
- The provision of farming tools
- The maintenance of schools on reserves

Canadian Courts have ruled that Aboriginal and Treaty Rights must be respected but, they are not absolute. The Supreme Court in *R v Sparrow* established principles outlining the

circumstances by which a Government decision that is apparently an infringement of a right may be justified. These are:

- Government can only interfere with rights if there is a compelling reason (e.g. conservation or resource management).
- When compelling reasons exist the manner in which regulations or restrictions are formulated must be respectful and sensitive to the constitutionally protected rights and interfere with these rights to the minimum extent possible.
- Ensure that any law or decision that may infringe a right is developed in a respectful manner and with meaningful consultation with the affected peoples.

The Courts via Sparrow indicated that governments should approach resource allocation according to the following priorities: (i) conservation; (ii) Indian fishing; (iii) non Indian commercial fishing; and, (iv) non Indian sport fishing. Sparrow was the first time that the Supreme Court directly addressed the issues of priorities and this led to a general understanding that commercial and sports users could only access any resource excess once Indian (and now Métis) use is satisfied. The Director of Manitoba's Constitutional Law Branch has concluded "that government is obligated to give a strong preference to constitutional justification for such action. Recognizing the history and economic importance of the commercial fishery to other groups in society, promoting tourism and encouraging family recreation and health may all be reasons for allowing broader access to the resources and for placing some limits on protected harvesting rights. The issue in each case is to ensure that aboriginal interests are given first priority and that any limitations on those rights can be justified on the basis of an important social policy".

Good faith is required on both sides throughout the consultation process. Meaningful consultation may oblige the Crown to make changes to a proposed action based on information

obtained through such consultations. The end result of good faith consultation may result in a duty to accommodate but, there is no obligation to accommodate if the issue is conservation.

Consultation came to the fore in 2005 in the *Mikisew Cree v Canada* case in which the Supreme Court provided clear direction respecting consultation in a treaty jurisdiction and concluded that the Crown has a duty to consult even when taking up land as contemplated in a treaty. Consultation is a two way street. While Aboriginal groups are not required to participate and should they choose not to, the consultation process may be considered as part of the justification of a Government decision. It is also important to recognize that consultation is good governance even if it is not legally required. It has also been made abundantly clear that where consultation is meaningful there is no ultimate duty to reach agreement but Government must demonstrate that it acted with honour and attempted to address reasonable concerns being expressed by the Aboriginal group. Consultation does not necessarily mean that activities will be curtailed but it does mean that consultation must occur in a meaningful and respectful fashion, detailed records must be maintained and wildlife managers must have defensible data to support management actions.

The above has now been complicated in Manitoba from a wildlife management perspective as a result of *R v Goodon* which relates to Métis peoples. These peoples have been afforded the same rights as First Nations in an area that could best be described as west central Manitoba.

The aforementioned sets the stage for implications that apply to moose management in Manitoba some of which are licensed hunting by residents, hunting by non residents through the lodge and outfitting business, access restrictions, access management and habitat management programs. Many of the aforementioned have significant economic implications whether it be to government or industry. And, just as important, there are implications to Aboriginal peoples in that there is a need for their involvement in management programs to ensure the wildlife

resources (e.g. moose) are available for government to meet their fiduciary obligations to future generations of these peoples.

Determining which communities to consult with will be determined by those which may be impacted. The 2 primary purposes of this process are to solicit community opinion so that the community will more readily accept the ultimate decision, and to demonstrate that Government wishes to meet the needs of the community.

Regarding decisions that are made, it is essential that all activities be recorded in detail which include emails, telephone calls, letters, memos, reports, meetings and meeting notes and other information generated all of which must be kept and maintained in an organized fashion.

If consultation did not occur or was not done in a defined manner and prior to Mikisew, does this mean that the decision made must be repealed? Initial advice from legislative counsel was it was something to be adhered to however it would now appear that this may not be essential especially if it can be demonstrated that it will have significant negative consequences to conservation of a wildlife resource.

Management Implications

The consultation process has many implications for resource management two of which are having knowledgeable staff and resources. These are essential as existing resources are inadequate especially when dealing with remote communities. Consultation is more than letters, emails and phone calls. Manitoba has made some resources (\$1.0 million) available for communities to access for such things as meetings, honorariums and meals available to ensure that the process is done in a meaningful way.

When a proposal runs the risk of impacting a right there will be a need to consult. Some Aboriginal Groups suggest that licensed hunting is impacting their rights and that until populations again reach levels of the past that all hunting must be curtailed. The position of MC is that generally hunting seasons will not be compromised by the need to consult but may be because of a decreased supply. This has occurred in the Duck and Porcupine Mountain region of western MB and GHA 26 in eastern MB – in these areas moose populations are down by about

60%. Wildlife managers must be proactive and begin the recovery process of which consultation is a major task to be dealt with and can be a lengthy process. It is important to remember that the Aboriginal community does not have to agree with the end decision made but the process must be meaningful and in good faith.

Questions that a wildlife manager might be asked are:

- What is the nature and purpose of the proposed activity?
- What decisions/authorizations might be made with respect of the activity?
- Does the decision made relate to use of land or resources?
- Where is the location of the activity?
- What is entailed in the activity?
- Which Aboriginal communities could be impacted?
- Are any traditional territories affected by the activity?
- What is the potential impact on the land or natural resources?
- Will the activity alter status quo of land use?
- What are the potential adverse impacts of the activity on Aboriginal and Treaty rights (e.g. hunting, fishing, trapping and gathering)?
- Are there concerns regarding the cumulative impacts of the proposed activity in combination with others in the area e.g. new roads (all weather, winter only), habitat manipulation activities?
- Are there potential negative impacts with respect to historical/archaeological sites, burial grounds or other areas of Aboriginal interest?
- Will the activity result in fragmentation of habitat, loss of vegetation, erosion, increased poaching, increased wildlife mortality due to vehicle collisions?

A partial list of activities that may infringe Treaty and/or Aboriginal Rights of access to resources and wildlife lands has been developed.

- Species management strategies/plans and regulations developed to put effective management actions in place including prohibiting or restricting hunter access into some habitats used by moose, caribou, elk, species at risk or species of concern.
- Management plans and regulations including habitat initiatives intended to ensure sustainable populations of any species.
- Management plans and regulations intended to protect specific local wildlife populations and/or wildlife habitat to ensure populations are sustainable.
- Allocation of wildlife resources for licensed hunting and trapping seasons including allocations of wildlife for nonresident/foreign resident use.
- Population reductions to benefit other interests (e.g. reduction of elk in a part of Manitoba where bovine tuberculosis has implications to the livestock industry).
- Allocation of vacant registered trap lines.
- Wildlife corridors enacted as refuges.
- Wildlife allocations including seasons and bag limits including big game quotas for outfitting. Bag limits would be altered for hunting unless there are sustainable populations which ensure that animals are available for First Nations' need. If populations were to become unsustainable Aboriginal peoples would need to be consulted about restrictions to their right to harvest wildlife.

Respecting moose, MC has a concern for its status in many GHAs as do a number of Aboriginal communities who have expressed concern. Some ideas advanced by the latter have been bull only seasons, selected number of licenses available for First Nations, specific season dates and access management and perceived negative impacts of logging. They have also implicated other First Nation communities for the problem being experienced by moose in their area.

Some consequences of failure to consult might be:

- Relationships damaged.

- Expense of time and money.
- Government could be sued.

Concerns

Destroying resources makes meaningless the right to hunt and trap for food and cultural purposes. It is essential that Aboriginals recognize the need for contemporary wildlife management practices if we are to ensure that the resources are available for government to meet its fiduciary obligation to Aboriginal peoples. “Bowinkle” has not changed since he walked across the Bering land bridge about 12-15,000 years ago – but look at what society has now – cars, trucks, ATVs, snow machines, modern firearms, lots of access etc. Local peoples must be engaged, involved and supportive of conservation measures and be willing to adapt if we have any hope of having sustainable resources for the future.

The word consultation is one that implies rights may be impacted. Thus it is essential to involve RHUs early on and this hopefully will result in them assisting in developing management strategies and be supportive of them and thereby avoiding the lengthy consultation process and be willing to engage in information sharing.

An important point to be recognized is that “Wildlife managers are not lawyers and lawyers and policy analysts and appointed bureaucrats are not wildlife managers”. Sound policy related to conservation can only prosper if it is science based. Wildlife management and subsequently conservation is complex but to be successful must have the co-operation and support of all members of society.

The consultation process means that programs and legislation are no longer being viewed just by our peers, mentors and localized constituents but now includes Justice Departments, defense lawyers, policy analysts and politically appointed bureaucrats with their own agendas. As wildlife managers we can now be expected to serve as expert witnesses and be subjected to intense cross examination of our data by defense counsel. The ‘review committee’ has now expanded greatly and all provide opinion and base legal arguments in 2 areas: i) the validity of

the biological data presented to support contemporary wildlife management actions that may infringe a “right”; and, ii) does a wildlife management action infringe on constitutionally protected rights.

The Manitoba Scene

There are political issues that must be resolved at levels above wildlife managers such as who gets what portion of the annual surplus – in other words dividing up the pie. The Gooden decision (2009) recognized that Métis have communal harvesting rights which extend throughout southwestern Manitoba. Manitoba’s big game resources were already fully allocated in many areas and this additional unregulated domestic harvest will have severe impacts on sustainability of big game populations. The risk is overharvesting and more conservation closures.

As rights are communal based, consultation must be at the community level. With this in mind MC has embarked on discussions relative to moose at the request of Aboriginal communities in western and eastern Manitoba which is also good governance. To date there have been many productive community meetings and information brochures (Figure 7) have been distributed. But, progress in some areas has been slow to the point that ongoing uncontrolled harvesting is further undermining attempts at rejuvenating populations. Some have raised ideas such as season closure for everyone, limited seasons, bull only bag etc. Emergency actions to curtail the downward slide will inevitably lead to harvest restrictions which will be an infringement requiring section 35 consultation and resources to do it. Hopefully by that time populations will not be at levels where recovery is impossible. To date MC has done its utmost to share information with First Nations and to invite feedback from communities on management actions they see as essential to recover moose populations.

Recovery options may include complete closure for a designated period, bag restrictions, temporary closure in new cut blocks, reducing licensed hunting opportunity, access controls, incentives to trappers and hunters to take more wolves, elimination of some resident hunting opportunity and curtailing of hunting by all nonresidents and of course aerial surveys to assess

herd status (which will be essential for ongoing consultation). And, a new approach to forest harvesting is required.

Regarding licensed hunting in MB draws for licences have been in place for many years, in addition to access restrictions, specific season dates, collection of harvest data, restricted hunting hours and sex of animal that can be taken. The aforementioned do not apply to RHUs. The harvest by RHUs in one GHA over a 2 year period (September 2006 - September 2008) was 162 moose (any age/sex) and in a one year period that by RHUs was 96 (any moose) whereas that by licensed hunters was 6 bulls (a 16:1 ratio). This harvest is minimal at best as some are unwilling to provide data believing that it will be used against them. To assist in population assessment and modeling there is a need to have reliable harvest data to facilitate more accurate predictions as to what sustainable harvest can be accommodated.

The feedback from right's based harvesters has focused on the following:

- 1: voluntary restrictions to bulls only harvesting until populations recover.
- 2: increased access created by logging and use of ATV's and snow machines has been the root cause of high harvest by all hunters over last 10 years.
- 3: restrictions on non local "rights based harvesters".
- 4: total closure for all moose hunting.
- 5: more aerial surveys to monitor populations.
- 6: predator control.
- 7: habitat destruction by logging (an interesting dilemma)
- 8: a belief that moose have simply moved to other areas

Manitoba, for many years, has left moose harvesting by RHUs unregulated. The reasons for this are that the province deemed the resources sufficient to support an unregulated harvest and where there are conservation concerns it has been government policy to work with First Nations to manage the resource rather than impose regulations. Despite repeated warnings on the status of big game species particularly moose, the concerns of wildlife managers have been ignored at the political level and now we are in a crisis situation.

The Manitoba government has both the legal and moral obligation to uphold and maintain the Honour of the Crown through reconciliation of the relationships between the crown and Aboriginal peoples. Implementation of an Aboriginal Consultation Policy is one part of the overall effort toward building better relationships with Aboriginal people.

The Director of Constitutional Law in Manitoba expressed an opinion based on concerns being heard, that within the few years we must challenge the NRTA. Treaties were signed without the knowledge of what would be available in the next 100+ years to facilitate the taking of moose. New technologies and easier access have made harvesting easier and the ability to drive populations into predator pits or extinction a reality.

In *R v Sparrow* (1990) 1 SCR 1075 the Supreme Court of Canada established the test for justifying infringement of treaty and aboriginal rights. First there must be a valid legislative objective. Conservation and resource sustainability including enhancement of species for future benefit of all users has been recognized as a valid objective. Conservation and management of resources is also consistent with aboriginal practices and enhancement of their rights. Without conservation measures the opportunity for RHUs and others to hunt for food will become moot. Government is tasked with the management of the resources for all user groups and this includes responsibility for sustainability for future harvesting opportunities by all user groups. Further, the courts have noted that planning for increased numbers of a resource for future benefits of all user groups is an equally valid objective provided aboriginal priority is recognized.

In terms of valid objectives, the BC Court of Appeal commented that justification of closures will focus on the reasonableness of management's belief in the changing circumstances that triggered the need to impose specific conservation measures in the first place. As suggested by *Sparrow* the resource must be managed for the benefit of all user groups in accordance with the suggested priority scheme. Further it cannot be managed in hindsight. The courts have recognized that the lack of scientific evidence to link a closure with government's sustainability target does not diminish the validity of the objective.

The law or activity put in place must maintain the honour of the crown and involves a number of factors.

1: was reasonable priority given to aboriginal/treaty rights?

2: Was the right infringed as little as possible while still achieving the desired result? For example if a partial closure could achieve the desired conservation goal, such measures should be chosen over full closure

3: Has there been consultation on conservation measures?

No single factor is determinative. Further, giving reasonable priority to aboriginal rights does not mean absolute priority to aboriginal interests. It is legitimate to consider the needs of other user groups. Sustainability benefits all user groups and without this, priority for aboriginal rights becomes meaningless.

In terms of compensation, several cases in BC dealing with fishery closures have held that compensation is not required for conservation measures.

Consultation and accommodation requires that government make every reasonable effort to inform and consult. It does not mean that government must agree with the aboriginal perspective. Management of a finite resource that is dynamic, variable and constantly changing does not usually offer the luxury of time. The courts recognize that conservation measures might have to be taken expeditiously. In some cases accommodation may not be possible in a situation where a reasonable and necessary conservation closure is required. Allowing a ceremonial harvest or aboriginal hunting first access may be sufficient priority and accommodation.

Concerns

Figure 8

1: there will be more focus on other big game species i.e. elk and deer.

2: closure of licensed hunting in some areas will either cause hunters to leave the sport or move to other areas thereby bringing increasing pressure on the resource in these areas.

3: some RHUs are entering the resource area of other rights based communities thereby putting the resources in these areas under increasing pressure and impacting their sustainability.

4: RHUs from MB are now being seen by Saskatchewan (SK) Natural Resource Officers more frequently hunting in Saskatchewan – this issue has been brought forward to SK with the suggestion that they get involved early in formal consultation to ensure populations do not spiral downward as in MB.

5: there is a need to manage populations rather than on a GHA basis and determine what is sustainable in these zones.

6: lack of resources funds to adequately monitor all species.

7: with band elections every 2 years, chief and councils can change with one being supportive of a management strategy and the next not but more concerned with rights.

In conclusion, and having reviewed the recent articles about the North American Conservation Model notably those written in the Wildlife Professional, where do Treaty and Aboriginal rights fit in – this aspect is something that is not accounted for. From a biological and ecological perspective we tend to think in decades or longer whereas those who are ensconced in political and social time frames work in 2-4 years intervals. Models can work but a more contemporary conservation model is required.

The message is that the future of wildlife and wildlife management involves partnerships and “is ours to make, not predict.”