TREATY 8 FIRST NATIONS OF ALBERTA

To protect, promote, bring to life, implement and sustain the true Spirit and intent of Treaty No. 8 as long as the sun shines, the grass grows, and the rivers flow.

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Re: Treaty 8 Alberta Chiefs' Position Paper on Consultation

Elders and Chiefs from the Treaty 6, 7 & 8 First Nations in Alberta gathered from April 12 to 14, 2010, from June 2 to 4, 2010, on August 24 and 25, 2010, and Treaty No. 8 Alberta Chiefs met on September 20th, 2010 to discuss consultation. Based on these deliberations, our objectives in this Position Paper (*Position Paper*) are threefold:

1. To set out our common consultation objectives, interests and principles including livelihood participation and greater participation in decision making;

2. To discuss our concerns with Alberta's current approach to consultation and the resulting general failure to respect our Treaty rights (in Appendix A); and

3. To provide our views (in Appendix B) of what we consider to be the core elements of a new, mutually developed, approach to consultation.

As stated in the letter of September 3, 2009 to the Premier, in the event that our concerns and interests are not satisfactorily addressed, we will take steps to develop our own province-wide First Nations' approach to consultation as an alternative to Alberta's *First Nations Consultation Policy on Land Management and Resource Development* ("Consultation Policy") and related guidelines. Some First Nations have, in fact, already developed their own consultation protocols. However, before more First Nations take this step, we the undersigned Chiefs of Treaty 8, invite your Government to enter into a negotiating process involving Alberta, Canada where appropriate, industry representatives and Alberta First Nations with a goal of jointly developing an agreement, not a policy, on consultation. This Position Paper would serve as our opening position in such negotiations. We note that a similar negotiating process has recently met

with success in Nova Scotia were the provincial government, Canada, and First Nations have ratified an agreement on consultation.

INTRODUCTION:

1. Treaty Centred Consultation

A core concern emerged from our discussions: Treaty No. 8 is the foundation of our relationship with the Crown. As Treaty 8 First Nations, we have the honour of being entrusted with these lands by our ancestors, and the obligation to future generations to be responsible stewards of these lands and our Treaty. It is through our Treaty that First Nations have maintained our historic and ongoing connection to our lands.

Failure to honourably and meaningfully consult with First Nations is disrespectful of our connection to the land as well as to our Treaty that reflects this connection. We need to change Alberta's record in this regard. For both Alberta and First Nations to continue to benefit from the Treaty, we must mutually respect and honour the Spirit and Intent of the Treaty No. 8.

We look to the Treaty as having its own life. The quintessential phrase from our oral history framing the Treaty is: "as long as the grass grows, the sun shines, and the rivers flow". This is a reflection of the living nature of the Treaty. Our Treaty can and will adapt over time, but we must always ensure that the core elements of the Treaty is upheld. Consultation is the forum through which we can ensure this balance takes place.

Our Nations also have protocols and ceremonies that we use to understand, maintain and balance the intent of the Treaty. Our protocols and ceremonial traditions give us the tools and legitimacy within our territories to make decisions on how we treat the land and its resources. Our processes pass on critical teachings and a management system based on generations of knowledge and information about our lands. These traditional processes vary from Nation to Nation and are key to interpreting the Treaty; further, these processes cannot be replicated by the Crown. However, Alberta's approach to consultation has not involved any significant attempt to incorporate our protocols and ceremonies into a mutually-agreeable approach.

Our Nations do not look at consultation as just a series of land use decisions, but also at the "big picture" of our relationship with Alberta and Canada. Consultation is about ensuring balance. Our perspectives and positions are guided by a number of different interplaying factors regarding our members, communities, economic interests and connections with the land. We do not see our traditional lands as set aside for the exclusive use of 'Albertans,' but rather to be shared with all people within Treaty 8 borders. We want to ensure our people and communities can sustain themselves with the same access to opportunities that others are entitled to and, at the same time, ensure that our Treaty and way of life is protected.

Our Treaty needs to be fulfilled for our people. We cannot have our rights defined so narrowly so as to make our rights useless or meaningless. Alberta needs to identify strategies with First Nations to ensure Treaty rights and developments are balanced in a mutually acceptable manner. There are areas of particular concern to many Nations that will require a detailed level of planning, discussions, and accommodations to ensure that Treaty rights continue to be viable and meaningful.

First Nations have expressed many concerns, on many occasions, about Alberta's approach to consultation since the introduction of the Consultation Policy by Alberta in 2005. We have experienced a

negative form of consultation by which Alberta has attempted to avoid responsibility while maintaining the appearance of 'consulting' with First Nations. This needs to change. We have signed on to the Protocol Agreement and engaged in the Consultation Policy review process because we want positive and mutually beneficial change. It is incumbent on Alberta to demonstrate, by changing its own approaches and attitudes, that we are not misplacing our optimism in a renewed relationship.

Although our primary relationship is with the Federal Crown, Alberta and First Nations must address the reality that we share the same lands and home. We can only mutually succeed if we are willing to work together. Consultation is the tool to ensure mutual success. It will only be successful if we attempt to address each other's issues in a manner that will get us closer to our goals.

The honour of the Crown and the Treaty relationship are sources of the duty to consult and accommodate which also require respect for, adherence to, and recognition of the Treaty. Any approach to consultation that is not grounded in the Treaty relationship cannot achieve the fundamental objective of reconciliation that has been called for by the Supreme Court of Canada. As the Supreme Court of Canada made clear in the *Taku River* and *Haida* cases, at paragraphs 24 and 45 respectively:

> The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).
>
> * * *
>
> The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.

Any approach to consultation going forward must recognize that our Treaty rights are protected by the *Constitution*. With respect, Alberta and Canada cannot simply pay lip service to those rights: consultation and accommodation processes must respect and accommodate our rights. While we are open to discussing how we can protect our Treaty rights, we are not open to an approach unilaterally developed by Alberta which ignores those rights in practice.

Our strong emphasis on the Treaty in the context of consultation is not simply a matter of principle or law – it is also a point of great practical importance for First Nations. Across Treaty 8 Alberta, First Nations are gravely concerned about the continued viability of our Treaty rights and our traditional ways of life. Resource development, urban growth, and other forms of development around Alberta are threatening First Nations' ability to hunt, fish, gather and trap. This has placed enormous stress on First Nation communities. Growth and development has increased pressures on the remaining areas of Crown land in these Treaty areas diminishing First Nations' ability to exercise our Treaty rights. The massive existing and planned development of the oil sands in the Treaty No.8 area has already affected and will continue to affect, the ability of those First Nations to exercise their rights. First Nations across the province face increasing pressures on their reserve lands, including the water resources within these lands, from increased resource development and/or the growth of neighbouring municipalities.

Respect for the Treaty goes well beyond being a matter of principle; respect for the Treaty is critical to the long term survival of First Nations' culture, way of life, and the well-being of our communities. We are troubled that in correspondence, many of our First Nations are told by Alberta that, essentially, our Treaty did not guarantee that our traditional ways of life would be maintained forever. We recognize that development will continue to take place. However, Alberta's approach is often selective and ignores the promises that were made in our Treaty. A fair "balancing" of rights and interests has to provide for the

meaningful exercise of our Treaty rights in the face of development, as well as, ways in which our First Nations can benefit from the development that does come.

The *United Nations Declaration on the Rights of Indigenous Peoples* also lends moral force to our call to Alberta and Canada to respect and adhere to the Treaties. The *Declaration* was broadly supported by 143 countries and acknowledged that "treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States." Accordingly, the *Declaration* affirmed in Article 37(1) that:

> *Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.*

The *Declaration* articulates certain principles that are paralleled in the Canadian legal tradition. It is well established that the Treaties are sacred agreements and that pursuant to the honour of the Crown, there is a requirement to respect and adhere to the terms of the Treaties.[1]

In addition to the discussion of the principles of consultation and other related matters in this Paper, First Nations also call on Alberta and Canada to do more, in cooperation with First Nations, to promote an improved level of awareness and understanding of our Treaty, including potentially:

- Treaty Day - The creation of a Treaty Day in Alberta to acknowledge the importance of our Treaties (T6, T7 & T8) to all Albertans and to increase the level of public understanding that the Treaties relationship between First Nations, the Crown and society in general, is fundamental to living in Alberta because our Treaties are sacred living documents that remind us where we've been and where we should be going.

- Treaty Commissioner - A commitment by Alberta to work with our First Nations and the Government of Canada to create a trilateral process, developed with and overseen by an independent Treaty Commissioner, to promote and work towards an improved and common understanding of Treaty No. 8 in Alberta.

2. Challenges Created by Alberta's Approach to Consultation to Date

A second theme also emerged from the meetings that pose a significant challenge for the review of the *Consultation Policy.* There is a pervasive sense of scepticism among our First Nations - many feel that Alberta's leadership and officials do not understand Treaty No. 8 and, therefore, do not have the political will to honour the Treaty and the Crown's duty to consult and accommodate. Alberta has acknowledged the Treaty in the text of the *Consultation Policy* and the *Protocol Agreement;* however, far more often than not Alberta's actions have failed to demonstrate respect for the Treaty and a genuine intention to fulfill the Crown's duty to consult and accommodate.

Our sense of scepticism stems from First Nations' experiences during the development of the *Consultation Policy* in 2005 and Alberta's approach to consultation since 2005. First Nations at the April, June, August, and September meetings this year expressed widespread disbelief that in 2010 it is still necessary to talk to Alberta about implementing the principles of *Mikisew Cree First Nation v.*

[1] *R. v. Badger,* (1996) 133 D.L.R. (4th) 324 (SCC), para. 41.

Canada ("*Mikisew"*)[2], a decision released by the Supreme Court of Canada in 2005. Alberta ought to have immediately revisited and revised the *Consultation Policy* in 2005 to ensure that it complied with *Mikisew*. "Better late than never" is not good enough to uphold the honour of the Crown. While there is room for debate about the meaning and implications of *Mikisew* and other decisions, what is of the greatest concern to the First Nations is that Alberta, in developing its consultation approach, has unilaterally decided what those cases mean in terms of consultation.

Our scepticism and mistrust are also the result of our collective practical experiences of trying to consult with Alberta. No matter what the *Consultation Policy* says, and no matter what the courts say about the Treaty and the duty to consult and accommodate, in practice Alberta has adopted the narrowest possible interpretation of the Treaty and the most minimal application of the duty to consult. Since 2005, it has been the nearly universal experience of First Nations that Alberta's approach to consultation rarely, if ever, involves anything more than notice (often at a late date), some information, and perhaps a meeting or two to fill in the Crown's consultation log. Meaningful consultation is exceptionally rare and accommodation has been entirely absent. Alberta's justification for this approach has been that it must "balance" First Nations' rights and concerns with the interests of the broader public. On the ground, this has meant that our Treaty rights are consistently trumped by the economic interests of government and industry. There has been no true balancing of interests. You cannot achieve reconciliation when terms are imposed by one side based on solely on the interests of the broader public.

On numerous occasions, First Nations have sought to enter into good faith consultation with Alberta on consultation matters including but not limited to: First Nation water rights in the context of water management and allocation; fish and wildlife management; development of the Land Use Framework, and subsequently the LARP and SSRP; the process for conducting Environmental Assessments; various oil sands policy reviews; and forestry issues. In those consultations, the input and suggestions of the First Nations on both the procedural and substantive aspects of our rights have been ignored or downplayed by Alberta.

There is no legal impediment to making some of the changes to the consultation processes sought by our First Nations. Rather, Alberta has simply decided that its approach is correct, or at least that it has more resources than First Nations to litigate these issues if challenged in court. A good example of Alberta's troubling approach is in respect of the Land Use Framework ("LUF"). Many First Nations dedicated significant time and resources to provide Alberta with input on the LUF. Nonetheless, Alberta largely ignored that input, approved the LUF, then proceeded to produce a "response" to First Nations' concerns and input well after the fact and in direct contradiction to the principle in law and in the *Consultation Policy* that consultation will occur in good faith and *before* decisions are made. Further, in respect of LARP and SSRP, and over the objections of the affected First Nations, Alberta simply imposed a consultation approach. This was done despite the fact that certain First Nations actually provided their suggestions on how consultation ought to occur and on what issues needed to be addressed during the development of the LUF. This sort of approach to consultation does not further reconciliation. Rather, it furthers the distrust and cynicism of the First Nations.

Those problems have only been exacerbated by Alberta's decision to end funding for Traditional Use Studies and significantly **reduce** core consultation funding to First Nations for 2010-2011, even as the number of project specific and general consultation matters for which Alberta purports to consult continues to increase. It is simply unrealistic for Alberta to expect First Nations to hire, train and retain

[2] 2005 SCC 69.

competent staff without realistic, long-term funding, particularly given the volume of consultation in which First Nations are expected to participate.

It is amidst this difficult climate of scepticism, doubt and growing mistrust that the Treaty 8 Alberta Chiefs has developed this Position Paper. First Nations and Alberta must build a new and better relationship on the foundation of our Treaty. To move in that direction, Alberta must take two concrete steps: 1) enter into negotiations with First Nations to reach a new agreement on consultation that incorporates the central points of this Position Paper, and 2) honour the Treaty and the Crown's duty to consult and accommodate. Where Alberta disagrees with any of the points raised in this Paper, we expect Alberta to identify the points of disagreement and to discuss them in good faith. A key concept of consultation is for the parties to hear each other's views and to try to understand and address them. This cannot be done, as has been the approach in the past, by Alberta simply declaring that it has met some of the First Nation's concerns without actually responding to First Nations' input or meeting and discussing why, in the First Nations' view, concerns have been not been addressed.

The September 3rd, 2009 letter indicated that any new approach to consultation must fairly and adequately reflect the core principles of *Mikisew* **and other relevant cases**. The letter set out some specific principles from *Mikisew* which represent the minimum standard for consultation. It is not necessary to repeat those principles here except to say that they remain part of our position. Elders and Chiefs from around Alberta met at the April 12-14, 2010 Consultation Meeting where Alberta's *Draft Policy Discussion Paper* was reviewed and the consensus was that Alberta's attempt to incorporate the principles of *Mikisew* is seriously deficient. To begin with, the *Draft Policy Discussion Paper* is premature because it was developed prior to Alberta receiving the input of First Nations through the Consultation Policy review process and this Position Paper. The exclusive focus on *Mikisew* principles is also inadequate. Further, Alberta's restatement of the *Mikisew* principles are selective, often qualified or cast in a context that is favourable only to Alberta and which departs from the intent of the principles as set out by the Supreme Court. First Nations cannot accept policy efforts to water down, soften, or otherwise diminish the principles of consultation and accommodation as set out in the case law.

In addition to the *Mikisew* principles, any new approach to consultation must address the principles and issues discussed below. We have also provided a model process for consultation that reflects the principles of consultation and should serve as the basis for any new consultation guidelines. This model process is set out in Appendix B to this Position Paper.

KEY CONSULTATION OBJECTIVES OF THE FIRST NATIONS

The objectives of our First Nations in respect of consultation and accommodation are, at a minimum, the following:

1. To maintain and protect our way of life, including our history, culture, language, tradition and economy, all of which are inextricably connected to our lands (reserve lands and traditional lands);

2. To ensure that we have the capacity and opportunity to build, enhance and maintain, a strong and secure culture, language, traditions and economy connected to our lands (reserves and lands within our Traditional Territories), our inherent and Treaty rights, and the history of our Peoples;

3. To ensure the security and protection of our constitutionally-protected rights – that we have a meaningful opportunity to exercise those rights now and in the future;

4. To ensure the meaningful participation of our First Nations in decision-making processes related to the planning and management, use and disposition of the lands and resources throughout our Traditional Territories and with respect to potential impacts on our reserve lands;

5. To ensure that we have an equal opportunity to share in the wealth of the Province – through capacity and training measures relevant to our People, through the acquisition of project-related benefits (award of jobs and contracts and various forms of participation in project benefits), and through more general measures, such as revenue sharing, to ensure that we receive an equitable share of the wealth of the Province (related to the fees, incomes, and economic benefits that are derived from resource extraction within our Traditional Territories); and

6. To enable our First Nations to attain and maintain a level of economic, social and political self-sufficiency, as individuals and as distinct Peoples, to standards that are at least equal to those prevailing in the rest of Canada;

With respect to point 6 in particular, we seek to ensure that there is a proper balance between protection of our rights and the environment and ecosystems on which our Treaty rights rely, and responsible industrial development, urban growth, and other forms of development.

While it is true that the courts have called for a balancing of various interests, that balancing cannot mean that the "public interest" or "economic goals of the Province" trump the protection and exercise of our Treaty rights. In other words, Alberta must always be mindful of the fact that the duty to consult and accommodate is a constitutional obligation that must take precedence over other interests.

This is not to say that there cannot be dialogue and a genuine attempt to work out a mutually acceptable approach to dealing with First Nation rights and interests. Indeed, this is why we are calling on Alberta to negotiate a new agreement on consultation. However, whether or not Alberta is serious about working together with First Nations to achieve a meaningful level of protection of Treaty rights depends entirely on whether or not we share a common objective. Alberta's approach to consultation is focused on attempting to minimize the importance and significance of First Nation rights and interests and "court proof" Alberta against any challenges to decisions it has made.

What is particularly troubling and disappointing is that while Alberta purports to work with our First Nations on consultation issues, Alberta continues to make decisions (grants of tenure and other dispositions, project approvals, adoption of legislation and policy) which adversely affect and infringe the rights and interests of our First Nations. Even more troubling is the fact that Alberta has simply refused to meaningfully engage with First Nations on critical issues such as revenue sharing, water allocation, fish and wildlife management, changes to environmental and regulatory approval processes, and other fundamental issues.

The principles of consultation set out in this Paper also apply equally to the Government of Canada regarding any federal initiatives, projects, regulatory processes or other decisions that have the potential to impact First Nation's rights and interests. On a similar note, many First Nations in Treaty No. 8 Alberta have traditional territories that include portions of the Northwest Territories, Saskatchewan and British Columbia and/or are signatories to Treaty No. 8 that extend into these other jurisdictions. Accordingly, the principles set out in this Paper also apply to any decisions or actions taken by those other governments that may adversely impact our First Nations' rights and interests.

INTERESTS OF OUR FIRST NATIONS

Our First Nations share the following key interests, namely, ensuring that adequate consultation and accommodation includes:

- That all processes are structured so that the Province is not the party that can make decisions without being required to take into account our rights and interests in those decisions and without taking into consideration our procedural concerns about consultation.
- The full protection of our Treaty and inherent rights now and for future generations.
- Protecting the use and enjoyment of our reserve lands and lands within our, Traditional Territories, and lands acquired pursuant to TLE entitlements and other land claims, for present and future generations.
- Achieving greater participation in the social and economic benefits flowing from development.
- Protecting, preserving, encouraging and enhancing the cultural, social, economic and environmental connection of our First Nations to lands and resources.
- That the regulatory review of projects properly incorporates the procedural and substantive concerns of our First Nations through all phases – from the early conceptualization and design of the process through to decision-making, monitoring, enforcement and reclamation.
- That any consultation process properly takes into account the legal principles recognized by the courts and that accommodation options allow for the full range of First Nations' concerns to be taken into account in decision making.
- Development of a forum for broader economic, social, and environmental issues to work with Alberta and Canada in addressing and developing solutions to these issues, while respecting the Federal, Provincial, and First Nations jurisdictions.
- That our First Nations have full information to assess potential impacts of Crown decision making on our rights and that our First Nations play a meaningful role in determining what information is required by the Crown, Industry and First Nations to determine such impacts.
- That traditional knowledge is respected and incorporated into decision making.
- That any decisions do not impair, or infringe, the rights and interests of our First Nations.
- When such an infringement occurs, accommodation of the infringement will be in the interest of the effected First Nation.
- That industrial development, urban growth, and other kinds of economic development take place in a way which minimizes the direct, indirect and cumulative social, health, cultural, economic and environmental impacts on our First Nations' rights and on our communities.
- That our First Nations benefit socio-economically from any development that does take place – both in terms of direct project benefits as well as in sharing the wealth of the Province.

In addition, First Nations recognize that consultation requirements may be different among our First Nations depending, among other things;

- on the potential impacts of a proposed development on the exercise of our rights,
- the severity and duration of the impacts,
- the proximity of a First Nation to a large urban centre,
- a First Nation's perspective on the significance or importance of the rights affected,
- the proximity of a First Nation to large scale proposals,
- the extent of existing and planned development in the vicinity of the area,
- cumulative impacts on our rights,
- the history and culture of our First Nations, and
- the nature of existing development and other related factors.

It is also obvious that consultation will be more complex in relation to some kinds of development (such as mines, agriculture, forestry, oil sands and conventional oil and gas projects, urban regional planning, water and land management planning, hydro electric generation, transmission lines, nuclear power, and infrastructure projects) than it is for other kinds of development.

As noted earlier, any adequate approach to consultation must recognize and reflect these differences in relation to required funding, the triggers for consultation, capacity and the way in which consultation is carried out. For example, projects requiring an assessment under Environmental Protection and Enhancement Act ("*EPEA*") or Canadian Environmental Assessment Act ("*CEAA*") will normally require more time and resourcing than other kinds of projects. Moreover, guidance needs to be given to decision makers to determine the level of consultation required in relation to potential impacts. Further, Alberta has to take significant steps to improve key policy and legislative initiatives, such as the current review of the water allocation system and development of regional land use plans, to build First Nation participation into the process so that major studies and reports are not undertaken based on scoping and terms of reference that are not broad enough to consider First Nation rights and concerns. Consultation with First Nations must occur at the earliest possible stage in the process of project development and not be left as a footnote to be addressed in the final stages of such processes.

KEY PRINCIPLES

As explained in more detail below, our approach is based on the key principles set out in the decided cases on consultation and accommodation and Treaty rights:

1. The Treaty is not a finished land use blueprint (*Mikisew*);

2. Consultation is an ongoing process and is <u>always</u> required (*Haida*);

3. Consultation is a "two-way" street with obligations on each side;

4. Consultation and accommodation are constitutional obligations (*Kapp*);

5. When the duty is triggered, First Nations have a clear constitutional right to Crown performance of that duty *(Haida, Mikisew*);

6. The duty to consult applies to a broad range of Crown actions, initiatives and decisions, including Crown officials charged with developing regulations and legislation that has the potential to impact First Nations rights and interests (*Haida, Delgamuukw, Tsuu T'ina Nation*)[3];

7. Claimed Treaty rights can give rise to the Crown's duty to consult and accommodate. The Crown has a duty to assess the strength of claimed rights and consult and accommodate accordingly (*Marshall, Sioui, Sundown, Simon*). This point is addressed in more detail below;

8. First Nations' input must be seriously considered, substantially addressed and, as the context requires, accommodation may be necessary (*Mikisew, Halfway River*);

9. Stakeholder processes are not sufficient to discharge the Crown's duty to consult (*Mikisew*) nor are public processes open to First Nations, such as participation in Public Hearings (*Dene Tha'*);

10. The Crown has a positive duty to provide full information on an ongoing and timely basis, so that First Nations can understand potential impacts of decisions on their rights (*Jack, Sampson, Halfway*) and such information must be responsive to what the Crown understands to be the concerns of the First Nations (*Mikisew*);

11. The Crown must properly discharge both its procedural and substantive duties in any consultation process (*Mikisew*) and a failure to properly satisfy process-related concerns of First Nations, irrespective of the ultimate impact on substantive rights, may be a basis upon which a decision can be struck down (*Mikisew*);

12. The Crown must have sufficient, credible information in decision making and must take into account the long-term sustainability of section 35 rights (*Roger William*). This is particularly so in light of Alberta's constitutional duty to ensure the sustainability of Treaty hunting, fishing and trapping rights pursuant to the *Constitution Act, 1930* (*R. v. Badger* [ABCA]);

13. The purpose of consultation is reconciliation and not simply the minimization of adverse impacts (*Dene Tha'*);

14. Consultation must take place early, before important decisions are made – at the "strategic planning" stage (*Haida, Dene Tha', Squamish Nation*);

15. Consultation cannot be postponed to the last and final point in a series of decisions (*Squamish Nation*)[4];

16. Consultation is required in respect of the design of the consultation process itself (*Huu-ay-aht*). Scoping, terms of reference and other preliminary processes cannot be used to narrow consultation

[3] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at para. 62; *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 168; *Tsuu T'ina Nation v. Alberta (Environment),* 2010 ABCA 137 at para. 55.

[4] A concern of our First Nations in the EA context or in virtually all regulatory applications (even if a formal environmental assessment is not required) is that consultation often does not take place until project design is well under way and until studies have been completed as part of an application submission. This puts First Nations in the position of having to ask for more studies, amendments to studies, or for changes to terms of reference for studies. This situation could be avoided by consulting early with First Nations in respect of terms of reference for environmental assessments – scoping of projects, information requirements placed on proponents, etc.

to excuse the Crown from consulting about First Nations' legitimate and relevant rights and concerns[5];

17. First Nations must be consulted about aspects of the design of environmental and regulatory review processes (*Dene Tha'*);

18. Consultation cannot just be in respect of "site specific impacts" of development – but must also take into account the cumulative impacts, derivative impacts, and possible injurious affection resulting from development (*Dene Tha', Taku River, Mikisew, Roger William*);

19. The Crown must approach consultation with an open mind and must be prepared to alter decisions depending on the input received (*Haida*); and

20. Consultation cannot be determined simply by whether or not a particular process was followed, but on whether the results are "reasonable" in light of the information presented, degree of impacts, and related matters (*Wil'itsxw)*.

These principles go to ensuring the full and meaningful protection and recognition of our rights. Without precision with respect to how consultation and accommodation will take place – procedurally and substantively – our rights will remain at risk. Further, Alberta has consistently taken an approach to consultation and discussions regarding the legal principles of consultation and accommodation that fails to pay due regard to what is being consulted about – our Treaty rights. Consultation and accommodation in Alberta is primarily about Treaty rights and therefore must also always involve full consideration and application of the following principles relating to the Treaty:

1. **A Treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. The Crown's honour requires an assumption that the Crown intended to fulfill its promises;**

2. Aboriginal Treaties constitute a unique type of agreement and attract special principles of interpretation;

3. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories;

4. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed;

5. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed;

6. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties;

7. The words of the treaty must be given the sense which they would naturally have held for the parties at the time;

[5] *West Moberly First Nation v. British Columbia,* 2010 BCSC 359, para.54 & 55; *Dene Tha' First Nation v. Canada,* 2006 FC 1354

8. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen in time at the date of signature. Treaty rights must be interpreted to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core Treaty rights in a modern context;

9. A technical or contractual interpretation of treaty wording should be avoided; and

10. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic.[6]

A specific approach to consultation

In light of the foregoing, the obvious question is: What do First Nations want in terms of consultation and accommodation? Individual First Nations have provided Alberta with input on this important question. Alberta has also engaged in various processes such as the Protocol Working Group process. In short, Alberta is well aware, in general terms, of what our First Nations are looking for. In our view, the only way to achieve greater clarity and certainty, for First Nation, Industry and the Crown, is to negotiate a new agreement on consultation.

As noted earlier, the contents of consultation will necessarily differ with the nature of the project or issue in question, the degree of potential impact on First Nations' rights, and the interests and concerns of the particular First Nations. Keeping the need for flexibility in mind, we have set out an approach to consultation in Appendix B that should serve as the starting point for negotiations with Alberta to develop a mutually acceptable consultation process. Appendix A sets out the mistakes and issues that have arisen since the introduction of the *Consultation Policy;* it will help ensure that negotiations will avoid the mistakes of the past five years.

Yours truly,

Treaty 8 Chiefs of Alberta

[6] *R. v. Marshall*, [1999] 3 S.C.R. 456, para. 78 (citations removed); *R. v. Badger*, [1996] 133 D.L.R. (4th) 324, paras. 41 and. 47*; R. v. Frank*, [1978] 1 S.C.R. 95; *R. v. Sundown*, [1999] 1 S.C.R. 393 at para. 32

SIGNATURE PAGE ATTACHED

cc: Treaty No. 8 Alberta Chiefs
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David Hancock, Minister of Education
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Ron Liepert, Minister of Energy
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Mary Anne Jablonski, Minister of Seniors and Community Supports
Lindsay Blackett, Minister of Culture and Community Spirit
Heather Klimchuck, Minister of Service Alberta
Cindy Ady, Minister of Tourism, Parks and Recreation
Hector Goudreau, Minister of Municipal Affairs
Jonathon Denis, Minister of Housing and Urban Affairs
Thomas Lukaszuk, Minister of Employment and Immigration
Darryel Sowan, Director of Livelihood
Chiefs Livelihood Committee (CLC)
Consultation Technical Team (CTT)

APPENDIX A

GENERAL CONCERNS WITH ALBERTA'S APPROACH TO CONSULTATION

As explained more fully below, discussions at the April, June, August and September meetings identified the following flaws and issues with Alberta's current approach to consultation under the *Consultation Policy*:

1. Alberta has too narrow a view of First Nations' rights

Alberta takes a very limited approach to what constitutes the section 35 rights of our First Nations, it ignores the oral promises made in the Treaty No. 8 and the dynamic nature of the Treaty, and it lacks any focus on what information and processes are required for the long-term sustainability of those rights.

The Treaty is a living document that continues to evolve and it is well established that our Treaty rights are not "frozen in time".[7] The written text of the Treaty is not a static and final accounting of our rights. Alberta approaches our Treaty rights as a noun, rather than a verb, as though our rights are written in stone, that they do not change, and that the places in which we exercise our rights do not and cannot change. Many cases have established that rights can, and in some cases must, be read into the Treaty to give meaning to express Treaty terms or to provide meaningful contemporary applications of rights.[8] As an obvious example, if First Nations are pushed out of areas due to industrial development, we will have to move elsewhere. Rather than understand that we have always had to adapt to changing circumstances, Alberta's approach, in fact, does the opposite. It ignores the impacts of development and Alberta officials have, in fact, been trying to confine us to smaller and smaller "consultation areas." That approach does not serve our interests or reflect the nature of our Treaty rights – it appears to be an attempt by Alberta to artificially create non-overlapping areas where consultation must take place.

Further, the entrenchment of our rights in s. 35 of the *Constitution Act, 1982*, was not an acknowledgement of a static set of rights, but rather, it was a recognition and affirmation of a body of generative rights which bind the Crown to take positive steps to identify First Nations' rights in a contemporary form, with the active participation of our First Nations.[9] As the Supreme Court of Canada stated clearly in *Sparrow*, section 35 was not enacted to maintain the *status quo*.

Alberta has refused to address claimed Treaty rights in the course of consultation under the current *Consultation Policy.* This approach is not defensible and is inconsistent with the dynamic and flexible nature of Treaty rights. The Supreme Court clearly sets out a framework for addressing claimed rights in the context of consultation and accommodation in the *Haida* case. First Nations must sufficiently describe the rights we are claiming and provide some evidence and reasoning in support of the rights. For its part, the Crown is obliged to assess strength of the claimed right and consult (and accommodate) accordingly. Dealing with claimed rights is not easy but simply denying the existence

[7] *R. v. Sundown,* [1999] 1 S.C.R. 393, para. 32.
[8] *Sundown,* supra.; *Marshall,* supra, para. 78.; see also: *R. v. Sappier,* 2004 NBCA 56; *R. v. Cote,* [1996] 3 S.C.R. 136; *R. v. Sioui,* [1990] 1 S.C.R. 1025; *R. v. Simon,* [1985] 2 S.C.R. 387; *Claxton v. Saanichton Marina Ltd.,* [1989] 3 C.N.L.R. 46 (BCCA);
[9] *Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700, para 1364; See also Brian Slattery, *Aboriginal Rights and the Honour of the Crown,* (2005), 29 S.C.L.R. (2d), pp. 435-443; and Brian Slattery, *The Generative Structure of Aboriginal Rights,* (2007) 38 S.C.L.R. (2d).

of a claimed right is not an acceptable approach.[10] Indeed, the Supreme Court has given clear direction that Treaty rights should be accommodated through negotiation and consultation rather than by litigation. [11]

The duty to consult and accommodate similarly applies to land claims, particularly those that have been accepted by either Canada or Alberta for negotiation. It is not honourable for the Crown to deal with lands and resources that are the subject of accepted land claims without significant consultation and accommodation.

First Nations and Alberta also have divergent views with respect to the effect of the Treaty on claims to Aboriginal rights and title. There is no definitive case on this point. Accordingly, it is not honourable for Alberta to unilaterally impose its position on these matters. Consultation must afford an opportunity to those First Nations who are advancing Aboriginal title and rights claims to present evidence and arguments in support of such claims.

2. Alberta's approach to consultation lacks precision

There is very little discussion of process-related issues concerning consultation and accommodation, such as how potential adverse impacts on First Nation rights and interests are to be determined (i.e., when will the duty be triggered), nor is there any guidance on how a decision maker would assess the strength (or weakness) of a First Nation's claim and the degree of consultation required - e.g., who will determine the required level of impact and therefore consultation required? Presumably, it leaves this important decision to Alberta officials but does not provide guidance on what information is required, what criteria should be employed, etc. This lack of precision has, in turn, allowed for inconsistent approaches within Alberta government departments, and across Alberta government departments as to whether consultation is required and as to the degree of requisite consultation. Consultation has also been significantly challenged by the fact that Alberta decision makers often claim that they do not have the authority or mandate to make independent decisions with respect to consultation and how it affects our Treaty rights.

3. There are no standards against which to assess consultation and accommodation

Alberta's approach lacks a mutually agreed-upon set of standards or objectives against which consultation and accommodation can be measured. This has also lead to wildly varying approaches to consultation from one ministry to another and even within the same ministry. It also promoted inconsistent approaches to consultation with industry project proponents.

4. Alberta has failed to recognize and implement the Duty to Accommodate

Alberta minimizes and downplays the need for accommodation and the means by which accommodation might take place and what kinds of accommodations may be available (in *R.* v. *Kapp*, the majority of the court makes it clear that both consultation and accommodation are constitutional duties). Alberta simply assumes that any form of mitigation proposed by a company, no matter how minimal, will be acceptable.

Consultation and accommodation with respect to our Treaty hunting, fishing, trapping and gathering must also take into account other binding legal principles. Alberta has a constitutional duty to ensure a

[10] *Haida*, supra, para. 3 – 38; see also: *R. v. Badger*, [1996] 1 S.C.R. 771, para.97.
[11] *R. v. Marshall (2)*, [1999] 3. S.C.R. 533, para. 22; *Haida*, supra., para. 47.

sustainable supply of fish and game for Treaty rights.[12] The reduction or degradation of habitat that supports fish and wildlife can constitute an infringement of Treaty rights and an unreasonable limitation of these rights.[13] When the Crown is making decisions about the management and allocation of fish and game and the management of related habitat, the *Sparrow* doctrine of priority must not only be respected, it must be a central consideration in any consultation and accommodation.

5. Alberta delegates substantive aspects of project specific consultation to industry

Alberta allows for a great deal of delegation of consultation obligations to industry – in a number of instances, it is not only the procedural aspects of consultation that are being delegated, but virtually the entire substantive duty as well – Alberta appears to see its duty as that of a "referee" – delegating practically all aspects of consultation to industry is akin to putting the fox in charge of the hen-house – industry has the goal of pushing forward its projects and of minimizing the concerns of First Nations. In addition, Alberta has no clear understanding of what is procedural or substantive consultation.

6. Environmental Assessments and similar processes are developed without the participation of First Nations

First Nations have repeatedly raised concerns about the lack of any meaningful inclusion of our rights in environmental assessment processes either generally or as a specific topic in Environmental Assessments ("EA") and other processes. To be clear, Alberta has rejected an approach that states that the impacts of proposals and developments will be measured against the ability of First Nations to exercise our rights now and into the future. This plays out in areas such as the scoping of projects for EA development of information requirements in terms of reference, etc. Those concerns have been downplayed and ignored. Alberta's consultation approach does not address this important issue and allows decision makers to continue to ignore First Nations procedural and substantive concerns about our rights in this important area. Time and time again, our concerns about EA are ignored by Alberta Environment. Some of our concerns include:

- Failure to develop any thresholds, criteria or measures to assess the impacts of development on our ability to exercise our section 35 rights now and into the future.

- Failure to seriously consider and accommodate our procedural concerns with respect to terms of reference for EA.

- Failure to assess direct, indirect and cumulative effects of resource development of our rights, including a failure to consider what information is required to undertake assessments on direct, indirect, and cumulative impacts of development on our rights.

- Failure to understand, much less address, the key cultural and social impacts of development on our rights – Alberta simply assumes that standard EA processes will deal with these concerns – this relates to the failure to consider the Aboriginal perspective in decision making – the importance of place, and the cultural elements underlying the passing down and exercise of our rights is ignored by Alberta.

- Failure to consult with us on the scoping of projects for Environment Assessments (EA) purposes.

[12] *R. v. Badger*, [1993] C.N.L.R. 143; 1993 CarswellAlta 306 (ABCA), paras.29-30; *Badger* (SCC), supra., paras. 7 & 9, 47, 70.
[13] *Tsilhqot'in,* supra., paras. 1272-75, 1288.

- Failure to undertake cumulative effects assessment to all resource allocation development decisions.

7. Consultation must be structured on a government-to-government basis

Consultants working for industry tend to approach selected groups of members or Elders and, in many cases, bypass First Nation governments. Alberta should be more directly involved in consultation to ensure consultation is aboveboard and that such practices are not accepted. Any new approach to consultation must make it clear that this cannot be allowed.

8. The capacity to consult is a persistent hindrance to meaningful consultation

There are no specifics in respect of capacity including that the government does not direct industry to provide capacity funding to participate in the process of consultation. A regulatory review of a large project can be costly and time-consuming. There appears to be an assumption among Alberta officials that First Nations have endless amounts of money and capacity to conduct large baseline studies, to gather information, to participate in all kinds of consultation processes, and the like. We require the capacity to consult our members, to attend meetings, to hire technical experts to review the voluminous submissions and to otherwise participate meaningfully in those processes. A small amount of capacity funding is wholly inadequate, yet the policy does not require industry to provide capacity funding to First Nations for industry-driven projects. For example, this leads to the problem that SRD approves projects over the capacity-related objections of First Nations, on the basis that industry is not required to provide funding. This also allows certain industry groups to avoid paying for any capacity, while other companies do provide some capacity.

9. There is a general lack of clarity regarding what role First Nations input should have

There is no discussion of how our input will be taken into account, what role First Nations will play in terms of determining what information is required to determine potential adverse impacts or infringements, or what information ought to be required in decision-making about resource development. As things now stand, First Nation's concerns about information requirements are largely ignored. There is no real attempt by Alberta to listen to First Nations about our funding and process-related concerns. The scepticism discussed earlier is especially acute in terms of funding issues – as Alberta pushes forward with all kinds of decisions, absent First Nations having sufficient capacity to gather information and participate, it is easy to draw the inference that Alberta's concern is more about court proofing than reconciliation.

10. Consultation occurs on a project-by-project basis, devoid of critical information about cumulative impacts on First Nations' rights

A particularly contentious issue is the degree to which the direct, indirect and cumulative impacts of development ought to be assessed in decision-making processes and what studies and information are required to assess those kinds of impacts on our rights. We have long sought a say in developing terms of reference or criteria by which impacts ought to be assessed against our ability to exercise our rights now and in the future. There is no requirement in the policy that this sort of input will be seriously considered – in fact, Alberta Environment and Sustainable Resource Development consistently ignore such input.

11. Consultation rarely, if ever, occurs at the strategic planning stage

Alberta Energy expressly refuses to consult at the tenure-granting stage. This is extremely troubling. The granting of tenures/mineral dispositions is a key strategic planning stage. Once tenures are granted or dispositions made, there is an expectation on the part of the purchaser or disposition holder that development will be permitted. Certain legislation may, in fact, require development to take place. Once the tenure is granted, the possibility of no development taking place in a particular area may be foreclosed and other kinds of accommodation may be foreclosed, irrespective of the concerns raised by First Nations. Since there is no current process by which Alberta analyzes existing development or planned development on tenures that have already been granted and how such current or future development affects section 35 rights, it is crucial that such analysis be done before more tenures are granted. There is no legal impediment to consultation prior to posting lands for sale or disposition. British Columbia, as one example consults prior to the grants of tenure/sale of lands. This is simply a choice by Alberta and one we feel is ill-advised.

12. There is a Duty to Consult in relation to Private Lands

The policy is silent on whether or not consultation ought to take place in respect of what the Province terms "private" lands. We do not accept that there is no duty to consult or accommodate where lands are deemed to be "private." *Badger* and other cases state that Treaty rights may be exercised on private lands where there is no visible, incompatible use of those lands. We are also not consulted on decisions to turn Crown lands into private lands. Moreover, we note that consultation is required, notwithstanding that the lands are private, where:

- There are renewals or extensions of any approvals, tenures, and leases that created the private lands;
- Where development on private lands has the potential to directly, indirectly, or cumulatively adversely impact upon the meaningful exercise of our inherent and Treaty protected rights on Crown land or on other lands to which we have a right of access; and
- Where development on private lands has the potential to injuriously affect our inherent Treaty protected rights on Crown lands or on other lands to which we have a right of access.

13. The Duty to Consult and Accommodate applies to decisions that affect Reserve Lands

The current *Consultation Policy* does not adequately address the critically important issue of the duty to consult and accommodate as it relates to reserve lands. Although Alberta does not have jurisdiction to make decisions directly with respect to reserve lands, Alberta can make decisions and take actions affecting traditional lands that have affects on reserve lands along with having lasting and profound impacts on our ability to use and enjoy reserve lands. Negative impacts of decisions concerning off reserve lands can have an adverse impact on reserve lands and constitute an interference with fundamental Treaty rights.

Reserves lands are a core term of the Treaty. It is well established that it was the common intention of both First Nations and the Crown that reserve lands would serve as the basis for a transition to a new economy.[14] First Nations have an established Treaty right to their respective reserve lands and to the

[14] For example: Richard H. Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights,* Canadian Institute of Resource Law, Saskatoon, April 1988, pp. 19-20, 26; Arthur J. Ray, Jim Miller, and Frank Tough, *Bounty and Benevolence,* McGill-Queen's University Press 2000, Montreal, pp. 71, 137-139, 168, 199; Treaty 7 Elders, et al, *The True Spirit and Original Intent of Treaty 7,* McGill-Queen's University Press 1996, Montreal, pp. 121-123, 146, 210, 312-313; Sarah Carter, *Lost*

use and benefit of those lands – this is beyond dispute.[15] In addition to being a term of the Treaty, First Nations' interests in reserve lands are a form of Aboriginal title derived from our prior historic occupation of our lands.[16] Moreover, constitutionally, there are a number of provincial laws which cannot apply on our reserves. Accordingly, any potential impacts on reserve lands are impacts on a core Treaty right and our Aboriginal title to reserve lands. Therefore, there is always a duty to consult with respect to potential impacts on our reserve lands. Most often, such impacts will require deep consultation, and in those instances where potential impacts are significant, the full consent of a First Nation will be required.[17]

14. Municipal decisions and actions can impact First Nations' rights

Alberta's approach to consultation fails to address the reality that the decisions of municipal districts, towns and cities have significant potential to impact First Nations' rights and interests. Municipal authority and powers are delegated from the provincial Crown. Many functions and decisions of municipalities can impact First Nations. For example, decisions to locate waste disposal sites, feedlots, construct highways, and zone development can have significant impacts on First Nations' reserve lands and other Treaty rights. More general planning decisions and policy initiatives can influence long term land use, infrastructure planning, and water quality and quantity, in ways that impact First Nations. Many First Nations repeatedly expressed this concern to Alberta during the development of the *Consultation Policy* but the issue has remained unaddressed. Any new approach to consultation has to acknowledge that as delegates of the Crown, municipalities can make decisions and set policies that may impact First Nations and, therefore, engage the duty to consult. Alternatively, Alberta must ensure that, where necessary, it exercises oversight to ensure the adequacy of consultations related to municipal decisions to ensure that the Crown's duty to consult is satisfied. Addressing municipal consultation would be consistent with the approach taken by other provinces.[18]

15. Alberta has an obligation to be forthright about consultation

Alberta has been unwilling to confirm, verbally or in writing, whether certain meetings and processes are consultation or part of the consultative process. On occasion, Alberta officials have been so inconsistent as to communicate that certain processes are both consultation and not consultation. Some First Nations have been assured by Alberta Environment officials that a meeting or series of meetings are not consultation, only to be told later by Alberta Justice that such assurances cannot be relied on. In regulatory processes, First Nations have had to ask for consultation records that industry delivers to Alberta officials, in which industry purports to have "consulted." This is the case even though Alberta is relying on those records as part of meeting its own consultation obligations. The honour of the Crown does not support a "shell game" approach to consultation. First Nations are entitled to clarity,

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Harvests: Prairie Indian Reserve Farmers and Government Policy, McGill-Queen's University Press 1990, Montreal, pp. 43-44, 49, 52, 55-57, 78; Richard T. Price, ed., *The Spirit and Intent of the Alberta Indian Treaties*, 3rd ed., University of Alberta Press, Edmonton, 1999, pp. 31, 141.

[15] See: s.10 of Schedule (2), *Constitution Act, 1930*; Since 1876 the *Indian Act* has contained the recognition that reserves are for the "use and benefit" of First Nations: *Indian Act,* S.C. 1876, c. 18, s. 4; *Indian Act,* S.C. 1880, c. 28, s. 6; *Indian Act,* R.S.C. 1886, c. 43, s. 2(k); *Indian Act,* R.S.C. 1906, c. 81, s. 2(i); *Indian Act*, R.S.C. 1927, c. 98, s. 2(j); and *Indian Act,* S.C. 1951, c. 29, s. 2(0); *Indian Act*, R.S.C., C.I-5, s.2(1).

[16] *Guerin v. Canada*, [1984] 2 S.C.R. 335, para.86.

[17] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 168-169.

[18] Government of Saskatchewan, *Draft First Nations and Métis Consultation Framework;*

honesty, and forthrightness from the Crown and its representatives. Nothing less will meet with the honour of the Crown obligations.[19]

Across Alberta, we have consistently been presented with pre-determined, fully developed consultation plans. Rarely, if ever, are First Nations asked by Crown officials for input into consultation processes. Project proponents have no better record in this regard. Consultation about the scope and terms of the consultation process itself is a critical matter that can determine whether consultation can be meaningful. The Crown must work with First Nations at the earliest stages to determine what rights and interests are at issue, understand which First Nation officials and communities need to be involved and to ensure that Crown officials involved in the consultation process have the capacity and authority to meaningfully consult and accommodate if necessary.[20]

16. Alberta must be flexible and conduct itself honourably with respect to Traditional Territories and Traditional Knowledge

Alberta's approach to consultation must be sensitive to and respect the reality that First Nations' traditional territories overlap and that some First Nations have different, and occasionally contrary, perspectives with respect to traditional territories. Any efforts by Alberta to create maps or databases that claim to represent discrete and non-overlapping traditional territories would be, simply put, untrue and an attempt to oversimplify consultation for the benefit of government and industry. First Nations are also concerned that Alberta's undue emphasis on "dots on a map" and traditional use sites of an historical nature, has resulted in a serious loss of focus on impacts to on-going Treaty hunting, fishing, trapping, gathering, and other traditional land uses on reserve lands. This approach to studying traditional use and building into the consultation process does not reflect our historical land use patterns and the way in which our peoples continue to use the land for Treaty rights and traditional use purposes.

[19] *Mikisew Cree First Nation v. Canada,* 2005 SCC 69, para.33; *Haida Nation v. British Columbia,* 2004 SCC 73, para.41; *R. v. Marshall,* [1999] 3 S.C.R. 456, para. 49.
[20] *West Moberly First Nation v. British Columbia,* 2010 BCSC 359, para.54 & 55; *Dene Tha' First Nation v. Canada,* 2006 FC 1354.

APPENDIX B

SUGGESTED APPROACH TO CONSULTATION

In our view, a negotiated consultation agreement should also include a consultation process or protocol containing the following elements:

A. A mutually agreed-upon set of objectives and interests (see our views on this matter above) against which consultation will be measured.

B. Individual First Nations may use the following principles to assess the adequacy of consultation:

- The Crown's "taking up" of lands and resources for development are subject to the duty to consult and accommodate.

- Consultation is an ongoing process and is always required.

- Consultation must be conducted with the genuine intention of seriously considering and substantially addressing the concerns of First Nations and wherever possible, demonstrably integrating the concerns of the First Nations within any Proposal – this extends to both procedural (process) and substantive concerns.

- Consultation must take place early in any Proposal before important decisions are made, including at the strategic planning stage of any Proposal and the tenure-granting/land sale stage.

- The duty to consult is not met by addressing only the site-specific impacts of any decision, but must also seriously consider and substantially address the potential indirect, derivative, induced and cumulative impacts of other existing, planned, or reasonably foreseeable industrial development(s) on our rights, including injurious affection related thereto.

- First Nations need adequate resources to assess the potential impacts of any decision on their rights and interests, including the identification of any mitigation and accommodation opportunities in relation to any decision. In order to be able to consult in a meaningful fashion, the Crown and third parties must be required to negotiate adequate funding with First Nations that enables us to carry out our consultation obligations and the Crown will not authorize development until companies have demonstrated that they have provided such funding.

- In carrying out consultation in relation to any Proposal, First Nations, the Crown and, if appropriate, third parties, have reciprocal obligations of reasonableness, good faith, and cooperation.

- Any consultation process and its outcome must be responsive to the interests and concerns of our First Nations.

- The nature of consultation, compensation and accommodation will vary depending upon the degree of potential adverse impacts on and infringements of the rights of our First Nations.

- Unless a First Nation delegates consultation to another entity or organization, any Crown and third party consultation must be specific to the rights, claims and traditional land uses of the particular First Nation which may be adversely affected or infringed by a decision.

- Communication must be open, honest and clear.

- The Crown and third parties have a positive obligation to provide full information to our First Nations on an ongoing basis, including new information as it becomes available, so that we can understand the potential direct, indirect and cumulative impacts of any decision on our rights and interests before a decision is made – where First Nations lack sufficient information to assess impacts, the Crown and industry may have to develop additional information through studies and reports – First Nation requests for additional information must be seriously considered – this is why First Nations input into terms of reference are critical.

- Based on the resources available, First Nations will outline their concerns with clarity, focusing on the potential direct, indirect and cumulative impacts of any development or issue on their rights.

- In any public regulatory process, the Crown and third parties must consult with us about the design of any regulatory review process for any Proposal, including the role of our First Nations in any such process; the screening and scoping of a proposal for environmental assessment under federal and/or provincial law; the drafting of Terms of Reference ("TOR") for an Environmental Impact Assessment ("EIA") or its equivalent under federal or provincial law; and the development of cumulative effects assessment and socio-economic impact assessment. More generally, the Crown must consult with us about the design of any consultation process, including the Alberta ***Consultation Guidelines*** and revisions thereto, as well as the design of any consultation processes for any Crown initiatives such as the LUF.

- Consultation with First Nations is a separate and distinct process from any public consultations conducted by the Crown or by Crown agencies through legislation, regulations or policy and the carrying out of any public hearings for Proposals under federal or provincial law is not a substitute for discharge of the Crown's duty to consult, although aspects of such consultation could be used in a separate and distinct process.

- In addition to the foregoing, if a decision has the potential to <u>infringe</u> a First Nation's Treaty or Aboriginal rights, justification and accommodation of such a potential infringement of that First Nation's rights requires the following:

    - ***Priority*** to be given to the First Nation's rights versus those of non-First Nation stakeholders;

    - ***Minimal impact*** on a First Nation's rights;

    - ***Mitigation measures*** to avoid impacts and to ensure that any impact that does occur is "as little as possible" and to ensure that First Nation concerns are "demonstrably integrated" into any plan of action;

    - ***Fair compensation*** for unavoidable infringements; and

- ***Other efforts*** to ensure sensitivity and respect of the First Nation's rights.

Although these consultation requirements are pre-requisites for the validity of government action in our view, they do not end at the decision-making stage. They are ongoing and continue through the life of any Proposal, including the construction, operation and de-commissioning stages.

Process for Consultation

a. Initial Information Requirements

Although our First Nations may have different suggestions for how consultation will take place on the ground, an agreed-upon consultation should provide the following kinds of specific detail:

- A list of specific decisions that will trigger the duty to consult, and which will ensure early notification – this should be based on an agreed-upon set of decisions which do and do not trigger the duty to consult – to the extent that procedural aspects of consultation are delegated to industry, any notification should be well before the application is submitted to the regulator or decision maker, so that First Nations have time to give their input on various process-related matters (required studies, TOR, etc.).

- Each party involved in the consultation should appoint, in writing, someone responsible for carrying out the consultation and the consultation policy should make clear that any attempt to circumvent the "official" person or body responsible for consultation will not constitute the legally-required consultation.

- Our First Nations expect to receive copies of all applications, policies or other decisions which trigger the duty to consult in both electronic and hard copy form.

- In order to allow us to understand the issue that forms the basis of consultation, we expect to receive information on:

    - the nature and scope of the decision;

    - the nature and scope of any future contemplated conduct, such as regulatory documentation related to the decision, or applications for future growth phases related to the decision;

    - the reasons for or purpose of the decision;

    - the timing of the contemplated conduct, including all applicable regulatory timelines;

    - the location of the contemplated conduct;

    - the duration of the contemplated conduct;

    - the potential risks associated with the contemplated conduct;

    - the proposed measures to be undertaken and methods to ensure inclusion of Traditional Use and Traditional Ecological Knowledge of our First Nations;

- a plan for how we will be consulted and included in the development of studies related to the decision, including in the pre-application phase and in all aspects of the regulatory review of the decision;

- the identification of alternatives to the contemplated conduct; and

- identification of who will be involved in carrying out the contemplated conduct, including any agents or contractors working for the Crown or third parties.

- Documents available to be reviewed, in hard copy and electronic form including, but not limited to:

    i. applications;

    ii. studies;

    iii. reports, such as in respect of seismic or exploration phases of the decision;

    iv. any previous assessments, studies or reports in respect of any phase of the decision including the exploratory stage, or in the vicinity of the decision that are known to or in the possession of the Crown or industry;

    v. information on applicable legislation, policies, guidelines and regulations related to the decision or which decision;

    vi. information on any deadlines or filing dates related to the decision; and

    - the names, addresses, emails, fax and telephone numbers for any relevant Crown decision makers related to the Proposal as well as identification of contacts for industry Proponents

    - If there is any change to information required to be delivered to the First Nation, or if new or additional information becomes available during the pre-application or regulatory review of the decision, this further information shall be delivered to the First Nation.

b. Processing of Information – General Kinds of Decisions

Again, while the particular steps may differ from one First Nation to another, some of the key components of a consultation approach would be:

- The First Nation will conduct a preliminary review of the information in a specified period of time and indicate whether it wishes to be consulted further and, if so, the First Nation will set out a preliminary list of its concerns.

- The consultation policy will specify such time periods that are mutually acceptable, and will ensure that time periods for response respect the culture of the First Nation and do not "count against" the First Nation when the First Nation is closed, such as in the Christmas season.

- The First Nation may request, and the Crown and industry shall attend, any preliminary meetings to discuss among other things:

    - the nature of the decision and the Crown's regulatory review process or other approval process contemplated, the First Nation's initial questions or concerns about the regulatory review process, if any, as well as time lines for the First Nation's review of the decision;

    - the consultation obligations of the Crown and third party in relation to the decision, how and when they will be carried out, including appropriate and acceptable time lines for the First Nation to consult in relation to the decision;

    - appropriate information requirements, including identification of information gaps, for the Crown and third parties to facilitate the First Nation's ability to determine and assess the potential impacts of the Proposal on their rights and interests; and

    - an appropriate budget provided by the Crown and/or industry and work plan for the First Nation's review of the decision and for the First Nation to engage fully and meaningfully in the regulatory review process for the decision.[21]

- As noted earlier, Alberta must recognize that First Nations' ability to participate fully and meaningfully in consultation is dependent on receiving adequate funding to do so. Provided that adequate technical/financial assistance is made available by the Crown and/or industry to our First Nations, we will conduct a technical review of the decision and will hold internal discussions with our Leadership and Community to determine and document our issues and concerns in relation to the direct, indirect and cumulative impacts of the decision on our rights and interests.

- Following the above steps, the First Nation will communicate any concerns arising thereunder to the Crown and the third party, as well as recommendations on how such concerns can be addressed, accommodated, or mitigated, including in relation to any compensation related thereto that may be required.

- The Crown and the third party will engage in consultation with the First Nations to seek to address and accommodate those concerns**.**

- If consultation is delegated to a third party, the third party will provide monthly reports/consultation summaries to the First Nation before submitting those reports to the Crown, so

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[21] Depending on the nature of the decision and the potential adverse impacts on our First Nations rights and interests, the budget and work plan will include items such as the carrying out of a traditional use study and collection to traditional ecological knowledge, if such information has not already been gathered within the vicinity of the project or decision, or an updating of information relevant to the vicinity of the project or decision; funding for legal and technical advice related to the decision, funding for a third party review of the decision as the context requires (including, but not limited to, a federal or provincial environmental assessment process), funding for community meetings and information sessions related to the decision and other related matters. The work plan will also set out time lines and a process for First Nation internal community engagement in respect of the decision. The work plan may also include time lines for our First Nation's review of, and input into, various stages of the environmental or regulatory review process such as commenting on TOR for an EA, scoping of the EA, identification of impacts to be studied in the EA, and related matters.

Any such funding would be in addition to the core funding provided by AAND.

that the First Nation can verify the accuracy of the information contained therein. If the Crown produces consultation reports or summaries, the First Nation will be provided with copies of such information on a monthly basis in order to verify the accuracy of the information contained therein.

- Prior to making a decision, if requested by the First Nation, the Crown will meet with the First Nation to discuss, among other things, the basis upon which the decision will be made, how the First Nation's issues and concerns were addressed, including concerns in relation to information gaps and, if those concerns have not been addressed, the reason(s) why those concerns have not been addressed.

- In the event that the concerns or some of those concerns cannot be resolved, the First Nation will discuss with the Crown and third parties alternative methods of resolving the dispute, including various forms of Alternative Dispute Resolution ("ADR"). However, if the First Nation's concerns cannot be resolved in any process set out herein or through ADR, our First Nations retain their full right to participate in any regulatory proceedings related to the referral and to raise its concerns in relation to potentially impacted rights in any court or other proceeding.

- Once a decision is made, if requested by the First Nation, the First Nation will receive a written copy of the decision including information on how its concerns were addressed. If those concerns were not addressed, the First Nation will receive a written explanation for why those concerns were not addressed.

- All TUS and TEK information that the First Nation provides to the Crown or third parties in relation to a decision will be kept in strict confidence and that information will not be released to any third party without the written consent of the First Nation unless disclosure of such information is required by law or unless that information is already in the public domain. The First Nation will treat Crown and third party information in the same manner.

- The First Nation will negotiate with the Crown or any third party the terms and conditions upon which any information can be used in any regulatory review processes, other public processes or court proceedings.

c. Consultation Process for Complex Decisions

In addition to the processes and steps set out above, the following additional consultation would be required in respect of any large-scale projects or processes such as those related to oil sands development, uranium, hydro-electric, nuclear power, any decision which triggers a federal or provincial environmental assessment, as well as in respect of any Crown-led initiative such as LARP and IFN.

- If requested by the First Nation, the Crown and any industry proponent of a decision will engage in face-to-face consultation concerning the development of TOR for a project. Among other things, such consultation will focus on the information required to be developed by the Proponent (including information required to assess potential direct, indirect and cumulative impacts on our rights and interests, the screening and scoping of the Proposal for regulatory review purposes, the identification of cumulative impacts and effects to be assessed, how our First Nations will be consulted in the regulatory review

process and how TUS/TEK will be considered and incorporated in the environmental assessment ("EA") or EIA for the project.

- If requested by our First Nations, the Crown will consult with us prior to any determination that an application for a project is complete for regulatory approval.

- We expect to be consulted on the information to be developed for any decision or process so as to ensure that potential impacts on our rights and interests will be taken into account – that might include baseline information, biophysical or other studies to be carried out, etc.

- Many of our First Nations have asked Alberta to work with us to carry out a traditional resource plans or studies which examine the current and future resource, environmental and ecosystem needs of the First Nation to meaningfully carry out their rights now and in the future including, but not limited to:

    i. Quality and quantity of wildlife species required;
    ii. Quality and quantity of aquatic species required;
    iii. Quantity and quality of plants or other things gathered; and
    iv. Quantity and quality, as the context requires, of air, water and ecosystems required to support the exercise of the First Nation's rights;
    v. Inclusion or understanding of information to consider the cultural impacts of decisions on our rights

- Meaningful incorporation of our TUS/TEK information in relation to the assessment of impacts through consultation and in respect of the regulatory review of any decision;

- A mechanism to ensure that information gaps in any decision or in any regulatory review process are identified and addressed prior to the issuance of any federal and/or provincial approval of a decision;

- Ensuring that the full social, cultural, environmental, health and economic impacts of decisions are assessed against our rights;

d. Accommodation

Depending on the results of the consultation carried out, our First Nations will work with the Crown and industry to identify forms of accommodation that are acceptable to our First Nations to address our concerns. Such forms of accommodation may include, but are not limited to:

a. the decision maker rejecting a decision or project, delaying a decision on a decision or project, revocation of the proposal by a third party or other proponent, or changing the decision or project based on the concerns and/or views expressed by the First Nation through consultation;

b. addressing the procedural concerns of our First Nations, by for example developing specific information requirements to assess the potential impacts of the decision on our rights within the regulatory review process or other public processes;

c. early engagement of our First Nations in planning related to a decision, including development of the regulatory review process for a decision or other public processes and our roles and participation in such processes;

d. negotiation of an Impact-Benefit Agreement, including funding to enable our members and businesses to take advantage of any employment and/or economic opportunities related to the Proposal, including forms of economic benefit beyond jobs or contracts;

e. inclusion of our First Nations in revenue sharing or some other means by which we share in the wealth of the Crown, outside of provisions in an Impacts-Benefit Agreement;

f. mitigating the impacts of a project, including a meaningful First Nation role in the monitoring of impacts of a project – this would need to involve a specific discussion of so-called reclamation – as we are concerned about the continued reliance of the Crown and industry on measures that have not been tested and which effectively tell us to suspend the exercise of our rights in certain areas for 40 years or more;

g. compensation for adverse impacts on, or infringements of, our rights, including financial or non-financial compensation (such as protected areas for exercising our rights); and

h. Negotiation of other kinds of agreements, such as exploration agreement related to development.