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Alberta First Nations Consultation & Accommodation Handbook

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Executive Summary

In recent years, the relationship between the Alberta government and the First Nations has become increasingly acrimonious. The media regularly report the negative reactions of First Nations communities to government policies and initiatives and their concerns with the impacts of resource development on their communities, notably their health and way of life. The multiplication of legal challenges to resource development in the province is attributed to increasing frustrations among First Nations with the lack of meaningful input into government policy and decision-making processes on land and resource development. This report explores some of the reasons for this deteriorating relationship between Alberta First Nations and the provincial government. We focus on the issue of Aboriginal consultation and accommodation, which is one of the most contentious in that relationship.

Alberta first released a First Nations Consultation Policy in 2005. It was the government's first attempt to fulfill its obligations to First Nations under the duty to consult and accommodate doctrine. On August 16, 2013, this Policy was replaced with *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013*. As was the case with the 2005 Policy, the initial reactions of Alberta's First Nations to this updated Policy have been mostly negative.

The first part of the report examines the relevant legal framework of Aboriginal consultation and accommodation, at both the domestic and the international levels. The second part focuses on Alberta's approach to consultation and discusses both the process of developing the 2013 Policy and the Policy itself. The third part of the report is a critical analysis of Alberta's approach to Aboriginal consultation, from the formulation of the 2013 Policy to the Policy itself. It focuses on the new Aboriginal Consultation Office and reviews two legislative initiatives that directly affect the consultation process. It offers suggestions for best consultation practices, based on the First Nations' advice to government and on a comparative analysis of consultation policies in other jurisdictions.

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List of Abbreviations

ACO	Aboriginal Consultation Office
AER	Alberta Energy Regulator
AEUB	Alberta Energy and Utilities Board
ALSA	*Alberta Land Stewardship Act*
APJA	*Administrative Procedures and Jurisdiction Act*
CIRL	Canadian Institute of Resources Law
DCMR	*Designation of Constitutional Decision-Makers Regulation*
EAB	Environmental Appeal Board
EBA	Economic Benefit Agreements
ERCA	*Energy Resources Conservation Act*
ERCB	Energy Resources Conservation Board
FMFN	Fort McKay First Nation
FPIC	free, prior and informed consent
IACHR	Inter-American Commission on Human Rights
ILO	International Labour Organisation's
LARP	Lower Athabasca Regional Plan
MSA	*Métis Settlement Act*
NQCL	Notice of Question of Constitutional Law
NRTA	*Natural Resources Transfer Agreement, 1930*
OAS	Organization of American States
OGA	*Oil and Gas Activities Act*
OGC	Oil and Gas Commission
REDA	*Responsible Energy Development Act*
UNDRIP	*United Nations Declaration on the Rights of Indigenous Peoples*

Introduction

On August 16, 2013, the Alberta government released *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013* (Policy or Consultation Policy).[1] This Policy will replace the government's Consultation Policy of 2005.[2] The enactment of a Consultation Policy represents the government's attempt to fulfill its obligations to First Nations under the duty to consult and accommodate doctrine. However, the initial reactions of the Alberta First Nations to the development of this updated Policy have been mostly negative.[3] A parallel development is the multiplication of legal challenges to resource development in the province, attributed to increasing frustrations among First Nations with the lack of meaningful input into government policy and decision-making processes on land and resource development.[4] This situation points to a fundamental breakdown in the relationship between First Nations and government when it comes to resource development in Alberta. It appears that the process of "reconciliation" that the courts are repeatedly urging governments and First Nations to pursue is seriously threatened.

The purpose of this report is to explore some of the reasons for the increasingly acrimonious relationship between Alberta First Nations and the government and to suggest possible improvements. We focus on the issue of Aboriginal consultation and accommodation, which is one of the most contentious in that relationship. The first part of the report examines the relevant legal framework of Aboriginal consultation, at the domestic and international levels. The second part focuses on Alberta's approach to consultation and accommodation and discusses both the process of developing the 2013 Policy and the Policy itself. The third part of the report is a critical analysis of Alberta's approach to Aboriginal consultation from the formulation of the 2013 Policy to the Policy itself. It focuses on the new Aboriginal Consultation Office (ACO) and reviews two legislative initiatives that directly affect the consultation process. It offers suggestions for best consultation policies based on the First Nations' advice to government and on a comparative analysis of consultation policies in other jurisdictions.

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[1] *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013* [Policy or Consultation Policy], online: <http://www.aboriginal.alberta.ca/documents/GoAPolicy-FNConsultation-2013.pdf>.

[2] *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* (16 May 2005) [Original Policy or Original Consultation Policy], online: <http://www.aboriginal.alberta.ca/images/Policy_APROVED_-_May_16.pdf>.

[3] "Alberta sets new rules on industry, aboriginal consultation", *MacLean's Magazine*, (19 August 2013), online: <http://www.macleans.ca/news/canada/alberta-sets-new-rules-on-industry-aboriginal-consultation/>; Shari Narine Sweetgrass, "First Nations reject province's consultation policy", *Alberta Sweetgrass* 20:6 (2013), online: <http://www.ammsa.com/publications/alberta-sweetgrass/first-nations-reject-province's-consultation-policy>.

[4] Bob Weber, "First Nations ramp up challenges to oilsands development", *Vancouver Sun* (2 January 2014).

Part 1: The Law of Consultation

1.1 Domestic Law

The Crown's duty to consult and accommodate with Aboriginal peoples (First Nations, Métis and Inuit) is well established as part of Canadian law that governs decisions regarding matters that affect Aboriginal rights, lands and interests.

1.1.1 The Source of the Duty

Properly speaking this duty is a subset of the "the right of all persons under Canadian law to be dealt with the Crown in a manner that is procedurally fair and reasonable and in accordance with the common law procedural and substantive elements on administrative law."[5] With regard to Aboriginal peoples, this duty has additional sources, such as the Crown's fiduciary relationship with Aboriginal peoples,[6] the need to justify infringements of Aboriginal rights under subsection 35(1) of the *Constitution Act, 1982*,[7] and the "honour of the Crown", which amplify and describe the duty to consult with them and if necessary accommodate their interests.

In *Haida Nation v. British Columbia (Minister of Forests)*, the Supreme Court stated that the duty to consult and accommodate is grounded in the *honour of the Crown* which arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."[8] The assertion of sovereignty gives rise to "an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation."[9] In the Supreme Court of Canada's view, "[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by section 35 of the

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[5] Thomas Isaac & Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41 Alta L Rev 49 at 57.

[6] First outlined in *R v Sparrow* (1990), [1990] 1 SCR 1075, 70 DLR (4th) 385 (SCC) at 1108-1109 [*Sparrow* cited to SCR], citing *Guerin v The Queen*, [1984] 2 SCR 335, 13 DLR (4th) 321 at 376. The term "aboriginal peoples" has a technical legal meaning in s 35(2) of the *Constitution Act, 1982*, (UK), 1982, c 11 and is commonly used in court cases and academic discussion.

[7] In *Sparrow*, the Supreme Court outlined the basic elements of a justification test in two parts. The first part asks whether there is a valid legislative objective to support the infringing action, the second part asks whether such objective upholds the honour of the Crown, and in particular whether the Aboriginal people affected by an infringing action have been adequately consulted with respect to the decisions to be made: *ibid* at 1119.

[8] 2004 SCC 73, [2004] 3 SCR 511 at para 32 [*Haida*]. In *Haida* the Crown had not fulfilled the duty to consult and accommodate but in the companion case *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*] the Crown had fulfilled its duty.

[9] *Ibid*.

Constitution Act, 1982."[10] Inasmuch as section 35 is a promise of rights recognition, the Crown must "act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate."[11] The Court said, "the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution."[12]

In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005),[13] the Supreme Court extended the Crown's duty to consult and accommodate to a Treaty context. This case is most relevant to the province of Alberta, a province which is entirely covered by what are known as the Numbered Treaties (notably Treaty No. 6, 7 and 8).[14] The Mikisew Cree First Nation were signatories to Treaty No. 8 that covers an extensive territory in the northern part of the province. Treaty No. 8 promised that, in return for the surrender of their title, the First Nation would have the "right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as before described, … and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."[15] The Supreme Court said: "it was contemplated by all parties that "from time to time" portions of the surrendered land would be "taken up" and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not."[16] There were no mechanisms in the Treaty to regulate the "taking up" of surrendered lands, however "the Crown was and is expected to manage the change honourably."[17] There was no need to invoke fiduciary duties as the *honour of the Crown* infuses both Treaty negotiations *and* interpretation giving rise to the Crown's duty to consult and accommodate.[18]

As pointed out by Sanderson, Bergner and Jones, even though the duty is grounded in the honour of the Crown, one should not "confuse the honour of the Crown itself with the

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[10] *Ibid*.

[11] *Ibid*.

[12] *Ibid* at para 32. Further, "Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s 35(1) of the *Constitution Act, 1982*."

[13] 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew*].

[14] Treaty 6 (signed in 1876 and 1899) stretches across the central part of Alberta and Saskatchewan, Treaty 7 (signed in 1877) covers the southern part of Alberta, and Treaty 8 (signed in 1899 and 1900) encompasses most of northern Alberta, northeastern British Columbia, the northwestern corner of Saskatchewan and a portion of the Northwest Territories south of Great Slave Lake.

[15] *Mikisew*, *supra* note 13 at para 2 [emphasis in original decisions].

[16] *Ibid* at para 30.

[17] *Ibid* at para 31.

[18] *Ibid* at para 51.

Crown's duty to consult and, if necessary, accommodate":[19]

> […] the duty to consult, although powerful, is but one of several mechanisms to further the goal of reconciliation. […] other elements include the Crown's fiduciary obligations, treaty obligations and the obligation to justify infringements of Aboriginal rights and title.[20]

> In the view of these authors, the role and purpose of the duty to consult should not and need not be expanded to encroach on or displace the other older and well-established doctrines … that collectively govern the overall relationship between the Crown and Aboriginal peoples […].[21]

1.1.2 The Purpose of the Duty

The broad purpose of the duty to consult is to advance the objective of reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty. However, the duty may fulfill different functions depending on whether the rights to be protected are asserted but unproven, or whether they are Treaty rights. In the first instance, the duty to consult is applied as an interim measure to protect the rights at stake from irreversible harm pending the resolution of the claims. In a Treaty context, the duty to consult serves to remedy "a procedural gap" in the Treaty.[22] In *Mikisew*, the Supreme Court stated that Treaty No. 8, properly interpreted, contemplated a process wherein surrendered lands would be "taken up" and changed into lands where Treaty rights did not apply.[23] However, the Treaty did not specify the process by which such lands could be "taken up" by government. This procedural gap gave rise to a duty to consult and accommodate.

In the *Little Salmon* case, which involved the interpretation of a modern Treaty, Justice Deschamps (for the minority) distinguished between the duty to consult in the context of asserted but unproven rights and the duty to consult in the context of a Treaty, and suggested that "it would be misleading to consider these two duties to be one and the same":

> […] it is important to make a clear distinction between, on the one hand, the Crown's duty to consult before taking actions or making decisions that might infringe on Aboriginal rights and, on the other hand, the minimum duty to consult the Aboriginal party that necessarily applies to the Crown with regard to its exercise of rights granted to it by the Aboriginal party to a treaty.[24]

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[19] Chris W Sanderson, QC, Keith Bergner & Michelle S Jones, "The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty" (2011-2012) 49 Alta L Rev 821 at 824 [Sanderson, Bergner & Jones, "Crown's Duty to Consult"].

[20] *Ibid* at 823.

[21] *Ibid* at 830.

[22] *Ibid* at 826.

[23] *Mikisew*, *supra* note 13 at para 30. See also para 33.

[24] *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103 at para 119 [Little Salmon].

1.1.3 The Trigger of the Duty

The duty to consult is triggered at a low threshold. As stated in *Haida*, "the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[25]

In a Treaty context, the government is presumed to be aware of the existence of the right asserted, therefore the duty to consult will be triggered by the potential adverse impact of contemplated government action on the rights:

> In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. […] The flexibility lies not in the trigger […] but in the variable content of the duty once triggered.[26]

1.1.4 The Variable Scope and Content of the Duty

The content of the duty varies according to the strength of the claim and the seriousness of the potential adverse impact on the right at stake. The scope of the duty will fall along a spectrum, from circumstances where the claim is weak or the effect is minor to cases where the rights are strong and the potential effect is serious:

> At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. […] At the other end, lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required […] Between these two extremes of the spectrum just described, will lie other situations.[27]

Deep consultation "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision."[28]

In the case of Treaties, the particular context of the Treaty will dictate the scope of consultation. In *Mikisew*, the Supreme Court considered the specificity of the promises made, the nature of the particular Treaty right, the seriousness of the impact of the Crown's proposed action, and the history of dealings between the Crown and the particular First

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[25] *Haida*, *supra* note 8 at para 35.
[26] *Mikisew*, *supra* note 13 at para 34.
[27] *Haida*, *supra* note 8 at paras 43-45.
[28] *Ibid* at para 44.

Nation.[29] The Court acknowledged the need to assess the impacts on Treaty rights not in absolute terms, but in relation to the specific reality of the Mikisew Cree,[30] and to take into account indirect, larger and cumulative impacts on Aboriginal rights as well as impacts on traditional livelihoods.[31]

Given that in that case the proposal was to "to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation",[32] the Court found that the Crown's duty was only at the lower end of the spectrum. Even at the lower end, consultation meant that the Crown was required to give notice to the Mikisew, to provide information about what the Crown knew of the anticipated adverse impacts, "to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights".[33] Here, Justice Binnie refers back to Justice Finch's statement in *Halfway River First Nation* of what constitutes adequate consultation:

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.[34]

There is thus both an "informational" and a "response" component to the duty.[35] The Court concluded that in this case, both the procedural and the response component of the duty to consult had not been adequately fulfilled and that "the Crown failed to demonstrate an 'intention of substantially addressing [Aboriginal] concerns … through a meaningful process of consultation'."[36]

1.1.5 The Duty to Accommodate

The obligation to "substantially address Aboriginal concerns" or to "seriously consider and demonstrably integrate" these concerns into a proposed decision or plan of action leads us

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[29] *Ibid* at para 63.

[30] *Ibid*. Justice Binnie stated that adverse effects on 14 trappers and 100 hunters did not seem that dramatic, unless considered in the context of a small northern community of relatively few families: *ibid* at para 3. See also para 47: "Twenty-three square kilometers alone is serious if it includes the claimant's hunting ground or trapline", and 48: "The meaningful right to hunt is not ascertained on a treaty-wide basis (all 840,000 square kilometers of it) but in relation to the territory over which a First Nation traditionally hunted, fished and trapped, and continues to do so today."

[31] *Ibid* at paras 44, 47.

[32] *Ibid* at para 64.

[33] *Ibid*.

[34] *Ibid* [emphasis added in *Mikisew*].

[35] *Ibid*.

[36] *Ibid* at para 67.

to consider the substantive component of the duty to consult, that is the duty to accommodate. Although the Supreme Court has always insisted that consultation will not always lead to accommodation, only if "required" or "appropriate",[37] it has also stated that "consultation that excludes from its outset any form of accommodation would be meaningless".[38] Consultation should have "the intention of substantially addressing the concerns of the Aboriginal peoples."[39] As noted in *Haida*, "meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations."[40]

The assertion that the duty to consult does not give First Nations a right of "veto" over the activity being contemplated has become common place. This is based on the Supreme Court's finding, in *Haida*, that the consultation process "does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim".[41] In *Little Salmon*, the Court acknowledged the difference between "the procedural protection of consultation" and "the substantive right of accommodation" and repeated that "the First Nation does not have a veto over the approval process" particularly where there was no possibility of accommodation and the impact was minimal.[42]

What needs to occur, the Court has said, is a balance of competing interests: "Balance and compromise are inherent in the notion of reconciliation."[43] This has led some legal commentators to conclude that "the Crown's duty to consult is at its core procedural, not substantive."[44]

However, the view that accommodation only requires a balancing of competing societal interests and that "consent" is not required is questionable in a Treaty context. As highlighted above, the finding in *Haida* that Aboriginal peoples do not have a veto over the approval process applied to a situation where Aboriginal claims were asserted but as yet unproven. The Supreme Court did not foreclose the possibility that consent may be required in cases of established rights: "The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case."[45] The Court's comments on the need to seek "compromise in an attempt to harmonize conflicting interests and move further along the path of reconciliation" applied

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[37] *Haida*, *supra* note 8 at para 47: "the effect of good faith consultation may be to reveal a duty to accommodate."

[38] *Mikisew*, *supra* note 13 at para 54.

[39] Delgamuukw v British Columbia, [1997] 3 SCR 1010 at para 168 [Delgamuukw].

[40] *Haida*, *supra* note 8 at para 46.

[41] *Ibid* at para 48 [emphasis added].

[42] *Little Salmon*, *supra* note 24 at para 14.

[43] *Haida*, *supra* note 8 at para 50.

[44] Sanderson, Bergner & Jones, "Crown's Duty to Consult", *supra* note 19 at 845.

[45] *Haida*, *supra* note 8 at para 48.

to accommodation that may result from "pre-proof consultation".[46] The Court noted that even pending resolution of a claim, "where a strong prima facie case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement".[47]

In a Treaty context, the rights are established rights. The types of accommodation measures that may be required to protect these rights are potentially different in nature and scope from those required in a pre-proof consultation context. In situations where the rights are established (and acknowledged by government) and the potential negative impacts of government actions are significant, we suggest that accommodation requires more than a simple balancing of competing societal interests. This is especially true when the potential negative impacts of a proposed Crown action may amount to an infringement of the Treaty rights at stake. The potential for Treaty infringement resulting from the Crown's steady "taking up" of land was acknowledged by Justice Binnie in *Mikisew*:

> If the time comes that in the case of a particular Treaty 8 First Nation, "no meaningful right to hunt" remains over its traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.[48]

Treaty 8 gives rise to procedural as well as substantive rights, and the protection of these substantive rights, notably the hunting, trapping and fishing rights, requires a higher duty of accommodation on the part of the Crown than in a pre-proof context. In a Treaty context, the processes of consultation and accommodation should be informed by the principles of the *Sparrow* doctrine of justification. The Crown's obligation to protect established Treaty rights leads to an expansion of the universe of accommodating measures including causing the least infringement possible, giving priority to Treaty rights, avoiding irreparable damage, compensation, recognizing the Aboriginal preferred means of exercising their rights, and recognizing that only demonstrably compelling and substantial objectives can trump Treaty rights.

1.1.6 Proponents and Delegation

In *Haida*, the Supreme Court noted that it was open for governments where appropriate to develop "regulatory schemes to address the procedural requirements appropriate to different problems at different stages … reducing recourse to the courts."[49] It also said, the

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[46] *Ibid* at para 49 [emphasis added].
[47] *Ibid* at para 47 [emphasis added].
[48] *Mikisew*, *supra* note 13 at para 48.
[49] *Haida*, *supra* note 8 at para 51.

Crown could "delegate procedural aspects of consultation to industry proponents seeking a particular development."[50] However, the Court noted that this could not be an unstructured discretionary process, citing an earlier decision in *R. v. Adams*, in that case, the Court warned governments that regulatory schemes which allocate wide discretion to the Crown without articulating specific criteria for the exercise of that discretion risk infringing Aboriginal rights:

> […] Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of specific guidance.[51]

Ultimately, the "legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated."[52] In *Haida*, the Court noted that a subsequent *Provincial Policy for Consultation with First Nations* (2003) directing provincial consultation was in place in British Columbia and "[s]uch a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers."[53] Subsequently, all jurisdictions in Canada have adopted policy instruments with respect to Aboriginal consultation.

1.1.7 Consultation on the Development of the Consultation Process

The honour of the Crown also implies that in developing a process of consultation that meets its obligations and is acceptable to Aboriginal peoples, the government negotiates that process with them. The courts have insisted that reconciliation should be furthered through negotiation rather than litigation. In the *Gitxsan* case, Justice Tysoe recalled that "[t]he first step of a consultation process is to discuss the process itself."[54]

This means that outstanding issues between First Nations and the government necessitate a process of give and take. First Nations are not just another stakeholder in a public participation process. The government should not impose unreasonable time frames and should provide ample opportunities for open dialogue with First Nations on a proposed consultation process. Administrative inconvenience alone is not an acceptable rationale for a flawed process. As stated in *Huu-Ay-Aht*, "The Crown is obligated to design a process for consultation that meets the needs for discharge of this duty before operational decisions

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[50] *Ibid* at para 53.
[51] *R v Adams*, [1996] 3 SCR 101, 138 DLR (4th) 657 at paras 51-52.
[52] *Haida*, *supra* note 8 at para 53.
[53] *Ibid* at para 51.
[54] *Gitxsan First Nation v British Columbia (Minister of Forests)*, [2003] 2 CNLR 142 at para 8 [*Gitxsan*].

are made."[55] This obligation applies as much to the design of the consultation process as to the substance of the process itself.

1.1.8 Standards for the Crown to Honourably Fulfill its Duty

As the Supreme Court put it in the *Manitoba Métis* case, in a Treaty context, the honour of the Crown requires that it diligently carries out its promises. The Crown "must seek to perform the obligation in a way that pursues the purpose behind the promise. The Aboriginal group must not be left "with an empty shell of a treaty promise": *Marshall*, at para. 52."[56] The Court added: "[v]iewing the Crown's conduct as a whole in the context of the case, did the Crown act with diligence to pursue the fulfillment of the purpose of the obligation?"[57] This should be the standard by which Alberta's process of consultation and accommodation is assessed.

1.2 International Law

The duty to consult and the concept of informed consent are also emerging international legal norms. The principle that government must hold meaningful consultation with indigenous peoples when it takes measures that may adversely affect them has been recognized in major international instruments, notably the International Labour Organisation's (ILO) *Indigenous and Tribal Peoples Convention* (1989) (ILO Convention),[58] the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) (2007),[59] and the Organization of American States (OAS) *Draft American Declaration on the Rights of Indigenous Peoples* (OAS Draft Declaration).[60]

The ILO Convention contains critical provisions outlining governments' consultation obligations, while the *UNDRIP* and the OAS Draft Declaration introduce the concept of free, prior and informed consent (FPIC). Article 32(2) of the *UNDRIP* provides:

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[55] *Huu-Ay-Aht First Nation v British Columbia (Minister of Forests)* (2005), BCSC 1121 at para 113 [*Huu-Ay-Aht*].

[56] *Manitoba Métis Federation Inc v Canada (Attorney General*) (2013), SCC 14 at para 80 [Manitoba Métis].

[57] *Ibid* at para 83.

[58] *ILO Convention 169*, 27 June 1989, 72 ILO Official Bulletin 59 [ILO Convention], online: ILO <http://www.ilo.org/indigenous/lang--en/index.htm>.

[59] UN General Assembly, (2007) *United Nations Declaration on the Rights of Indigenous People: resolution*, GA RES/61/295, UNGAOR, 61st Sess Supp No 49 [*UNDRIP*], online: <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

[60] OAS, Committee on Juridical and Political Affairs, *Draft American Declaration on the Rights of Indigenous Peoples*, OR OEA/Set K/XVI/GT/DADIN/Doc.317/07 rev 1 (2008) [OAS Draft Declaration], online: OAS <http://scm.oas.org/>.

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

The right of FPIC has both a procedural and a substantive component. The UN Working Group on Indigenous Populations has stated that:

> … the right of free, prior and informed consent is grounded in and is a function of indigenous peoples' inherent and prior rights to freely determine their political status, freely pursue their economic, social and cultural development and freely dispose of their natural wealth and resources […] Procedurally, free, prior and informed consent requires processes that allow and support meaningful and authoritative choices by indigenous peoples about their development paths.[61]

Various States have also recognized the right of FPIC in their domestic law and some, such as Bolivia, have even incorporated it into their Constitution.[62] For its part, Canada not only voted against the *UNDRIP* when it came to a vote in the United Nations General Assembly, but it also initially refused to sign the *UNDRIP* after it was overwhelmingly approved in 2007.[63] It was only on November 12, 2010 that the Canadian government finally endorsed the *UNDRIP*; however, Canada's Statement of Support was qualified by the assertion that the *UNDRIP* is an aspirational document that is non-legally binding and that it "does not reflect customary international law nor change Canadian laws."[64] Canada has stated that it has "concerns with some of the principles in the Declaration [particularly] with free, prior and informed consent when interpreted as a veto."[65] Upon the conclusion of his recent visit to Canada in the fall of 2013, James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples, expressed the hope "that the provincial and federal governments in Canada, as well as the country's courts, will aspire to implement the standards articulated by the Declaration."[66]

Despite Canada's reservations, the concept that FPIC forms an integral part of the right to consultation is gaining wider acceptance at the international level. First Nations in

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[61] *UN Human Rights Commission, Working Group on Indigenous Populations* (Working paper submitted by Mrs Antoanella-Julia Moroc and the Tebtebba Foundation), "Standard-setting: Legal Commentary on the Concept of Free, Prior and Informed Consent", CHR, 23rd Sess, UN Doc E/CN.4Sub.2/AC.4/2005/WP.I (2005) at para 56.

[62] Government of Bolivia, Bolivian Constitution, (2009) *Constitución Política del Estado* (Article 352), online: <http://consuladoboliviano.com.ar/portal/node/119>.

[63] The *UNDRIP* was adopted by 144 votes, with only 4 votes against (Australia, Canada, New Zealand and the US) and 11 abstentions.

[64] Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010) ["Statement of Support"], online: <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> (retrieved 20 January 2014).

[65] Federal Policy at 9; see Appendix 4.

[66] James Anaya, "Statement upon conclusion of the visit to Canada" (15 October 2013), online: <http://unsr.jamesanaya.org/statements/statement-upon-conclusion-of-the-visit-to-canada>.

Canada are increasingly referring to the government's obligations under the *UNDRIP* and to the concept of FPIC in their submissions to Canadian courts. In a 2012 case dealing with human rights,[67] both Amnesty International and the Assembly of First Nations submitted to the Federal Court of Canada that the "*UNDRIP* also reflects emerging norms in international law regarding the rights of indigenous peoples." The Federal Court stated as follows:

> The Supreme Court of Canada has recognized the relevance of international human rights law in interpreting domestic legislation such as the *Canadian Human Rights Act*. The Court has held that in interpreting Canadian law, Parliament will be presumed to act in compliance with its international obligations. As a consequence, where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations. Parliament will also be presumed to respect the values and principles enshrined in international law, both customary and conventional.[68]

The right of indigenous peoples to consultation and, in some instances, to actual consent has been acknowledged in decisions of international human rights tribunals and bodies. The Inter-American Human Rights system has been particularly helpful for Canadian First Nations. Two legally binding international instruments in the consultation context are the *Charter of the Organization of American States* (OAS) (art. 106) and the *American Convention on Human Rights* (American Convention) (art. 33).[69] Although Canada has not acceded to the American Convention, it is a party to the OAS, and as such it is subject to the jurisdiction of the Inter-American Commission on Human Rights. Canadian First Nations have had recourse to this forum on several occasions.[70] Both the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court on Human Rights have found a State obligation to obtain the consent of indigenous peoples when contemplating actions that may affect their property rights.[71]

1.3 Court Challenges

When government's conduct is challenged on the basis of an allegation that it failed in its

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[67] *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445.

[68] *Ibid* at para 351.

[69] *Charter of the Organization of American States*, 30 April 1948, OAS Treaty No 1-C, 61, 119 UNTS 1609 (entered into force 13 December 1951); *American Convention on Human Rights*, OEA/Ser.LV/II.82/ Doc.6 rev 1 at 25 (1992) [American Convention].

[70] See S James Anaya & Robert A Williams, "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System" (2001), 14 Harv Hu Rts J 33; also see Verónica de la Rosa Jaimes post on "The Petition of the Arctic Athabaskan Peoples to the Inter American Commission on Human Rights" (22 July 2013), online: ABlawg <http://ablawg.ca/2013/07/22/the-petition-of-the-arctic-athabaskan-peoples-to-the-inter-american-commission-on-human-rights/> (retrieved 21 January 2014).

[71] Penelope Simons & Lynda Collins, "Participatory Rights in the Ontario Mining Sector: An International Human Rights Perspective" (2010) 6:2 JSDLP at 189-196.

duty to consult and accommodate, that conduct may be brought to court for review.[72] In those proceedings, analogies from administrative law are applicable and the standard of review would focus on the process.

> Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable.[73]

The legal mechanisms[74] and evidence of inadequacy are beyond the scope of this paper.[75] However, we would make three comments: first, litigation of this type is expensive, extensive and complicated – not only for the affected First Nation but also proponents whose projects can be tied up for several years. Second, the normal remedy for the courts is to direct the affected First Nation to engage in additional consultation with *the same parties that misunderstood their concerns the first time*. Third, it is not just First Nations that are engaging in this kind of litigation, some project proponents are equally frustrated by the Crown mishandling of its obligations and some recent trial decisions reflect this trend.[76]

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[72] *Haida*, *supra* note 8 at para 60.

[73] *Ibid* at para 63.

[74] Judicial review, action for declaration, Statement of Claim etc are a few examples.

[75] For a broad, contemporary take on this see: Sanderson, Bergner & Jones, "Crown's Duty to Consult", *supra* note 19.

[76] *Moulton Contracting Ltd v British Columbia*, 2013 BCSC 2348 (currently under appeal). In Ontario, Northern Superior Resources claims $110M from the provincial government for failing to adequately consult with affected Aboriginal communities, online: CBC News <http://www.cbc.ca/news/canada/thunder-bay/exploration-firm-sues-ontario-for-110m-over-mining-claims-1.2251748> and Northern Superior Resource <http://www.nsuperior.com/claim.aspx>.

Part 2: Alberta's Approach to Consultation

As noted in the Introduction to this report, Alberta developed its Original Consultation Policy in 2005 and replaced it in August 2013 with an updated Consultation Policy. This part of the report examines the way in which the Alberta government developed the new Policy, and describes the Policy itself, including the draft Consultation Guidelines and Consultation Matrix which once finalized will form an integral part of the completed Policy. A timeline of the development of these Consultation Policies and relevant statutes is found in Appendix 1 of this report.

2.1 The Original Consultation Policy

The Original Consultation Policy, entitled *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development*,[77] was approved on May 16, 2005 shortly after the Supreme Court handed its *Haida* and *Taku River* decisions, but before the release of the *Mikisew Cree* decision. This was followed by the release on September 1, 2006 of a set of *First Nations Consultation Guidelines*, subsequently updated on November 14, 2007.[78] The Guidelines provided additional details regarding the specific consultation processes that applied in each of four key government departments (collectively "the Original Consultation Policy"). This Original Consultation Policy was subject to immediate criticism from Alberta First Nations,[79] some Alberta Métis who were excluded,[80] industry, academics[81] and the interested public. The Policy included a commitment to review the policy four years after implementation, but it was only in 2013 that Alberta released an updated Consultation Policy.

2.2 Process of Developing the 2013 Policy

In 2009, through correspondence and discussions, the Chiefs of Treaty 6, 7 and 8, the three main Treaty areas in Alberta,[82] started reviewing the Original Consultation Policy with

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[77] *Supra* note 2.

[78] *Alberta's First Nations Consultation Guidelines on Land Management and Resource Development* (14 November 2007) [Old Guidelines], online: <http://www.aboriginal.alberta.ca/documents/First_Nations_and_Metis_Relations/First_Nations_Consultation_Guidelines_LM_RD.pdf>.

[79] For example Debora Steel, "Treaty 8 First Nations Reject Alberta's Consultation Policy", *Alberta Sweetgrass* 12:3 (1 February 2005), online: <http://www.ammsa.com/publications/alberta-sweetgrass/treaty-8-first-nations-reject-albertas-consultation-policy>.

[80] For example see online: <http://ceaa.gc.ca/050/documents/p59539/80198E.pdf>.

[81] For example see: Monique Passelac-Ross & Verónica Potes, "Consultation with Aboriginal Peoples in the Athabasca Oil Sands Region: Is it Meeting the Crown's Legal Obligations?" (2007) 98 Resources 1-7, online: <http://dspace.ucalgary.ca/bitstream/1880/47040/1/Resources98.pdf>.

[82] See *supra* note 14.

Alberta. The Chiefs stated their desire that the revised Policy be based on the principles outlined by the Supreme Court in the *Mikisew Cree* case. Then Premier Ed Stelmach agreed that the nine principles outlined by the Chiefs were a good foundation to discuss changes to the Original Consultation Policy.[83]

In February 2010, Alberta released a Draft Policy Discussion Paper outlining the Purpose of the Policy and twelve Guiding Principles. The Chiefs of Treaty 6, 7 and 8 met on several occasions in 2010 to discuss the proposed changes to the Consultation Policy. In various letters in the month of September 2010, the three Treaty First Nations Associations of Alberta released a detailed Position Paper on Consultation outlining the First Nations' consultation objectives, interests and principles (Position Paper (2010)).[84] In this document, the Alberta First Nations discussed their concerns with Alberta's approach to consultation and its failure to respect Treaty rights, and offered their views on what they considered to be the core elements of a new approach to consultation. The Treaty Chiefs invited Alberta and Canada to enter into a negotiation process with a goal of jointly developing an agreement (not a Policy) on First Nation Consultation. No such agreement was entered into. Subsequently, several First Nations developed their own consultation policies to govern industry consultations.[85]

On October 24, 2012, Bill 2 was tabled in the legislature, passed third reading on November 21, 2012, and was given Royal Assent on December 10, 2012. The *Responsible Energy Development Act* (*REDA*) was proclaimed in force, in part, on June 4, 2013 to become effective June 17, 2013.[86] *REDA* created a new single Alberta Energy Regulator (AER) and section 21 of the Act states that the AER has *no* jurisdiction to assess the adequacy of Crown consultation.

On October 28, 2012, Alberta released a three page *Discussion Paper on First Nations Consultation* proposing a revised First Nation Consultation Policy. The Discussion Paper proposed four key ideas: the creation of a central consultation office; the introduction of a consultation levy on industry to support capacity funding for First Nations; a consultation matrix; and the forced disclosure of agreements negotiated between First Nations and industry. That Discussion Paper was closed for public comments on November 30, 2012 but the date was later extended to December 21, 2012 for First Nations input.

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[83] See *Treaty 8 First Nations of Alberta Annual Report 2009-2010* at 13, online: <http://www.treaty8.ca/images/t8fna%20annual%20report%202009-10.pdf>.

[84] The Position Paper (2010) is attached to this report as Appendix 3. The Treaty 8 website has several letters outlining the ongoing efforts of Treaty 8 regarding consultation, online: <http://www.treaty8.ca/Livelihood/Consultation/Government-Letters>.

[85] See for example, Swan River First Nation Consultation Policy, online: <http://swanriverfirstnation.org/files/2213/3901/3931/UPDATED_CONSULTATION_PACKAGE_FOR_COMPANIES.pdf>.

[86] Alberta OC 163/2013. This was the first of a three phase roll-out of the *REDA*, the second phase was on 30 November 2013 and the third phase was on 29 March 2014.

On April 2, 2013, Alberta released a Draft of The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013, as well as the associated Draft Corporate Guidelines for First Nations Consultation Activities, 2013 incorporating a Consultation Matrix (collectively "Draft Consultation Policy"). The government set a deadline of May 3, 2013 for public input on this policy, later extended to May 17, 2013. This Draft Consultation Policy was essentially an expanded Discussion Paper of which the one-page Consultation Matrix was the only substantive addition. It did not appear to reflect any prior or consequent input from First Nations or public comments on the Discussion Paper.[87]

In the meantime, on May 8, 2013 the government tabled Bill 22, the *Aboriginal Consultation Levy Act* which passed third reading on May 15, 2013. Notably this legislation was enacted *before the public's consultation period on the* Draft Consultation Policy closed. The *Aboriginal Consultation Levy Act* received Royal Assent on May 27, 2013.[88] The Act will come into force on proclamation.

Finally, on August 16, 2013, Alberta released *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013*,[89] as well as draft Corporate Guidelines for First Nations Consultation Activities, 2013 incorporating a Consultation Matrix (collectively "Consultation Policy").[90] There were very few changes between the Draft Consultation Policy and the final Consultation Policy.

The new Policy is not yet in force. The Aboriginal Consultation Office (ACO) was officially established on November 1, 2013 by way of government re-organization but it is not yet fully operational. The Alberta government's website states that "[w]hile an internal re-organization is undertaken, and until the ACO is fully established, applications will continue to be processed under [the Original Policy]."[91] Negotiations of the final *Corporate Guidelines for First Nations Consultation Activities, 2013* and the Consultation Matrix with First Nations and resource companies are ongoing and will, to our understanding, continue until April 1, 2014.

2.3 Alberta's Consultation Policy (2013)

The following comments address both the Policy itself and the draft Corporate Guidelines

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[87] See for example, Bob Weber, "Alberta's resources consultation plan for First Nations is more of the same, bands say", *The Globe and Mail* (10 April 2013), online: <http://www.theglobeandmail.com/news/politics/albertas-resources-consultation-plan-for-first-nations-is-more-of-the-same-bandssay/article11006274/>

[88] *Aboriginal Consultation Levy Act*, SA 2013, c A-1.2.

[89] *Supra* note 1.

[90] All three documents can be found online: <http://www.aboriginal.alberta.ca/1036.cfm>.

[91] See "Aboriginal Consultation Office Update" online: <http://www.aboriginal.alberta.ca/1.cfm>.

and Consultation Matrix, which outline Alberta's initial position pending negotiations with industry and First Nations. We discuss the draft guidelines and matrix as if they were adopted in their current form.

2.3.1 Policy Statement

The Policy states that Alberta will consult with First Nations on "decisions relating to land and natural resource management"[92] because the provincial mandate to manage and develop Crown lands and resources is subject to a legal and constitutional duty to consult First Nations and, where appropriate, accommodate their interests when Crown decisions may adversely impact their continued exercise of constitutionally protected Treaty rights. Treaty rights are defined as the right to hunt, fish, and trap for food, on unoccupied Crown lands and other lands to which First Nations members have a right of access for such purposes. Traditional uses are stated to be First Nation customs or practices on the land that are not Treaty rights. They include burial grounds, gathering sites, and historical or ceremonial locations and do not refer to proprietary interests in the land.

The purpose of the Policy is to reconcile First Nations' constitutionally protected rights with other societal interests with a view to substantially address adverse impacts on Treaty rights and traditional uses through a meaningful consultation process. Consultation is a process intended to understand and consider the potential adverse impacts of anticipated Crown decisions on First Nations' Treaty rights, with a view to substantially address them.

The duty to consult is triggered when: Alberta has real or constructive knowledge of a Treaty right, a decision relating to land and natural resource management is contemplated and that decision has the potential to adversely impact the continued exercise of a Treaty right. Consultation may reveal a Crown duty to accommodate First Nations. The primary goal of accommodation will be to avoid, minimize, or mitigate adverse impacts on Treaty rights or traditional uses and, where appropriate, accommodation will be reflected in the Crown's decision.

The Policy applies to strategic and project-specific decisions on provincial and affected federal Crown lands. Crown decisions that Alberta will assess for potential consultation include: provincial regulations, policies, and plans; and decisions on projects relating to oil and gas, forestry, and other forms of natural resource development. Crown decisions that Alberta will *not* assess for potential consultation will include: leasing and licensing of rights to Crown minerals; accessing private lands to which First Nations do not have a

[92] Policy, *supra* note 1 at 1. This "refers to provincial Crown decisions that directly involve the management of land, water, air, forestry, or fish and wildlife."

rights of access; policy matters unrelated to land and natural resource management and emergencies.

2.3.2 Consultation Office

The Policy anticipates the creation of a consultation office, as part of the provincial government reporting to the Minister of Aboriginal Affairs, to satisfy Alberta's duty to consult. The consultation office will manage all aspects of consultation, including:

- determining the need to consult;
- determining the depth of consultation;
- supervising consultation activities;
- determining the accommodation measures required; and
- determining whether Alberta has adequately met its duty to consult and accommodate.

Under the Corporate Guidelines and Consultation Matrix, project proponents will seek a Consultation Assessment by the consultation office as early as possible in the planning phase of an anticipated Crown decision. The consultation office will, within 10 working days of the receipt of adequate information, conduct a "pre-consultation assessment" to classify the potential effects of requested Crown actions or approvals on Treaty rights and traditional uses into one of three categories:

- Level 1 – no adverse impacts – no further action or notification is required;
- Level 2 – low impacts requiring consultation – ordinarily proponents will be delegated the procedural aspects of consultation as directed in writing by the ACO; and
- Level 3 – significant or permanent impacts which ordinarily means government-led consultation by the consultation office.

In the pre-consultation assessment, the consultation office will consider the following factors: magnitude, scope, timing, location, and duration of the proposed project; general availability of Crown land in the area for exercising Treaty rights or practising traditional uses; Treaty Land Entitlement negotiations and other information derived from First Nations or other government relevant information.

First Nations will receive written notification of Level 2 and 3 projects/activities and an initial response is due within 15 or 20 working days. If there is no response or if First Nations do not raise any concerns, consultation will be considered complete.

The consultation office will assess any First Nation's response and determine if consultation is required. If consultation is required, then a supervised consultation period of 20 (Level 2) to 45 (Level 3) working days will follow. This will involve the consultation

office or proponent engaging in a dialogue with the First Nation by way of telephone, email or in meetings. If a First Nation requests a meeting, the consultation party is strongly encouraged to comply. Once the proponent understands the nature of a First Nation's concerns, both parties are expected to work together to discuss potential strategies to avoid or minimize the impacts to Treaty rights and traditional uses, including amending project plans to accommodate site-specific concerns and to reduce or change the potential impact on areas used for exercising Treaty rights and traditional uses. If the parties agree to a mitigation strategy, the proponent will need to confer with the consultation office, which will then work with the regulatory authority to determine whether the proposed strategy could result in unintended regulatory complications. Proponents must thoroughly document consultation activities and First Nations are encouraged to do so as well.

After consultation, the proponent will submit its consultation records to the consultation office and the First Nation and request an assessment of adequacy by the office. The consultation office may also request First Nation consultation records. Using consultation records, the consultation office will determine the adequacy of Crown consultation before a Crown decision is made within 5 (Level 2) to 10 (Level 3) working days. Additional consultation directions may be given to the proponent in the event of inadequate consultation. Once adequacy is determined, the consultation office will inform the First Nation, proponent or consulting parties and the appropriate regulatory authorities about that determination.

The timelines may be extended if a proponent changes the project, the First Nation or other consulting parties provide information beyond the pre-consultation assessment and for regulatory matters. Alberta will also consult directly with First Nations, normally through the consultation office, when it is the proponent or it undertakes strategic initiatives with potential adverse impacts on Treaty rights and traditional uses.

Alberta acknowledges that some First Nations have developed their own consultation protocols and encourages proponents to be aware of these protocols, but it does not require proponents to comply with these protocols while consulting with First Nations. In cases of conflict between a First Nation's consultation protocol and Alberta's Policy, the Policy will prevail.

2.3.3 Alberta Energy Regulator

Alberta has established the Alberta Energy Regulator (AER). The AER has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of First Nations. The consultation office will work closely with the regulator to ensure that any needed consultation occurs for decisions on energy project applications within the regulator's mandate.

2.3.4 Consultation Capacity

Alberta will develop a program to increase consultation capacity funding to First Nations and will fund that program through a levy on industry. As discussed above in Section 2.2, Alberta enacted the *Aboriginal Consultation Levy Act* to implement this commitment. The consultation office will manage this fund. Alberta will solely fund government-led consultation for Crown projects.

2.3.5 Transparency of Process

The integrity of the consultation process depends on all parties knowing clearly at each step of a consultation what the costs of that consultation will be. The consultation levy and its resulting funding contribute to this transparency by increasing the consultation capacity of First Nations. The option of entering into agreements such as project impact benefit agreements is open for exploration between First Nations and proponents. One tool to maintain the integrity of the process is negotiation of a consultation process agreement between Alberta and a First Nation. Where a cooperative arrangement protecting the integrity of the consultation process cannot be developed, Alberta will rely on the compulsory disclosure process enabled by the *Aboriginal Consultation Levy Act*.

Part 3: Critique of Alberta's Approach to Consultation

Aboriginal consultation in Alberta after the new Policy will still be a frustrating, complicated, and expensive exercise despite government, industry, First Nations and public hopes.

It need not be so.

In this Part, we suggest that Alberta's new approach to consultation will make little or no difference and offer examples of some best practices that could be adopted in some fashion to bring about desirable changes. Our critique focuses on the following matters:

1. Policy Formulation.
2. Substance of the Consultation Policy.
3. Three novel aspects of Alberta's approach to consultation:
   a) the Aboriginal Consultation Office (ACO);
   b) the *Aboriginal Consultation Levy Act*; and
   c) the removal of the Alberta Energy Regulator's jurisdiction to consider the adequacy of Crown consultation.
4. Case study of potential change: Treaty 8 and the BC Oil and Gas Commission.

3.1 Policy Formulation

It is difficult to understate the damaging effect that the process of developing the new Policy has had on the already tenuous relationship between Alberta and First Nations. The formulation of the new Policy was procedurally troubling in several respects:

1. it was not a negotiated agreement as requested by the Alberta Treaty Chiefs in their Position Paper (2010);
2. Alberta's Discussion Paper was a brief and vague statement of intentions with a limited timeframe of one and a half months to receive and consider public input. It did not appear to reflect *any substantive negotiated input* from First Nations as expressed in the Position Paper (2010) and it was promptly rejected by First Nations;[93]
3. the Draft Consultation Policy was basically an expanded Discussion Paper which had an extremely tight deadline of one and half months for public comment, and First Nations comments on the Discussion Paper were not reflected in this important policy;

[93] See for example, "Alberta backs off consultation proposals after pushback from First Nations", *CTV News* (9 January 2013), online: <http://www.ctvnews.ca/canada/alberta-backs-off-consultation-proposals-after-pushback-from-first-nations-1.1107373>.

4. a central element of the new Policy, the *Aboriginal Consultation Levy Act* was passed *before the public consultation period* for the Draft Consultation Policy closed;
5. the passage of the *Aboriginal Consultation Levy Act* involved less than 9 hours of debate, and it occurred without any consultation with the affected First Nations and indeed in the face of opposition of the majority of Alberta First Nations;
6. there appears to be no variation between the ideas put forward in the Discussion Paper, and the contents of the Draft and final Consultation Policy,[94] to show consideration of First Nations' input; and
7. announcing a policy while leaving significant matters open for subsequent "negotiation," which in the past experience of First Nations would prove to be futile, is not honourable.

In short, Alberta appeared to have an idea as to what the Crown's duty to consult and accommodate required and was unvarying in that idea. Even though Alberta's draft Corporate Guidelines and Consultation Matrix are still under negotiation, this history of policy formulation suggests there will be little change to those drafts.[95]

In a *First Nation Roundtable on Alberta's Aboriginal Consultation Policy* organized by the Canadian Institute of Resources Law (CIRL) in November 2013 and attended by representatives of all three Treaty Areas in Alberta, we heard how frustrating Alberta's process of developing a consultation policy was to First Nations. While it is consistent with prior experience, First Nations participants described what they saw as the colonial, racist nature of the Policy as being "Round 2 of Paternalism." Particular emphasis was placed on Alberta's disregard of First Nations' input into the Policy. First Nations in Alberta are diverse and the responses to the Policy were equally diverse. There was a consistent theme, described by a participant in this way:

> First Nations are under regular government assault in all areas political and economic. This assault remains unchecked and unchallenged. The question becomes how do you want the assault to continue?

Attendees noted that some First Nations were boycotting negotiations on the Consultation Guidelines and Matrix. Other attendees described how the Treaty Associations and individual First Nations have been designing their own consultation protocols or policies. Finally, some First Nations said that they were tired of Alberta defining Treaty rights and suggested that First Nations should take control of activities by regulating developments on their traditional lands.

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[94] It should be noted that the Final Consultation Policy released on 16 August 2013 bore the date of 3 June 2013.

[95] See *supra* note 87.

As noted above,[96] we suggest that consultation with Aboriginal peoples about the formulation of a consultation policy that affects them is a legal requirement. However, and in any event, Alberta's process of developing a consultation policy that impacts First Nations[97] does not, in our view reflect the high ideals of the honour of the Crown, which the Supreme Court has most recently said in *Manitoba Métis Federation Inc. v. Canada (Attorney General)* (2013) governs *how* decisions are made in regards to Aboriginal peoples.[98]

3.2 Substance of the Consultation Policy

In this part, we look at the substance of the Policy. We first discuss the Treaty context of the duty to consult in Alberta, the decisions that trigger a duty to consult, the definition of the consultation process, and accommodation generally.

In our analysis we use legal methodologies to interpret the Policy. While it is true that policy documents are not legislation or agreements, the use of legal analysis is justified by noting that court cases in this area can follow policy.[99] Our critical assessment of Alberta's approach to First Nations consultation is based on an analysis of the judicial doctrine, on Alberta First Nations' concerns with the government's approach to consultation and their suggestions for change, and on a review of other Canadian jurisdictions' approaches to Aboriginal consultation. Every jurisdiction in Canada has an Aboriginal consultation "policy" instrument. The actual operation of those policies in the various jurisdictions is beyond the scope of this report. We have compared Alberta's Policy with each of them in an effort to find "best practices" that have been expressed elsewhere in Canada to inform current or future negotiations.[100]

3.2.1 Foundations Matter: The Misunderstanding of Treaty Rights

In their 2010 Position Paper,[101] Alberta's Treaty Chiefs insisted that the honour of the Crown and the Treaty relationship were the founding blocks of the duty to consult and

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[96] See Section 1.1.7 of this report.

[97] The *Consultation Policy* applies only to First Nations, there is a separate process under negotiation with Métis Settlements. From notes on the authors file.

[98] *Manitoba Métis*, *supra* note 56 at para 73.

[99] *Haida*, *supra* note 8, para 51. See: Section 1.1.6.

[100] Thanks is extended to Shayan Najib who contributed to this research in the Summer of 2013. A summary of those findings is attached as Appendix 4, including links to the policies of each jurisdiction to which reference can be made. As to "best practices" see definition in *Best Practices for Consultation and Accommodation*, Report to New Relationship Trust by Myers Norris Penny LLP (2009) at 3, online: <http://www.newrelationshiptrust.ca/downloads/consultation-and-accomodation-report.pdf>.

[101] Position Paper (2010), Appendix 3.

accommodate. They suggested that "any approach to consultation that is not grounded in the Treaty relationship cannot achieve the fundamental objective of reconciliation that has been called for by the Supreme Court of Canada".[102] They expressed grave concerns about the continued viability of Treaty rights and traditional ways of life in the face of resource development, urban growth and other forms of development in the province. For the Chiefs, respect for their Treaty rights was critical to the long-term survival of their culture, ways of life and the well-being of their communities.

However, they described "a pervasive sense of scepticism among our First Nations" resulting from the feeling that Alberta's leadership and officials did not understand the Treaties and lacked the political will to honour them.[103] Alberta's insistence on the need to "balance" First Nations' rights and concerns with the interests of the broader public resulted in a consistent trumping of the First Nations' Treaty rights. They attributed this to the fact that the 2005 Policy preceded the release of the *Mikisew Cree* case. The new Policy, released in 2013, cannot be excused in the same way.

The Alberta government's understanding of Treaty rights is impoverished. First, the notion that Treaty rights to hunt, fish and trap are restricted to <u>food</u> is erroneous. Alberta's interpretation appears to flow from the *minority* opinion in ***R. v. Badger*** (1996)[104] that Treaty 8 had merged with the *Natural Resources Transfer Agreement, 1930* (*NRTA*).[105] The *majority* opinion in *Badger* held that, as a promise of a means to earn a livelihood:

> Treaty No. 8, then, guaranteed that the Indians "shall have the right to pursue their usual vocations of hunting, trapping and fishing". The Treaty, however, imposed two limitations on the right to hunt. First, there was a geographic limitation. The right to hunt could be exercised "throughout the tract surrendered … saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". Second, the right could be limited by government regulations passed for conservation purposes.[106]

The geographic limitation in Treaty 8 was interpreted to allow hunting on all lands *not* taken up under the Treaty "and occupied in a way which precluded hunting when it was

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[102] *Ibid* at 3.

[103] *Ibid* at 4.

[104] *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324 at paras 2 & 7 [*Badger*].

[105] *Constitution Act, 1930*, RSC 1985, App II, No 25, Schedule 2. Paragraph 12 provided: "12. 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 game and fish 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." This had been interpreted as negating commercial hunting in return for an expanded territory outside of the surrendered lands, in *Frank v The Queen*, [1978] 1 SCR 95, 75 DLR (3d) 481 and *R v Horseman*, [1990] 1 SCR 901.

[106] *Badger*, *supra* note 104 at para 40.

put to a visible use that was incompatible with hunting."[107]

The majority *expressly rejected* the "merger and replacement" interpretation. Instead they said that Treaty rights, as the solemn promises of the Crown to First Nations, took precedence:

> Treaty No. 8 right to hunt has only been altered or modified by the NRTA to the extent that the NRTA evinces a clear intention to effect such a modification. …. Unless there is a direct conflict between the NRTA and a treaty, the NRTA will not have modified the treaty rights. Therefore, the NRTA language which outlines the right to hunt for food must be read in light of the fact that this aspect of the treaty right continues in force and effect.[108]

The *NRTA* did not modify the geographic limits in Treaty 8, other than by extending Treaty harvesting rights province-wide subject to those limits,[109] nor did it modify the limited purposes of provincial regulation of those rights, namely conservation of the supply of game.[110]

In *Mikisew*, the court noted that "the clause governing hunting, fishing and trapping cannot be isolated from the Treaty as a whole, but must be read in the context of its underlying purpose, as intended by both the Crown and the First Nations peoples."[111] That purpose was to ensure that "the same means of earning a livelihood would continue after the treaty as existed before it."[112] Further, discussing *Badger* it said, "*Badger* recorded that a large element of the Treaty 8 negotiations were the assurances of continuity in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation."[113] This is the proper interpretation of Alberta's numbered Treaties – the exercise of the rights to hunt, fish and trap was "a means of earning a livelihood,"[114] and that livelihood was and remains interwoven in the distinctive cultures of Alberta First Nations including, among others, harvesting and gathering rights for fuel, medicinal plants, and food such as berries, roots; the right to exercise traditional practices including, governance, ceremonial, spiritual, education practices; and the right to transmission of their language and culture to succeeding generations.

Second, like its predecessor, the 2013 Policy maintains an artificial distinction between Treaty rights and traditional uses. What Alberta calls "traditional uses" are defined as "customs and practices on the land that are not existing section 35 Treaty rights but are nonetheless important to First Nations," including the use of lands for burial grounds,

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[107] *Ibid* at para 58.
[108] *Ibid* at para 47 [emphasis added].
[109] *Ibid* at para 66.
[110] *Ibid* at paras 69-73.
[111] *Mikisew*, *supra* note 13 at para 29.
[112] *Ibid* at para 30.
[113] *Ibid* at para 47.
[114] *Ibid* at paras 47-48.

gathering sites and historical or ceremonial locations.[115] The suggestion that traditional uses such as the use of lands for gathering or for religious and ceremonial uses are not protected by section 35 as Treaty rights is legally questionable. These uses are actually part and parcel of Treaty rights to a culture and to a way of life. This is an artificial, made-in Alberta distinction which has negative ramifications, particularly when regulators make decisions about impacts of proposed projects on traditional uses rather than Treaty rights.[116]

Finally, the Policy restricts the duty to consult to these decisions that may adversely impact "the continued exercise of a treaty right." This restricted view of the scope of Treaty rights is also evident in the Policy's statement that the depth of consultation will be influenced by "the degree to which First Nations have used the affected lands and resources for the exercise of Treaty rights and traditional uses and continue to do so today."[117] These statements appear to limit Treaty rights to those that are currently exercised and presumably to specific locations, without taking into account the continued erosion of these rights over time. Presumably, the Treaties protect the opportunity to exercise the rights guaranteed by Treaty in perpetuity. If development occurs on lands which were extensively used for the practice of Treaty rights, and are no longer available, First Nations may need to shift their land-use patterns in response to current development. The government needs to consult First Nations on the use of lands which are not being used currently. This is consistent with *Mikisew*'s requirement that the process of "taking up" lands allowed under the Numbered Treaties, i.e. transferring lands from a category where Treaty rights may be exercised to lands where those Treaty rights cannot be exercised, can only take place honourably by way of consultation.

No other jurisdiction adopts Alberta's narrow definition of Treaty rights. No other jurisdiction defines "traditional uses" as non-Treaty rights.

Manitoba, a prairie province wholly subject to Numbered Treaties, in its policy refers throughout to Treaty rights and defines them as "rights established in an agreed Treaty between the Crown and a group of Aboriginal peoples and include the right under paragraph 13 of the *Manitoba Natural Resources Transfer Agreement* of First Nations' members to hunt, trap and fish for food at all seasons of the year on unoccupied Crown land and other land to which they have a right of access."[118]

Saskatchewan, another prairie province wholly subject to Numbered Treaties, does *not* make this distinction in its policy.[119] Rather as the only other policy than mentions

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[115] Policy, *supra* note 1 at 1.

[116] See Section 3.5.3 below regarding the *Devon* decision.

[117] Policy, *supra* note 1 at 5 [emphasis added]. This is *not* the case in the Federal Policy at 48 where past uses are considered.

[118] Manitoba Policy at 1. The definition of Treaty Rights is at 6.

[119] Saskatchewan Policy at 5. Treaty rights are not narrowly defined.

"traditional uses" it does so *in addition* to Treaty rights, Aboriginal rights and Métis rights.

Alberta's narrow definition of Treaty rights and distinction between Treaty rights and "traditional uses" is a misinterpretation of what the Supreme Court has said in *Badger* and *Mikisew*. This is an ongoing frustration for First Nations and must be corrected.

3.2.2 Matters for Consultation: The "Trigger List"

Alberta will consult with First Nations on decisions relating to land and natural resource management, which refers to provincial Crown decisions that directly involve the management of land, water, air, forestry, or fish and wildlife.

Strategic Decisions

The Policy applies to strategic and project-specific Crown "decisions" that may adversely impact Treaty rights and traditional uses.[120] Application of the consultation process to strategic decisions is notionally good, as it goes beyond project-specific decisions and potentially encompasses higher level actions and decisions, such as land and resource use planning, regulations and policies.

In line with the view that consultation must occur *early* in the consultation process, the judicial doctrine calls for a broad range of decisions to be subject to consultation and accommodation, including high level planning activities. In *Haida*, the Supreme Court found that "decisions made during strategic planning may have potentially serious impacts on Aboriginal rights and title", and that "if consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences".[121] In *Carrier-Sekani*, the Court repeated its view that:

> […] government action is not confined to decisions or conduct that have an immediate impact on lands and resources. […] Thus the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights".
>
> […] high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on the land and resources" […] This is because such structural changes to the resource management may set the stage for further decisions that will have a *direct* adverse impact on land and resources.[122]

Alberta lists the strategic decisions subject to the Policy as "provincial regulations, policies

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[120] Policy, *supra* note 1at 2.

[121] *Haida*, *supra* note 8 at para 76.

[122] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 44 & 47 [*Carrier Sekani*].

and plans."[123] However the Policy does not define what *strategic consultation* means: this is left to be done in upcoming operational guidelines.[124]

First Nations have criticized Alberta for failing to consult them adequately on the development of provincial land-use strategies[125] such as the Land-Use Framework, and of regional plans such as the Lower Athabasca Regional Plan (LARP), which became law on September 12, 2012.[126] In August 2013,[127] five of the First Nations whose reserves and traditional lands are located within the Lower Athabasca Region filed requests for review of the LARP with the government.[128] The First Nations allege that LARP in its current form does not protect the First Nations' Treaty and Aboriginal rights, traditional land uses, use and enjoyment of reserve lands, and culture. These requests for review will be considered jointly by one review panel which is yet to be appointed by the Stewardship Minister.[129] First Nations have also been critical of the provincial consultation approach with respect to other policies such as the Wetlands Policy and the Bio-diversity Policy both of which have not progressed since September 2012.

In other jurisdictions, Manitoba applies its Policy to "any proposed provincial law, regulation, decision or action,"[130] Quebec's Policy applies to "drafting statutes and regulations, administrative decisions as well as activities ensuing therefrom."[131] New

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[123] Policy, *supra* note 1 at 3.

[124] *Ibid* at 2. The reference to "operational guidelines" is presumably to the renamed draft Corporate Guidelines. The earlier Draft Consultation Policy of April 2013 included Draft Operational Guidelines. This sloppiness is notable throughout the Consultation Policy and another example is the release on August 13 of the Consultation Policy bore the date of 3 June 2013.

[125] Alberta's regional planning legislation is the *Alberta Land Stewardship Act*, SA 2009, c A-26.8 [*ALSA*]. Under *ALSA*, Alberta is divided into 7 Regions named for the prominent watersheds in each region: Lower Peace; Upper Peace; Lower Athabasca; Upper Athabasca; North Saskatchewan; Red Deer; and South Saskatchewan. The Regional Plans are binding on municipalities and provincial government departments. To date only the LARP has been approved by Cabinet.

[126] Position Paper (2010), Appendix 3 at 5. Alberta was criticized for imposing a consultation approach on the First Nations, and for ultimately ignoring the First Nations' input in formulating LARP. LARP was referenced in the Dover/Brion decision with negative consequences for the Fort McKay First Nation: see Section 3.5.3 below.

[127] Pursuant to the one year limitation period in s 19.2 of *ALSA*.

[128] These are: the Athabasca Chipewyan First Nation, the Mikisew Cree First Nation, the Cold Lake First Nations, the Onion Lake First Nation, and the Fort McKay First Nation and Fort McKay Métis Community Association.

[129] Copies of the requests for review can be found on the Alberta Government's website: <https://landuse.alberta.ca/RegionalPlans/LowerAthabascaRegion/Pages/LARPRequestsforReview.aspx>.

[130] Manitoba Policy at 1.

[131] Quebec Policy at 4: "The guide applies to activities related to planning and to drafting statutes and regulations, administrative decisions as well as activities ensuing therefrom and that may affect the rights and interests claimed by certain Aboriginal communities, such as the development of the territory and natural resources."

Brunswick,[132] Saskatchewan,[133] and Canada's Federal Policy have extensive trigger lists[134] that include strategic decisions.[135]

There appears to be a general agreement among various consultation policies that "strategic consultation" includes at a minimum, in the words of Alberta's Policy, "provincial regulations, policies and plans." Other jurisdictions however *do elaborate on the consultation process* beyond Alberta's bare assertion. For example, the bulk of the Federal Policy contains detailed guidelines as to how government departments can design and implement consultation processes[136] and British Columbia's Policy clearly spells out consultation processes for strategic consultation.[137] These policies should be referenced in future negotiations.

Mineral Rights

The "Leasing and licensing of rights to Crown minerals" is expressly excluded from the matters subject to the Policy,[138] which narrows the scope of strategic decisions subject to the Policy. In this respect, the 2013 Policy continues the Original Policy where the 2007 Guidelines specifically stated that First Nations would not be consulted prior to the disposition of mineral rights, as "the leasing of Crown mineral rights does not, in and of itself, adversely impact First Nations Rights and Traditional Uses."[139]

In their 2010 Position Paper, the Alberta Treaty Chiefs pointed out that the granting of tenures/mineral dispositions is a key stage in strategic planning, since once a tenure has

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[132] New Brunswick Policy at 3. This list includes: "*Regulations, Policies, Plans and Procedures* – The creation, amendment or implementation of regulations, policies or procedures, including strategic and operating plans, which may negatively impact the traditional use of Crown land and resources or the way a right is exercised."

[133] Saskatchewan Policy at 5-6: "*Legislation, Regulation, Policy and Strategic Plans* – Creating a new or amended piece of legislation, regulation, policy or strategic plan that may have the effect of limiting or altering the use of Crown lands and renewable resources."

[134] Federal Policy at 11. The Consultation Directive accompanying Guiding Principle No 1 gives a non-exclusive list as to examples of federal crown activities that may require consultation, including a "change in regulation or policy that may restrict land use". Notably the Policy includes as an example of strategic consultation "any structural or organizational changes that reduce the Crown's oversight and decision-making ability" at 20.

[135] Policies in other provincial jurisdictions are silent in this regard or do not distinguish strategic decisions from Crown actions/approvals/operational decisions. See Appendix 4.

[136] Federal Policy at 17-48.

[137] BC Policy at 9-20. Given the paucity of Treaties in British Columbia, the government recognizes that land and resources decisions will invariably invoke consultation (at 8).

[138] Policy, *supra* note 1 at 3.

[139] Old Guidelines, *supra* note 78, Part III: The Department of Energy's First Nations Consultation Guidelines at 8.

been granted, there is an expectation on the part of the purchaser or disposition holder that development will be permitted. They observed that British Columbia is one jurisdiction where consultation takes place prior to the grants of tenure/sale of lands.[140]

We would argue that First Nations *ought* to be consulted at the stage of issuance of mineral leases and licenses, which signals that areas may be subject to potential development, before energy development projects are even conceived and proposed. This is not unprecedented in Alberta. Under the *Metis Settlement Act*[141] the Métis Settlement Accord included a Co-Management Agreement[142] under which the provincial government maintained title to mineral interests under Métis Settlements but would cooperate with the Métis Settlements in leasing mineral rights.[143]

Early consultation at the leasing stage would expedite development in areas where First Nations indicate that they do not object to development. It would also advance the partnership in development that First Nations are calling for and the certainty that industry is seeking. As noted by the Courts, early consultation does not result in a "veto" on development by First Nations, but in our view the earlier the consultation the better in order to avoid subsequent disagreement once industry has committed time and effort to project development in those areas.

Some jurisdictions do direct Aboriginal consultation in the granting of mineral rights, for example New Brunswick's Policy trigger list.[144] Manitoba's Policy does not make a distinction, nor does Quebec's Policy, and only Saskatchewan's Policy is similar to Alberta's Policy.[145] Other policies are silent on this matter.

We would suggest that consultation on mineral dispositions in certain "core areas" of traditional territories where First Nations exercise Treaty harvesting rights and around First Nation Reserves may be a reasonable compromise in negotiations. As discussed below in Section 3.6, this is one of the features of the Consultation Process Agreements negotiated

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[140] Position Paper (2010), Appendix 3 at 11.

[141] RSA 2000, c M-14 [*MSA*].

[142] Attached as Schedule 3 to the *MSA*.

[143] The details of this procedure are outlined at 15-18 in David Laidlaw & Monique M Passelac-Ross, *Sharing Land Stewardship in Alberta: The Role of Aboriginal Peoples*, CIRL Occasional Paper #38 (Calgary: CIRL, 2012), online: <http://dspace.ucalgary.ca/bitstream/1880/48941/1/CoManagementOP38w.pdf>. See also: "Co-Management Agreement Summary", online: <http://www.aboriginal.alberta.ca/973.cfm> (accessed 17 March 2014).

[144] New Brunswick Policy at 3: "Resource Management – Licensing, leasing, permitting or regulating access to fish, wildlife, forests, minerals or other Crown resources." [Emphasis added.]

[145] Saskatchewan Policy at 6: "issuance of mineral dispositions … is not subject to this policy. These dispositions do not provide the disposition holder with a right of access to lands for purposes of mineral exploration and development."

between First Nations and the BC Oil and Gas Commission in the Treaty 8 area in northeast BC.

Cumulative Impacts

The Policy makes no mention of the issue of cumulative impacts of projects,[146] which is a major concern for First Nations and has been high on the list of issues that they have brought forward repeatedly during legal challenges,[147] regulatory proceedings and in consultation processes.[148] Ideally, the issue of the cumulative impacts of resource developments should be dealt with at the strategic level of land-use planning. Steven A. Kennett has written extensively on the need to deal with cumulative environmental effects at the strategic level, arguing, among other things, that government should take a pro-active role in cumulative effects management and that current environmental assessment models are inadequate.[149] Alberta claims to be "committed to manage the cumulative effects of development on air, water, land and biodiversity at the regional level."[150] This is to be implemented through regional planning. However, Alberta has failed to develop criteria, methods and thresholds for assessing the direct and cumulative impacts of development. This is one of the failures of the LARP noted in the First Nations' requests for review of the LARP mentioned earlier in this section.

As noted above, policies in other jurisdictions commonly direct Aboriginal

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[146] An accessible description of cumulative impacts is contained in Richard R Schneider, *Alternative Futures: Alberta's Boreal Forest at the Crossroads* (Edmonton: Federation of Alberta Naturalists & Alberta Centre for Boreal Research, 2002) Ch 5 at 63-81. Development has continued unchecked since 2002.

[147] The Beaver Lake Cree Nation claims that the cumulative effects of development in its traditional territory has deprived its members of any meaningful Treaty No 6 harvesting rights. In *Lameman v Alberta*, 2012 ABQB 195, 66 Alta LR (5th) 136, pleadings respecting some 19,000 authorizations were struck on the basis, among others, that the resultant litigation would be unwieldy at paras 66-67. (Statement of Claim, online: <http://www.raventrust.com/media/beaverlakecree/blcnstatementofclaimsmall.pdf> (accessed 15 March 2014)).

[148] The 2010 Position Paper, Appendix 3, identifies the following two concerns in Appendix A: 10) Consultation occurs on a project-by-project basis, devoid of critical information about cumulative impacts on First Nations' rights; and 11) Consultation rarely, if ever, occurs at the strategic planning stage.

[149] Steven A Kennett, *Towards a New Paradigm for Cumulative Effects Management*, CIRL Occasional Paper #8 (Calgary: CIRL, 1999), online: <http://dspace.ucalgary.ca/bitstream/1880/47201/1/OP08Cumulative.pdf>; *Integrated Resource Management in Alberta: Past, Present and Benchmarks for the Future*, CIRL Occasional Paper #11 (Calgary: CIRL, 2002), online: <http://dspace.ucalgary.ca/bitstream/1880/47198/1/OP11Benchmarks.pdf>; *Integrated Landscape Management in Canada: Getting from Here to There*, CIRL Occasional paper #17 (Calgary: CIRL, 2006), online: <http://dspace.ucalgary.ca/bitstream/1880/47192/1/OP17Landscape.pdf>; and *Closing the Performance Gap: The Challenge for Cumulative Effects Management in Alberta's Athabasca Oil Sands Region*, CIRL Occasional Paper #18 (Calgary: CIRL, 2007), online: <http://dspace.ucalgary.ca/bitstream/1880/47191/1/OP18Athabasca.pdf>.

[150] Alberta Government, Land Use Framework, *Response to Aboriginal Consultation on the Lower Athabasca Regional Plan* (June 2013) at 17, online: <https://www.landuse.alberta.ca/Pages/default.aspx>.

consultation on strategic matters such as land use planning with a detailed process of consultation. We would recommend consideration of those policies in any negotiations.

One policy we do *not* recommend following is Saskatchewan's Policy, as it is the one policy that attempts to restrain Aboriginal consultation on cumulative impacts. This limitation is not expressed so boldly, rather it is in the interaction of several policy statements. Saskatchewan "does not consider the duty to consult to be retroactive and therefore will not consult on decisions it made in the past."[151] Accordingly if the decision or disposition, e.g. Crown mineral lease allows for renewal or extension, there is no consultation. Other circumstances, including the transfer of an existing disposition, will only require consultation if there are "new adverse impacts."[152] Alberta's Old Guidelines, which still apply pending the adoption of new Corporate Guidelines, were even more restrictive, as they did not allow for consideration of any new adverse impacts in any situation.[153] Notably, the Federal Policy does direct consideration of whether current activities require consultation in the context of cumulative impacts.[154]

Other Policies and Emergencies

Alberta's Policy also expressly excludes: policy matters unrelated to land and natural resource management[155] and emergency situations.[156]

Other Jurisdictions: Policies in most other jurisdictions direct Aboriginal consultation as a matter of "good governance" for example in the Federal Policy[157] and Manitoba's Policy;[158] and "other policy" reasons in Saskatchewan's Policy,[159] Ontario's Policy,[160] and Nova Scotia's Policy.[161] Notably the Federal Policy notes that "[t]he Crown *may*, for policy

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[151] Saskatchewan Policy at 6.

[152] *Ibid* at 11.

[153] Old Guidelines, *supra* note 78, Part III: The Department of Energy's First Nations Consultation Guidelines at 8.

[154] Federal Policy at 36-37.

[155] In this regard, we note that First Nations we heard from at the Roundtable expressed concerns that resources for policy analysis from an Aboriginal perspective were lacking.

[156] Policy, *supra* note 1 at 3. The other exclusion is "Accessing private lands to which First Nations do not have a right of access for exercising their Treaty rights and traditional uses." One contentious area in this regard is harvesting rights on grazing leases and the as yet, undetermined status of grazing leases as "private property", see for example *R v Martin*, 2008 ABQB 29, 436 AR 174; 90 Alta L Rev (4th) 305.

[157] Federal Policy at 5.

[158] Manitoba Policy at 5.

[159] Saskatchewan Policy at 16.

[160] Ontario Policy at 3, albeit in a limited undertaking to develop "engagement practices".

[161] Nova Scotia's Policy at 3 such as "high levels of public or community interest, seeking information that may improve decisions, reconciliation and relationship-building with First Nations, avoiding regulatory delays, business climate issues, federal requirements for areas with shared/overlapping responsibilities, etc."

reasons, seek to address these related interests" including circumstances where the Crown has determined there is no duty to consult.[162] We suggest this omission undermines Alberta's already contentious relationship with First Nations.

Alberta's omits consultation in emergencies but other jurisdictions have included some Aboriginal consultation in emergency situations for example under: Quebec's Policy,[163] Saskatchewan's Policy,[164] and Manitoba's Policy[165] which notably talks of considering "consultation [as] warranted once the urgency or emergency has been resolved."[166]

Legislation

Other jurisdictions direct Aboriginal consultation on proposed legislation that potentially affect Treaty and Aboriginal rights for example: Manitoba's Policy directs consultation on "any proposed provincial law",[167] and Quebec's Policy applies to "activities related to planning and to drafting statutes."[168] In *R. v. Lefthand*, the Alberta Court of Appeal has ruled that there is no legal duty to consult First Nations in legislative formulation.[169] We note however, that there is no legal impediment to *exceeding* the legal requirement for consultation in the spirit of the honour of the Crown, the Treaties and reconciliation especially when dealing with legislation affecting First Nations and Métis peoples.

3.2.3 Definition of the Consultation Process

Alberta's approach to consultation does not embody a purposive approach to consultation, namely the reconciliation called for by the Courts.[170] In our view, and in First Nations' view, this is not enhanced by the limited definition of consultation in the Policy:

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[162] Federal Policy at 21. Examples are cited, including Aboriginal hunting rights giving rise to a declaration of wildlife conservation zone, accommodation measures including development measures and claims negotiations where an Aboriginal interest is expressed in surplus federal lands that are being disposed of.

[163] Quebec Policy at 14.

[164] Saskatchewan Policy at 7 "if time permits".

[165] Manitoba Policy at 4.

[166] *Ibid*.

[167] Manitoba Policy at 1.

[168] Quebec Policy at 4.

[169] 2007 ABCA 206, leave denied [2007] SCCA No 468 at para 38 [*Lefthand*]: "There can however be no duty to consult prior to the passage of legislation, even where aboriginal rights will be affected." *per* Slattery JA. See also: *Treaty Eight First Nations v Canada (Attorney General)*, [2003] 4 CNLR 349 (FCT) and *Hupacasath First Nation v Canada (Foreign Affairs)*, 2013 FC 900.

[170] See Purpose of the Duty, Section 1.1.2 of this report.

> Consultation is a process intended to understand and consider the potential adverse impacts of anticipated Crown decisions on First Nations' Treaty rights, with a view to substantially address them.[171]

First, the definition only deals with Treaty rights and while we have argued that Treaty rights, properly understood, include what Alberta calls "traditional uses", this omission may be notable, although other sections in the Policy include application to traditional uses.[172] Second, while consultation is a "process", the implication of the definition and First Nations' prior experience[173] is that this is a *one-way process* where First Nations are consulted merely as a matter of procedural hurdles on the way to development approval. Alberta's policy does state that "Alberta will solicit, listen carefully to, and seriously consider First Nations' concerns with a view to substantially address potential adverse impacts",[174] but absent written reasons explaining *what concerns were considered and how they were dealt with*, this is difficult to measure. Further, Alberta's Consultation Matrix does not consider the information from the consultation process as elevating the level of consultation required i.e. from Level 2 to Level 3, it merely says that further time for consultation at the designated level *may* be required.

Other Jurisdictions: The example of policies in other jurisdictions is salutary. For example, the Yukon's Umbrella Final Agreement (1993) and most recent Land Claim Settlement Agreements define consultation as follows:

> "Consult" or "Consultation" means to provide:
> (a) to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
> (b) a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and
> (c) full and fair consideration by the party obliged to consult of any views presented.[175]

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[171] Policy *supra* note 1 at 1.

[172] For example in Policy Application at 2. This may just be an oversight, although the question remains: will Alberta consult on impacts to traditional uses only, i.e. no Treaty rights impacted?

[173] The First Nations we have talked to have noted that in the past, their input was seen as going into a black-hole at the government with no response forthcoming, changes in government personnel requiring re-education on the issues, little evidence of any consideration of their views in the resulting decisions, let alone written reasons justifying or explaining why their views were disregarded. See also Position Paper (2020), Appendix 3 at 5.

[174] Policy *supra* note 1 at 4.

[175] Yukon Policy at Chapter 1 at 2. This definition has become common in Land Claim Settlement Agreements, for example in the *Gwich'in Comprehensive Land Claim Agreement* (1992) Chapter 2 definition and more recently the *Maa-nulth First Nations Final Agreement* (2009) at 283-284. These are available online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca>; and Mary C Hurley, *Settling Comprehensive Land Claims*, Library of Parliament Background Paper PRB 09-16-E (Ottawa: Supply & Services, 2009), online: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0916-e.pdf>.

British Columbia's Policy emphasizes the *iterative nature* of consultation where an exchange of views can result in new additional considerations or changes to the depth of consultation.[176] This is also recognized in Ontario's Policy,[177] Saskatchewan's Policy,[178] and the Federal Policy.[179]

We would suggest that an expanded definition of consultation along the lines of the Umbrella Final Agreement, with the iterative language from British Columbia and the recognition that consultation may change the level of consultation, should be included.

3.2.4 The Understanding of Accommodation

As stated above,[180] the Crown's duty to consult with Aboriginal peoples includes a duty to accommodate and that duty cannot be delegated to third parties. The Policy describes the goal of accommodation as avoiding, minimizing or mitigating adverse impacts, and states that accommodation will be "assessed on a case-by-case basis and applied when appropriate."[181]

In the 2005 Policy, Alberta chose to delegate the "procedural aspects" of the duty to consult to project proponents, primarily private industry. However, as pointed out by the Treaty Chiefs, it was not only the procedural aspects of consultation that were being delegated, but the substantive aspects as well. Alberta basically relied on proponents to propose mitigation measures in the guise of accommodation and it failed to recognize and implement its duty to accommodate.[182]

The 2013 Policy anticipates that the ACO will carry our government-led consultation for Level 3 consultation, "with support from appropriate provincial departments" and the possible participation of proponents.[183] Remember that Level 3 consultation involves strategic-level decisions and activities or projects that may result in significant or permanent impacts on Treaty rights or traditional uses. Presumably, the duty to accommodate the concerns of First Nations in those cases is at the high end. However, neither the Policy nor the Corporate Guidelines or Matrices address the types of

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[176] BC Policy at 9. "The phases and steps help identify the key elements of the consultation process; however, *consulting is an iterative process* that may entail going back and forth between phases as circumstances dictate."

[177] Ontario Policy at 8.

[178] Saskatchewan Policy at 12.

[179] Federal Policy at 52.

[180] See The Duty to Accommodate, Section 1.1.5 of this report.

[181] Policy, *supra* note 1 at 2 & 4.

[182] Position Paper (2010), Appendix 3, Appendix A, under 4 & 5.

[183] Policy, *supra* note 1 at 6.

accommodation measures that may be offered.

For Level 2 consultation, the ACO will continue to delegate the procedural aspects of consultation to proponents. Proponents are expected to develop potential mitigation strategies to minimize and avoid adverse impacts and to implement these measures as directed by government.[184] The government looks at mitigation measures identified by proponents as an integral part of the accommodation that may be owed to First Nations.

The Policy does not elaborate on the types of accommodation measures or "mitigation strategies" that will be considered by Alberta. In our view, this is a significant flaw. In some cases, accommodation can only come from governments, for example designating replacement reserves or wilderness preserves. Proponents may advance some accommodation proposals, but given their lack of authority to provide Crown-only accommodation measures and Alberta's hands-off attitude, let alone the Federal Government's withdrawal from consultation processes in Alberta, those measures are necessarily limited. This not only imposes greater costs on industry proponents to get agreements, but it also distorts the real concerns of First Nations.

In the 2010 Position Paper, First Nations had put forward a list of types of accommodation measures that were acceptable to them. These included rejecting, amending or delaying projects, developing specific information requirements within the regulatory review process, negotiating impact-benefit agreements, including First Nations in revenue-sharing, developing various forms of mitigation with First Nations' input, compensating for adverse impacts or infringements of their rights, and negotiating other forms of agreements related to resource development.[185]

Other jurisdictions: Other policies include whole sections on Accommodation, including Quebec,[186] Newfoundland[187] and most notably the Federal Policy which elaborates on the government's role in providing and assessing the adequacy of accommodation.[188] The Federal Policy lists examples of accommodation measures that may be negotiated with First Nations: *mitigation* by making changes to the project to reduce or avoid impacts, *regulation* by imposing terms in a Crown authorization, *proponent agreements* to reduce impacts that are enforceable by the Crown, and *compensatory measures* including, among others, "habitat replacement; providing skills, training, or employment opportunities for members of the Aboriginal group; land

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[184] *Ibid*.

[185] Position Paper (2010), Appendix 3 at 28-29.

[186] Quebec Policy at 12. Notably it includes participation of Aboriginal peoples in environmental monitoring.

[187] Newfoundland Policy at 3-4. Notably the project proponent will bear all the cost of consultation, accommodation and compensation for First Nations.

[188] Federal Policy at 53-55.

exchanges; impact-benefit agreements; or cash compensation."[189]

The BC Policy describes a variety of accommodation measures, including, "mitigation; proposal modification; commitments to take other action; a spectrum of land protection measures; and impact monitoring."[190] It notes that project proponents may be in a better position to modify projects in this way but notes that in certain situations, economic or financial accommodations may be required.[191] First Nations' input into accommodation measures is required and good faith efforts to reach an agreement are mandated, but it does not necessarily require agreement from First Nations on those measures as the government retains decision-making powers. Notably, even if agreement is reached between a proponent and First Nation on accommodation, the Crown must still consider the adequacy of that accommodation.

3.3 Aboriginal Consultation Office (ACO)

In this part we discuss, the centralization of Aboriginal consultation into one office, the propriety of the province determining its own adequacy of crown consultation and particulars of the determinations under the Policy, Corporate Guidelines and Matrix with a view to providing alternatives.

3.3.1 Centralization

The centralization of Aboriginal consultation into the Aboriginal Consultation Office (ACO) is a *good* step, subject to concerns as to the process that it will administer and the resources devoted to that exercise. As we noted above, the ACO was formally established by way of a government reorganization on November 1, 2013.[192]

The Original Policy and most other jurisdictions have a distributed model where generally speaking Aboriginal consultation is at the departmental or agency level responsible for decision making.[193] The conflict between departmental objectives and First Nation priorities is an inevitable concern, as is the consistency called for in satisfying the

[189] Federal Policy at 53.
[190] BC Policy at 6, 17-18.
[191] BC Policy at 18.
[192] See *supra*, Section 2.3.2.
[193] Saskatchewan has government led consultation. See Appendix 4.

provincial Crown's fulfillment of the duty to consult.[194] First Nations have in the past criticized this aspect of Aboriginal consultation.[195]

3.3.2 Missed Opportunity

In *Haida* the Supreme Court advocated for a regulatory scheme to avoid recourse to the Courts.[196] We see Alberta's choice of a policy and in particular the creation of the ACO as a missed opportunity to be one of the first to establish a regulatory scheme for consultation.[197] There are existing models in Alberta for a regulatory scheme with appeal mechanisms, such as the Environmental Appeal Board (EAB)[198] that could be adapted to assess the adequacy of Crown consultation. We would suggest that recourse to a binding appeal mechanism of that nature would be rare but it would impose discipline on Alberta and the ACO to take its consultation obligations seriously.

First Nation's experience in the past has been to the contrary, and a regulatory scheme for Crown consultation would have been a major step forward in the goal of reconciliation and mending Alberta's relationship with First Nations.

3.3.3 ACO Capacity Concerns

The channelling of consultation through the ACO may have unintended negative consequences. In particular, lack of government capacity may hamper the processing of projects and create a backlog of projects awaiting direction from the ACO. These capacity concerns may be alleviated by a number of mechanisms, such as hiring outside consultants[199] or additional employees, but this is dependent on adequate government funding and resources.[200]

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[194] Federal Policy at 12, says "Departmental and agency approaches to consultation should integrate, to the extent possible, the fulfilment of consultation obligations with departmental policy objectives and with other overarching government policy objectives." See Appendix 4.

[195] Position Paper, Appendix 3 at 16.

[196] *Haida*, *supra* note 8 at para 51.

[197] In practice at least, in Alberta a regulatory scheme regarding Métis Settlements applies to exploration licenses, see *supra* note 142.

[198] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, Part 4.

[199] We understand that Alberta has engaged consultants to undertake the negotiations on the Corporate Guidelines and Matrix (Private communications with the authors).

[200] In s 4(3) of the *Aboriginal Consultation Levy Act*, the Minister may only use the funds generated by that levy to give grants or "to pay the costs of administering this Act." The ACO will manage the Fund under

3.3.4 ACO Communications

The Policy and the courts have emphasized the necessity for a "meaningful consultation." Given the primacy of communication in meaningful consultation, the standards governing the ACO deserve attention. The Policy, Corporate Guidelines and Matrix refer to communications by the ACO in several places in divergent manners.

One deficiency is the lack of *any reference to guidance for First Nations* and more generally to direct communications between the ACO and First Nations in the consultation process. In contrast, the ACO will *direct* proponents in Level 2 consultations,[201] *guide* the proponents in how to support the ACO in [Level 3] consultation,"[202] *confer* with the proponent on mitigation strategies agreed to by First Nations[203] and give *further direction* to the proponent if consultation is insufficient.[204] Other policies, for example the Federal Policy,[205] do direct guidance for First Nations. Any effort to present the ACO as a "neutral party" in its role of assessing the adequacy of consultation may be undermined by the ACO's close relationship with proponents and the apparent lack of communication with First Nations.

Secondly, while reporting ACO decisions in writing to First Nations and proponents is required under the Consultation Guidelines (aside from Level 1 Consultations), there is no requirement as to the format of such writings.[206] This is a needlessly risky practice, for example, proving that the "process was reasonable" for the ACO may be more difficult in judicial review proceedings. Other policies direct consideration of written communication with explicit requirements to list First Nations' concerns, how the decision has addressed them and why. This is the case with the BC Policy[207] and the Federal Policy.[208]

Other deficiencies include the lack of directions regarding translation services where necessary.[209] The Corporate Guidelines request proponents for Level 2 to notify First Nations without requiring confirmation that notification was received, as is the case for

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the Policy, but aside from the management of the fund, other operations of the ACO would be dependent on general revenues.

[201] Corporate Guidelines at 2.

[202] Policy at 6.

[203] Corporate Guidelines at 3.

[204] Corporate Guidelines at 4.

[205] Federal Policy at 51. In contrast, Old Guidelines, *supra* note 78, Part III: The Department of Energy's First Nations Consultation Guidelines, at 5-8 was devoted to programs supporting First Nations consultations.

[206] Policy at 6-7.

[207] BC Policy at 17-19: "For middle to deep consultation processes, consider articulating the reasons for decision, including what accommodation, if any, has been deemed appropriate."

[208] Federal Policy at 43. Deep consultation involves providing written reasons. This is assisted by the Issue Tracking Table which is continually updated through consultation: see at 52.

[209] Federal Policy at 49 (as a "support"), Quebec Policy at 11 (main language is English), Manitoba at 4, and Saskatchewan Policy at 6.

Level 3 consultations.[210] The Initial Engagement section speaks of a dialogue where "discussions may be done over the telephone, by email, or in person,"[211] with no mention of document exchange, confirmation letters, agreed minutes or other procedures being required.[212] While the Policy and Corporate Guidelines direct proponents to thoroughly document the "dialogues" in the Initial Engagement and Exploring Mitigation phases (it only encourages First Nations to do so), there is no explanation as to what that documentation will require. This is significant as the ACO will rely on those consultation records to determine the adequacy of the consultation process.[213] Policies in other jurisdiction do discuss consultation records, notably in the Federal Policy's requirement for an Issue Tracking Table and records management system;[214] and BC Policy's emphasis on communication practices such as a non-response requiring a repeat enquiry.[215]

Those policies should be referenced in any negotiations.

3.3.5 Determination of the Need to Consult

Project proponents and Alberta, if it is acting as a proponent,[216] will submit an Application for Assessment for that project to the ACO, which must conduct a "pre-consultation assessment" within 10 working days to determine what level of consultation is required.[217]

This fixed timeline is unrealistic, especially as the only reason allowed for delay is that the "application or proponent information is deemed incomplete."[218] Routine matters may be assessed within these timelines given adequate resources, e.g. staffing, expertise and adequate procedures, but careful consideration of any application requires time, especially given the multiple factors to be considered.[219] Errors at this stage are particularly significant for First Nations, as one of the categories resulting from this "pre-consultation

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[210] Corporate Guidelines at 2.

[211] Corporate Guidelines at 3.

[212] The Federal Policy directs notifications in writing at 51 with the suggestion that the bulk of communications will be in written form and confirming meeting results.

[213] Corporate Guidelines at 4.

[214] Federal Policy at 50.

[215] BC Policy at 15.

[216] Policy at 6, under Delegation says "Within this Policy, a proponent is defined as "an entity or person who is either applying for or seeking a Crown decision related to land and natural resource management." This can include "industry, municipal governments, or any other organization requiring Crown approval of a project" at 8. Notably, municipalities are given authority to consult directly under the Saskatchewan Policy at 8; see also the Frequently Asked Questions (FAQ) on Municipal Consultation on Saskatchewan's website, see Appendix 4.

[217] See *supra*, Section 2.2.2.

[218] Matrix.

[219] Corporate Guidelines at 2.

assessment", namely Level 1 Consultation, would see *no notification* to the First Nation.

In principle, this cannot be correct. The Courts have said in *Mikisew* that the threshold to trigger consultation is very low, and Alberta, as a party to the Treaties, will always have notice of Treaty rights. The requisite flexibility lies in the variable content of the duty to consult, which at a minimum requires notification.[220] We would argue that the majority of Crown decisions on surrendered lands that remain Crown lands, including lands "taken-up" by the Crown, would call for notification. First Nations can always indicate to the ACO the areas where they will not require notifications.

In British Columbia, the government shares with First Nations the opportunity to set the consultation levels. The BC Policy states that there are three levels of consultation: notification only, normal and deep,[221] analogous to consultation Levels 1, 2 and 3 in Alberta. The pre-assessment phase in BC involves much of the same work as the ACO is directed to undertake, albeit without the firm deadlines, and it results in a *preliminary determination* as to the level of consultation required. This is followed by an Engagement Phase. If for example the consultation level is deemed notification only, the notification letter will include "information about the proposed decision or activity and, where feasible, provide maps … [and] generally indicate what information [BC] already has about known Aboriginal Interests and potential impacts…and *seek clarification and input regarding the information provided*."[222] A First Nation's response will usually confirm B.C's assessment in routine matters, but a response in an extraordinary case may call for a different level of consultation. BC will review the First Nation response to determine if its preliminary assessment is correct, and communicate any decision on consultation levels to the First Nation in writing prior to conducting consultations, if any.[223]

The authority to classify consultation remains with the BC government – although we note the risk of misclassification will also rest on the government and be assessed in judicial review proceedings by a correctness standard.[224] Other policies also seek confirmation from First Nations to reduce the risk that the government's initial assessment is uncertain, for example the Manitoba Policy[225] and the Federal Policy.[226]

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[220] See *supra*, Section 1.1.4.

[221] BC Policy at 11. See at 8 where BC considers the paucity of Treaties as requiring consultation in most circumstances. Interestingly, BC's Policy accords with *Mikisew* in this regard.

[222] BC Policy at 14. Note the BC Policy cites *Gitxsan* in a sidebar as well.

[223] BC Policy at 15-16. The BC consultation is iterative with the possibility of elevating the level of consultation: see *supra*, Section 3.2.3, Definition of Consultation Process.

[224] See *supra*, Section 1.3, Court Challenges.

[225] Manitoba Policy at 3: Consultation if impacts or if government is uncertain.

[226] Federal Policy at 40.

We would suggest that administrative practicality, judicial doctrine, and risk reduction should mandate written notification to the First Nation in Level 1 consultations. BC's Policy in this regard should inform any negotiations.

3.3.6 Level 2 and Level 3 Consultations

We note that *all* the timelines for consultation in the Consultation Matrix (incorporated by the Corporate Guidelines) are unreasonably short. The Corporate Guidelines direct that a written notification package be sent to the First Nations by the project proponent for Level 2 consultations, and normally by the ACO on behalf of Alberta for Level 3 consultations.[227] There is no timeline for that notification package to be sent to First Nations.

3.3.7 First Nation Response

The Consultation Matrix directs the First Nation to respond within 15 (Level 2) or 20 working days (Level 3) of the receipt of the notification package. Such response will "name the specific project and clearly identify the potential adverse impacts on Treaty rights and traditional uses."[228]

First, this is both unrealistic and unfair. It is unrealistic given that First Nations administer a wide variety of programs,[229] communication infrastructure is limited and decision-makers may be unreachable for weeks. In short, First Nations are not large urban centres where business is accustomed to rapid decision-making. It is unfair in that the proponent, or Alberta represented by the ACO, would have worked on a project or initiative for a considerable period of time before making an Application for Assessment,[230] while First Nations are required to review highly complex material within at most 20 days, usually from a standing start. While pre-application consultation with industry proponents is common, the Policy does not require it. Other policies do, for example, despite Saskatchewan's government directed consultation, proponents are urged to develop relationships with First Nations and Métis communities prior to making specific proposals.[231] Further, any extension of the deadline to respond requires that First Nations provide "information … beyond the potential impacts assessed during pre-consultation

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[227] Corporate Guidelines at 2-3.

[228] Corporate Guidelines at 3.

[229] Such as housing, education, financial administration, social and health matters with two levels of government.

[230] There is no direction in the Policy requiring immediate notification of First Nations.

[231] Saskatchewan Policy at 8.

assessment."[232]

Second, any First Nation response, under Alberta's definition of consultation will not change the level of the consultation but may merely extend the time of consultation at that level.[233]

Third, a First Nation's non-response or failure to respond in time results in consultation being considered complete. The ACO alone will determine if further consultation is required.

3.3.8 Consultation Continues

The Consultation Matrix provides an equally limiting consultation phase of 20 (Level 2) to 45 working days (Level 3) from the receipt of a First Nation response, if any. During this period, First Nations, project proponents and potentially the ACO are directed to: engage in a dialogue with the First Nation to determine the details of the potential impacts and whether or not the impacts can be mitigated. Once the proponent understands the nature of the First Nation's concerns, both parties are expected to work together to discuss potential strategies to avoid or minimize the impacts.[234]

That timeline may be extended by the ACO under certain limited circumstances, only one of which relates to First Nation information that was *not* considered in the pre-assessment determination.[235]

As we note above, these timelines are unrealistic and unfair for all of the parties given the amount of work in this truncated process, but particularly for First Nations.

3.3.9 Consultation Matrix Critique

The courts have noted that consultation with First Nations on the "consultation process" itself is a pre-requisite to designing the appropriate process.[236] This has not happened to date and First Nations experience has suggested this is not likely to change, particularly given the process of developing the Policy that Alberta has chosen. We note that government consultation when there is no corresponding intent to compromise is itself inadequate.

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[232] Consultation Matrix.
[233] As noted above in Section 3.2.3.
[234] Consultation Guidelines at 3.
[235] Consultation Matrix.
[236] See *supra*, Section 1.1.7.

Further, the courts have noted that meaningful consultation requires flexibility and Alberta's Consultation Matrix with its tight timelines, limited extensibility of those timelines and restrictions on First Nations response does not exhibit that flexibility. It is impossible to conceive of a Level 3 "deep consultation", being carried out within the deadlines of the Consultation Matrix, as satisfying Alberta's duty to consult and accommodate.

The majority of other policies call for either an agreement as to the process, deadlines and objectives[237] or exhibit the necessary flexibility.[238] Manitoba's Policy requires meetings between government and Aboriginal representative to "design a consultation process that reflects the nature, scope and content appropriate for the particular situation," and may, in particularly complex projects, require a written "consultation protocol."[239] That flexibility is embedded in the BC Policy not just in the initial Engagement Phase, but throughout the consultation process where the deepening of consultation as necessary may be required. Only Saskatchewan's Policy imposes a similar Consultation Matrix with deadlines for consultation.[240]

We note that the Policy allows for consultation process agreements to be negotiated between Alberta and individual First Nations,[241] but in the absence of such an agreement – the threat of compelled disclosure of consultation-related agreements to the government is made explicit in the Transparency of Process section. The justification of that disclosure is not apparent.

We would urge Alberta to engage with First Nations, preferably on an agreement basis such as Manitoba's Policy or at least consider the BC Policy because, as *Gitxsan* says "The first step in the consultation process is to discuss the process itself."[242]

3.3.10 Determination of Adequacy

At the end of the consultation process, the proponent or Alberta will assemble its consultation records and submit them to the First Nation and the ACO for a *Decision on Adequacy* as to whether the Crown's duty to consult and accommodate has been met. On receipt of a request for a Decision on Adequacy, the ACO is directed to provide its decision

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[237] Manitoba Policy at 3-4; Quebec Policy at 1: First Nation consultation is a separate process from other public consultations; Nova Scotia Agreement and PEI Agreement have joint design committees; Yukon's Umbrella Agreement and the Nunavut Land Claims Agreement are all agreement based.

[238] Ontario in some circumstances, BC Policy at 14-15 and Federal Policy at 22-24 and 42-50, see Appendix 4.

[239] Manitoba Policy at 3-4.

[240] Saskatchewan Policy at 10. Note that deep consultation (Level 5) does not have a deadline.

[241] Policy at 2 & 9, Corporate Guidelines at 1 & 4 and Corporate Guidelines at 4-5.

[242] *Gitxsan*, *supra* note 54.

within 5 (Level 2) to 10 (Level 3) working days,[243] based on those consultation records.[244] The ACO *may* request a First Nation to provide its consultation records. The Decision on Adequacy will be communicated in writing to proponents and to affected First Nations and the ACO may decide that additional consultation is required.

The conflict, particularly in Level 3 consultations, is apparent: *the same office that conducts consultation also assesses the adequacy of consultation*. This is the definition of a reasonable apprehension of bias. This is exacerbated by the direction that the ACO *may request* First Nation consultation records but is not required to do so. The consultation records of the proponent or the ACO are delivered to the First Nation, but there is no requirement that agreed, parallel or rebuttal submissions by First Nations be submitted or considered. The refusal or failure by the ACO to request First Nation consultation records is a *failure to disclose the case to be met* on the part of a dissatisfied First Nation. This is a breach of fundamental justice resulting in any determination of adequacy by the ACO to be analogous to the infamous "*Star Chamber decisions*" of late medieval England. A more prosaic example would be the recent case of *Pembina Institute v. Alberta (Environment and Sustainable Resources Development)*[245] where Justice Marceau described how,

> *Baker v. Canada* [1999] 2 S.C.R. 817 states the fundamental principles of the duty of procedural fairness are:
>
> 1. a fair and open procedure
> 2. the right to be heard
> 3. consideration by the decision maker tasked with the duty to decide and
> 4. decisions are to be free from the reasonable apprehension of bias.[246]

We suggest that the ACO's assessment of the adequacy of Crown consultation and accommodation will not meet those standards.

We note that this concern, together with Alberta's former process of consultation and First Nations' experience, is central to the frustration of First Nations and their advisors. Indeed in our initial Focus Group meeting,[247] several advisors to First Nations saw continued consultation as a waste of time and resources. We note that First Nations we have heard from are not anti-development, indeed they see responsible development as enhancing their opportunities to maintain their culture, traditions and ways of life, but continued consultation under the new Policy is now questionable.

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[243] Extendable in certain limited circumstances: "Regulatory requirements resulting in a modification to a project; Regulatory ministries decisions regarding conditions that fall within their mandate and Proponent amendments to a project." see Consultation Matrix, Decision on Adequacy.

[244] Consultation Matrix.

[245] 2013 ABQB 567.

[246] *Ibid* at para 25.

[247] Held on 28 January 2013 at CIRL's office at the University of Calgary.

At a minimum, the opportunity to respond to proponent and Alberta consultation records is required.

3.3.11 Proposed Review Office

One possibility to address First Nations' concerns would be to establish an independent *Review Office*, within the ACO. While the name chosen is not inconsequential, it is the *function* that matters:

1. Once the ACO makes a determination whether consultation is adequate;
2. a proponent, including Alberta when it is acting as project proponent,[248] or a First Nation dissatisfied with that determination, may make a single recourse to the *Review Office* within a limited time;
3. the *Review Office* would normally decide on written submissions, but could hold hearings for oral submissions from the disputants under strict rules or timelines for decisions;
4. the powers of the *Review Office* would be limited to directing *additional consultation at the appropriate level* for a specified period, which can be extended by agreement.

This is the normal remedy that courts will, after a lengthy, expensive and divisive lawsuit, grant in administrative review applications, if warranted. Administrative review proceedings in court may still be brought, but the proposed *Review Office* would certainly satisfy the court's urging in *Haida* to avoid court proceedings. Ideally, that Review Office would have impartial representation from First Nations and government to enhance the legitimacy of that process.

Another alternative, in replacement for or addition to the *Review Office*'s process, may be the appointment of a trusted mediator from a roster to mediate for a defined period, with the possibility of seeking approval for additional time provided progress is possible. This is one option available under the Federal Policy.[249]

We would urge consideration of this proposal, or other innovative mechanisms to address First Nation concerns.

3.4 The *Aboriginal Consultation Levy Act* (*Levy Act*)

As noted in Section 2.1, Bill 22, the *Aboriginal Consultation Levy Act* (*Levy Act*), was

[248] But not in circumstances where Alberta is consulting on initiatives or strategic matters that is on "provincial regulations, policies and plans".

[249] Federal Policy at 48: "dispute reconciliation methods" as part of the consultation process.

tabled on May 8, 2013 and was adopted before the consultation period on the Draft Consultation Policy was closed. The Bill was introduced "as part of the Alberta government's overhaul of regulatory and Aboriginal consultation processes in the province".[250] The *Levy Act* contemplates regulations that have yet to written which will affect all aspects of the Act.

3.4.1 Purpose

One missing factor in adequate consultation has been the lack of capacity and funding for First Nations. The *Levy Act* appears to be intended to address this issue, as the pre-amble states:

> WHEREAS it is desirable to assist First Nations and other identified aboriginal groups in participating in the consultation [with First Nations] by providing grants to the First Nations and other identified aboriginal groups based in part on a consultation levy to be paid by proponents of provincial regulated activities;

The courts have noted that preambles to legislation may be used to inform the interpretation of legislation particularly in the case of ambiguity in identifying the "mischief" that legislation was intended to address, most recently in *Quebec (Attorney General) v. Moses*.[251] The pre-amble to the *Levy Act* makes mention only of First Nations and not Métis peoples. While it is open for the responsible Minister to make specific declaration as to "aboriginal groups" in section 2 of the *Levy Act*,[252] it would appear that the thrust of this legislation is directed towards First Nations.

A "First Nation" is defined in subsection 1(1)(d) as "a band, as defined in the *Indian Act* (Canada), with reserve land in Alberta." This definition would exclude, for example:

a) the Lubicon Lake Cree First Nation (Band 453) that does not hold reserve lands in Alberta;[253] and

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[250] John Olynik, "Alberta Government Introduces Aboriginal Consultation Levy Legislation" (14 May 2013) Lawson Lundell, Project Law Blog, online: <http://www.projectlawblog.com/2013/05/14/alberta-government-introduces-aboriginal-consultation>.

[251] 2010 SCC 17, [2010] 1 SCR 557 at para 101.

[252] Section 2 of the *Levy Act* provides: "The Minister may by order identify aboriginal groups for the purposes of this Act."

[253] The Lubicon Lake Cree are a recognized Indian Band No 453, see online: <http://pse5-esd5.ainc-inac.gc.ca/FNP/Main/Search/FNMain.aspx?BAND_NUMBER=453&lang=eng> (retrieved 12 June 2013) but they have no designated reserve lands in Alberta, see online: <http://www.aadnc-aandc.gc.ca/eng/1100100020670/1100100020675> (retrieved 12 June 2013).

b) First Nations outside of the territorial boundaries of Alberta such as those in the Athabasca/Peace River basin downstream from Alberta in Saskatchewan and the Northwest Territories even though they are within the boundaries of Treaty 8.

In the legislature, the Minister of Aboriginal Affairs said that that section 2 was intended to allow for consultation funding for identified First Nations which do not *yet* have a land base in Alberta. He cited Peerless Trout First Nation, recognized as a band for which the Federal Government is in the process of surveying a Reserve, a process that will take 2 or 3 years, during which consultation funding could be provided.[254]

3.4.2 The Levy Fund

Subsection 4(1) of the *Levy Act* establishes a fund called the Consultation Levy Fund (Levy Fund). The Levy Fund will be funded through payments by project proponents[255] and appropriations from the Alberta's general fund.[256] However, the *Levy Act*, as currently phrased without extending regulations, is limited in scope — both as to who is liable for the levy and for what activities.

In terms of the entities that the *Levy Act* applies to, they are defined in subsection 1(1)(h) as "proponent" meaning a person undertaking a provincially regulated activity. These proponents include individuals and corporations[257] but exclude the Alberta and federal Crown, municipal governments or those excluded by regulation under the *Levy Act*.[258] The exclusion of municipalities could, for example, provide an exemption for The City of Calgary in paying any levy (or consulting with Treaty 7 First Nations)[259] when it chooses to enlarge or rebuild the Glenmore Dam or affect the upper Elbow River.

This is a serious restriction, given that the Policy anticipates that consultation on strategic initiatives, on projects of which the government is a proponent and on major projects requiring a Level 3 consultation will be led by government. First Nation consultation capacity with respect to strategic consultation or with respect to major projects is crucial, and it is an open question whether these projects are subject to the collection of a levy.

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[254] *Alberta Hansard* (14 May 2013) at 2431-2432.

[255] *Levy Act*, *supra* note 88, s 4(2)(a).

[256] *Ibid*, s 4(2)(b).

[257] *Interpretation Act*, RSA 2000, s 28(1)(nn) "person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person.

[258] *Levy Act*, *supra* note 88, ss 1(1)(h)[i]-[iv] respectively.

[259] This is the position of British Columbia courts concerning Aboriginal consultation by municipalities. See *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379, [2012] 4 CNLR 218 a municipality granting a development permit for lands adjacent to a reserve has no duty to consult.

Further, the Act restricts the use of the funds to Crown consultation in respect of provincial regulated activities (s. 4(3)(a)), which are defined in subsection 1(1)(i)(i) as being "an activity on Crown land for which an approval is required."[260] This definition would exclude privately owned property, further restricting the areas to which a levy may apply.

In addition, an "approval" is defined in subsection 1(1)(a) as: "a permit, licence, registration, authorization, disposition, certificate, allocation or other instrument or form of approval or consent issued or authorized by a specified enactment."[261] The specified enactments are limited under subsection 1(1)(j) to:

(i) the Environmental Protection and Enhancement Act,
(ii) the Forests Act,
(iii) the Historical Resources Act,
(iv) Part 8 of the Mines and Minerals Act,
(v) the Public Lands Act,
(vi) the Water Act,
(vii) a regulation under an enactment referred to in subclauses (i) to (vi), or
(viii) any enactment prescribed by the regulations for the purposes of this clause.

This list does not include provincially regulated activities with respect to energy development that are caught in legislation such as the *Hydro and Electric Energy Act*, the *Oil and Gas Conservation Act* or the *Oil Sands Conservation Act*. However, the list of provincial regulated activities may be extended by regulation under subsection 10(a).

By contrast, under the *Responsible Energy Development Act* (*REDA*),[262] the Alberta Energy Regulator (AER) has jurisdiction over applications for the specified enactments in the *Levy Act and* "energy resource enactments", including the key statutes applying to energy development.[263] The *Levy Act*'s "taxation powers" appear to be directed at *permissions* for proponent's activities on Alberta Crown lands rather than a levy on resource extraction.

It is difficult to ascertain what amount of funding the approval of provincial regulated activities under the *Levy Act* may generate. The Government of Alberta, in its briefing of opposition leaders, indicated that the current estimates of corporate funding for Aboriginal consultation is in the order of $150-200 million, and it anticipates that the *Levy Act* will

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[260] *Levy Act*, *supra* note 88, s 1(1)(i)(ii) permits extension by regulation to "(ii) an activity prescribed or described by the regulations as a provincial regulated activity".

[261] *Ibid*, s 1(1)(a).

[262] SA 2012, c R-17.3.

[263] *Ibid*, s 1(1)(j), "energy resource enactment" means: (i) the Coal Conservation Act, (ii) the Gas Resources Preservation Act, (iii) the Oil and Gas Conservation Act, (iv) the Oil Sands Conservation Act, (v) the Pipelines Act.

generate $70 Million dollars.[264] It remains to be seen what amount will be levied under this Act, but it should be noted that in the past, only $6.6 million of annual core funding for First Nations consultation was available under old legislation from appropriations on Alberta's General Fund.[265]

In the absence of regulations, uncertainty remains as to how the funds will be collected and distributed. Will the levy be collected once an Assessment Application is made to the ACO, or will it be part of the other regulatory processes? Will the Minister or the ACO allocate funding on the basis of population, areas of development, project size, First Nations' capacity or needs? How will Alberta "manage" the funding: will it develop specific programs, long term funding or short term project level funding? What does "Alberta will solely fund government-led consultation for Crown projects," mean? How will government-led consultation be funded? Can the levy be used to cover the costs of consultation by Alberta, including those related to the creation, staffing and operation of the ACO? These questions are left to be answered through regulations.

Most significantly, will industry consider the consultation levy as an addition to the current industry funding of First Nations or as a replacement?

3.4.3 Consultation-related Agreements[266]

Section 8 outlines requirements with respect to agreements that First Nation communities and resource companies may enter into and represents a significant concern of First Nations and industry. It reads as follows:

> 8(1) The Minister may, in accordance with the regulations, require a proponent to provide the Minister with information, including third party personal information, records and other documents, including copies of agreements relating to consultation capacity and other benefits pertaining to provincial regulated activities, for one or both of the following purposes:
>
> a) to assist in determining the amount of grants to be provided to First Nations and other identified aboriginal groups;
>
> b) to plan and facilitate any required Crown consultation in respect of regulated provincial activities.

The confidentiality of this information is addressed in subsection 8(2): when the provision of such information is "subject to any kind of confidence or is supplied, explicitly or implicitly, in confidence, the providing of that information, record or document does not

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[264] *Alberta Hansard* (15 May 2013) at 2473 *per* Honorable Member for Edmonton-Beverly-Clareview, Mr Bilous (New Democratic Party Critic). Notably, the Minister did not dispute these claims.

[265] See BearPaw Legal Education & Resource Centre, "Consultation in Alberta – First Nations Consultation Capacity Investment Program", online: <http://www.bearpaweducation.ca/consultation-alberta>.

[266] The term "consultation-related agreements" is used in the draft Corporate Guidelines to designate the types of agreements contemplated under s 8 of the *Levy Act*: see Corporate Guidelines at 5.

waive or negate any confidence attached to the information, record or document, and the confidence continues for all purposes."[267] The government may, under subsection 8(3), publish in aggregate form any information collected under the Act.

The issues with this provision for industry and First Nations are significant. What types of agreements are encompassed by section 8? Are they limited to those arising from consultation processes under the government's Consultation Policy? Do they include First Nation Consultation Protocols that often require that an application fee be paid by project proponents to even consider a project application? Are Impact Benefit Agreements included? Prior agreements appear to be exempted from the application of this policy but is that correct? What are the sanctions for non-compliance, and how will they be enforced? Again, significant questions remain to be answered, likely through regulations.

Many Impact Benefit Agreements privately negotiated between First Nations and resource companies include an express restriction on First Nations from advancing a Notice of Concern to provincial regulators such as the AER, Environmental Review Panels etc. in return for economic benefits. The requirement for First Nations and project proponents to disclose such privately negotiated agreements is objectionable.

Finally, there is a privative clause in section 9 of the *Levy Act* that purports to insulate the Minister's decisions from judicial review. These decisions include the definition of Aboriginal groups, the calculation and exemption of payers into the fund, the manner of administration of the *Levy Fund*, the calculation and amount of grants to First Nations. Further the nature of the compulsory disclosure in section 8 by the Minister will be protected.

3.5 The Alberta Energy Regulator (AER)

The hurried release of the Consultation Policy in August 2013 appears to be linked to the creation of the new single Alberta Energy Regulator (AER) under the *Responsible Energy Development Act* (*REDA*).[268] The Act was proclaimed in force in part on June 4, 2013[269] to be effective June 17, 2013. The AER is the successor to the Energy Resources Conservation Board (ERCB) and it assumes all of the ERCB's powers, duties and functions.

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[267] Privacy was one of the changes from the Discussion Paper to the April 3 Draft Policy [emphasis added].

[268] *Supra* note 262.

[269] By way of an Order in Council (OC 163/2013).

3.5.1 The AER's Jurisdiction

Section 21 of the *REDA* removes the jurisdiction of the board to assess the adequacy of Crown consultation with Aboriginal peoples:

> *Crown consultation with aboriginal peoples*
>
> 21. The Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the Constitution Act, 1982.

However, pursuant to the *Administrative Procedures and Jurisdiction Act* (*APJA*)[270] and the *Designation of Constitutional Decision-Makers Regulation* (DCMR),[271] the AER retains the authority to decide "all questions of constitutional law" in the discharge of its specialized responsibilities. These are defined in subsection 10(d) of the *APJA* as:

> (i) a challenge to the applicability or validity of a provincial or federal statute, or
> (ii) a determination of any right under the *Constitution Act, 1982* or the *Alberta Bill of Rights*.

In past proceedings in front of the ERCB, First Nations that claimed to be adversely affected by proposed energy developments, notably oil sands operations, have raised such "questions of constitutional law", arguing that the projects had adverse impacts on their Aboriginal and Treaty rights, and that the Crown had not adequately consulted with them. In accordance with section 12 of the *APJA*, the ERCB has held that it can only decide questions of constitutional law if the affected First Nations submit a written Notice of Question of Constitutional Law (NQCL) to the government and to the proponent in regard to the project. The ERCB and now the AER have the authority, under section 13 of the *APJA*, to refer questions of constitutional law to the Court of Queen's Bench when it is of the "opinion that the court is a more appropriate forum to decide the question."[272] To our knowledge, this has never occurred with First Nation constitutional questions.

REDA repeals the *Energy Resources Conservation Act* (*ERCA*),[273] the Act governing the ERCB. Whereas section 3 of the *ERCA* required the ERCB to consider whether a project was "in the public interest" before approving it, *REDA* no longer includes such a reference to the "public interest" as part of the factors that the board may or must consider. Instead, section 15 of *REDA* requires the board to consider "any factor prescribed by the

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[270] RSA 2000, c A-3 [*APJA*].

[271] The Designation of Constitutional Decision Makers Regulation (AR 69/2006) [DCMR] has been modified on 29 May 2013 (OC 144/2013) pursuant to the Regulations Act, RSA 2000, c R-14 by way of the Miscellaneous Corrections (Alberta Energy Regulator) Regulation (AR 89/2013) in s 31 to substitute the "Alberta Energy Regulator" for the Energy Resources Conservation Board. The Schedule to the DCMR references the Alberta Energy Regulator's authority to decide "all questions of constitutional law."

[272] *APJA*, *supra* note 270, s 13(1).

[273] RSA 2000, c E-10.

regulations, including the interests of landowners" in dealing with applications or conducting inquiries. No regulations under *REDA* have yet prescribed consideration of the public interest. However, the AER is also bound by other statutory provisions, such as subsection 10(3)(a) of the *Oil Sands Conservation Act*, which enables the board to approve applications for oil sands developments "if in its opinion it is in the public interest to do so".[274]

3.5.2 Past Practice of the Energy Regulator with Respect to Aboriginal Issues

How have the ERCB and its predecessor the Alberta Energy and Utilities Board (AEUB) dealt with the constitutional issues raised by First Nations to date? A review of past AEUB/ERCB decisions shows the reluctance of the regulator to address claims of inadequate Crown consultation with Aboriginal peoples as well as claims of potential infringements or impacts of proposals on Aboriginal and Treaty rights.[275]

As to the adequacy of Crown consultation with Aboriginal communities affected by energy developments, the regulator tends to view the process it administers under its legislative and regulatory powers as an adequate consultation process. The ERCB has not acknowledged that Aboriginal peoples are entitled to a consultation process separate from that general public process. First Nations and Métis that have been able to demonstrate that they may be directly and adversely affected by proposed development (the test used by the regulator) have been entitled to be consulted by project proponents, and indeed both the regulator and the Crown have encouraged the proponents to enter into consultation and negotiations with potentially affected Aboriginal communities. We suggest that the consultation process administered by the energy regulator is inappropriate in the case of project developments that may significantly impact and even infringe the rights of Aboriginal peoples. It is noteworthy that even after Alberta adopted the Original Consultation Policy in 2005, that Policy simply stated that "when a decision is to be made by the Alberta Energy and Utilities Board or the Natural Resources Conservation Board, Alberta *may* report on consultation to the relevant decision-maker".[276]

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[274] RSA 2000, c O-7.

[275] See Nigel Bankes, "Regulatory Tribunals and Aboriginal Consultation" (2003) 82 Resources 1; Monique Passelac-Ross, *The Trapping Rights of Aboriginal Peoples in Northern Alberta*, CIRL Occasional Paper #15 (Calgary: CIRL, 2005) at 63-64; Verónica Potes, Monique Passelac-Ross & Nigel Bankes, *Oil and Gas Development and the Crown's Duty to Consult: A Critical Analysis of Alberta's Consultation Policy and Practice* (Calgary: The Institute for Sustainable Energy, Environment and Economy, 2006) at 20-22 and 30-32; Monique M Passelac-Ross & Verónica Potes, *Crown Consultation with Aboriginal Peoples in Oil Sands Development: Is it Adequate? Is it Legal?*, CIRL Occasional Paper #19 (Calgary: CIRL, 2007) at 40-43, online: <http://dspace.ucalgary.ca/bitstream/1880/47190/1/OP19AboriginalOilsands.pdf>.

[276] Original Consultation Policy, *supra* note 2 at 5.

The removal by *REDA* of the board's ability to consider the adequacy of consultation with Aboriginal peoples leaves this responsibility entirely with the ACO.

On issues of questions of constitutional law raised by First Nations pursuant to the board's authority to consider questions of general law, its duty to consider "the public interest",[277] or pursuant to subsection 10(d) of the *APJA*, the board has stated on repeated occasions that it does not have the jurisdiction to deal with constitutional issues, or alternatively that these issues will be decided at a later date.[278] In a recent decision on a Notice of Question of Constitutional Law (NQCL) submitted by the Cold Lake First Nation concerning the *Osum Oil Sands Corp., Taiga Project*, the ERCB stated that the board's own consultation process was just "one component of a much broader consultation process" and the ultimate decisions about the adequacy of that process rested with the Crown itself.[279] An assessment of non-fulfillment of the duty to consult was premature.

In short, Alberta energy regulators have in the past, denied, delayed or deferred constitutional questions brought by First Nations or considered their own regulatory process adequate consultation on behalf of the provincial Crown.

3.5.3 The AER's Position: The Dover Decision

The Dover decision is the first decision issued by the AER and illustrates how little appetite the regulator has to deal with constitutional issues raised by First Nations. The case concerns a proposed oil sands project by Dover Operating Corp. (since renamed Brion Energy Corp.) in the traditional territory of the Fort McKay First Nation (FMFN). The FMFN submitted two NQCL to the board (the ERCB, which was replaced by the AER which issued the final decision on the project): 1) would the approval of the Dover project constitute an infringement of its Treaty rights and therefore be outside the jurisdiction of the province?; 2) had the Crown adequately discharged its duty to consult and accommodate? In a Letter outlining the reasons for its decision that it did not have the

[277] First Nations have pointed out that, as stated by the Supreme Court in the *Carrier Sekani* case, there may be a duty on the part of the board to consider their constitutionally protected rights as part of a "special public interest" test that surpasses the "dominantly economic focus of the consultation […]": *supra* note 122 at para 70.

[278] For comments on these issues, see Nigel Bankes, "Who decides if the Crown has met its duty to consult and accommodate?" (6 September 2012); "Bill 2 the Responsible Energy Development Act and the Duty to Consult" (19 November 2012); "Constitutional Questions and the Alberta Energy Regulator" (24 October 2013), online: ABlawg <http://ablawg.ca/2013/10/24/constitutional-questions-and-the-alberta-energy-regulator/>.

[279] NQCL submitted by the Cold Lake First Nations concerning the *Osum Oil Sands Corp, Taiga Project* (ERCB Letter Decision of 17 July 2012) at 8.

jurisdiction to consider the constitutional questions posed by the FMFN,[280] the ERCB summarized its position as follows:

- the board's authority to consider constitutional issues does not extend its specialized jurisdiction to matters outside its statutory mandate;
- the board's mandate does not allow it to assess or supervise Crown conduct including consultation with First Nations;
- the board's process forms part of a much broader consultation process in which the Crown is engaged;
- it is premature for the board to consider the adequacy of consultation because other provincial authorizations are necessary for the project to proceed and there may be other opportunities for further consultation;
- the board does not have the authority to grant a remedy that would require the Crown to fulfill its constitutional obligations including with regard to Crown consultation; and
- where the proponent is not the Crown or a Crown agent, the board's public interest mandate does not extend to assessing the adequacy of Crown consultation which has yet to be completed.

In its decision to approve the Dover project,[281] the AER reiterates the position of the board with respect to constitutional issues. The matter of the adequacy of Crown consultation (the second question) was no longer relevant, since by the time the AER issued its decision, section 21 of *REDA* had removed that jurisdiction from the board. As to the first question raised by the FMFN, the AER found that it had no jurisdiction to consider constitutional questions other than questions of constitutional law as defined in the *APJA* because it was not authorized by the Act to do so, and further that the provisions of the *APJA* concerning necessary notice had not been met.[282]

The board approved the project subject to a number of conditions and commitments, but refused to impose a 20km buffer zone as requested by the FMFN. Nowhere in its decision does the AER refer to the negative impacts of the project on Aboriginal or Treaty rights. Instead, the board considered the project's effects on "traditional land use activities". It concluded that even though "there will be some localized adverse effects from the project", these "will not prevent Fort McKay from exercising its traditional land use activities in the Moose Lake Reserves area or regionally."[283] As to cumulative effect issues, the AER stated that these are best dealt with through LARP, which is "the appropriate

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[280] ERCB, Application No 1673682, Reasons for April 18, 2013, Decision on Notice of Question of Constitutional Law (23 May 2013). This is not online but is referenced in the leave application to the Alberta Court of Appeal, Fort McKay First Nation v Alberta Energy Regulator, 2013 ABCA 355 [Dover Appeal].

[281] 2013 ABAER 014: Dover Operating Corp, Application for a Bitumen Recovery Scheme – Athabasca Oil Sands Area (6 August 2013) [Dover Decision].

[282] *Ibid* at paras 26, 29-30.

[283] *Ibid* at para 174.

mechanism for identifying and addressing the regional cumulative effects of resource development activities."[284] The board stated that, because the Dover project was located in an area that had been selected by the government to include oil sands development, and because the buffer zone requested by the FMFN had not been incorporated into LARP, it could not "reverse government policy by designating new areas where development is prohibited."[285]

The FMFN was granted leave to appeal the AER's Dover decision on October 18, 2013.[286] The two matters that the Court of Appeal agreed to hear concerned the board's narrow definition of what constitutes a "question of constitutional law" under the *APJA*, and its narrow interpretation of its jurisdiction to consider constitutional issues. However, shortly before the matter was to be heard on appeal, the FMFN and Brion Energy entered into a confidential agreement and the appeal was discontinued.[287]

Thus, while *REDA* excludes the jurisdiction of the AER to consider the adequacy of consultation by the province in section 21, the board's constitutional jurisdiction to consider whether an approval would adversely affect Treaty rights remains an issue.

3.5.4 Relationship Between the AER and the ACO

The 2013 Consultation Policy states that "[t]he Consultation Office will work closely with the [Alberta Energy] Regulator to ensure that any needed consultation occurs for decisions on energy project applications within the Regulator's mandate." What this means legally and in practice remains to be seen. A recent amendment to the AER *Rules of Practice* specifies that one of the factors that the board may consider in deciding whether or not to hold a hearing is whether the Crown has requested that a hearing be held for the purpose of assessing impacts to and the means to mitigate the impacts on Aboriginal peoples.[288] This is only given to the provincial Crown.

Further, on November 26, 2013, prior to hearing of the Dover Appeal, the Minister of Energy issued a Ministerial Order under section 67 of *REDA* which provides direction to the AER as to how to ensure that its decisions in respect of energy applications are consistent with the work of the government in meeting its consultation obligations under the constitution and under the Consultation Policy.[289] The Aboriginal Consultation

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[284] *Ibid* at para 43.

[285] *Ibid* at para 41.

[286] Dover Appeal, *supra* note 280 by Justice Slatter.

[287] Kelly Cryderman, "First Nation deal gives Dover oil project key boost" *The Globe and Mail* (22 February 2014).

[288] Alberta Energy Regulator Rules of Practice, AR 99/2013 as am by AR 203/2013, s 8.

[289] Government of Alberta, Department of Energy, Ministerial Order 141/2013, 26 November 2013, Appendix – Aboriginal Consultation Direction – Purpose. This was found under the Energy Department's

Direction appended to this Ministerial Order directs the AER to create and maintain a consultation unit that will work with the ACO to ensure that Alberta meets its consultation obligations. It establishes a flow of information between the AER and the ACO with respect to energy applications and ensures that proponents contact the ACO and include in their application the information needed to assess the potential impacts of their proposed projects on Aboriginal rights and traditional uses.

The AER is instructed to request advice from the ACO about the adequacy of consultation prior to making a decision on an energy application, and to request advice from the ACO as to actions that may be required to address potential impacts of projects on Aboriginal rights or traditional uses.[290] The AER must send a copy of its decision along with reasons to the ACO, and it must inform the ACO of any application for regulatory appeal, reconsideration or leave to appeal application filed by a First Nation or other Aboriginal group.

REDA provides for an appeal of decisions of the AER to the Alberta Court of Appeal, with leave of the Court.[291] We suggest that any advice as to determination of the adequacy of consultation by the ACO may now be indirectly appealable by First Nations. This is not certain, and First Nations dissatisfied by a project approval by the AER would be well advised to bring judicial review proceedings against the ACO *and* explore an appeal to the Court of Appeal on this basis.

We note that the bulk of energy projects are not subject to any review process by the AER, let alone the ACO. However, for energy related projects on First Nation traditional lands that do require AER approval, we have attached as Appendix 5 a flowchart describing that approval process. There are several points to be made in this regard: firstly, pre-application industry consultation with First Nations is still required on a good business basis to ensure subsequent approval; secondly, the new ACO imposes an additional bureaucratic layer for project approvals by the AER with the uncertainty associated with the possibility of First Nation's taking judicial proceedings; and thirdly, the ACO may be a bottleneck in the process; and finally, while the timelines in the Consultation Matrix may promise faster approval processes, that process is fundamentally flawed. We suggest that little has changed for First Nations, industry and government in the consultation and accommodation process.

Travel Expenses but is now described in the AER website, "Public Notice of Application Q & A", online: <http://www.aer.ca/about-aer/what-we-do/Q-and-A-PNoA> where the process is described as "under development." The Ministerial Order is included as Appendix 6 and became effective 30 November 2013.

[290] *Ibid*, ss 5-6.

[291] *REDA*, *supra* note 262, s 45.

3.6 Case Study: Treaty 8 and the BC Oil and Gas Commission

We are given to understand that the *Aboriginal Consultation Levy Act*, with its levy on industry proponents, takes inspiration from the BC Oil and Gas Commission (OGC), in particular with regard to the Treaty 8 area in northeast British Columbia. The OGC, which was originally established by the *Oil and Gas Commission Act*, is continued by the *Oil and Gas Activities Act* (*OGA*).[292] Similar to the AER, the OGC is an independent, single window regulatory agency responsible for regulating oil and gas activities and pipelines in British Columbia, and it is designed to provide a streamlined one-stop regulatory agency. The OGC collects various fees for applications and levies on oil and production.[293] In one respect though, the OGC is different from the AER, in that one of its purposes is "to encourage the participation of First Nations and aboriginal peoples in processes affecting them."[294]

The OGC has entered into Consultation Process Agreements with various First Nations in the Treaty 8 area. These agreements are posted on the OGC's website.[295] They are similar in form, and many are still in the process of negotiation or re-negotiation as the case may be. They provide a Tenure Referral Process, essentially a detailed consultation process with a dispute resolution process on an escalating scale for an application to the OGC. The Agreements provide that the OGC will make payment(s) to a First Nation to facilitate consultation under these agreements, and they restrict the First Nation's ability to require proponents to pay "any fees, levies, compensation or other charges for the review of Applications." This funding is made under a confidential Appendix. The Consultation Process Agreements do not limit the legal position that the First Nation can take with respect to the adequacy of the consultation process, but practically there is the threat of consultation funding being cut-off from the OGC.

These agreements and their negotiation are controversial within First Nation communities. Some of the First Nations that had signed agreements with the OGC have chosen not to renew them once they expired. They do not see the process as a meaningful consultation process and point out that in the history of the OGC, only one project has ever been turned down.

In addition to Consultation Process Agreements, First Nations in BC's Treaty 8 area have entered into Economic Benefit Agreements (EBA) with the BC government, which allow for some form of revenue-sharing with the province.

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[292] SBC 2008, C 36 [*OGA*].

[293] Fee, *Levy and Security Regulation*, BC Reg 8/2014.

[294] *OGA*, s 4(c). Section 84 provides: "For greater certainty, the provisions of this Act are intended to respect aboriginal and Treaty rights in a manner consistent with s 35 of the *Constitution Act, 1982*".

[295] See BC Oil & Gas Commission, "Consultation Process Agreements", online: <https://www.bcogc.ca/first-nations/consultation-process-agreements>.

First Nations in Alberta should take notice of these BC Process Consultation Agreements, as the 2013 Policy contemplates them with the threat of compulsory disclosure, under section 8 of the *Aboriginal Consultation Levy Act*.

Conclusions

In this report, we set out to understand some of the reasons for the poor state of the relationship between Alberta First Nations and the provincial government. In our view, Alberta's approach to meeting its duty to consult and accommodate falls short of the courts' high standards of conduct, we do not find it "honourable". While the Alberta government could perhaps be excused for having misunderstood its obligations in its 2005 Original Consultation Policy, it has had many opportunities since then to improve on its performance. First Nations have been more than willing to engage in a serious conversation with Alberta, to share their views of their concerns with the former policy and their expectations for the new policy, and to negotiate in good faith a process for developing a revised Policy that would be acceptable to them. Their efforts have failed.

Both the way in which Alberta set out to develop the 2013 Policy, and the Policy itself, are objectionable and deeply offensive. Alberta continues to exhibit a lack of understanding of the ultimate purpose of consultation and accommodation, i.e. the protection of Aboriginal and Treaty rights and the reconciliation of Aboriginal societies with the Crown's sovereignty. It continues to disregard the critical importance of consultation on strategic decision-making and on cumulative impacts management, preferring to focus on project-specific consultation. The way in which it envisions the ACO as managing the entire consultation process, in particular the determination of the adequacy of consultation, without the involvement of the affected First Nations is deeply troubling and demonstrates a lack of political will to honour the Crown's obligations or, more concerning, a deliberate process to stifle dissent from vulnerable Albertans.

First Nations have well-founded concerns about Alberta's commitment to respecting the Treaties, the very foundation of the relationship, and whether it is negligence, arrogance or a deliberate choice, Alberta has earned that scepticism. As we have noted earlier, Alberta has missed an opportunity to establish a regulatory system for consultation and accommodation that could lead to a true reconciliation. As admonished by the Supreme Court in the *Mikisew* case, Alberta has failed to manage the ongoing relationship between Aboriginal peoples and the Crown in a manner in keeping with the honour of the Crown. The government's approach to consultation and accommodation does not advance the process of reconciliation, it undermines it.

Appendix 1:
Timeline of Key Policy Developments

- May 16, 2005, The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development is approved, followed by the release of First Nations Consultation Guidelines for four key government departments on September 1, 2006 (updated on November 14, 2007).
- January 2009 to September 30, 2010 negotiations between the Alberta government and First Nations on a revised consultation policy. September 23, 2010, Assembly of Alberta Chiefs Position Paper on Consultation submitted to the Alberta government.
- October 24, 2012, Bill 2, which creates a new regulator, the Alberta Energy Regulator (AER), is tabled in the legislature and passed into law on November 21st, 2012 as the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3. Section 21 of that Act provides that the AER has **no** jurisdiction to assess the adequacy of the Crown consultation with First Nations.
- October 28, 2012, Alberta releases a three page Discussion Paper (2012) proposing a revised First Nation Consultation Policy with a deadline for comments of November 30, 2012 (later extended to December 21, 2012).
- April 2, 2013, Alberta releases a draft of The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013, as well as draft Corporate Guidelines for First Nations Consultation Activities, 2013 incorporating a Consultation Matrix. The government sets a deadline of May 3, 2013, later extended to May 17, for public input on this draft policy.
- May 8, 2013, Bill 22 is tabled in the legislature and passed into law on May 15, 2013 as the *Aboriginal Consultation Levy Act*, S.A. 2013, c. A-1.2, to be proclaimed in force on a date to be determined.
- June 4, 2013, the *Responsible Energy Development Act*, S.A. c. 17 is declared by O.C. 163/2013 to be effective June 17, 2013.[296]
- August 16, 2013, Alberta releases *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013*, to come into force on an unspecified date, along with draft Corporate Guidelines for First Nations Consultation Activities, 2013 including a Consultation Matrix.
- November 1, 2013, the Alberta Consultation Office (ACO) is created.

[296] Except Part 3 and ss 1(1)(s)(i)-(v), 2(1)(b) and (2)(b)-(e), (h)-(i), 31, 36(a)(i)-(iii) and (b)(i), 84, 88(2), 97(9) and (12)(b), 101(12)(a), 102 & 110.

Appendix 2:
Consultation Policy (2013)

The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013

Introduction

The Government of Alberta ("Alberta") is committed to strengthening relationships with First Nations through the continued recognition of the Treaty relationship between First Nations and the Crown. Alberta's legal duty to consult and accommodate is grounded in the honour of the Crown. Under this Policy, Alberta will seek to reconcile First Nations' constitutionally protected rights with other societal interests with a view to substantially address adverse impacts on Treaty rights and traditional uses through a meaningful consultation process.

Alberta's management and development of provincial Crown lands and natural resources is subject to its legal and constitutional duty to consult First Nations and, where appropriate, accommodate their interests when Crown decisions may adversely impact their continued exercise of constitutionally protected Treaty rights. In this document, "decisions relating to land and natural resource management" refers to provincial Crown decisions that directly involve the management of land, water, air, forestry, or fish and wildlife.

Treaty Rights Context

Alberta respects that First Nations' Treaty rights are protected by section 35 of the *Constitution Act, 1982*, and understands the important role these rights have in maintaining First Nations' cultures and traditions. Alberta recognizes that impacting Treaty rights to hunt, fish, and trap for food may trigger a duty to consult. These rights may be practised on unoccupied Crown lands and other lands to which First Nations members have a right of access for such purposes.

Traditional Uses

Alberta recognizes that First Nations may engage in customs or practices on the land that are not existing section 35 Treaty rights but are nonetheless important to First Nations ("traditional uses"). Traditional uses of land include burial grounds, gathering sites, and historical or ceremonial locations and do not refer to proprietary interests in the land. First Nations' traditional use information can help greater inform Crown consultation and serve to avoid or mitigate adverse impacts. Alberta will consult with First Nations when traditional uses have the potential to be adversely impacted by land and natural resource management decisions.

Duty to Consult

Consultation is a process intended to understand and consider the potential adverse impacts of anticipated Crown decisions on First Nations' Treaty rights, with a view to substantially address them. Alberta recognizes that a duty to consult exists when the following three factors are all present:

1. Alberta has real or constructive knowledge of a right;

2. Alberta's decision relating to land and natural resource management is contemplated; and

3. Alberta's decision has the potential to adversely impact the continued exercise of a Treaty right.

Accommodation

Consultation may reveal a Crown duty to accommodate First Nations. The primary goal of accommodation will be to avoid, minimize, or mitigate adverse impacts of a Crown decision on Treaty rights or traditional uses.

Accommodation, where appropriate, will be reflected in the Crown's decision.

Policy Response

Through *The Government of Alberta's First Nations Consultation Policy on Land and Natural Resource Management, 2013* ("*Policy*"), Alberta will seek to reconcile First Nations' Treaty rights and First Nations' traditional uses with Alberta's mandate to manage provincial Crown lands and resources.

Alberta will consult with First Nations when Crown land and natural resource management decisions may adversely impact Treaty rights protected under the *Constitution Act, 1982*, as well as traditional uses.

In conjunction with the changes to the regulatory regime represented by the Integrated Resource Management System and Regulatory Enhancement Project, Alberta intends to increase its emphasis on strategic consultation. Strategic consultation will be defined in the operational guidelines.

Policy Application

Provincial Crown Lands

This *Policy* applies to strategic and project-specific Crown decisions that may adversely impact the continued exercise of Treaty rights and traditional uses. Specifically, the *Policy* applies to Crown decisions in relation to land and natural resource management with the potential to adversely impact

- Treaty rights on provincial Crown lands, as described above; or

- Traditional uses on provincial Crown lands, as described above.

Alberta may enter into specific consultation process agreements with individual First Nations to further clarify the consultation process. A formal process to outline the creation of consultation process agreements will be developed after the implementation of this *Policy*. Consultation process agreements will be consistent with this *Policy*.

Matters Subject to this Policy

Crown decisions that Alberta will assess for potential consultation will include:

- Provincial regulations, policies, and plans that may adversely impact First Nations Treaty rights and traditional uses; and
- Decisions on projects relating to oil and gas, forestry, and other forms of natural resource development that may adversely impact First Nations Treaty rights and traditional uses.

Matters Not Subject to this Policy

Crown decisions that Alberta will *not* assess for potential consultation will include those relating to:

- Leasing and licensing of rights to Crown minerals;
- Accessing private lands to which First Nations do not have a right of access for exercising their Treaty rights and traditional uses;
- Crown decisions on policy matters that are unrelated to land and natural resource management; and
- Emergency situations that may impact public safety and security.

The *Policy* does not preclude other Crown processes that may engage First Nations and lead to government-to-government agreements or resolutions. That engagement may occur between First Nations and Crown officials and elected leadership.

Federal Crown Lands

In some cases, the *Policy* may also apply to provincial Crown decisions relating to or impacting lands other than provincial Crown lands. Alberta recognizes that First Nations members may also be exercising Treaty rights and traditional uses on federal Crown lands (including Indian reserves). Therefore, consultation with First Nations may be required for provincial Crown decisions with the potential to adversely impact the exercise of Treaty rights and traditional uses on federal Crown lands.

Guiding Principles

In November 2005, the Supreme Court of Canada released its decision in *Mikisew Cree First Nation v. Canada,* addressing the Crown's duty to consult First Nations in Treaty areas. From this decision and others, a number of principles have been derived to help guide consultations in a respectful and meaningful manner. Alberta believes that the following principles will result in meaningful consultation.

- Alberta will consult with honour, respect, and good faith, with a view to reconciling First Nations' Treaty rights and traditional uses within its mandate to manage provincial Crown lands and resources for the benefit of all Albertans.
- Consultation requires all parties to demonstrate good faith, reasonableness, openness, and responsiveness.

- Consultation should be carried out before Crown decisions on land and natural resource management are made. Where appropriate, consultation will be done in stages.

- Alberta and project proponents will disclose clear and relevant information regarding the proposed development, decision, or project to First Nations and allow reasonable time for review.

- The level of consultation depends on the nature, scope, magnitude, and duration of the potential adverse impacts on the Treaty rights and traditional uses of the affected First Nation.

- Alberta will inform First Nations and project proponents of known potential adverse impacts and the degree of consultation to be undertaken.

- Alberta will solicit, listen carefully to, and seriously consider First Nations' concerns with a view to substantially address potential adverse impacts on Treaty rights and traditional uses.

- Proponents must act within applicable statutory and regulatory timelines and in accordance with *The Government of Alberta's Corporate Guidelines for First Nations Consultation Activities*.

- First Nations have a reciprocal onus to respond with any concerns specific to the anticipated Crown decision in a timely and reasonable manner and to work with Alberta and project proponents on resolving issues as they arise during consultation.

- The Crown's duty to consult does not give First Nations or project proponents a veto over Crown decisions, nor is the consent of First Nations or project proponents required as part of Alberta's consultation process.

- Accommodation will be assessed on a case-by-case basis and applied when appropriate. The Crown is ultimately responsible for accommodation, but project proponents may have a role in accommodating First Nations.

Elements of Consultation

Content of the Duty

The content of the duty to consult and the appropriate level of consultation to be conducted are based on specific factors. Because the degree of consultation required varies with specific circumstances, Alberta's approach to meeting the duty to consult requires flexibility and responsiveness.

Alberta has developed draft *Government of Alberta's Corporate Guidelines for First Nations Consultation Activities* ("*Corporate Guidelines*"), which include a draft consultation matrix that classifies activities according to their relative potential impact on Treaty rights and traditional uses. Operational matrices will be created to identify when (i.e., in what cases) and how much (i.e., the degree of) consultation is required. The matrices will also identify timelines within the consultation process.

Scope of Consultation

The scope of consultation will be defined by the project or initiative being proposed and its potential adverse impacts on the continued exercise of Treaty rights and traditional uses. For projects or initiatives to which the operational matrices would apply, Alberta will use the operational matrices to make its initial determination of the scope of consultation.

Depth of Consultation

Alberta recognizes that more consultation may be required where the potential adverse impact on Treaty rights and traditional uses is greater. Factors that could influence the depth of consultation include:

- The geographic extent of the anticipated Crown decision's impact on the land or resources; and
- The degree to which First Nations have used the affected lands and resources for the exercise of Treaty rights and traditional uses and continue to do so today.

Consultation Office

Alberta will also establish a consultation office that reports to the Minister of Aboriginal Relations. In satisfying Alberta's duty to consult, this office will manage all aspects of consultation, including:

- Policy development and implementation;
- Pre-consultation assessment;
- Management and execution of the consultation process;
- Assessment of consultation adequacy;
- Consultation capacity-building initiatives with First Nations; and
- Measures to protect the transparency and integrity of the consultation process.

The consultation office will carry out these activities in a manner described in this *Policy* and the draft *Corporate Guidelines*.

Direct Consultation by the Crown

Alberta will consult directly in the following situations:

- When Alberta undertakes strategic initiatives with the potential to adversely impact Treaty rights and traditional uses;
- When Alberta acts as a project proponent; and
- When a project requires Level 3 consultation as set out in the draft *Corporate Guidelines*.

Direct Crown consultation will ordinarily be carried out by the consultation office with support from appropriate provincial departments. Consultation for certain strategic initiatives may be led by provincial departments with support from the consultation office. For Level 3 consultation, proponents may be required to participate in and lead various aspects of direct consultation.

Delegation

Within this *Policy*, a proponent is defined as "an entity or person who is either applying for or seeking a Crown decision related to land and natural resource management." Alberta recognizes that the legal duty to consult rests with the Crown. However, when consultation relates to specific projects, the law allows the Crown to delegate procedural aspects of consultation to project proponents.

Generally, the consultation office will delegate procedural aspects of consultation for projects where the preliminary assessment indicates that the scope of consultation is limited (refer to the operational matrices within the draft *Corporate Guidelines*). When delegating aspects of consultation, the consultation office will assess consultation adequacy. The level of consultation that the consultation office requires of proponents depends on the extent of the potential adverse impacts on the Treaty rights and traditional uses and the scope and depth of the proponents' anticipated activities.

When it delegates procedural aspects of consultation, the consultation office will remain engaged in the consultation process. In general, procedures that may be delegated to project proponents include:

- Providing First Nations with plain language information on project scope and location;
- Identifying potential short- and long-term adverse project impacts;
- Meeting with First Nations to discuss their concerns;
- Developing potential mitigation strategies to minimize or avoid adverse impacts;
- Implementing mitigation measures, as directed; and
- Summarizing, for both Alberta and First Nations, consultation efforts including an explanation, when required, of how specific First Nations' concerns regarding adverse impacts have been addressed.

Despite the above, the consultation office will direct and manage all aspects of consultation for those projects requiring Level 3 consultation with First Nations as set out in the draft *Corporate Guidelines*. In cases involving proponents, the consultation office will guide the proponents in how to support the consultation.

Proponents will summarize, for both Alberta and the appropriate First Nations, their consultation efforts in a way that clearly demonstrates how mitigation strategies will address impacts to the Treaty rights and traditional uses. Using this information, the consultation office will assess the adequacy of consultation and provide direction to proponents regarding mitigation.

Alberta acknowledges that some First Nations have developed their own consultation protocols. Alberta encourages proponents to be aware of these protocols, but does not require proponents to comply with them while consulting with First Nations. In cases of conflict between a First Nation's consultation protocol and this *Policy* or the *Corporate Guidelines*, the *Policy* and *Corporate Guidelines* will prevail.

As stated above, the consultation office will manage delegated aspects of consultation. Forthcoming operational guidelines will set out minimum standards for delegated consultation activities, specific timelines, and a range of Crown-management activities. This clarification of the Crown's role will help ensure delegated consultation activities are meaningful and consistent with the *Policy*.

Roles and Responsibilities in Delegated Consultation

Government of Alberta

Conducting a Pre-Consultation Assessment

Pre-consultation assessments will guide the consultation office in determining if consultation is needed in the circumstances and, if so, the scope and extent of the consultation required. The consultation office will complete this initial assessment as early as possible in the planning phase of an anticipated Crown decision.

Determining Notification Requirements

The consultation office is responsible for determining which projects require consultation and which First Nations need to be notified and for directing proponents to provide reasonable time for First Nations to respond with their specific concerns about the potential adverse impacts.

Considering the Response and Determining Adequacy

The consultation office will determine whether delegated activities were performed adequately by considering what efforts were made to mitigate or substantially address potential adverse impacts on Treaty rights and traditional uses. This assessment of adequacy will be made after consultation is completed and before the Crown decision is made. If the consultation office finds performance to be inadequate, the consultation office may direct the proponent to take further steps to achieve adequacy.

Accommodating First Nations

While accommodation is the responsibility of the Crown, proponents will have a role in identifying and implementing potential mitigation measures, where appropriate.

Reporting the Decision and Following Up

In a manner consistent with the draft *Corporate Guidelines*, Alberta may report its decision in writing to the affected First Nations. When procedural aspects of consultation are delegated, it

is expected that proponents will identify adverse impacts on Treaty rights and traditional uses to Alberta, and how they plan to mitigate those impacts.

First Nations

Timely Information Sharing and Communication

First Nations have a reciprocal obligation to be timely in responding to the Crown's efforts to consult and in providing Alberta or proponents with specific information on how the project or initiative may adversely impact the exercise of their Treaty rights and traditional uses. The obligation also requires First Nations to report consultation concerns to Alberta as soon as possible. First Nations are invited to work with Alberta to identify the geographic areas on which they have historically exercised their Treaty rights and traditional uses and continue to do so.

Providing a Single Point of Contact

Consultation will occur on a government-to-government basis. Alberta recognizes that consultation will require the participation of different levels of officials, employees, or agents of Alberta and First Nations, depending on the nature of the anticipated Crown decision and the organizational structure of the particular government. For clarity and efficiency, Alberta requires First Nations to identify a single point of contact to serve as the First Nation's authorized consultation representative that Alberta or the proponent should contact. A First Nation's Chief and Council, ordinarily recognized by Canada, may serve as this representative.

Project Proponents

Carrying Out Delegated Activities

Project proponents that have procedural aspects delegated to them by Alberta's consultation office may include industry, municipal governments, or any other organization requiring Crown approval of a project. The consultation office will assess the adequacy of the consultation. As directed by Alberta, proponents will notify potentially affected First Nations early in project planning to allow reasonable time for First Nations' concerns to be considered. Proponents will discuss project-specific issues that arise with First Nations as well as strategies to address those concerns.

Consultation Timelines

The assessment of consultation adequacy will generally occur within applicable statutory and regulatory timelines and in accordance with the *Corporate Guidelines*.

Coordinating Consultation

Consultation may involve coordination across jurisdictions, departments, agencies, and processes. Alberta will continue to work on enhancing cross-government working relationships, in order to

strengthen this coordination. Alberta will also develop coordination processes with other provincial and territorial governments, Canada, or agencies of government, with a view to increasing information-sharing and cross-jurisdictional collaboration.

Alberta Energy Regulator

Alberta has established the Alberta Energy Regulator ("the Regulator"). This Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation-associated First Nations' Treaty rights as recognized and affirmed under Part II of the *Constitution Act, 1982.* The consultation office will work closely with the Regulator to ensure that any needed consultation occurs for decisions on energy project applications within the Regulator's mandate.

Consultation Capacity

Alberta will develop a program to increase capacity funding to First Nations and to fund that program through a levy on industry. The consultation office will be responsible for managing and distributing this funding to First Nations. Alberta will solely fund government-led consultation for Crown projects.

Transparency of Process

The integrity of the consultation process depends on all parties knowing clearly at each step of a consultation what the costs of that consultation will be.

The levy and its resulting funding contribute to this transparency by increasing consultation capacity of First Nations. Alberta supports general community economic development initiatives which proceed outside this *Policy*, including current discussions with First Nations on an Economic Opportunities Initiative. The option of entering into agreements about project impact benefit agreements is open for exploration between First Nations and proponents.

Measures to maintain integrity of the consultation process will be contained in guidelines developed to support this *Policy*.

Corporate and Operational Guidelines

To provide all parties to the consultation process with increased clarity and direction, and to ensure that consultation is meaningful, Alberta will adopt *Corporate Guidelines* and operational guidelines that will:

- Develop a range of Crown-monitoring activities for delegated consultation;
- Clarify specific information required from First Nations on projects and initiatives;
- Coordinate consultation by working with Canada and provincial governments;
- Reflect the needs of proponents and First Nations as well as specific ministry mandates and regulatory processes; and

- Guide the development of consultation matrices to identify triggers, project scope, and depth of consultation, and address the range of projects and initiatives and their potential to impact Treaty rights and traditional uses.

Review

It is important for all parties to continue to identify, discuss, and resolve issues related to First Nations consultation. Alberta will review this *Policy*, and all associated documentation, in separate engagement forums with First Nations, industry, and other stakeholders annually as mutually decided upon by the affected parties. The purpose of these forums will be to assess the performance, standards, and best practices of the consultation process. This will ensure that the *Policy* reflects developments in First Nations consultations and responds to the future needs of First Nations, industry and other stakeholders. Alberta reserves the right to amend this *Policy* as appropriate.

Conclusion

This *Policy* replaces *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* (adopted May 16, 2005) and comes into force upon a date to be specified.

Alberta's previous *First Nations Consultation Guidelines on Land Management and Resource Development* (updated November 14, 2007) outlined procedures to help the Crown implement its duty to consult. The *Policy* and *Corporate Guideline*s support these existing guidelines, which will remain in effect, with necessary changes, until forthcoming operational guidelines under the *Policy* come into effect. Many of the matters outlined in the *Policy*, including the consultation office, operational matrices, the consultation levy and consultation process agreements, will require further engagement and discussion with First Nations, industry, and other stakeholders.

In the event of a discrepancy between the *Policy* and the existing guidelines, the *Policy* will prevail. Where consultation on a project or initiative has commenced prior to this *Policy* coming into effect, consultation will be completed under the previous policy and guidelines.

Appendix 2A:
Draft Guidelines

The Government of Alberta's Corporate Guidelines for First Nations Consultation Activities, 2013

Introduction

The draft *Government of Alberta's Corporate Guidelines for First Nations Consultation Activities* ("draft *Corporate Guidelines"*) have been developed to provide consulting parties with clear direction on and standards for consultation activities. Transparency, adequacy, and accountability of these activities are key outcomes of the draft *Corporate Guidelines*.

Purpose

The Government of Alberta's duty to consult is a legal obligation founded in the honour of the Crown. These draft *Corporate Guidelines* establish standards for consultation activities to assist the Government of Alberta ("Alberta") in meeting its obligations in a manner consistent with the honour of the Crown. Clearly outlining Alberta's consultation processes and standards will increase the transparency of Alberta's consultation initiative overall. Increased transparency leads to accountability for all parties and provides better assurances of consultation adequacy.

When the consultation office delegates procedural aspects of consultation to proponents, it expects the activities undertaken on its behalf to meet the standards established here.

Corporate Guidelines Application

The draft *Corporate Guidelines* document applies to all strategic and project-specific Crown decisions that may adversely impact the continued exercise of Treaty rights and traditional uses. The draft *Corporate Guidelines* will apply to Alberta's consultations with all First Nations; however, Alberta is prepared to enter into specific consultation process agreements with First Nations. These agreements will further clarify the consultation process.

Consultation Assessment

When a project or initiative involving land management and resource development is proposed, Alberta's consultation office will conduct a preliminary assessment to determine

- Whether the project requires consultation;
- Which First Nations to notify;
- What level of consultation is necessary in the circumstances; and
- Whether or not to delegate procedural aspects of consultation to project proponents.

The consultation office's initial assessment may be done on a case-by-case, project, or class basis.

To support this assessment, Alberta has developed a draft Consultation Process Matrix and appended it to these draft *Corporate Guidelines*. The draft matrix establishes three potential assessment levels for consultation. When the preliminary assessment identifies the scope of consultation as Level 2, the consultation office will normally delegate procedural aspects of consultation to the proponent. The consultation office will ordinarily consult directly on projects requiring Level 3 consultation.

Specific operational matrices will be developed to replace the draft Consultation Process Matrix. These operational matrices will serve as tools for the consultation office in conducting its preliminary consultation assessment.

In its initial assessment, the consultation office will consider factors including

- The magnitude, scope, timing, location, and duration of the proposed project;
- The status of the project site relative to lands selected as part of Treaty Land Entitlement negotiations;
- The general availability of Crown land in the area for exercising Treaty rights or practising traditional uses;
- The specific information shared by First Nations about exercising their Treaty rights or practising traditional uses;
- Information acquired through direct interactions with First Nations; and
- Other relevant information that is available to Alberta.

If consultation is required, the consultation office will communicate that requirement to the proponent and communicate what it expects of the proponent.

Delegation

When procedural aspects of consultation are delegated, the proponent is expected to proceed according to the following. In direct consultation, the consultation office will do the same.

Notification

Once a consultation trigger has been identified and the scope of consultation determined, the next step is to notify the appropriate First Nation(s). For Level 2, the consultation office will direct proponents to create and send to First Nations a notification package containing, at minimum, a plain language description of the project magnitude, scope, timing, location, duration, possible impacts (as understood by Alberta), and visual aids such as maps or diagrams, where possible.

For Level 3, the consultation office will create the notification package. They will then forward the notification package to each affected First Nation's authorized consultation representative and confirm that it was received by the authorized representative. Evidence of receipt may include a courier receipt, an email or letter acknowledging receipt, a follow-up telephone call confirming receipt, or other documentation with similar details.

If it believes a proposed project may adversely impact its exercise of Treaty rights and traditional uses, the notified First Nation is expected to respond to the consultation office or proponent within the timelines identified in the draft Consultation Process Matrix. The nature of this response is outlined in the matrix. The timelines and responses will be clarified in operational matrices.

All notification activities and responses to notification packages must be thoroughly documented by the consultation office in Level 3 consultation or by their delegated proponent in Level 2 consultation.

First Nations Response

When responding to written notification within the timelines identified in the draft Consultation Process Matrix, the First Nation is expected to name the specific project and clearly identify the potential adverse impacts on Treaty rights and traditional uses.

Initial Engagement

Upon receipt of a response to notification, the consultation office or proponent will engage in a dialogue with the First Nation to determine the details of the potential impacts and whether or not the impacts can be mitigated. These discussions may be done over the telephone, by email, or in person. If a First Nation requests a face-to-face meeting to discuss the project, the consulting party is strongly encouraged to do so in the spirit of meaningful dialogue and positive relationship-building.

The consulting party must thoroughly document all initial engagement activities. First Nations are also encouraged to document these activities for their own records.

Exploring Mitigation

Once the proponent understands the nature of the First Nation's concerns, both parties are expected to work together to discuss potential strategies to avoid or minimize the impacts to Treaty rights and traditional uses. Mitigation strategies could include amending project plans to accommodate site-specific concerns and to reduce or change the potential impact on areas used for exercising Treaty rights and traditional uses.

The proponent must thoroughly document any mitigation strategies explored or agreed upon by the parties. First Nations are also encouraged to document these activities for their own records.

Proposing Solutions

If the parties agree to a mitigation strategy, the proponent will need to confer with the consultation office, which will then work with the regulatory authority to determine whether the proposed strategy could result in unintended regulatory complications (e.g., environmental or site-specific sensitivities).

If the parties do not agree on a mitigation strategy, the nature of the disagreement and all attempts to resolve it must be documented by both parties to be considered by the consultation office.

Reporting and Completing the Consultation

The proponent is required to compile their consultation record as directed by the consultation office, detailing the activities that occurred as a part of the consultation, and provide it to the consultation office and the First Nation. The consultation office will use this record to assess the adequacy of consultation. The consultation office may also ask the First Nation to provide their consultation records. If the consultation is considered inadequate, the proponent will be given further direction on what is required. The consultation office will manage the consultation process and conduct the final assessment of adequacy.

Once the consultation is considered adequate, the consultation office will inform First Nations, project proponents, the appropriate regulatory bodies, and (if different from the project proponent) the consulting party of the result of its assessment.

Consultation Timelines

Crown decisions will generally occur within applicable statutory and regulatory timelines and in accordance with the draft *Corporate Guidelines*. Depending on the impact to the First Nation's Treaty rights and traditional uses, the consultation issues raised, and the specifics of the proposed project or initiative, consultation may take days or months. For this reason, proponents are encouraged to contact the consultation office in the early stages of their project or initiative.

The draft Consultation Process Matrix establishes timelines associated with levels and phases of consultation. It also establishes conditions that may extend deadlines, such as project modification and additional information that may modify the level of consultation required. The timelines could also be affected by

- First Nations holiday office closures (which vary from First Nation to First Nation);
- Ceremonial days or events such as Treaty Days, National Aboriginal Day, and community dances/feasts (generally one or two days); and
- Emergency situations such as wildfires and floods (timelines vary to extent of the emergency).

Other circumstances may also warrant modifying the timelines. In all cases, the consultation office will have the authority to do so.

Transparency of Process

Alberta is committed to achieving a consultation process which maintains integrity of that process.

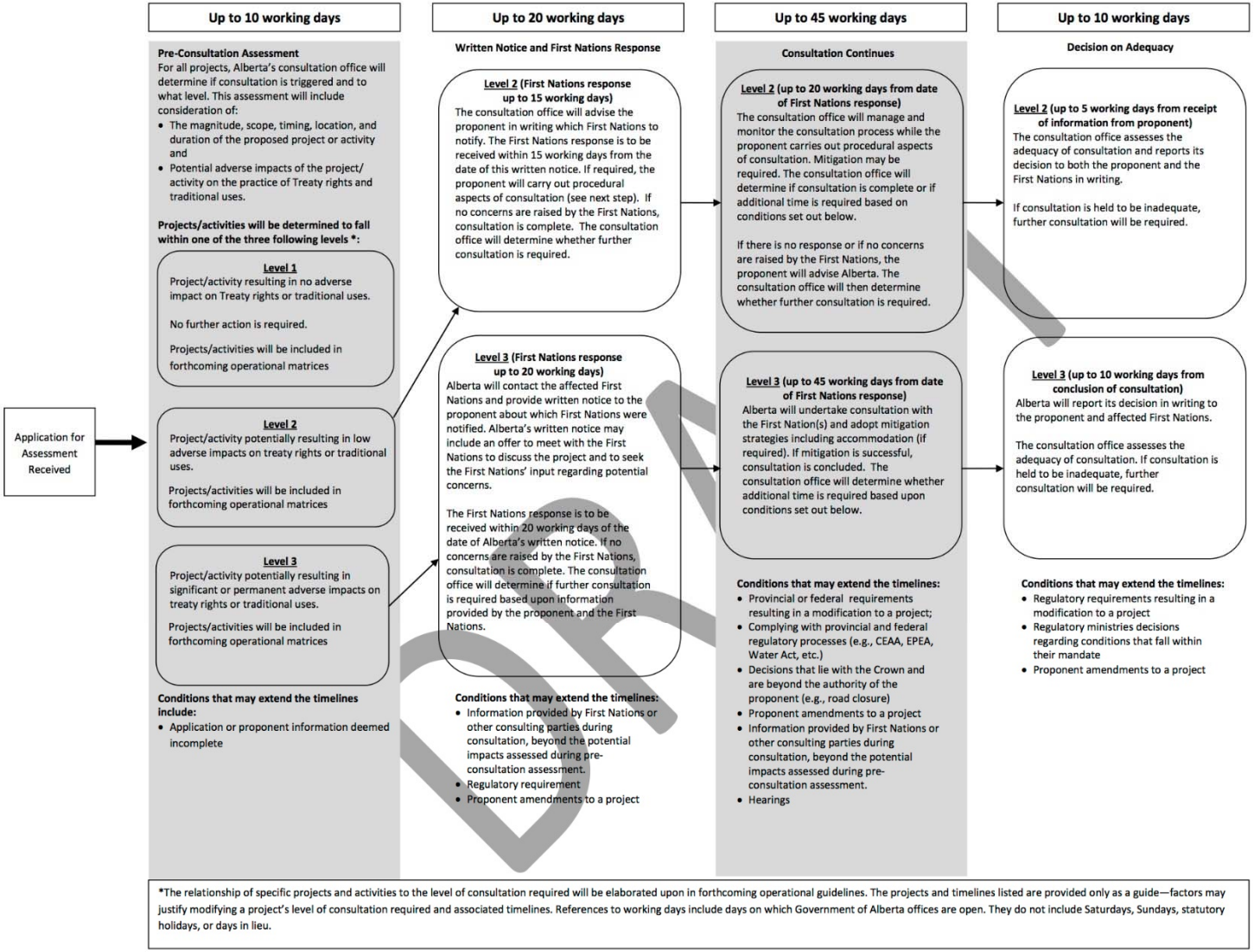
One tool to maintain the integrity of the process is negotiation of a consultation process agreement between Alberta and a First Nation.

Where a cooperative arrangement protecting the integrity of the consultation process cannot be developed, Alberta will rely on the compulsory disclosure process enabled by the *Aboriginal Consultation Levy Act*. Under that process, industry proponents will provide to the consultation office all

consultation-related agreements signed with First Nations as an outcome of consultation processes along with their consultation logs. Alberta will publish aggregated information regularly.

The parties acknowledge that disclosure of these agreements can significantly harm relations between the parties. As a result, the agreements will be kept confidential, and will not be made public or shared with any person or organization outside of Alberta staff except as required by law. Sanctions will be developed for proponents who fail to comply.

Appendix 2B: Draft Consultation Matrix



Appendix 3:
Alberta Treaty Chiefs Position Paper (2010)

TREATY 8 FIRST NATIONS OF ALBERTA

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

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September 30, 2010

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Re: Treaty 8 Alberta Chiefs' Position Paper on Consultation

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

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

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

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

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

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

INTRODUCTION:

1. Treaty Centred Consultation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[2] 2005 SCC 69.

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

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

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

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

KEY CONSULTATION OBJECTIVES OF THE FIRST NATIONS

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

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

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

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

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

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

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

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

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

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

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

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

INTERESTS OF OUR FIRST NATIONS

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

- That all processes are structured so that the Province is not the party that can make decisions without being required to take into account our rights and interests in those decisions and without taking into consideration our procedural concerns about consultation.

- The full protection of our Treaty and inherent rights now and for future generations.

- Protecting the use and enjoyment of our reserve lands and lands within our, Traditional Territories, and lands acquired pursuant to TLE entitlements and other land claims, for present and future generations.

- Achieving greater participation in the social and economic benefits flowing from development.

- Protecting, preserving, encouraging and enhancing the cultural, social, economic and environmental connection of our First Nations to lands and resources.

- That the regulatory review of projects properly incorporates the procedural and substantive concerns of our First Nations through all phases – from the early conceptualization and design of the process through to decision-making, monitoring, enforcement and reclamation.

- That any consultation process properly takes into account the legal principles recognized by the courts and that accommodation options allow for the full range of First Nations' concerns to be taken into account in decision making.

- Development of a forum for broader economic, social, and environmental issues to work with Alberta and Canada in addressing and developing solutions to these issues, while respecting the Federal, Provincial, and First Nations jurisdictions.

- That our First Nations have full information to assess potential impacts of Crown decision making on our rights and that our First Nations play a meaningful role in determining what information is required by the Crown, Industry and First Nations to determine such impacts.

- That traditional knowledge is respected and incorporated into decision making.

- That any decisions do not impair, or infringe, the rights and interests of our First Nations.

- When such an infringement occurs, accommodation of the infringement will be in the interest of the effected First Nation.

- That industrial development, urban growth, and other kinds of economic development take place in a way which minimizes the direct, indirect and cumulative social, health, cultural, economic and environmental impacts on our First Nations˝ rights and on our communities.

- That our First Nations benefit socio-economically from any development that does take place – both in terms of direct project benefits as well as in sharing the wealth of the Province.

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

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

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

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

KEY PRINCIPLES

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

1. The Treaty is not a finished land use blueprint (*Mikisew*);
2. Consultation is an ongoing process and is <u>always</u> required (*Haida*);
3. Consultation is a "two-way" street with obligations on each side;
4. Consultation and accommodation are constitutional obligations (*Kapp*);
5. When the duty is triggered, First Nations have a clear constitutional right to Crown performance of that duty (*Haida*, *Mikisew*);

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

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

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

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

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

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

12. The Crown must have sufficient, credible information in decision making and must take into account the long-term sustainability of section 35 rights (*Roger William*). This is particularly so in light of Alberta's constitutional duty to ensure the sustainability of Treaty hunting, fishing and trapping rights pursuant to the *Constitution Act, 1930* (*R. v. Badger* [ABCA]);
13. The purpose of consultation is reconciliation and not simply the minimization of adverse impacts (*Dene Tha'*);

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[5] *West Moberly First Nation v. British Columbia*, 2010 BCSC 359, para.54 & 55;*Dene Thå First Nation v. Canada*, 2006 FC1354.

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

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

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

A specific approach to consultation

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

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

Yours truly,

Treaty 8 Chiefs of Alberta

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

SIGNATURE PAGE ATTACHED

cc: Treaty No. 8 Alberta Chiefs
Ted Morton, Minister of Finance and Enterprise
David Hancock, Minister of Education
Iris Evans, Minister of International and Intergovernmental Relations
Ron Liepert, Minister of Energy
Luke Ouellette, Minister of Transportation
Mel Knight, Minister of Sustainable Resource Development
Alison Redford, Minister of Justice and Attorney General
Rob Renner, Minister of Environment
Gene Zwozdesky, Minister of Health and Wellness
Yvonne Fritz, Minister of Children and Youth Services
Jack Hayden, Minister of Agriculture and Rural Development
Ray Danyluk, Minister of Infrastructure
Mary Anne Jablonski, Minister of Seniors and Community Supports
Lindsay Blackett, Minister of Culture and Community Spirit
Heather Klimchuck, Minister of Service Alberta
Cindy Ady, Minister of Tourism, Parks and Recreation
Hector Goudreau, Minister of Municipal Affairs
Jonathon Denis, Minister of Housing and Urban Affairs
Thomas Lukaszuk, Minister of Employment and Immigration
Darryel Sowan, Director of Livelihood
Chiefs Livelihood Committee (CLC)
Consultation Technical Team (CTT)

APPENDIX A

GENERAL CONCERNS WITH ALBERTA'S APPROACH TO CONSULTATION

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

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

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

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

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

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

[7] *R. v. Sundown*, [1999] 1 S.C.R. 393, para. 32.

[8] *Sundown*, supra; *Marshall*, supra, para. 78;see also: *R. v. Sappier*, 2004 NBCA 56; *R. v. Cote*, [1996] 3 S.C.R. 136; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Simon*, [1985] 2 S.C.R. 387; *Claxton v. Saanichton Marina Ltd*., [1989] 3 C.N.L.R. 46 (BCCA);

[9] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para 1364; See also Brian Slattery, *Aboriginal Rights and the Honour of the Crown*, (2005), 29 S.C.L.R. (2d), pp. 435-443;and Brian Slattery, *The Generative Structure of Aboriginal Rights*, (2007) 38 S.C.L.R. (2d).

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

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

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

2. Alberta's approach to consultation lacks precision

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

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

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

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

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

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

[10] *Haida*, supra, para. 3 – 38; see also: *R. v. Badger*, [1996] 1 S.C.R. 771, para. 97.

[11] *R. v. Marshall* (2), [1999] 3. S.C.R. 533, para. 22; *Haida*, supra., para. 47.

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

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

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

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

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

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

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

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

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

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

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

[13] *Tsilhqot'in*, supra, paras. 1272-75, 1288.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. Alberta has an obligation to be forthright about consultation

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

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

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

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

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

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

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

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

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

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

[19] *Mikisew Cree First Nation v. Canada*, 2005 SCC 69, para.33; *Haida Nation v. British Columbia*, 2004 SCC 73, para.41; *R. v. Marshall*, [1999] 3 S.C.R. 456, para. 49.

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

APPENDIX B

SUGGESTED APPROACH TO CONSULTATION

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

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

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

- The Crown's "taking up" of lands and resources for development are subject to the duty to consult and accommodate.
- Consultation is an ongoing process and is always required.
- Consultation must be conducted with the genuine intention of seriously considering and substantially addressing the concerns of First Nations and wherever possible, demonstrably integrating the concerns of the First Nations within any Proposal – this extends to both procedural (process) and substantive concerns.
- Consultation must take place early in any Proposal before important decisions are made, including at the strategic planning stage of any Proposal and the tenure-granting/land sale stage.
- The duty to consult is not met by addressing only the site-specific impacts of any decision, but must also seriously consider and substantially address the potential indirect, derivative, induced and cumulative impacts of other existing, planned, or reasonably foreseeable industrial development(s) on our rights, including injurious affection related thereto.
- First Nations need adequate resources to assess the potential impacts of any decision on their rights and interests, including the identification of any mitigation and accommodation opportunities in relation to any decision. In order to be able to consult in a meaningful fashion, the Crown and third parties must be required to negotiate adequate funding with First Nations that enables us to carry out our consultation obligations and the Crown will not authorize development until companies have demonstrated that they have provided such funding.
- In carrying out consultation in relation to any Proposal, First Nations, the Crown and, if appropriate, third parties, have reciprocal obligations of reasonableness, good faith, and cooperation.
- Any consultation process and its outcome must be responsive to the interests and concerns of our First Nations.
- The nature of consultation, compensation and accommodation will vary depending upon the degree of potential adverse impacts on and infringements of the rights of our First Nations.

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

- Communication must be open, honest and clear.

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

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

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

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

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

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

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

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

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

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

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

Process for Consultation

a. Initial Information Requirements

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

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

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

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

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

    - the nature and scope of the decision;

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

    - the reasons for or purpose of the decision;

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

    - the location of the contemplated conduct;

    - the duration of the contemplated conduct;

    - the potential risks associated with the contemplated conduct;

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

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

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

- o the identification of alternatives to the contemplated conduct; and

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

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

  i. applications;

  ii. studies;

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

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

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

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

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

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

b. Processing of Information – General Kinds of Decisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Consultation Process for Complex Decisions

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

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

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

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

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

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

    i. Quality and quantity of wildlife species required;

    ii. Quality and quantity of aquatic species required;

    iii. Quantity and quality of plants or other things gathered; and

    iv. Quantity and quality, as the context requires, of air, water and ecosystems required to support the exercise of the First Nation's rights;

    v. Inclusion or understanding of information to consider the cultural impacts of decisions on our rights

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

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

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

d. Accommodation

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

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

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

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

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

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

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

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

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

Appendix 4A:
Consultation Policies and Agreements in Canadian Jurisdictions – List

Jurisdiction	Policy	Responsible Ministry	Link to Policy
Canada	Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (2011)	Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca>	<http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf>
Yukon	Umbrella Final Agreement (1993)	Executive Council Office <http://www.eco.gov.yk.ca/index.html>	<http://www.eco.gov.yk.ca/pdf/umbrellafinalagreement.pdf>
Northwest Territories	The Government of the Northwest Territories' approach to consultation with Aboriginal Governments and Organizations (2007)	Aboriginal Affairs and Intergovernmental Relations <http://www.daair.gov.nt.ca/_live/pages/wpPages/home.aspx>	<http://www.daair.gov.nt.ca/_live/documents/content/Aboriginal_Consultation_Approach.pdf>
Nunavut	Nunavut Land Claims Agreement (1993)	Department of Executive and Intergovernmental Affairs <http://gov.nu.ca/eia>	<http://gov.nu.ca/sites/default/files/files/013%20-%20Nunavut-Land-Claims-Agreement-English.pdf>
Newfoundland & Labrador	The Government of Newfoundland and Labrador's Aboriginal Consultation Policy On Land and Resource Development Decisions (2013)	Labrador and Aboriginal Affairs Office <http://www.laa.gov.nl.ca/laa/>	<http://www.laa.gov.nl.ca/laa/publications/aboriginal_consultation.pd>
Nova Scotia	Nova Scotia Interim Consultation Policy (2007)	Office of Aboriginal Affairs <http://novascotia.ca/abor/>	<http://novascotia.ca/abor/docs/Nova-Scotia-Interim-Consultation-Policy-June-1807.pdf>
	Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process (2010)		<http://novascotia.ca/abor/docs/MK_NS_CAN_Consultation_TOR_Sept2010_English.pdf>
New Brunswick	Government of New Brunswick Duty to Consult Policy (2011)	Department of Aboriginal Affairs <http://www2.gnb.ca/content/gnb/en/departments/aboriginal_affairs.html>	<http://www2.gnb.ca/content/dam/gnb/Departments/aas-saa/pdf/en/DutytoConsultPolicy.pdf>

Jurisdiction	Policy	Responsible Ministry	Link to Policy
Prince Edward Island	Provincial Policy on Consultation with the Mi'kmaq (2009)	Department of Intergovernmental and Public Affairs – Aboriginal Affairs Secretariat <http://www.gov.pe.ca/aboriginalaffairs/>	<http://www.gov.pe.ca/photos/original/hea_mikmaqconsu.pdf>
	Consultation Agreement (2012)		<http://www.gov.pe.ca/photos/original/aas_consult.pdf>
Manitoba	Interim Provincial Policy For Crown Consultations with First Nations, Métis Communities and Other Aboriginal Communities (2009)	Manitoba Aboriginal and Northern Affairs <http://www.gov.mb.ca/ana/>	<http://www.gov.mb.ca/ana/pdf/interim_aboriginal_consultation_policy_and_guidelines.pdf>
Saskatchewan	First Nation and Métis Consultation Policy Framework (2010)	Government Relations – First Nations, Métis and Northern Affairs <http://gr.gov.sk.ca/fnmna>	<http://gr.gov.sk.ca/Consultations/Consultation-Policy-Framework>
Alberta	The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013	Ministry of Aboriginal Relations <http://www.aboriginal.alberta.ca>	Policy: <http://www.aboriginal.alberta.ca/documents/GoAPolicy-FNConsultation-2013.pdf> Corporate Guidelines (Draft): <http://www.aboriginal.alberta.ca/documents/GoACorpGuidelines-FNConsultation-2013.pdf> Consultation Matrix (Draft): <http://www.aboriginal.alberta.ca/documents/GoAMatrix-FNConsultation-2013.pdf>
Quebec	Interim guide for consulting the Aboriginal Communities (2008)	Secrétariat aux affaires autochtones <http://www.autochtones.gouv.qc.ca/index_en.asp>	<http://www.autochtones.gouv.qc.ca/publications_documentation/publications/guide_inter_2008_en.pdf>
Ontario	Draft Guidelines For Ministries on Consultation With Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights (2006)	Ministry of Aboriginal Affairs <http://www.ontario.ca/ministry-aboriginal-affairs>	<http://docs.files.ontario.ca/documents/258/3-maa-draft-guidelines-for-ministries-on.pdf>
	Aboriginal Consultation Guide for preparing a Renewable Energy Approval (REA) Application (2013)	Ministry of the Environment <http://www.ontario.ca/ministry-environment>	<https://dr6j45jk9xcmk.cloudfront.net/documents/919/3-3-4-aboriginal-consultation-guide-en.pdf>

Jurisdiction	Policy	Responsible Ministry	Link to Policy
British Columbia	Updated Procedures For Meeting Legal Obligations When Consulting First Nations Interim (2010)	Ministry of Aboriginal Relations and Reconciliation <http://www.gov.bc.ca/arr/>	<http://www.gov.bc.ca/arr/reports/down/updated_procedures.pdf>
	Oil and Gas Commission Draft Interim Consultation Procedure with Treaty 8 First Nations (September 2011)	BC Oil and Gas Commission <https://www.bcogc.ca>	<https://www.bcogc.ca/node/5971/download>

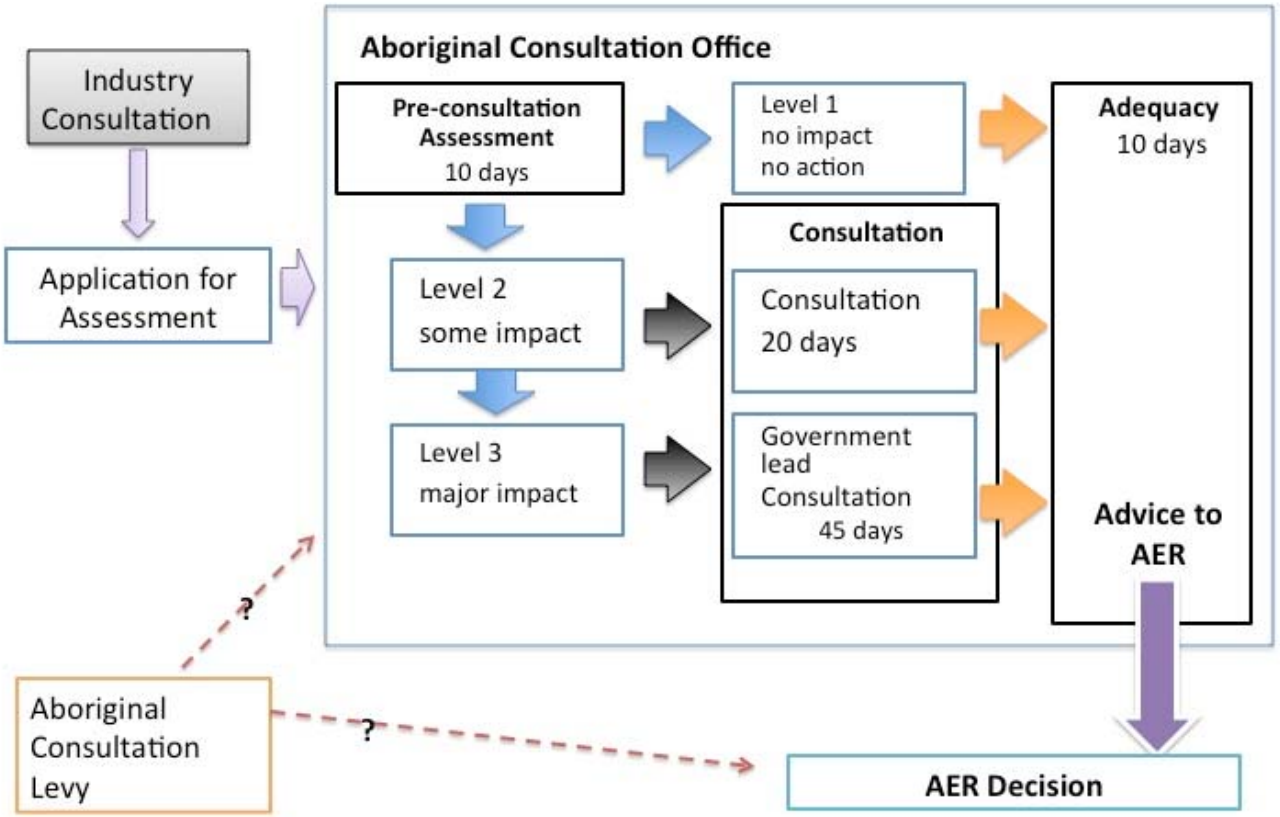
Appendix 4B:
Consultation Policies and Agreements in Canadian Jurisdictions – Comparison

Jurisdiction	Level of Detail	Responsibility	Basis of Consultation	Rights Considered	Initial Determination	Consultation Design	Strategic
Canada	Detailed Policy Guidelines	Distributed (CEEA)	Legal and good governance	Treaty and aboriginal rights including title	Government determined but if uncertain ask	Government designed, preference for EIA process	Yes
Yukon	Land Claims Agreement	Distributed	Contractual	All aspects	Parties	Contractual source	Yes
Northwest Territories	Broad Policy	Distributed	Legal	Treaty and aboriginal rights	Government determination	Government designed	Silent
Nunavut	Land Claims Agreement	Distributed	Contractual	All aspects	Parties	Contractual source	Yes
Newfoundland & Labrador	Broad Policy with Guidelines	Distributed	Legal	Treaty and aboriginal rights	Government determined – no details	Guidelines in negotiation	Silent
Nova Scotia	Broad Policy	Distributed	Legal and policy	Treaty and aboriginal rights	Government determination	Limited details	Silent
Agreement (2010)	Framework Consultation Agreement (Optional)	Joint Design Committee	Contractual	Treaty and aboriginal rights on a with prejudice basis	Party led	Joint design	Silent
New Brunswick	Broad Policy	Centralized (Aboriginal Affairs)	Legal	Treaty and aboriginal rights, including title	Government determined – no details	No Details	Yes

Jurisdiction	Level of Detail	Responsibility	Basis of Consultation	Rights Considered	Initial Determination	Consultation Design	Strategic
Prince Edward Island	Broad Policy	Distributed	Legal	Mi'kmaq treaty or aboriginal rights	Government determined – no details	No Details	Silent
Agreement (2012)	Consultation Agreement (Optional)	Centralized (Department of Aboriginal Affairs)	Contractual	Mi'kmaq treaty or aboriginal rights on a with prejudice basis	Party led	No Details	Silent
Manitoba	Broad Policy	Distributed	Legal and good governance	Treaty and aboriginal rights and a broad consideration of "interests"	Government determined but if uncertain ask	Required FN input and for large projects make an agreement with First Nations	Yes
Saskatchewan	Detailed Policy	Distributed	Legal and policy	Treaty rights, asserted Métis rights and traditional uses (not including aboriginal title)	Government lead – no delegation to proponents	Consultation Matrix - short timelines	Yes
Alberta	Broad Policy with Guidelines and Consultation Matrix	Centralized (ACO)	Legal	Treaty rights and traditional uses.	Government determined	Consultation Matrix with short timelines (under negotiation)	Yes
Quebec	Detailed Policy	Distributed	Legal	Treaty and aboriginal rights	Collaboration with the Aboriginal communities if possible	Government lead - timelines to be agreed with First Nations prior to consultation	Yes

Ontario	Broad Policy	Distributed	Legal and policy	Treaty and aboriginal rights including title.	Government determination	First Nations will have input into the design process in some circumstances	Silent
REA Policy (2013)	Department Detailed Policy	Department Policy	Legal	Treaty and aboriginal rights including title.	Government determination	Detailed procedure	No
British Columbia	Detailed Policy	Distributed	Legal	Treaty and aboriginal rights including title.	Government notification and First Nation response	Government notification and First Nation response will set the consultation level and process	Yes
OGC Policy (2011)	Department Detailed Policy	Department Policy	Legal	Treaty rights	Government notification and First Nation response	Government notification and First Nation response will set the consultation level and process	No

Appendix 5:
Flowchart of Anticipated Consultation Process at AER



Appendix 6:
Ministerial Order 141/2013

Government of Alberta
Energy

Office of the Minister

404 Legislature Building
Edmonton, Alberta
Canada T5K 2B6

Telephone 780/427-3740
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GOVERNMENT OF ALBERTA

DEPARTMENT OF ENERGY

MINISTERIAL ORDER 141/2013

I, **KEN HUGHES, Minister of Energy**, pursuant to section 67 of the *Responsible Energy Development Act*, make the Aboriginal Consultation Direction in the attached Appendix, effective on the coming into force of section 1(1)(s)(ii) of that Act.

Dated and signed at _____, Alberta this ____ day of _____, 2013.

Original signed by the Honourable Minister Ken Hughes on November 26, 2013.

_____
Minister of Energy

APPENDIX

ABORIGINAL CONSULTATION DIRECTION

PURPOSE

The Minster of Energy and Environment and Sustainable Resource Development are authorized by section 67 of the *Responsible Energy Development Act* (REDA) to give directions to the Alberta Energy Regulator (the "AER") for the purpose of

> (a) providing priorities and guidelines for the AER to follow in carrying out of its powers, duties and functions, and
>
> (b) ensuring the work of the AER is consistent with the programs, policies and work of the Government of Alberta in respect of energy resource development, public land management, environmental management and water management.

This Direction applies to "applications" to the AER for "energy resource activity" "approvals" under "specified enactments", all as defined in REDA ("energy applications").

The purpose of this Direction is to ensure that the AER considers and makes decisions in respect of energy applications in a manner that is consistent with the work of the Government of Alberta ("Alberta")

> (a) in meeting its consultation obligations associated with the existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution, Act 1982;* and
>
> (b) in undertaking its consultation obligation pursuant to *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development (2005)* as amended or replaced from time to time ("Consultation Policy") and any associated Consultation Guidelines ("*Guidelines*").

This Direction

(a) recognized that

i. the AER has a responsibility to consider potential adverse impacts of energy application on existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution, Act 1982* within its statutory authority under REDA,

ii. AER process will constitute part of Albert's overall consultation process as appropriate.

iii. Alberta retains the responsibility to assess the adequacy of Crown consultation in respect of energy applications,

(b) sets out the process to be followed by the AER to require information from proponents and provide information to Alberta regarding energy applications that may adversely impact the exercise of existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution, Act 1982*,

(c) facilitates timely, efficient and effective information exchange between the AER and Alberta with respect to energy applications that require aboriginal consultation;

and

(d) requires the AER to act consistently with decisions made by Alberta under the *Consultation Policy* and *Guidelines* in respect of energy applications to

(i) support informed consideration of applications by the AER,

(ii) ensure that the AER's approval of energy applications is consistent with Alberta's consultation and engagement in respect of the energy project to which it relates.

Any opinion, consideration or decision of the AER in respect of energy applications' potential impacts on existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution, Act 1982* shall not be construed as the opinion, consideration or decision of Alberta.

DIRECTIONS TO THE AER

1. The AER shall create and maintain a consultation unit that will work with Alberta's Aboriginal consultation Office (ACO) to ensure Alberta will be able to meet consultation obligations associated with

(a) the exiting rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution, Act 1982*, and

(b) the *Consultation Policy and Guidelines*.

2. If a proponent has provided the AER with information about a proposed energy project prior to submitting an energy application, the AER must direct the proponent to contact the ACO and the AER must immediately notify the ACO of

(a) the proponent's name,

(b) any project details known by the AER, including nature and scope of the project, where the project will be located, and details about the proponent, and

(c) a list of the energy applications that the AER anticipates will be made in respect of the energy project.

3. When a proponent files an energy application with the AER, the AER must immediately provide the ACO with

(a) a copy of the application;

(b) any project details known by the AER that it has not previously submitted to the ACO,

(c) a list of the energy applications that the AER anticipates will be made in respect of the energy project,

(d) a copy of any statement of concern filed by a First Nation or other aboriginal group in respect of the application,

(e)a copy of any submission filed by a First Nation or other aboriginal group in respect of the application under the *Alberta Energy Regulator Rules of Practice,* and

(f) copies of any evidence and information submitted by or with respect to First Nations and other aboriginal groups.

4. The AER shall

(a) require the proponent to include in its application detailed information gathered about the potential impact of the proposed project on existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982* and potential impacts on traditional uses as defined in the *Consultation Policy,* and a copy of any consultation information or advice that was issued by the ACO in respect of the energy application,

(b) immediately advise the ACO of any changes the proponent proposes to the energy project,

(c) immediately provide the ACO with information with respect to the approval process that the AER will follow in considering the application, including

(i) information with respect to the ADR process that will be used, if any, and

(ii) whether a hearing will be held on the application;

and

(d) immediately advise the ACO of the AER's decisions with respect to including First Nations or other aboriginal groups in the ADR or hearing process.

5. Prior to making a decision in respect of an energy application, the AER shall request advice from the ACO respecting whether Alberta has found consultation to have been adequate, adequate pending the outcome of the AER's process, or not required.

6. Prior to granting an approval of an energy application where Alberta has found consultation to have been adequate or adequate pending the outcome of the AER's process, the AER shall

(a) request from the ACO advice on actions that may be required to address potential impacts on existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982* or traditional uses as defined in the *Consultation Policy,* and

(b) if requested, provide the ACO with its draft approval prior to issuance.

7. When the AER makes a decision in respect of an energy application, the AER must immediately provide the ACO with a copy of its decision, and any related reasons, in respect of the decision, at the same time it provides notice of the same to the proponent.

Appeal of AER decision to Court of Appeal

8. The AER must immediately provide the ACO with a copy of any application for regulatory appeal, reconsideration or leave to appeal application to the Court of Appeal filed by a First Nation or any other aboriginal group.

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