Canadian Institute of Resources Law
Institut canadien du droit des ressources

Aboriginal Peoples and Resource Development in Northern Alberta

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Executive Summary

This paper is the final component of a multifaceted research project on legal and institutional responses to land and resource use conflicts in Northern Alberta. The paper evaluates the situation of forest-based Aboriginal communities faced with intensifying resource development in the northern boreal region of Alberta. It considers the extent to which the rights and interests of Aboriginal Peoples are acknowledged, protected and accommodated in the provincial resource allocation and development process.

The paper begins with a brief discussion of Aboriginal and treaty rights in the context of Treaty 8, which covers Northern Alberta, and draws some implications of this analysis for the provincial resource development process. A review of the provincial government's policies and commitments with respect to Aboriginal Peoples follows. Next, the paper focuses on certain government initiatives that seek to accommodate Aboriginal rights and interests in the resource development process. These include cooperative management agreements, legislation in relation to the disposition of mineral rights on Metis Settlements Lands, and various processes of consultation with Aboriginal Peoples. The final section examines certain initiatives of the resource sector towards Aboriginal Peoples, using the Athabasca Oil Sands region as a case study. The paper concludes that the provincial government shows a growing awareness of the need to address Aboriginal and treaty rights issues and has taken some steps to address these issues. Nevertheless, the government needs to undertake a complete review of its resource legislation in order to identify ways to effectively protect and accommodate the rights of Aboriginal Peoples.

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1.0 Introduction

The northern half of Alberta (the boreal forest region) is sparsely populated. Only 6.3% of the total provincial population lives in that vast area.[1] By contrast, all of Alberta's Metis settlements, and 51% of Alberta's Aboriginal population are located in that region.[2] The region has a wealth of natural resources. It contains a large proportion of Alberta's forested lands (90%) and produced 73% of the provincial timber harvest in 1996/1997.[3] Six of Alberta's seven pulp mills are located within or immediately adjacent to the region.[4] The region also accounts for a significant proportion of conventional oil and gas production (42% and 37% of the provincial total respectively), and the totality of the province's production of oil sands (bitumen).[5] Agricultural activity is expanding within the area, notably in the Peace River region, where forested land continues to be cleared for agricultural purposes.[6] All of these resource sectors have growth potential and the production of conventional oil and gas, oil sands as well as timber resources is expected to intensify over the foreseeable future.[7]

The significant cumulative environmental impacts of intensifying resource development on Alberta's boreal forest region have been brought to the attention of the public, government and industry and widely debated in the past few years.[8] The impacts of these developments on Aboriginal Peoples living in the boreal forest region have been equally serious but much less publicized. These impacts include the social disruption associated with the sudden influx of workers to relatively isolated communities that had been shielded from close contact with western lifestyles and values. They also include the health and cultural impacts resulting from the deterioration of land and water ecosystems, notably the impacts on wildlife and its habitat as

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[1]Richard R. Schneider, *Alternative Futures: Alberta's Boreal Forest at the Crossroads* (Edmonton: The Federation of Alberta Naturalists and The Alberta Centre for Boreal Research, 2002) at 12.

[2]Government of Alberta, Northern Development Branch, *Economic and Demographic Profile of Northern Alberta* (Peace River: October 1998) at 27.

[3]*Ibid.* at 17.

[4]Alberta Environmental Protection, *The Boreal Forest Natural Region of Alberta*, April 1998, Chapter 3 – Human activities in the BFNR and their environmental impacts, at 88.

[5]Government of Alberta, *supra* note 2 at 18.

[6]Schneider, *supra* note 1 at 15-16.

[7] *Ibid*. at 69-72.

[8] For an overview of the ecological impacts of intensifying resource development in the boreal forest and relevant sources, see Monique M. Ross, *Legal and Institutional Responses to Conflicts Involving the Oil and Gas and Forestry Sectors*, CIRL Occasional Paper #10 (Calgary: Canadian Institute of Resources Law, January 2002).

well as from air pollution.[9] These impacts have deeply affected the traditional economy, and the very cultural integrity, of the affected Aboriginal communities.[10]

Aboriginal communities have dealt with the onslaught of resource development in their traditional lands in a variety of ways. They have used legal and political tools to attempt to slow down, if not entirely stop, resource development or to mitigate its negative impacts on the land and on their communities. In certain cases, the conflict between resource companies (notably oil and gas and forestry) and Aboriginal Peoples has led to acts of civil disobedience, such as road blockades.[11] At the same time, Aboriginal communities with record levels of unemployment and poverty have sought to obtain a share of the considerable economic benefits generated by resource development on their traditional lands. They have also attempted to obtain from the provincial government the right to develop or extract the resource, on their own or jointly with industry, or at a minimum to secure some business opportunities and employment for their people.

This report evaluates the situation of forest-based Aboriginal communities confronted with intensifying resource development in the northern boreal region of Alberta. The question it attempts to answer is the following: to what extent are the rights, interests and values of Aboriginal Peoples acknowledged, protected and accommodated in the provincial resource allocation and development process? In order to answer this broad question, a set of other questions needs to be investigated: 1) What are those Aboriginal rights, interests and values and how are they affected by resource development? 2) Is the provincial government acknowledging its constitutional responsibilities towards Aboriginal Peoples? 3) Are the rights and interests of Aboriginal Peoples accounted for in the legislative and regulatory framework of resource development in Alberta? 4) How are resource companies dealing with Aboriginal Peoples whose land and resource uses are affected by their activities?

The report is in five parts: 1) a brief discussion of Aboriginal and treaty rights in the context of Treaty 8; 2) a review of the provincial government's policies and commitments with respect to Aboriginal Peoples; 3) an assessment of the extent to which the legal and regulatory regime applicable to resource development accommodates the rights and interests of Aboriginal Peoples; 4) a case study of resource companies' efforts to address the concerns of Aboriginal communities affected by industrial developments; and 5) conclusions.

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[9]Alberta Environmental Protection, *Northern River Basins Study – Report to the Ministers 1996* (Edmonton, 1996) at 54-61.

[10]*Ibid*. at 61: "Archival information and traditional knowledge interviews suggest that development has caused a deterioration in the cultural and physical health of affected aboriginal communities". See also Andrew Huff, "Resource Development and Human Rights: A Look at the Case of the Lubicon Cree Indian Nation of Canada" (1999) Colorado Journal of International Environmental Law and Policy 161, discussing the effects of oil and gas exploitation on the traditional economy and health of the Lubicon.

[11]E.g., the road blockade set up by the Lubicon Cree in 1988, as described in John Goddard, *Last Stand of the Lubicon Cree* (Vancouver: Douglas & McIntyre, 1991) at 171-194.

2.0 Aboriginal and Treaty Rights in Northern Alberta

2.1 Discussion

The boreal forest region of Alberta is almost entirely encompassed within Treaty 8, one of Canada's numbered treaties. Treaty 8 covers a much larger area, since it extends into northeast British Columbia and the northwestern corner of Saskatchewan, and reaches north to the south shore of Great Slave Lake in the Northwest Territories. Treaty negotiations began in 1899, and the various Aboriginal groups living in this vast territory signed or adhered to Treaty 8 in the Spring and Summer of 1899 and 1900. Some Aboriginal groups, such as the Lubicon Cree, were entirely bypassed by the Treaty Commissioners and did not have an opportunity to adhere to the treaty at the time.[12] For these groups that did not sign the treaty and have not yet settled their claims with the federal government, the issue of unextinguished Aboriginal rights, including title to the land, remains unsettled.

Pursuant to the written text of Treaty 8, the Aboriginal signatories agree to "cede, release, surrender and yield up to the Government of the Dominion of Canada … all their rights, titles, and privileges whatsoever to the lands included" within the treaty.[13] In exchange, the treaty recognizes to the Aboriginal signatories the right to continue hunting, trapping and fishing throughout the area encompassed in the treaty, subject to government regulation aimed at wildlife conservation, and except on tracts that "may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."[14]

Without getting into a detailed analysis of the terms of the treaty and of the rules of interpretation developed by the courts,[15] it may simply be noted here that the written text of the treaty is only the starting point for an analysis of its terms. A long line of decisions by the Supreme Court of Canada has established that the oral terms and the understanding of the meaning and intent of a treaty by the Aboriginal parties are equally important in the interpretation of its terms.[16] Further, the courts have held that "treaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation towards aboriginal peoples", and that "any limitations which restrict the rights of the Indians

[12]These included several Cree groups living in the interior north of Lesser Slave Lake. See Goddard, *supra* note 11 at 11-12.

[13]*Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, etc.* (Ottawa: Queen's Printer, 1966).

[14]These two restrictions on treaty rights are known as the "regulatory limitation" and the "geographical limitation".

[15]An analysis of Treaty 8 is found in Monique M. Ross & Cheryl Y. Sharvit, *Forest Management in Alberta and Rights to Hunt, Trap and Fish Under Treaty 8* (July 1998) 36:3 Alberta Law Review at 645.

[16]For a detailed elaboration by the Supreme Court of Canada of the principles applicable to treaty interpretation, see *R.* v. *Sioui*, [1990] 1 S.C.R. 1025; *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075; *R.* v. *Badge*r, [1996] 1 S.C.R. 771; *R.* v. *Marshall*, [1999] 3 S.C.R 456. These principles were recently applied by the Federal Court of Canada in the *Benoit* decision, a case also involving Treaty 8: *Benoit* v. *Canada*, [2002] F.C.T. 243.

under treaties must be narrowly construed".[17] For the Aboriginal signatories, Treaty 8 was primarily a peace treaty which guaranteed that their way of life, embodied in their rights to hunt, trap and fish, would be protected in perpetuity. As noted by the Supreme Court in the *Badger* case, "it is clear that for the Indians the guarantees that hunting, fishing and trapping rights would continue was the essential element which led to their signing of the treaties".[18]

In 1930, the federal government transferred control and ownership of Crown lands and natural resources to the three Prairie provinces under the Natural Resources Transfer Agreements (NRTAs).[19] Paragraph 12 of the Alberta Agreement states that provincial fish and game legislation will apply to Aboriginal Peoples, subject however to the Aboriginals' right to hunt, trap and fish for food on "unoccupied" lands or on lands to which they may have a right of access, a right which the Province "assures to them". The province assumed a constitutional obligation to fulfill the promises made to the Indians by the treaty, notably to secure to them "the continuance of the supply of game and fish for their support and subsistence" and to protect their rights to hunt, trap and fish.[20] The Supreme Court has held that paragraph 12 of the NRTA has both limited and expanded the treaty rights.[21] The NRTA "evidenced a clear intention to extinguish" the treaty right to hunt commercially; however, the NRTA did not extinguish or replace the treaty right to hunt for food, but protected and in fact expanded it.[22] The geographical area of the right to hunt for food has been extended to include the whole of the province, and the way in which hunting can be conducted has been removed from the jurisdiction of the province.[23] In the *Breaker* case, the Provincial Court of Alberta noted as follows: "Paragraph 12 of the NRTA, as modified, empowered the Province of Alberta to act in the stead of the Federal Government with the same duties and responsibilities. There is a duty on the province to not unjustifiably infringe on either the Treaty right itself or as modified in the NRTA."[24]

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[17]*Badger*, *supra* note 16 at 781 and 794.

[18]*Badger*, *supra* note 16 at 792.

[19]The three agreements are found as schedules to the *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 25.

[20]Paragraph 12 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 for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

[21]*Badger*, *supra* note 16 at 773 and 795.

[22]*Ibid*. at 796.

[23]*Ibid.* at 818; *R.* v. *Horseman*, [1990] 1 S.C.R. at 933. Note that this interpretation of para. 12 of the NRTA has been questioned: see Justice Wilson's dissent in *Horseman* at 913-922 and C. Bell, "*R.* v. *Badger*: One Step Forward or Two Steps Back?" (1997) 8 Constitutional Forum 21.

[24]*R.* v. *Breaker*, [2001] 3 C.N.L.R. 213, para. 394.

The provincial government and the beneficiaries of Treaty 8 take a vastly different view of the terms of the treaty and of the NRTA,[25] notably the "geographical limitation" on the treaty rights. The provincial position, based on a literal interpretation of the written terms of the treaty, appears to be that the government has an unlimited right to "take up" or "occupy" any Crown lands for resource development, thereby extinguishing treaty rights.[26] However, this view is contrary to the principles of treaty interpretation referred to earlier, and the case law does not support that position.

The Supreme Court has held that whether or not land has been "taken up" is a question of fact that must be resolved on a case-by-case basis. Crown land is only considered to be taken up or occupied when it is put to a visible use that is incompatible with the exercise of the treaty right.[27] For a treaty right to be considered incompatible with occupancy of the land by the Crown, "it must not only be contrary to the purpose underlying that occupancy, it must prevent the realization of that purpose".[28] Thus, it has been held that the use of Crown lands for forestry purposes is not necessarily incompatible with a treaty right to hunt.[29] Indeed, in Justice Huddart's opinion in the *Halfway River* case, the issuance by the Crown of a logging permit "can be seen as allowing the temporary use of some land for a specific purpose, compatible with the continued long-term use of the land for Halfway's traditional hunting activities. The Crown was asserting a shared use, not a taking up of land for an incompatible use".[30] A distinction is therefore drawn between Crown use that constitutes a "taking up" of lands that precludes the exercise of hunting, fishing and trapping rights, and Crown use that allows a "sharing" of the land and is compatible with uses by Aboriginal Peoples.

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[25]First Nations still dispute the validity of the NRTA, which they argue was unilaterally enacted by the federal government without their consent. First Nations in Alberta, Manitoba and Saskatchewan have launched a lawsuit against the federal government to challenge the legality of the NRTA: see Jamie Honda-McNeil, *Cooperative Management in Alberta – An Applied Approach to Resource Management and Consultation with First Nations* (Edmonton: Faculty of Graduate Studies, University of Alberta, Spring 2000) at 49.

[26]See Report of the Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Volume 2, Part Two (Ottawa: Minister of Supply and Services, 1996) at 433: "Canada and Alberta take the position that any rights the Dene Tha' may have had to lands outside their reserves were extinguished absolutely – according to the text of the document – by Treaty 8." The Alberta government's views are similar to those advanced by the government of British Columbia in *Halfway River First Nation* v. *B.C.*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), para. 100: "So the appellants say that as a result of the "geographical limitation" in Treaty 8 the Crown is entitled to take up Treaty lands for "settlement, mining, lumbering, or other purposes" without violating any promise made by the Crown to the Indians. As there has been no infringement of Indian treaty rights, no "justification" analysis is required." See also the federal government's stand in the *Mikisew* case, where the federal Minister argued that since the lands in question had been taken up for purposes of a national park (Wood Buffalo National Park), the Mikisew Cree could no longer claim treaty rights on that land: *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2002] 1 C.N.L.R. 169 (F.C.T.D.), para. 60.

[27]*Badger*, *supra* note 16 at 804.

[28]*Sioui*, *supra* note 16 at 1073.

[29]*Badger*, *supra* note 16 at 804, citing *R.* v. *Strongquill*, [1953] 8 W.W.R. (N.S.) 247 (Sask. C.A.).

[30]*Halfway River, supra* note 26, para. 173.

Further, to hold that the Crown's right to "take up" land is unlimited and absolute, is untenable. In the *Halfway River* case, Justice Huddart held:

> … the Indian's right to hunt granted to the signatories of Treaty 8, and the Crown's right to regulate, and to require or take up lands, cannot be given meaning without reference to one another. They are competing, or conflicting rights as has been recently affirmed in R. v. Sundown, [1999] S.C.J. No. 13 at paras. 42 and 43. The Indians' right to hunt is subject to the "geographical limitation", and the Crown's right to take up land cannot be read as absolute and unrestricted, for to do so (as even the Crown concedes) would render the right to hunt meaningless.
>
> … it is unrealistic to regard the Crown's right to take up land as a separate or independent right, rather than as a limitation or restriction on the Indians' right to hunt.[31]

The Federal Court of Canada reached a similar conclusion vis-à-vis the federal government's power to take up land in the *Mikisew* case, another Treaty 8 case:

> The treaty makes it clear that the "taking up" of land will be the exception, not the rule. The "taking up" of land will happen gradually, perhaps temporarily, and deliberately. It clearly was not intended to occur automatically on all the land surrendered.
>
> The approach of the Crown forwarded here would render the 1982 constitutionalization of the treaty rights meaningless. It is clear that post-1982, the Crown cannot unilaterally defeat treaty rights. This position taken by the Minister cannot be reconciled with the honour and integrity of the Crown as a fiduciary.[32]

Some legal experts question whether the provincial Crown has indeed the authority to "take up" or "occupy" land, and further whether provincial resource legislation which is otherwise valid is applicable when it relates to land-based rights such as the rights to hunt, trap and fish. [33] Shin Imai argues that the "taking up" of treaty lands falls within the core federal authority over "Indians, and Lands reserved for the Indians" under subsection 91(24) of the *Constitution Act, 1867*. In his view, the NRTA transferred authority to the province to regulate with respect to conservation matters, but the authority to "take up" lands remains with the federal government.[34] Nigel Bankes analyzes the implications of *Delgamuukw* for provincial resource legislation and concludes that provincial laws (such as oil and gas, mining, forestry, planning or expropriation laws) that relate to matters included within the core or primary jurisdiction of the federal government under "lands reserved" should be held inapplicable. The "lands reserved"

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[31] *Halfway River*, *supra* note 26, paras. 134, 136.

[32] *Mikisew*, *supra* note 26, paras. 39, 85. See also Patrick Macklem's analysis of the regulatory and geographical limitations of Treaty 9: "The Impact of Treaty 9 on Natural Resource Development in Northern Ontario" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 97 at 127: "An open-ended interpretation of either of the two qualifications on hunting, trapping, and fishing rights would confer an unbridled authority upon government actors to extinguish precisely that which Aboriginal signatories thought they were protecting."

[33] Shin Imai, "Treaty Lands and Crown Obligations: The "Tracts Taken Up" Provision" (2001) 27 Queen's L.J. at 34-38; Nigel Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" Case Comment (1998) 32 U.B.C. L. Rev. 317.

[34] Shin Imai, *supra* note 33 at 34-38.

category includes land-based rights such as the rights to hunt, trap and fish.[35] In the *Taku River* case, Justice Rowles of the Court of Appeal of British Columbia agreed that the Supreme Court analysis in *Delgamuukw* applies not only to the ability of a province to extinguish Aboriginal rights, but "would also apply so as to limit the power of the province to infringe aboriginal rights and title."[36]

To the extent that a provincial government is entitled to infringe treaty rights by "taking up" land for resource development, certain legal duties attach to the exercise of its powers. Brian Slattery suggests that a fiduciary obligation arises when the Crown exercises its discretion with respect to Aboriginal land rights. It is grounded in the trust relationship existing between Aboriginal Peoples and the Crown. It applies to the provincial Crown when it acts unilaterally to affect Aboriginal lands, rights, property or interests or assumes discretionary powers to affect adversely Aboriginal interests protected by the trust relationship.[37] Patrick Macklem also notes that "the grant of authority to 'take up' lands, either for listed or unlisted purposes, is subject to the Crown's overarching fiduciary obligation to exercise its discretion in accordance with the interests of Aboriginal peoples."[38]

Further, Crown actions which lead to an infringement of constitutionally protected treaty rights, whether as a result of a "taking up" of lands for incompatible purposes or the imposition of a "shared use", must be justified under the *Sparrow* justification test.[39] The Supreme Court has held that "it is equally, if not more important to justify *prima facie* infringements of treaty rights" as it is to justify infringements of aboriginal rights, and that the provincial government owes to the First Nations the same duty as the federal government to not infringe unjustifiably their treaty rights.[40] The first step in the justification analysis is to establish that in infringing the right, government is pursuing a valid legislative objective. Second, government must establish that the means used to pursue that valid legislative objective uphold the honour of the Crown and are in keeping with the Crown's fiduciary duty to Aboriginal Peoples. Depending on the circumstances of the case, this may involve giving priority to the Aboriginal right in question, or at least infringing the right as minimally as possible. Government will not be able to demonstrate

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[35]Bankes, *supra* note 33 at 350. See also Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Review at 774-782.

[36]*Taku River Tlingit First Nation* v. *B.C. (Project Assessment Director)*, [2002] 2 C.N.L.R. 312 (B.C.C.A.) para. 151 (leave to appeal to S.C. granted Nov. 14, 2002). In the *Haida* decision, Justice Lambert interpreted Justice Rowles' statement as follows: "From the context it is clear that what was being said was that the Provincial Legislature lacked capacity to authorize an infringement by a law in relation to a matter coming within the class of subjects "Indians, and Lands reserved for the Indians". But, of course, the Provincial Legislature has the legislative capacity to authorize what proves to constitute an infringement of aboriginal title by a law of general application": *Haida Nation* v. *B.C. (Min. of Forests*), [2002] 2 C.N.L.R. 121 (B.C.C.A.), para. 32.

[37]Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 7 Can. Bar Rev. 261.

[38]Patrick Macklem, *supra* note 32 at 130.

[39]*Badger*, *supra* note 16 at 813-815; *Halfway River*, *supra* note 26, para. 176; *Mikisew Cree*, *supra* note 26, para. 86.

[40]*Badger*, *supra* note 16 at 814, 820.

that it has satisfied its fiduciary duty if it has not consulted adequately with the affected Aboriginal Peoples. Another factor in the justification test is whether fair compensation is available in situations of expropriation.

2.2 Implications for Provincial Resource Development

What does this interpretation of treaty rights mean for provincial resource development? The provincial government is under an obligation to ensure that it acts in the best interests of Aboriginal Peoples when allowing resource development on Crown lands encompassed within Treaty 8. Any provincial legislation or regulation that potentially affects the treaty rights to hunt, trap and fish must give proper protection to these rights. As stated by the Supreme Court in the *Sparrow* decision, "the extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation".[41] This has several implications.

First, the provincial government must ensure that the legislative scheme governing the development of natural resources permits the accommodation of treaty rights with the competing rights issued to land and resource users.[42] There may be a need to review resource legislation that grants a large amount of discretion to decision-makers in order to ensure that the statutory scheme provides them sufficient guidance as to the way in which they should uphold Aboriginal and treaty rights. The Supreme Court has found that government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance", and that such discretionary legislation may be found to represent a prima facie infringement of aboriginal or treaty rights.[43] The legislation or regulations must provide the representatives of the Crown "sufficient directives" to ensure that they will respect the treaty rights.

Second, resource development cannot be allowed to impair the lands and resources upon which Aboriginal Peoples depend to such an extent that the treaty rights to hunt, trap and fish can no longer be exercised and that they cannot gain subsistence from these activities. Commenting on the impact of clear-cut logging on Aboriginal rights, Justice Seaton of British Columbia's Court of Appeal notes: "I cannot think of any native right that could be exercised on lands that have recently been logged."[44] Patrick Macklem suggests that treaty rights "ought to be viewed as not only conferring the right to engage in the activity listed by the terms of the treaty, but also including the right to expect that such activity will continue to be successful, measured by reference to the fruits of past practice."[45] In other words, the health and integrity of wildlife

[41] *Sparrow*, *supra* note 16 at 1110.

[42] As noted by Madam Justice Huddart in *Halfway River*: "The larger question may be whether the province's forest management scheme permits the accommodation of treaty and aboriginal rights with the perceived rights of licensees": *supra* note 26 at para. 171.

[43] *R.* v. *Adams*, [1996] 3 S.C.R. 101; *R.* v. *Côté*, [1996] 3 S.C.R. 139; also *R.* v. *Marshall*, *supra* note 16 at para. 64.

[44] *MacMillan Bloedel* v. *Mullin* (1985) 61 B.C.L.R. 145 at 151.

[45] Macklem, *supra* note 32 at 117.

populations and habitat must be maintained at such a level that the activities of hunting, trapping and fishing remain viable. The provincial government should make every effort to protect not only the lands and resources, but also continuing access of Aboriginal Peoples to the fish and wildlife, without which the rights to hunt, trap and fish become meaningless. In the *Saanichton* case, the British Columbia Court of Appeal, applying the Supreme Court decision in *Simon*, held that "the right to carry on the fishery encompasses other rights which are incidental to the rights granted by the treaty".[46] The construction of a marina would have prevented the Saanich people from travelling freely to and from the fishery and would have destroyed fish habitat. The Court concluded that a provincial licence of occupation that derogates from a treaty right "is of no force or effect".[47]

Third, in order to infringe the treaty rights as minimally as possible and to find accommodation between the activities protected by treaty and the competing land and resource uses, the government has an obligation to consult the First Nations potentially affected by its actions in a timely and meaningful way. Much has been written on the Crown's obligation to consult with First Nations, notably on the sources and nature of the obligation.[48] The courts and legal writers have taken different views as to whether consultation is required in order to determine the existence of Aboriginal or treaty rights, or whether it is simply required to justify infringement of rights which have already been established. Lawrence and Macklem have suggested that "the duty to consult is not simply one element of a justification test governing infringements of existing Aboriginal or treaty rights. The duty to consult also operates *ex ante* on the parties, requiring the Crown to initiate discussions with any First Nation whose interests appear to be adversely affected by a proposed Crown action to attempt to jointly determine the rights of the respective parties."[49] This view has been confirmed by two recent decisions of the Court of Appeal of British Columbia, which held that the Crown's obligation to consult with Aboriginal Peoples arises absent a proven aboriginal right.[50] In *Taku River*, Justice Rowles stated that the Crown' s proposition that the obligation to consult only arises after aboriginal rights or

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[46]*Saanichton Marina Ltd*. v. *Claxton* (1989) 36 B.C.L.R. (2nd) 79 at 92 (B.C.C.A.). The term "reasonably incidental" was further defined and applied by the Supreme Court in *R*. v. *Sundown* [1999] 1 S.C.R. 393, paras. 26-33.

[47]*Ibid.* at 92.

[48]E.g., Robert J.M. Adkins & Elissa A. Neville, "Consultation with First Nations: Revisiting the Sources and Nature of the Obligation" and Shawn Denstedt & Alice Woolley, "Developing with First Nations: Identifying and Satisfying Legal Obligations to First Nations in Oil and Gas Development", in The Canadian Bar Association National Environmental Law Conference, March 2000, Calgary, Alberta; John J.L. Hunter, "Consultation with First Nations: When Does the Obligation Arise?", Pacific Business & Law Institute, Canadian Aboriginal Law 2000, Vancouver, October 2000; Barbara Fisher, "The decision in *Paul v. Forest Appeals Commission*: Its Impact on the Duty to Consult and the Determination of Aboriginal Rights", Pacific Business & Law Institute, Aboriginal Law Update, Vancouver, December 2001; Cheryl Sharvit, Michael Robinson & Monique M. Ross, *Resource Developments on Traditional Lands: The Duty to Consult*, CIRL Occasional Paper #6 (Calgary: Canadian Institute of Resources Law, February 1999).

[49]Sonia Lawrence & Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar Rev. 252 at 267.

[50]*Taku River* and *Haida*, *supra* note 36.

title have been established in court proceedings "rests on a misreading of the decisions of the Supreme Court of Canada" and that accepting that proposition "would effectively end any prospect of meaningful negotiation or settlement of aboriginal land claims".[51] In *Haida*, Justice Lambert agreed with Justice Rowles' findings about what he called "the timing fallacy", and further noted that the duty to consult "does not arise simply from a *Sparrow* analysis of s. 35. It stands on the broader fiduciary footing of the Crown's relationship with the Indian peoples who are under its protection".[52]

The onus is then on the provincial Crown, before allowing resource development that may potentially infringe upon Aboriginal and treaty rights, to meet its fiduciary obligation by engaging in consultations with Aboriginal Peoples to ascertain the extent and nature of their rights. The inquiry into Aboriginal and treaty rights cannot be conducted by government acting on its own; it requires the active participation of the affected First Nations. As noted by Justice Huddart in *Halfway*, "only the first nation will have information about the scope of their use of the land, and of the importance of the use of the land to their culture and identity".[53] This information is crucial to determining whether a proposed resource allocation or development is compatible with an Aboriginal or treaty right, and whether a particular right has been or may be infringed by the Crown's action. The provincial government must ensure that this information base, upon which proper consultation depends, is available at an early stage in the resource allocation and development process.

Fourth, when the above conditions have been met and infringements of Aboriginal or treaty rights cannot be avoided, the resource development process must provide for the awarding of compensation. Fair compensation in situations of expropriation is one of the considerations of the justification test articulated in *Sparrow*.[54] In the Delgamuukw case, Chief Justice Lamer found that "compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights: *Guerin*" and that the amount of compensation depends on the nature of the right affected, the nature of the infringement and "the extent to which aboriginal interests were accommodated".[55] In the *Mikisew Cree* case, Justice Hansen stated: "At the present time, I am not aware of any jurisprudence that applies an analysis of the adequacy of compensation offered for the infringement of a treaty right."[56] Justice Hansen further noted that "the issue of compensation would have to be explored in good faith, and in a transparent manner that would permit an informed First Nation to consider the conditions upon which they could voluntarily agree to the infringement of their treaty rights."[57] Compensation for infringement of

[51] *Taku River, ibid.* at paras. 194 and 174.

[52] *Haida*, *supra* note 36 at paras. 41-47 and 55.

[53] *Halfway River*, *supra* note 26 at para. 180.

[54] *R.* v. *Sparrow*, supra note 16 at 1119: "Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include […] whether, in a situation of expropriation, fair compensation is available […]."

[55] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 at 1114.

[56] *Mikisew*, *supra* note 26 at para. 175.

Aboriginal or treaty rights therefore requires adequate consultation with the affected First Nation.

There is a convergence of opinion from the courts and legal writers that the provincial government is under an obligation to engage in consultation and negotiation with Aboriginal Peoples to seek protection and accommodation of their rights in the resource development process. To what extent is the Alberta government acknowledging its constitutional obligations towards First Nations? And how is the government meeting these obligations in the course of allowing resource development to occur on Treaty 8 lands? The following sections explore these issues further.

3.0 Provincial Policies and Commitments with Respect to Aboriginal Peoples

In Alberta, the most comprehensive document addressing Aboriginal issues is the policy entitled *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework*, released in 2000.[58] This document sets out the basic structure for existing and new provincial policies to address First Nation, Metis and other Aboriginal issues. It is noteworthy that the Policy focuses first on socioeconomic opportunities, and only secondly on issues of Aboriginal and treaty rights, the constitutional obligations of the government, and consultation with Aboriginal Peoples regarding public land uses and resource development, all of which are grouped under the heading "Clearer Government Roles and Responsibilities".

The Policy asserts that "when the western treaties were signed, Aboriginal title, including rights on 'traditional lands', was ceded and replaced by treaty rights" and that "only the Alberta government has a legal right of ownership and management of provincial lands and resources".[59] This assertion of exclusive provincial ownership and managerial powers over provincial lands and resources is in itself problematic and it is sure to antagonize and raise objections from First Nations that dispute the provincial interpretation of Treaty 8 and the NRTA.[60] Next, the provincial government commits itself to meeting all of its treaty, constitutional and legal

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[57] *Ibid.*

[58] Government of Alberta, *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework* (Edmonton: 2000).

[59] *Ibid*. at 14, 17.

[60] The First Nations perspective is that Treaty 8 was a peace treaty allowing for a sharing of resources and that the Indians did not sell or cede title to land and resources, but simply agreed to loan them (see e.g., Lorraine D. Hoffman-Mercredi & Phillip R. Coutu, *Inkonze, The Stones of Traditional Knowledge: A History of Northeastern Alberta* (Edmonton: Thunderwoman Ethnographics, 1999) chapter 10, The Fraudulent Treaty, at 241-263). Further, First Nations point out that the NRTA transferred control and ownership of Crown lands and resources to the province "subject to any other trusts existing in respect thereof, and to any interest other than that of the Crown in the same" (NRTA, *supra* note 19, s. 1) and further, dispute the validity of that transfer without their consent.

obligations respecting the use of public lands.[61] This includes honouring Aboriginal uses, including the rights to hunt, fish and trap on public lands, as provided for in the various treaties, as well as in the 1930 NRTA. The government undertakes to "acknowledge and respect the existing treaty and other constitutional rights of Aboriginal people in provincial legislation, policies, programs and services".[62]

With respect to consultation, the policy states that the Government of Alberta will, "where appropriate, consult affected Aboriginal people about proposed regulatory and development activities that may infringe existing treaty, NRTA or other constitutional rights".[63] While the commitment to consult Aboriginal Peoples on resource development is made, the basis and nature of the duty to consult remain unclear and the language used in the document is ambiguous. First, consultation is to take place "where appropriate", which opens the door for discretionary decisions by government as to when consultation is deemed to be "appropriate". In addition, the term "existing" treaty, NRTA and constitutional rights may be interpreted differently by government and Aboriginal peoples. Further, there is uncertainty as to the nature of the consultation to be undertaken.

On the one hand, the Policy asserts that it is the government's role, "not the role of industry", to consult with affected Aboriginal Peoples where constitutional rights may be infringed.[64] This implies an acknowledgement of the fiduciary and constitutional obligation owed by the provincial Crown to Aboriginal Peoples. On the other hand, in the context of resource development, the government encourages "a 'good neighbour' approach based on respect, open communication and cooperation".[65] The policy states that proponents of resource developments are expected to consult with potentially affected communities and people, and that government, Aboriginal communities and industry are encouraged to facilitate dialogue and participate in good faith. A distinction appears to be made between consultation by government based on the potential infringement of constitutionally protected rights, and consultation by industry in the context of resource development. Given the significant impacts of resource development such as oil and gas and forestry on lands and resources and on the land-based rights of Aboriginal Peoples in northern Alberta,[66] it is difficult to conceive of any resource development that may not potentially infringe the constitutional rights of Aboriginal Peoples. As the discussion earlier in this report of the Crown's right to "take up" lands suggests, the provincial government does not have unrestricted powers and is under a fiduciary obligation to ensure recognition and accommodation of Aboriginal and treaty rights when allowing resource development on Treaty 8 lands.

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[61] *Strengthening Relationships*, *supra* note 58 at 14.

[62] *Ibid.* at 17.

[63] *Ibid*. at 18.

[64] *Ibid*. at 15.

[65] *Ibid*.

[66] See Section 1 of this Occasional Paper.

The Policy states that the government will work with communities and industry to use existing mechanisms and develop new ones to consult appropriately on resource development and land use decisions.[67] The next section of this Occasional Paper examines the legal and regulatory framework for resource allocation and development in order to determine what these "existing mechanisms" for consultation with Aboriginal Peoples may be.

The Aboriginal Policy Framework also acknowledges the need to develop "baseline studies of traditional uses".[68] Traditional land use and occupancy studies are commonly accepted means to document and map traditional and contemporary land and resource uses by Aboriginal communities.[69] The government undertakes, in consultation with First Nations and industry, to facilitate the development of best practice guidelines for such studies, and further to negotiate protocols with Aboriginal communities to address issues of management and security of sensitive information, and to "work with all interested people to facilitate timely baseline studies".[70] In addition, the government promises to work with Aboriginal communities to identify and place notations on specific sites. Although no link is established between traditional use studies and consultation processes, presumably the traditional use studies would support and give meaning to any consultation process between government and Aboriginal Peoples with respect to public land uses and resource development. A prerequisite to determining the potential impacts of resource development on traditional uses, notably on Aboriginal rights to hunt, trap and fish, is adequate knowledge about the use of the area slated for development by Aboriginal Peoples. Only Aboriginal communities have knowledge about their traditional and current land and resource uses, as well as about sites and areas of particularly significance to them. Traditional land use and occupancy studies provide a means for these communities to initiate the process of collecting and sharing that knowledge.

In the area of forestry development, another important policy commitment towards Aboriginal Peoples is found in the National Forest Strategy and the Canada Forest Accord, both of which were signed by the government of Alberta in 1998.[71] The five-year national forest strategy is designed to "guide Canada's efforts in sustainable forest management as we enter a

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[67] *Strengthening Relationships*, *supra* note 58 at 18.

[68] *Ibid*. at 18.

[69] The following definition of "land use and occupancy study" is found in Terry Tobias, *Chief Kerry's Moose: a guidebook to land use and occupancy mapping, research design and data collection* (Vancouver: Ecotrust Canada and Union of B.C. Indian Chiefs, 2000) at 1: "First Nation peoples carry maps of their homelands in their heads. For most people, these mental images are embroidered with intricate details and knowledge, based on the community's oral history and the individual's direct relationship to the traditional territory and its resources. Land use and occupancy mapping is about documenting those aspects of the individual's experience that can be shown on a map. It is about telling the story of a person's life on the land. Over time individual experience becomes part of the collective oral traditions, a story of much grander proportions. In this respect, use and occupancy mapping is a means to help record a nation's oral history."

[70] *Strengthening Relationships*, *supra* note 58 at 18

[71] Canadian Council of Forest Ministers, *National Forest Strategy 1998-2003, Sustainable Forests: A Canadian Commitment* (Ottawa, May 1998) and *Canada Forest Accord*, (Ottawa, May 1, 1998/April 1, 2001).

new millennium".[72] The strategy outlines a collective vision and goal, and identifies nine strategic priorities that will guide the policies and actions of Canada's forest community, including governments, industries, non-government organizations, communities and individuals. Strategic Direction Seven is entitled "Aboriginal Peoples: Issues of Relationship." It states as a principle that "Aboriginal peoples have an important and integral role in forest development, planning and management" and that "forest management in Canada, therefore, must recognize and make provision for Aboriginal and Treaty rights and responsibilities, and respect the values and traditions of Aboriginal peoples regarding the forests for their livelihood, community and cultural identity".[73] In the Forest Accord, the Canadian Ministers responsible for forests commit to fulfill their vision by notably:

> Recognizing and making provision for Aboriginal and treaty rights, ensuring the involvement of Aboriginals in forest management and decision-making, consistent with these rights, supporting the pursuit of both traditional and modern economic development activities, and achieving sustainable forest management on Indian Reserve Lands.[74]

This high level of commitment to the protection of Aboriginal and treaty rights, and to the involvement of Aboriginal Peoples in forest management "consistent with these rights", is noticeably absent from the Alberta Forest Legacy, the outcome of a three-year extensive consultation process with Albertans to develop a provincial forest conservation strategy.[75] None of the recommendations submitted to government in the proposed strategy, and none of the commitments and principles outlined in the final Forest Legacy, makes any mention of the constitutional rights of Aboriginal Peoples and of the need to acknowledge and protect these rights. Aboriginal Peoples are simply mentioned among the "forest stakeholders" that will be involved in the review of existing decision-making and review processes that allow for public input.[76]

4.0 Accommodation of Aboriginal Rights and Interests in the Resource Development Process

In the context of natural resources, government initiatives have focused mainly on enhancing relations and dialogue with selected Aboriginal groups through a process known as cooperative management, as well as on improving socio-economic opportunities, including capacity-building, employment and business opportunities, for Aboriginal communities. With one exception, the legislative and regulatory framework for resource allocation and development

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[72] *Ibid*., Preface.

[73] *Ibid.* at 34.

[74] *Canada Forest Accord*, *supra* note 71, under Our Commitment to Action.

[75] Alberta Environment, *The Alberta Forest Legacy – Implementation Framework for Sustainable Forest Management* (Edmonton: #0-7785-0131-0).

[76] *Ibid*. at 7 - Effective Public Involvement and 8 - Community Participation.

has not yet been amended to reflect the courts' repeated admonitions to governments to engage in consultation and negotiation with Aboriginal Peoples in order to seek accommodation of their rights in resource development. Provincial policies and agreements with First Nations often include a statement that, while the treaty and other constitutional rights of Aboriginal people are recognized and affirmed, this recognition does not affect the jurisdictional authority of the province over matters in relation to natural resources, and the province retains full ownership and management rights over Crown lands and resources.[77] While the provincial government pays lip service to the recognition of constitutionally protected treaty rights, it appears to be unwilling to draw the implications of such a recognition for a major restructuring of the resource allocation and development process. The only example of legislative change to accommodate Aboriginal rights and interests dates back to 1989, when the provincial government and the Alberta Metis Settlements reached an accord allowing for co-management of mineral resources.

The following subsections review briefly the government's various approaches to involving Aboriginal Peoples in the resource development process and assess these initiatives in light of the discussion in section 2 of this Paper. The intent is not to provide a comprehensive list of all provincial initiatives directed at Aboriginal Peoples,[78] but rather to evaluate the extent to which the provincial government protects and accommodates the constitutional rights of Aboriginal Peoples when allowing resource development to occur in the Treaty 8 area. First, the cooperative management agreements entered into by the provincial government and three First Nations with respect to forest resources are discussed. An overview of the legislation enacted in 1990 in relation to the disposition of mineral rights on Metis Settlement Lands follows. Finally, the analysis turns to existing consultation processes with Aboriginal Peoples who experience the adverse effects of resource development, notably oil and gas and forestry.

4.1 Cooperative Management Agreements

In 1993, the Grand Council of Treaty 8 First Nations and the provincial government entered into a Memorandum of Understanding (MOU), with the intention to "establish a means of consulting with each other regarding new and existing policies, programs and services."[79] The parties agreed that the Grand Council and the appropriate Ministers responsible for the areas of discussion would develop a process or processes for consultation within one year of the agreement. In December 1993, a special committee (Treaty 8 First Nations – Alberta Relations Committee) was established to oversee the development of such consultation processes.[80] To

[77]See the discussion of the *Aboriginal Policy Framework* in Section 2.0 as well as the discussion of Cooperative Management Agreements in Subsection 4.1 of this paper.

[78]For a synopsis of these initiatives, see Government of Alberta, *Provincial Initiatives Directed Towards Aboriginal People in Alberta* (Edmonton: Aboriginal Affairs, September 1996).

[79]Alberta – Grand Council of Treaty 8 First Nations, *Memorandum of Understanding Between Her Majesty the Queen in Right of the Province of Alberta and the Grand Council of Treaty 8 First Nations, February 10,1993*, unpublished document.

[80]*Sub-Agreement to the Memorandum of Understanding between The Grand Council of Treaty 8 First Nations and Her Majesty the Queen in Right of the Province of Alberta, Working procedures*, December 31, 1993, unpublished document.

date, that committee has not met and no process of consultation was ever established between the Grand Council and government departments for the Treaty 8 area under this MOU.

Instead, starting in 1994, the provincial government has entered into negotiations with individual First Nations on an ad hoc basis. In three cases, these negotiations have led to the entering into of "cooperative management agreements" in the area of natural resources and environmental protection. In 1996, the government developed a policy document entitled *Environmental Protection Cooperative Management Framework*, outlining a consistent provincial approach to the negotiation of such agreements.[81]

According to this document, the objective of cooperative management agreements is to establish "a process of consultation and cooperation on renewable resource or environmental matters of mutual interest". Although these may include land management matters, the agreements "are not intended as land management tools". Respect for the existing rights of each party, including, on the one hand, treaty and Aboriginal rights, and on the other, Alberta's "legislative and regulatory jurisdiction over natural resources and environmental matters" and "proprietary rights to natural resources", is affirmed. Further, the document specifies that existing legal agreements and resource allocations will be recognized and respected. In addition to "providing a vehicle for meaningful consultation" with First Nations or Aboriginal communities, the agreements should enable Aboriginal Peoples to "have opportunities to benefit economically and socially from resource development", with the emphasis placed on economic opportunities generated by the private sector. Regarding access of Aboriginal communities to renewable resources, the agreements "may provide specific renewable resource management consultation or participation mechanisms for First Nations or Aboriginal communities", although the resource allocation process is to follow the same rules as those applicable to all Albertans.

To date, three Memoranda of Understanding (MOUs) have been signed between the provincial government and the Whitefish Lake First Nation (1994), the Little Red River and Tallcree First Nations (1995), and the Horse Lake First Nation (1997), all located within the Treaty 8 area.[82] In addition to creating structures and processes to implement cooperative management of renewable resources, the first two agreements include a commitment by the provincial government to allocate timber supplies to the First Nations. For the Whitefish Lake First Nation and the Little Red River Cree/Tallcree First Nations, this economic development component was a key priority in the negotiation of their agreements. In the case of the Horse Lake First Nation, no timber supply was available to be allocated to the First Nation, although economic and social benefits from resource development were expected to be one of the benefits of the agreement.

A comparative analysis of these agreements and an overall assessment of cooperative

[81]Alberta Environmental Protection, *Environmental Protection Cooperative Management Framework*, November 1996.

[82]Alberta – Whitefish Lake First Nation, *Memorandum of Understanding (MOU) between the Whitefish Lake First Nation and the Government of the Province of Alberta, 1994*; Alberta – Little Red River Cree/Tallcree First Nations, *Memorandum of Understanding Between the Little Red River Cree Nation, the Tallcree First Nation and the Government of Alberta, 1995*; Alberta – Horse Lake First Nation, *Memorandum of Understanding between the Horse Lake First Nation and the Government of the Province of Alberta, 1997*. Unpublished documents.

management in Alberta is found in Jamie Honda-McNeil's thesis on Cooperative Management in Alberta,[83] while Leslie Caroline Treseder's thesis focuses on the Little Red River Cree and Tallcree First Nations cooperative management agreement.[84] Honda-McNeil concludes that it is still too early to predict how successful these initiatives will be, and that the results so far have been mixed. In his view, the main benefits of the agreements have been "the linkages to economic development", in particular for these communities that were able to obtain timber allocations, and some degree of "capacity building" as First Nations have become more familiar with government processes and gained the "ability to use the bureaucratic system to acquire what they believe they are entitled to".[85] Treseder identifies additional benefits, namely the development of working relationships with both industry and government, the securing of "a voice for First Nations" in forest management, and the establishment of a mechanism for conflict avoidance or reduction.[86]

Another positive result of the agreements has been the completion by the First Nations of traditional land use studies, and/or wildlife studies and cultural inventories of their traditional lands.[87] As noted earlier, this information is critical to any consultation between First Nations and government regarding the extent and nature of Aboriginal land and resource uses, and the process of accommodation of these uses with competing uses, notably the extraction of natural resources. With respect to the Whitefish Lake First Nation (WFLFN), Clifford Hickey notes that the undertaking of a land use and occupancy study was a primary component of the cooperative management agreement:

> It was recognized that any attempt to make informed land 'management' decisions required an understanding of community land and resource use patterns.[…]
>
> For the WFLFN, land use maps have served as a vehicle for dialogue between themselves, government and industry. It gives a clear indication of the territory utilized by Whitefish Lake residents and provides a basis for governmental understanding of the intimate relationship that Whitefish Lake residents have with a specific geographical landscape.[88]

However, the expectations on the part of the First Nations that these agreements will lead to effective consultation, or even joint management and planning of renewable natural resources, with the provincial government appear to have been frustrated. The Horse Lake First Nation notes that the agreement has failed to meet the department's legal obligation to consult with First

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[83]Jamie Honda-McNeil, *Cooperative Management in Alberta – An Applied Approach to Resource Management and Consultation with First Nations* (Edmonton: Faculty of Graduate Studies and Research, University of Alberta, Spring 2000).

[84]Leslie Caroline Treseder, *Forests Co-Management in Northern Alberta: Conflict, Sustainability, and Power* (Edmonton: Faculty of Graduate Studies and Research, University of Alberta, Fall 2000).

[85]Honda-McNeil, *supra* note 83 at 118-119.

[86]Treseder, supra note 84 at 81-84.

[87]Honda-McNeil, *supra* note 83 at 94-95.

[88]Clifford Hickey, *Whitefish Lake First Nation Land Use and Occupancy Study* (Edmonton: Network of Centers of Excellence, Sustainable Forest Management Network, Project Report 1999-5) at 2 and 23.

Nations. The Whitefish Lake First Nation also expresses concern over the provincial government's commitment to implement the MOU and complains that industry continues to operate within their traditional area without consultation.[89]

According to Honda-McNeil, the perceived lack of government commitment to implement the MOUs at the operational level may well be linked to "government uncertainty as to what level of consultation (on oil and gas exploration and development in this case) is necessary to meet their legal obligation to consult, and to what extent the MOUs should facilitate that consultation."[90] This uncertainty is reflected in the vagueness of the agreements. The goals and objectives, and the terms used in the agreements, lack clarity, and much of the content is left to be defined by implementation processes or structures. This lack of clarity has led to widely different interpretations by the parties of what the agreements are meant to accomplish. Honda McNeil notes that government representatives expressed concerns that the MOUs "lacked clear policy direction as to what they want to achieve" and further:

> Clear definitions for pivotal terms in the agreements are also lacking for the most part. For example, the word "consultation" means consent to Aboriginal people, but not necessarily to bureaucrats.[91]

Even the name "cooperative management" is misleading, since it "infers joint management of renewable natural resources, when clearly that is not the intent".[92]

With respect to the Little Red River Cree and Tallcree MOU, Treseder also finds that the two parties have different goals for the process:

> The Little Red River Cree and Tallcree First Nations are seeking influence over natural resource management in their traditional territories, while Alberta is seeking avenues for consultation and cooperation with First Nations. Conflict avoidance and economic development are common objectives for both parties. Aboriginal rights issues have supposedly been left off the agenda but remain an underlying motivating factor for both parties.[93]

Like Honda-McNeil, she notes that many participants in her study stressed the need to clarify expectations, definitions, roles and responsibilities and to define immediate priorities for the Cooperative Management Planning Board.[94]

Even though the cooperative management agreements have had beneficial results, they have not resulted in true co-management involving power sharing between the provincial government and the First Nations. The provincial government has viewed the agreements as

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[89]Honda-McNeil, *supra* note 83 at 88.

[90]*Ibid*.

[91]*Ibid*. at 79.

[92]*Ibid*. at 105.

[93]Treseder, *supra* note 84 at 80.

[94]*Ibid*. at 85.

providing "a vehicle for meaningful consultation". However, it is unlikely that these consultation processes would be found to meet the Crown's legal obligation to consult in the event of a legal challenge. Clearly, the objective of the provincial government in entering into these agreements was not to give priority to the Aboriginal and treaty rights of the affected First Nations nor to seek accommodation of these rights with the rights of industrial forest users. Honda-McNeil notes:

> The cooperative management agreements are not considered by the province as the panacea to solve state/First Nations relations, or to fully meet the legal obligation to consult. Rather, they are one of a number of tools used by the province to discuss environmental and renewable resource issues with First Nations.[95]

The next section examines a more robust form of co-management, one that has been legislated and involves Aboriginal Peoples at an earlier stage in the resource allocation and development process.

4.2 Mineral Dispositions on Alberta Metis Settlement Lands

In 1989, the Alberta Metis Settlements and the province of Alberta signed the Alberta Metis Settlements Accord. With this Accord, the provincial government gave the Settlements fee-simple ownership of certain lands, committed to pay a $310 million financial package over 17 years, created a self-government framework and allowed for co-management of exploration for and development of mineral resources on settlement lands. The Accord was implemented by four provincial statutes proclaimed in November 1990.[96]

The *Metis Settlements Act* contains the Co-Management Agreement (CMA) which applies to the disposition of mineral rights within the Metis Settlements.[97] The CMA is an agreement between the Minister of Energy, the Metis Settlements General Council and each of the eight Metis Settlements corporations established by the *Metis Settlements Act*.[98] It enables the Minister, under section 16(c)of the *Mines and Minerals Act*, to issue dispositions in respect of Crown minerals pursuant to the procedure outlined in the CMA. This procedure only applies to mineral dispositions issued after November 1, 1990; mineral rights dispositions made prior to this date were "grandfathered".[99] For the Metis, two guiding principles underlied the negotiation

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[95]Honda McNeil, *supr*a note 83 at 109.

[96]*Metis Settlements Act*, S.A.. 1990, c. M-14.3; *Metis Settlements Land Protection Act*, S.A. 1990, c. M-14.8; *Metis Settlements Accord Implementation Act*, S.A. 1990, c. M-14.5; and *Constitution of Alberta Amendment Act, 1990*, S.A. 1990. c. C-22.2.

[97]For a detailed review of the Co-Management Agreement and its implementation, see Geoffrey W. Kent, "Mineral Dispositions on Alberta Metis Settlement Lands: A Co-Management Approach", in Monique M. Ross & J. Owen Saunders, ed. *Dispositions of Natural Resources: Options and Issues for Northern Lands* (Calgary: Canadian Institute of Resources Law, 1997) at 137.

[98]The eight Metis Settlements comprise 1.26 million acres of land in northern Alberta.

[99]Mineral rights over a substantial area (550,000 acres) were continued under existing leases and licences.

of this agreement: 1) the need to draw economic benefits from oil and gas activities, and 2) the desire to assume greater control over mineral resource development within their communities.[100]

For each Settlement Area, the CMA establishes a Metis Settlements Access Committee (MSAC), a co-management structure comprised of five members. The Minister of Energy forwards all posting requests for minerals to the affected MSAC. The MSAC has 42 days to send its recommendations to the Minister. The MSAC may recommend that the posting request be denied, or that the minerals be posted with special terms and conditions. These terms and conditions may relate to the environmental, socio-cultural, and land-use impacts, and employment and business opportunities of the exploration and development of the minerals posted, as well as to royalty and participation options reserved to the General Council. If the Minister and the MSAC agree upon mutually acceptable terms and conditions, these terms and conditions are included in the Notice of Public Offering (NPO) for mineral rights. If the MSAC recommends that the minerals not be posted, the Minister can still issue dispositions, but with notification that access will not be granted to the Metis Settlements Lands to recover the minerals.

Once the mineral rights have been published for sale in an NPO, the Minister forwards the name of the highest bidder to the affected Settlement corporation and the General Council. At that time, a development agreement may be negotiated between the three parties.[101] If a development agreement is entered into, the Minister awards the mineral rights to the bidder who has reached the agreement and, where a participation option has been agreed to, to the General Council.

This legislated co-management process for the disposition of mineral rights was developed after extensive consultation and negotiations between the Metis Settlements and the provincial government. Despite the difficulties encountered in its implementation, the co-management process appears to have evolved as a "workable mechanism for resource disposition" and has played "a vital role in contributing to the self-reliance and economic viability of the Settlement communities".[102] It remains a unique example in Alberta of co-management between the provincial Crown and Aboriginal Peoples at the rights allocation stage of the resource development process.

The following section examines the extent to which and the way in which the provincial government fulfills its fiduciary and constitutional obligation to consult with Aboriginal Peoples when allowing resource development that potentially infringes on their rights.

[100]Kent, *supra* note 97 at 139.

[101]Development agreements may include royalty rates and payments, participation/working interest provisions, confidentiality agreements, template surface leases, etc.

[102]Kent, *supra* note 97 at 149.

4.3 Consultation Mechanisms in the Resource Development Process

A review of Alberta's resource management legislation in a paper published by the Canadian Institute of Resources Law in 1998 notes that the two lead provincial land and resource managers "enjoy broad discretionary powers in allocating rights to access and use public lands and natural resources" and that "statutory guidance is minimal with respect to agricultural, mineral, forest and other dispositions".[103]

From the standpoint of Aboriginal Peoples, provincial resource legislation provides no guidance to the Ministers regarding the need to acknowledge and protect Aboriginal and treaty rights, or the manner in which lands can be "taken up" for resource development so as to infringe these rights as minimally as possible. Protection of these rights often results indirectly from provisions that are designed to minimize environmental impacts during the development process. In the event of a court action against the provincial government for infringement of Aboriginal rights, provincial efforts to minimize impairment during the development process may be taken into consideration by the court at the justification stage of the analysis. However, the government needs to take a proactive approach to ensure that existing Aboriginal and treaty rights are specifically protected and accommodated at all stages of the resource development process. Indeed, the legislative schemes pursuant to which mines and minerals and forest resources are allocated and developed may well amount to a *prima facie* infringement of treaty rights.[104]

In neighbouring provinces, government departments have developed Aboriginal consultation policies that provide general direction to decision-makers within these departments who oversee activities and decisions on Crown lands. British Columbia first developed a *Crown Lands Activities and Aboriginal Rights Policy Framework* in 1997.[105] Thereafter, provincial ministries and agencies involved in land and resource use adopted ministerial guidelines outlining consultation processes.[106] It is noteworthy that both the provincial policy and the consultation guidelines were considered in court decisions.[107] In his dissenting opinion in the

[103]Steven A. Kennett and Monique M. Ross, *In Search of Public Land Law in Alberta* (Calgary: Canadian Institute of Resources Law, Occasional Paper # 5, January 1998) at 15.

[104]For an analysis of provincial forest legislation in light of treaty rights, see Monique M. Ross and Cheryl Y. Sharvit, "Forest Management in Alberta and Rights to Hunt, Trap and Fish Under Treaty 8" (1998) 36 Alberta L. Rev. (No 3) at 645.

[105]Province of British Columbia, Ministry of Aboriginal Affairs, *Crown Lands Activities and Aboriginal Rights Policy Framework*, January 1997.

[106]Province of British Columbia, Ministry of Aboriginal Affairs, *Consultation Guidelines*, September 1998; Ministry of Forests, British Columbia. Ministry Policy Manual. *Policy 15.1 – Aboriginal Rights and Title* and *Appendix – Consultation Guidelines*, June 1999. The government recently issued a new Provincial Consultation Policy which amends the 1998 Consultation Guidelines, brings the policy in conformity with current case law, and consolidates the 1997 Policy Framework: Province of British Columbia, *Provincial Consultation Policy for Consultation with First Nations*, October 2002.

[107]See for example *Haida Nation* v. *British Columbia (Ministry of Forests*), [2001] 2 C.N.L.R. 83 (B.C.S.C.), paras. 55-58; *Cheslatta Carrier Nation* v. *British Columbia* (2000), [2001] 1 C.N.L.R. 10 (B.C.C.A.), para. 20; *Westbank First Nation* v. *British Columbia (Minister of Forests)* (2000), [2001] 1 C.N.L.R. 361 (B.C.S.C.), para. 94; *Paul* v. *British Columbia (Forest Appeals Commission)* [2001] B.C.J. No. 1227, paras. 116-119, 157.

Paul case, Justice Huddart states that the consultation guidelines "may satisfy this duty to consult", to the extent that they are being complied with.[108] In addition to these policy documents, the province of British Columbia enacted legislation which was designed, amongst other objectives, to encourage the participation of Aboriginal Peoples in oil and gas and pipelines-related processes affecting them.[109] In Saskatchewan, the Department of Environment and Resource Management also adopted Aboriginal Consultation Guidelines in an effort to "assist SERM staff in understanding our obligations (both legal and moral) to consult with Aboriginal people when developing and implementing legislation or policies that affect Aboriginal people".[110]

In Alberta, neither the departments responsible for resource development nor the department responsible for Aboriginal affairs have yet developed province-wide consultation policies or guidelines. It appears that the provincial government is currently considering the development of such policies.[111]

At the present time, consultation with individual First Nations may occur by means of the cooperative management agreements discussed above or other community-specific projects. In the context of energy developments, the consultation project with the Dene Tha' First Nation is an example of such consultation processes.[112] Community-specific processes are certainly a step in the right direction. However, these ad hoc approaches to consultation are not grounded in a clear endorsement by the provincial government of its constitutional obligations towards Aboriginal Peoples, nor are they guided by clear departmental directions as to how the Crown's obligation to consult can best be met. Further, consultation typically occurs after resource rights, such as long-term forest tenures or subsurface mineral rights, have been allocated to the private sector, when specific development projects are approved.

For the majority of Aboriginal communities that are not involved in community-specific processes, consultation on individual resource development projects normally occurs under general public consultation processes or consultation with affected stakeholders. The *Environmental Protection and Enhancement Act*, Alberta's main environmental legislation,

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[108]*Paul, supra* note 107 at 157, citing Madam Justice Newbury in *Cheslatta*, supra note 107 at para. 20.

[109]*Oil and Gas Commission Act*, S.B.C. 1998, c. 3, s. 3(c). The Oil and Gas Commission assumed responsibility for the conduct of consultation with First Nations. On the Commission's legal obligations to First Nations, see Murray Rankin, Sandy Carpenter, Patricia Burchmore and Christopher Jones, *Regulatory Reform in the British Columbia Petroleum Industry: The Oil and Gas Commission* (1999) 38 Alta. L. Rev. (No. 1) 143.

[110]Province of Saskatchewan, Saskatchewan Environment and Resource Management, Public Involvement and Aboriginal Affairs (PIAA) *Aboriginal Consultation Guidelines*, January 2000, at 2, January 2001.

[111]Conversation with Jamie Honda-McNeil, Manager, Resource Initiatives, Department of Aboriginal Affairs and Northern Development, June 2002.

[112]For a review of the Dene Tha' consultation project, see Monique M. Ross, "The Dene Tha' Consultation Pilot Project: An 'Appropriate Consultation Process' with First Nations?" (2001) 76 Resources 1.

includes statutory provisions for "public participation" and "public input" at various stages in the review and approval of projects.[113]

In particular, the environmental assessment process, which is designed to provide a means to review projects "at the earliest stages of planning" to asses their potential environmental, social, economic and cultural impact and mitigate adverse impacts, allows for public involvement in the review of proposed activities.[114] Not all proposed activities are subject to an environmental assessment; some projects are mandatorily assessed, others are exempt from an assessment under the Act and associated regulations.[115] For those projects which are deemed by the Director to require further assessment, the possibility is offered to those who are "directly affected" by the activity to send a written statement of concern to the Director, who must consider those statements of concern.[116] If a full assessment is required, the proponents must prepare an environmental impact assessment (EIA) report for submission to government. The terms of reference of the EIA report may include a description of fishing, hunting, cultural and traditional uses by Aboriginal groups, documentation of First Nations and Metis concerns regarding the impact on historical resources and traditional land uses, and the identification of possible mitigation measures to address these impacts.[117] Proponents may also be required to undertake a public consultation program with "directly affected" local First Nations and Metis. However, the way in which information on traditional land uses is collected and consultations with Aboriginal communities are conducted is left to the discretion of the proponent. As a result, the consultation process varies widely depending on the affected community and the proponent.

The Energy and Utilities Board (EUB) and the Natural Resources Conservation Board (NRCB), the regulatory boards responsible for reviewing and approving energy projects as well as specified projects that may affect the natural resources of Alberta, also have extensive public notification and public consultation requirements.[118] Applicants must attach to their applications a detailed summary of their public involvement program as well as outstanding concerns among local residents. People who are "directly affected" by an application are expected to resolve as

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[113] *Environmental Protection and Enhancement Act (EPEA)*, S.A. 1002, c. E-13.3.

[114] *Ibid*., Part 2, Division 1, s. 38.

[115] *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta. Reg. 111/93.

[116] *EPEA*, ss. 42(6) and 44.

[117] E.g., Alberta Environmental Protection, *Final Terms of Reference for the Proposed Suncor Energy Inc. Project Millenium*, March 4, 1998, under 1.3 – Public Participation, 7.0 – Historical Resources/Traditional Land Use, 9.0 – Public Consultation; Alberta Environment, *Final Terms of Reference – Environmental Impact Assessment (EIA) Report for the Canadian Natural Resources Limited Horizon Oil Sands Project, Fort McKay, Alberta,* December 2001, under 4.2, 5.5 – Land Use, Access to Public Lands and Aggregate Resource Conservation, 8.0 – Historical Resources and Traditional Land Use, 9.0 – Socio-Economic Factors, 10.0- Public Consultation Requirements.

[118] *Energy Resources Conservation Act*, RSA 1980, c. E-11, s. 29; also ERCB and Alberta Environment, Public Involvement in the Development of Energy Resources, ERCB/AE Informational Letter IL 89-4; EUB, Guide 56: Energy Development Application Guide; *Natural Resources Conservation Board Act*, S.A. 1990, c. N-5.5, s. 8 and *Rules of Practice of the Natural Resources Conservation Board*, Alta. Reg. 353/91.

many issues as possible with the applicant prior to a public hearing. If their concerns cannot be solved, they may bring them to the boards at a public hearing.

In addition to these consultation processes that can be used by Aboriginal communities, there are procedural requirements for notification of individual Aboriginal People whose activities may be affected by upcoming developments. For instance, registered trappers have the right to be notified in writing by resource proponents a few days prior to commencement of oil and gas exploration activities or forest harvesting operations. Thus, the provincial Ground Rules that govern timber harvesting operations across the province seek "to minimize the impact of timber operations on the trapping opportunities within the Registered Trapping Area". Forest companies are expected to supply harvesting plans to the senior trappers and to notify trappers of impending activities a few days before operations begin.[119] The trappers' right to be notified is recognized for all registered trappers, be they Aboriginal or not, and it is based on their provincially allocated and regulated trapping licence,[120] not on their treaty right.

These statutory and procedural mechanisms for consultation with Aboriginal communities affected by resource development enable these communities to become informed of proposed developments, to identify their concerns and to bring them to the attention of both the proponents and government agencies. Nevertheless, these "public consultation" processes fall short of meeting the provincial government's fiduciary and constitutional obligations to Aboriginal Peoples for three reasons.

First, the statutory "public consultation" processes are based on general requirements of procedural fairness. The duty to be fair arises whenever a statutory decision-maker is empowered to make decisions that may affect the interests of third parties, whether or not Aboriginals. This duty to be fair is to be distinguished from the duty to consult arising out of the Crown-Aboriginal relationship discussed in Section 2 of this paper. Various court decisions dealing with the Crown's obligation to consult distinguish between these statutory and procedural obligations, and the fiduciary or constitutional obligation to consult.[121] In the *Mikisew* case, Justice Hansen found that public consultation in the context of an environmental impact assessment process does not constitute "First Nations consultation as required by subsection 35(1) of the *Constitution Act, 1982*."[122] Since the Mikisew Cree had asserted interference with a constitutionally protected right, "at the very least, Mikisew is entitled to a distinct process if not a more extensive one".[123]

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[119]Alberta Environmental Protection, *Alberta Timber Harvest Planning and Operating Ground Rules* 1994, under section 4.5, Integrating Timber Harvesting With the Trapping Industry, at 30. Certain forest companies offer a much longer period of notification to the trappers operating within their forest tenure area: see eg. Alberta-Pacific Forest Industries Inc. – 1999 Annual Operating Plan Summary Document, under 2.1 – Notification of Commercial Operators: Alpac commits to notifying trappers at least five years before harvesting occurs in or near their area of operation and to meeting with them to discuss harvest plans and attempt to eliminate potential conflicts.

[120]A Registered Fur Management Licence is issued by the provincial government and renewed yearly, pursuant to the *Wildlife Regulation*, Alta. Reg. 143/97.

[121]For instance, the *Taku River* case focuses on the existence of a constitutional or fiduciary obligation to consult with First Nations, as distinct from any administrative law duty of procedural fairness: *supra* note 36.

[122]*Mikisew*, *supra* note 26 at paras. 141-157.

[123]*Ibid*. at para. 153.

Justice Hansen further stated that the fact that an Aboriginal community is treated as just another stakeholder in a consultation process may be used as evidence that the Crown "did not accord those rights priority over those of other users, as would be expected given their constitutional status under s. 35(1)".[124]

Second, consultation at the stage of review and approval of specific projects occurs too late in the decision-making process, after the rights to access and develop the resources have been allocated. The purpose of consultation at the project approval stage is not to ascertain the nature and scope of the treaty rights at issue and the potential effects of a proposal on these rights in order to determine whether or not the proposed development infringes treaty rights and should be approved. It is simply to mitigate potential adverse effects on Aboriginal land and resource uses.

Various EUB decisions approving applications relating to energy developments illustrate the unwillingness of the Board to address issues of potential infringements of Aboriginal and treaty rights at the project approval stage. When Aboriginal communities have brought up concerns related to the impact of proposed projects on their fishing and hunting rights and their continued ability to live off the land in a traditional fashion, and suggested that infringements of their rights could only be justified if there was meaningful consultation and compensation by the provincial government or with their consent, the Board has given no consideration to the sui generis nature of Aboriginal rights and the Crown's obligation to them. The Board has stated that it does not owe a fiduciary obligation to Aboriginal Peoples and that it does not have the authority to deal with Aboriginal and treaty rights nor to decide where they apply.[125] The Board has also turned down requests from First Nations that adequate traditional land use studies be completed before applications are approved. For instance, in its decision approving the Shell-Muskeg River Project, even though one of the affected Aboriginal communities had raised concerns about the way in which the proponent had collected land use information without their involvement, the Board simply acknowledged the extensive consultation process carried out by Shell, noted that the process resulted in the resolution of many issues, and accepted the company's assessment of local land use.[126]

Third, as noted, consultation is left to occur between project proponents and Aboriginal communities, without specific direction or oversight by government. Consultation with industry

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[124]*Ibid.* at para. 155.

[125]See for example Conwest Exploration Co. ERCB Decision D 94-6, 12 August 1994, at 15; Amoco Canada Petroleum Co. Application for an Exploratory Well, Whaleback Ridge Area, ERCB Decision D 94-8, 6 September 1994, at 7-8; Proceedings Regarding an Approved Sour Gas Plant Unocal Canada Management Ltd. Slave Field (Lubicon Lake Area), ERCB Decision D 95-23, 23 February 1995, at 14.

[126]Shell Canada Limited Muskeg River Mine Project, EUB Decision 99-2, 12 February 1999, at 8.4: "The Board does not demand that consultation result in the resolution of all or any objections, only that legitimate and well-intentioned efforts are made to that end. […] the Board notes the concerns raised by both the ACFN and Anzac regarding whether Shell's assessment of traditional land uses adequately considered their particular uses of the land. In this case, however, the Board accepts that Shell's assessment of local land use was sufficiently generic to be applicable to both communities. […] the Board concludes that Shell's consultation program meets the Board's requirements for reasonable and satisfactory consultation"; see also Epcor Generation Inc. and Epcor Power Development Corporation, EUB Decision 2001-111, December 2001, at 9 and 44.

does not relieve the provincial government of its legal duty to undertake its own consultation with Aboriginal Peoples. As noted in the *Mikisew* case, ""this duty cannot be delegated to interested third parties".[127]

The next section reviews some of the consultation processes which have developed as a result of initiatives by resource companies and Aboriginal communities.

5.0 Resource Sector Initiatives: Case Study of the Athabasca Oil Sands Region

As the development and exploration of natural resources expands in the Boreal Forest region of Alberta, the degree of interaction between resource developers and Aboriginal Peoples increases. This interaction often leads to tensions between the involved parties because of their different and usually incompatible uses of the land. Resource developers have begun to attempt to reduce this tension by consulting with affected Aboriginal groups both before they develop new projects, and as part of their ongoing operations strategy.

This increase in consultation does not necessarily indicate recognition of Aboriginal or treaty rights. The companies involved are likely motivated to implement a consultation process for some of the following reasons: 1) to meet the aforementioned regulatory requirements to consult with all affected public groups; 2) for the business reason that if they can negotiate agreements in advance, they will not be faced with unexpected costs; 3) to avoid the possibility that the government will impose a stricter consultation process; and 4) to avoid legal challenges by Aboriginal parties that may jeopardize their operations, either through increased costs or loss of licences.

Other than the regulatory requirement to consult with the "public" and "directly affected" groups, as discussed earlier, there is no provincial policy setting out the way in which consultation is to occur. This policy vacuum can lead to varying standards amongst resource developers, with respect to both the content and the scope of the consultations carried out. In order to determine what is actually occurring in Alberta, the Athabasca Oil Sands Region was reviewed as a case study. This region provides a good illustration of the resource development industry in Alberta because of the number of parties involved in the region, on both the industry and the Aboriginal side.

It appears that despite a lack of provincial consultation guidelines, most companies operating in the region have developed relatively similar processes. It also appears that many Aboriginal groups are adapting to the processes and establishing groups to deal specifically with the resource developers in order to ensure that their interests are protected as much as possible. What is not as immediately apparent, but becomes increasingly obvious with a closer examination of this situation, is that the Alberta government is relying on consultations between

[127] *Mikisew, supra* note 26 at para. 156.

industry and Aboriginal groups as a means of diffusing claims based on Aboriginal or treaty rights. This strategy was clearly seen in the review of the EUB decisions in the region.

In order to understand what processes are being utilized in the region, Syncrude's consultation policy is outlined first. Any significant differences that exist between this company and other regional resource developers are noted. The focus then shifts to the initiatives developed by the Aboriginal communities in the region to deal with industry. A brief review of some of the results of these consultation processes between industry and Aboriginal groups follows.

Syncrude, a joint venture controlled by some of the largest oil and gas companies in Canada, has been operating in the Fort McMurray region of Alberta since the early 1970's. The company has a relatively long history of interaction with the local Aboriginal population and its process for dealing with this population has evolved over time. Syncrude's general consultation policy is based on the belief that the public, as individuals or as interest groups, have the right to be consulted about decisions that could directly affect them. The principles that have been developed to consult effectively with the public are:

1. Syncrude has the responsibility to seek out and facilitate the involvement of those potentially affected.

2. Public participants must be involved in designing consultation processes and, as far as possible, the process should meet the needs of all participants.

3. The roles and responsibilities of participants in any consultation process must be clear and understood.

4. Information relevant to participants' understanding and evaluation of a decision will be fully disclosed to allow meaningful participation.

5. Contributions to the consultation process will be fully considered in subsequent decision-making and feedback will be supplied to participants on how their input was utilized.[128]

This policy is fairly broad in scope and clearly designed to deal with all affected parties, not specifically Aboriginal Peoples. The other companies reviewed, Suncor and Albian Sands, have similar general consultation policies. All three companies also have specific information on programs and goals relating to Aboriginal Peoples. Once again, the resource developers appear to be in line with the Alberta government and the focus is primarily on the provision of socio-economic benefits to the Aboriginal communities. The following statement found on Syncrude's Aboriginal Commitment web page is representative of the industry's approach: "We pledge to provide opportunities in employment, education, and business and community development, as well as to protect the environment for future generations."[129]

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[128]Syncrude Canada Limited Website – Regional Public Consultation Overview, May 8, 2002: www.syncrude.com/community/06_01.html.

[129]Syncrude Canada Limited Website – Aboriginal Commitment, May 8, 2002: www.syncrude.com/community/aboriginal.html.

In order to deal effectively with resource developers, many of the Aboriginal communities in the area have formed organizations within their own bands, or in some cases, amongst several Aboriginal groups, including the Metis. Examples include the Fort McKay Industry Relations Corporation (the "IRC"), representing the Fort McKay First Nation and Fort McKay Metis Local #122, and the Athabasca Tribal Council (the "ATC"), which represents the five main Aboriginal groups in the area.[130] The Fort McKay IRC has developed the following consultation principles:

1. The most effective way for Fort McKay to realize long term social, economic and environmental benefits from resource development is to maximize cooperation and communications among the parties and to ensure each party's satisfaction with the decision and outcomes.

2. Fort McKay must have timely, accurate and thorough information about projects to ensure its residents understand project-specific and accumulative impacts, and to make informed decisions about each project. Information must be presented by knowledgeable People we trust and who work for the community.

3. Fort McKay must have the resources necessary to review, study and, provide input into applications, take part in formal and informal application processes, and be an active participant in ad hoc, ongoing resource development related forums.

4. Fort McKay must have the resources required to identify and develop career, job, and economic opportunities resulting from resource development.

5. The changes Fort McKay residents have seen in their community during the latter half of this century cover a broad spectrum of social and cultural issues. Fort McKay's survival as a community with an inherent culture capable of sustaining itself into the future depends on its ability to respond to changes in a positive way.[131]

From these principles, it is clear that the Fort McKay IRC has decided to attempt to work with industry in an effort to secure a self-sustaining community. The ATC has taken a similar approach, and one of their goals is to develop meaningful and productive relationships with the stakeholders in the region.[132] While both organizations do refer to the maintenance and protection of Aboriginal and treaty rights as part of their mandates, this commitment is not always clearly reflected in their consultation principles or the resulting agreements.

As a result of the consultation processes that are in place, many agreements have been reached between resource developers and Aboriginal Peoples in the region. While none of the specific agreements were available for review, the general information provided by all parties

[130]These include: Athabasca Chipewyan First Nation, Fort McMurray #468 First Nation, Mikisew Cree First Nation, Fort McKay First Nation, Chipewyan Prairie First Nation.

[131]Fort McKay Industry Relations Corporation website, Consultation Principles: www.fortmckayirc.com/principles.htm.

[132]Athabasca Tribal Council website, Goals and Objective: www.atc97.org/goals.html

indicates that the primary focus has been on providing socio-economic benefits to Aboriginal Peoples. These agreements usually include some requirement for the resource developer to provide jobs, training, scholarships, and other community benefits to the particular Aboriginal group that is signing the agreement. Other agreements deal with the environmental impacts of oil sands development. The Fort McKay IRC indicates that these agreements aim to give their people a voice in matters such as monitoring environmental impacts, mitigating these impacts, and including Traditional Environmental Knowledge in work being done in the region.[133] It would appear that while some agreements provide some compensation for loss of traditional uses of the land, this is rarely the primary focus.

The ATC signed a Capacity Building Agreement with resource developers in the region in 1999. This was followed by subsequent agreements involving all three levels of government.[134] The intent was to ensure that First Nations share fully in the economic opportunities arising from the more than $20 billion of projected new investment in the oilsands. These agreements were to last for three years, and are now up for renewal. The renegotiation of the agreements may offer the ATC and both levels of government an opportunity to incorporate stronger consultation obligations into these documents.

In addition to direct negotiations with Aboriginal groups, resource developers have been instrumental in the creation of two organizations designed to deal with the concern about the ability of the regulatory process to control the cumulative impacts of development in the area. This concern has led to the development of a Regional Sustainable Development Strategy (the "RSDS") and the creation of the Cumulative Environmental Management Association ("CEMA"). The RSDS is designed to set out the framework for managing cumulative effects in the region, and CEMA is a separate entity that works towards achieving the RSDS.[135] The resource developers in the region have provided the majority of the funding for these initiatives that provide another opportunity for Aboriginal Peoples to ensure that their concerns are being heard. Unfortunately, CEMA has already fallen behind the timelines set out in the RSDS. One of the reasons is the strain that is placed on the Aboriginal communities as they try to deal with the intensity and the pace of development in the area.

While in some respects the resource developers should be praised for initiating consultation processes with Aboriginal communities before being forced to do so by the government, it should be remembered that their reasons are not completely altruistic. The companies involved receive the benefits of having a specific agreement that they intend to rely upon to protect them from future cost increases related to claims from Aboriginal Peoples. As well, when the agreements focus on providing jobs and training that enables employment in the

[133]Fort McKay IRC website, Accomplishments: www.fortmckayirc.com/accomplishments.htm

[134]ATC/ARD newsletter website – June 28, 2002: www.atc97.org/atc-ard/index.html.

[135]Regional Sustainable Development Strategy for the Athabasca Oil Sands Area, Progress Report July 2001. For a more detailed discussion of the RSDS and CEMA, see: Harry Spaling, Janelle Zwier, William Ross & Roger Creasey, "Managing Regional Cumulative Effects of Oil Sands Development in Alberta, Canada" (December 2000) 2:4 Journal of Environmental Assessment Policy and Management at 514.

oil sands industry, they are gaining a trained, knowledgeable workforce located near their operations.

By failing to provide a structure under which consultation between Aboriginal Peoples and industry must occur, and by relying on industry consultation as a means of deferring claims for Aboriginal and treaty rights, the provincial government may be creating immediate and future problems. The immediate difficulty is that the failure to provide a province-wide consultation structure for resource developers leads to great inefficiency in the consultation process. This inefficiency is a serious problem for Aboriginal communities, since they have limited resources and yet must learn to deal with each company's particular style of negotiation. This undoubtedly leads to miscommunication and confusion, and probably to agreements that are not exactly what either party intended.

The potentially larger problem has not yet become an issue, but may come to light in the future as the economic benefits that Aboriginal Peoples are receiving from the current agreements begin to decrease. By not being directly involved in the consultation process, the provincial government is leaving itself open to claims by the Aboriginal Peoples that proper, effective consultation has not been carried out. If successful, this type of claim could result in substantial compensation being awarded to Aboriginal Peoples, who could argue that their treaty rights were never properly considered and protected before the land was "taken up" for resource development. This scenario may also affect the resource developers in the region and reduce the certainty of the agreements they have signed. If the province tried to counter the Aboriginal Peoples' claim by arguing that consultation did occur in the form of direct consultation with industry, Aboriginal Peoples could simply argue that those negotiations were contractual agreements between two private parties, and could in no way reduce or affect their Aboriginal or treaty rights nor the fiduciary or constitutional obligations of the Crown. Given the above-mentioned debate about whether a Provincial government can even "take up" lands in a manner that infringes treaty rights, it seems very unlikely that a private agreement with a corporation could possibly affect these rights.

6.0 Conclusion

This paper started with the question: "to what extent are the rights, interests and values of Aboriginal Peoples acknowledged, protected and accommodated in the provincial resource allocation and development process?". The best answer may be that there is a growing awareness, on the part of both the provincial government and industry, that the question can no longer be evaded and requires some form of resolution.

At a policy level, the provincial government has stated its commitment to address issues of Aboriginal and treaty rights and to share the economic benefits of resource development with Aboriginal Peoples. In many cases, the private sector is taking up the challenge of identifying and addressing some of the concerns of Aboriginal communities. Consultation processes and agreements negotiated between resource developers and Aboriginal Peoples are providing substantial benefits to Aboriginal communities. Nevertheless, consultation between Aboriginal Peoples and resource developers is not a panacea for a consultation process with government

rooted in a proper recognition of Aboriginal and treaty rights.[136] The onus is on the provincial government, in consultation with Aboriginal Peoples, to first establish the nature and extent of their constitutionally protected rights, and further to initiate a complete review of its resource legislation in order to identify how these rights can best be protected and accommodated in the resource development process.

In 1996, the Royal Commission on Aboriginal Peoples (RCAP) concluded in its final report that a reallocation of lands and resources was essential in order to enable Aboriginal Peoples to move towards self-sufficiency:

> Aboriginal peoples need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently, on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.[137]

Shin Imai has similarly suggested that what is needed to implement historical treaties is a "comprehensive analysis to determine whether there are sufficient lands to meet treaty obligations", as well as a reallocation of lands and resources between Aboriginal and non-Aboriginal users, and the setting aside of sufficient lands to fulfill the treaty promises. [138]

The courts have suggested to governments constructive ways to fulfill their obligations to Aboriginal Peoples and insisted that negotiating in good faith is much preferable to litigation. The Supreme Court has held in *Marshall* that "the process of accommodation of the treaty rights may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi'kmaq rather than by litigation".[139]

By virtue of its fiduciary obligation to Aboriginal Peoples and its legislative authority over "Indians and lands reserved for Indians", the federal government must be involved in this process of negotiation. Alberta's Aboriginal Policy framework underlines the need for the federal government to "fulfill its responsibilities to First Nations communities and people" and acknowledges that both levels of government and Aboriginal communities and organizations must work together to define their respective roles and responsibilities, including funding.[140] The RCAP urged the federal government to "seek the agreement of the provinces and territories in enacting a national code to permit traditional Aboriginal activities on Crown lands, which the

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[136]For a recent account of industry's growing frustration with government's failure to act on its consultation obligations, see "Caught in the middle of a legal and political muddle", Oilweek Newsletter, December 2, 2002, at 32; also Rick Mofina, "Oil industry warned Ottawa year before native blockade", National Post, August 17, 2001.

[137] RCAP Report, *supra* note 26 at 557.

[138]Shin Imai, *supra* note 33 at 29-34.

[139]*R.* v. *Marshall* (*Marshall No. 2*), [1999] 3 S.C.R. 533, para. 22.

[140]Strengthening Relations, *supra* note 58 at 19.

provinces and territories could enact as part of their land and resource management law."[141] The interests of all Canadians, including those of resource companies, would best be served by the resolve of both levels of governments to address squarely outstanding issues of Aboriginal and treaty rights in the resource development process. Lack of political leadership in this critical area can only lead to mounting frustration on the part of all involved and exacerbate land and resource use conflicts.

[141]RCAP Report, *supra* note 26 at 632-633 and Recommendation 2.4.48.

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