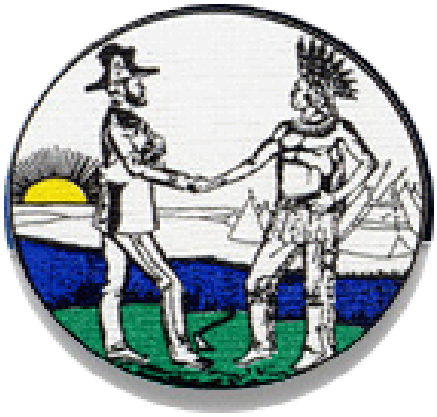

RESPONSE OF THE PARTICIPATING TREATY ___ FIRST NATIONS TO THE DRAFT GOVERNMENT OF SASKATCHEWAN FIRST NATION AND MÉTIS CONSULTATION POLICY FRAMEWORK OF DECEMBER, 2008

TABLE OF CONTENTS

INTRODUCTION TO RESPONSE OF THE PARTICIPATING TREATY ____ FIRST NATIONS

This paper is presented on behalf of the Treaty ____ First Nations of _____ Saskatchewan, as indicated on the signature page below.

This paper is prepared in response to the draft Government of Saskatchewan First Nation and Métis Consultation Policy Framework (herein the "Draft Policy") of December, 2008 released on December 22, 2008.

This paper analyzes the Draft Policy of Saskatchewan, provides both general and specific comments with respect to the context of the Draft Policy, and outlines areas which First Nations feel need to be addressed in Saskatchewan's approach to its constitutional obligations to consult with and accommodate the interests and ambitions of Saskatchewan's First Nations.

We note that the Draft Policy was completed before Saskatchewan received all First Nations' submissions with respect to the proposed Draft Policy. For instance, the submissions entitled Toward the Reconciliation of Interests and Ambitions – Participating Treaty No. 6 First Nations Position Paper Regarding the Duty to Consult and Accommodate & Sharing Wealth & Benefits of Resources submitted on _____, 2008 are not referred to in the section of the Draft Policy entitled "What We Heard". Accordingly, the Draft Policy was prepared without the benefit of having received all of the First Nations' submissions with respect to this matter. These submissions were therefore not considered by Saskatchewan in the preparation of its Draft Policy. The Participating First Nations do not consider it appropriate that Saskatchewan would develop and finalize its Draft Policy knowing full well that the submissions of a number of Saskatchewan First Nations were being prepared but not received.

Finally, and for the reasons outlined herein, the Participating First Nations do not consider that the Draft Policy fully or properly reflects the common law as it relates to the Crown's constitutional obligation to consult with and accommodate the interests and ambitions of First Nations. As an example, the decided cases make it clear that one of the first aspects of consultation is for the Crown to consult with First Nations about the design of any consultation process (*Huu-ay-aht First Nation*). We understand that case to mean that the parties must work together to design a meaningful consultation process that meets their respective interests and concerns. In our view, the Draft Consultation Policy is not a consultation process in any meaningful sense. As discussed below, it lacks any precision or guidance that can assist decision makers in carrying out their constitutional obligations owed to First Nations. Instead, it is essentially based on Saskatchewan's view of the case law and Saskatchewan's objectives. The concerns of First Nations –procedural and substantive – are largely missing from the Draft Policy.

Accordingly, the Participating First Nations will expect Saskatchewan to fully comply with the common law and will take steps to ensure that Saskatchewan does comply with the common law, as development and other issues proceed wherein the Crown seeks to take action which will or may infringe upon the exercise of the aboriginal and treaty rights of Saskatchewan First Nations.

In fact, the Participating First Nations consider that the Draft Policy is little, if any, improvement upon either the "Government of Saskatchewan Guidelines for Consultation with First Nations and Métis People: A Guide for Decision Makers" of May 2006, or the Interim Guide for Consultation with First Nations and Métis People of January, 2008. Once again the Draft Policy is an attempt by Saskatchewan to minimize its lawful obligations to First Nations in that it takes a minimalist approach to the common law in this area. Many principles of law that have been established by the Courts with respect to both the duty to consult and the duty to accommodate are not addressed in the Draft Policy. Accordingly, we are concerned that bureaucratic officials charged with the implementation of the Crown's duty to consult and accommodate will be given no notice of or information about these additional principles and can therefore not be expected to implement the Crown's duties to the extent that the Courts have thus far recognized.

The minimalist approach by Saskatchewan's constitutional obligations to consult and accommodate is, unfortunately, reflected in the name of the policy itself. The Draft Policy is said to be "Consultation Policy Framework". The omission of the word "accommodation" from the name of the Draft Policy itself is telling. The Draft Policy should be entitled "Consultation *and Accommodation* Policy Framework" and should refer to the common law principles established by the Courts in relation to the Crown's obligation to accommodate First Nations, in appropriate circumstances, and should also elaborate on the mechanisms and options for accommodation of First Nations' interests and ambitions in appropriate circumstances, both of which the Draft Policy failed to do, as will be seen below.

PART A – GENERAL COMMENTS, CONCERNS AND ISSUES

Key Objectives of our First Nations

As will be discussed throughout this document, the objectives of the First Nations in respect of consultation and accommodation are the following:

1. To ensure that we have the capacity and opportunity to build, enhance and maintain a strong and secure culture, language, traditions and economy that is linked to the lands, resources and history of our Peoples;

2. 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;

3. 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;

4. To ensure the meaningful participation of our First Nations in decision-making processes related to the alienation, use and disposition of the lands and resources throughout our Traditional Territories; and

5. To ensure that we share in the wealth of the Province – through capacity and training measures relevant to our Peoples, 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 which 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).

Many of these objectives, particularly in relation to the security and protection of our rights, cannot come from a process in which the Government of Saskatchewan is seeking "common ground" between the Crown, industry and First Nations, for the simple reason that the Treaty and Aboriginal rights of First Nations are given constitutional protection pursuant to section 35 of the *Constitution Act, 1982*. A Policy which does not give effect to this constitutional protection of our rights is bound to be problematic. 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 those rights.

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. However, whether or not Saskatchewan is serious about working together with First Nations to achieve a meaningful level of protection of those rights depends entirely on whether or not the parties share a common objective. Based on the December, 2008 Draft, it appears that Saskatchewan is attempting to minimize the importance and significance of First Nation rights and interests. Moreover, as discussed below, Saskatchewan appears to be deferring crucial issues of concern to us to "exploratory tables".

What is particularly troubling and disappointing is that while Saskatchewan purports to work with our First Nations on the development of a consultation policy, Saskatchewan continues to make decisions (grants of tenure and other dispositions, project approvals, adoption of legislation and policy) which continue to adversely affect and infringe the rights and interests of First Nations.

By way of introduction, it is important for the Government of Saskatchewan to understand the basis for some of the comments and criticisms set out herein. To provide a foundation for that understand, we wish to set out some of the key interests of the First Nation and what are considered to be some of the key principles which ought to guide consultation and accommodation. The items set out are not exhaustive.

Interests of our First Nations

- Ensuring the full protection of our Treaty and Aboriginal rights now and for future generations
- Protecting the use and enjoyment of our Reserve lands, Traditional Territories, and lands acquired pursuant to TLE entitlements, for present and future generations
- Developing greater capacity to participate in the social and economic benefits flowing from development
- Protecting and preserving the cultural, social, economic and environmental connection of our First Nations to lands and resources

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

- Ensuring that any consultation process properly takes into account the common law and that accommodation options allow for the full range of First Nations 'concerns to be taken into account in decision making

- Ensuring 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

- Ensuring that traditional knowledge be incorporated into decision making

- Ensuring that any decisions do not impair, or minimally impair, the rights and interests of our First Nations

- Ensuring that industrial development takes 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

- Ensuring that our First Nations benefit 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

Key Principles

As described more fully throughout these submissions, we do not agree with a number of the "key principles" set out in the Draft Policy. In our view, they minimize or ignore what the courts have already decided. It remains our hope that Saskatchewan will not base its Consultation Policy on its own minimalist interpretation of what the cases say. This is a recipe for uncertainty and for litigation. We continue to hope that Saskatchewan will work with us with an open mind to find a way of meeting our respective interests. Having said this, we do feel compelled to set out what we consider to be some of the key principles emerging from the decided cases:

1. Consultation is an ongoing process and is always required; (*Haida*)

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

3. Consultation and accommodation are constitutional obligations (*Kapp)*

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

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

6. The Crown has a positive obligation to provide full information on an ongoing 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*);

7. 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*);

8. 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*);

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

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

11. Consultation cannot be postponed to the last and final point in a series of decisions (*Squamish Nation*)[1];

12. Consultation is required in respect of the design of the consultation process itself (*Huu-ay-aht*);

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

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

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

16. 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)*.

[1] As discussed later in these submissions, a concern of 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.

The reason why we feel it is so important to discuss these principles is because, in our view, they go to ensuring the full and meaningful protection of our rights. Absent precision in a Policy about how consultation and accommodation will take place – procedurally and substantively – our rights will remain at risk.

Specific Resource-Related Concerns

The Policy calls for the establishment of a number of "Exploratory Tables", such as in respect of sharing in economic growth; environmental stewardship and land use planning, traditional use, consultation funding, and dispute resolution. In our view, these are key aspects of consultation and accommodation. It is difficult to understand how a consultation policy can be developed when these key items – which go to the heart of consultation and accommodation – are put off to some future discussion. As but one example, absent land use planning (especially prior to grants of tenure/dispositions), how is it possible to know whether a particular area has reached the stage where little or no development ought to take place? How can this be done absent the development of traditional use studies and the development of proper base line information and studies to meaningfully measure potential impacts on section 35 rights? What happens while the "exploratory tables" do their work – is it business as usual in terms of development?

We wish to describe in some detail our expectations concerning consultation related to resource development activities. We do so because such consultation is key to the protection of our rights and the development of the Province's economy and because this will, in our view, assist the Province in understanding the kinds of items we expect to be part of any consultation policy.

a. General Comments

Consultation requirements will be different 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 extent of existing and planned development in the vicinity of the area, and other related items. It is also obvious that consultation will be more complex in relation to some kinds of development (such as mines, oil sands and larger conventional oil and gas projects) than it is for other kinds of development. As noted earlier, any policy must recognize and reflect these differences in relation to required funding, capacity and the way in which consultation is carried out. As an example, projects requiring an assessment under the *Environmental Assessment Act* 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.

b) Relationship to Land Use Planning

It is unclear to us how consultation under a consultation policy can take place absent a discussion of land use planning. For example, how will consultation relate to existing land use plans and amendments thereto? Will the outcome of consultations under a consultation policy be integrated into land use plans? Will land use plans be revisited and revised to ensure that they comply with the outcome of consultations? Will regulatory bodies be required to follow amended land use plans? Will regulatory bodies be bound by a consultation policy, even if they are quasi-judicial?

c) Environmental Stewardship

We see "environmental stewardship" as necessarily linked to consultation and accommodation. Currently, environmental issues are dealt with through different pieces of provincial legislation and there can be a federal role in dealing with environmental issues. We wish to focus our comments, in particular, on the conduct of environmental assessments and how those assessments need to deal with our constitutionally-protected rights.

We have the following questions, comments and concerns:

- What is the relationship between any environmental assessments required by the *Environmental Assessment Act* and the duty to consult? In particular,
    - How will the results of any consultation under a policy or guidelines be integrated into the regulatory and environmental review of particular projects?
    - Is Saskatchewan prepared to ensure, such as through legislation and regulations, that the contents of such consultation will have to be taken into account by decision makers and regulatory bodies?
    - Is Saskatchewan prepared to ensure, such as through legislation and regulations, that any environmental assessments will deal explicitly with the social, economic, environmental, health and cultural impacts of development on our constitutionally-protected rights and on our People?
- Is Saskatchewan prepared to consult with our First Nations early in any regulatory and environmental review processes including, without limitation:
    - In respect of the design of such processes, including First Nations' participation therein;
    - On the scoping of projects for assessment purposes, including the design of any terms of reference for the conduct of such assessments (including the projects that will be included in any cumulative impacts assessment)
- In order to ensure that the Crown, Industry and First Nations have full, credible, reliable and meaningful information to assess the impacts of development, including the cumulative impacts of development[2] and ultimately to decide on whether or not a particular project should be approved (or the conditions that ought to be attached to any approval), we wish to work with your Government and, where the context requires, industry, to develop:

[2] We define "cumulative impacts" as meaning the changes to the local and regional environment caused by all past, present and reasonably foreseeable future human activities and includes the potential social, cultural, health, economic and environmental impacts of these activities on our rights and our People.

- local and regional targets for wildlife populations, vegetation, water, air quality, fish, plants and other resources on which our First Nations rely to carry out our rights

- quality baseline data, benchmarks and meaningful effects modeling, to ensure that the full social, cultural, health, environmental and economic impacts of development are assessed on our communities and against our ability to exercise our rights now and into the future;

- development of a study or studies to determine the health impacts of development on our communities

- development of a traditional resource plan or plans or some other study or studies which examines the current and future resource, environmental and ecosystem needs of the our First Nations to carry out our rights now and into the future including, but not limited to:

    - quality and quantity of species required

    - quality and quantity of plans and other things gathered

    - quality and quantity, as the context requires, of air, water and ecosystems required to support the exercise of our rights

    - information on the impacts of grants of tenure and current and reasonably foreseeable industrial development on our ability to exercise our rights

    - information on what lands and resources are left in our Traditional Territories to support the exercise of our rights

- Development of a mechanism that will provide for the meaningful incorporation of TUS and TEK information in relation to the assessment of impacts in any regulatory review process, and adequate funding to support the collection of that information

- Development of a study of cumulative impacts, including proper baseline data requirements (i.e., a pre-disturbance baseline) which will provide the Crown, Industry and First Nations with meaningful information, to ensure that they fully understand the impacts of current and planned developments on our rights, including changes in the pattern of our resource needs and to ensure full assessment of such impacts

Key Concerns about the Draft Policy

In our analysis of the Draft Policy, a key question for us is the following: does the Draft Policy advance the objectives set out earlier in these submissions? Does the policy substantially improve on the *status quo*? As discussed in more detail in these submissions, we must unfortunately conclude that the Draft Policy does very little, if anything, to improve on the existing interim framework for Crown consultation in Saskatchewan. Despite the many detailed suggestions that First Nations have made for consultation and accommodation, the Draft Policy ,

does not come close to meeting our objects in respect of both the procedural and substantive aspects of consultation and accommodation.

Some of our main concerns (but by no means all of our concerns) with the Draft Policy are:

- The Draft Policy sets out what we believe is an extremely narrow definition of our rights that are protected by section 35 of the *Constitution Act, 1982* – for example, it makes no mention of the oral promises that the courts have already decided are part of the numbered treaties, such as the protection of livelihood interests; it makes no mention of our rights to gather certain things such as traditional plants for medicinal purposes; it does not deal with the ceremonial aspect of our rights; and it leave no room for debate or interpretation about the impacts of the *NRTA* on our rights or what other rights, treaty or otherwise, may be protected by section 35

- It lacks precision – there is very little discussion of process-related issues concerning how consultation and accommodation, such as in relation to how potential adverse impacts on First Nation rights and interests are to be determined, 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 - who will determine the required level of impact and therefore consultation required? Based on what information? By what criteria? Will First Nation engagement in consultation come only once such a preliminary decision is made?

- The Draft Policy lacks definitions of key terms – for example, what, exactly, is the definition of consultation employed in the Draft Policy? The Draft Policy requires a discussion of accommodation, including some definition of the possible kinds of accommodation that are available

- The Draft Policy does not make clear the kinds of decisions that will attract the duty to consult – it leaves too much discretion to decision makers to determine if consultation is required and how much consultation is required

- The Draft Policy lacks a mutually agreed-upon set of standards or objectives against which consultation and accommodation can be measured

- The Draft Policy minimizes and downplays the need for accommodation and the means by which accommodation might take place and what kinds of accommodation may be available (in *R. v. Kapp*, the majority makes it clear that both consultation and accommodation are constitutional duties, yet the Policy is based, as noted earlier, on achieving some sort of common ground in areas in which there are inherent conflicts in land uses and objectives – the fact that conflicts need to be worked out calls out for precision in terms of process – yet the Policy lacks any precision at all and leaves many decisions to the discretion of decision makers in the Saskatchewan Government

- With respect to both consultation and accommodation, does the Policy contemplate that, based on the concerns put forward by First Nations, a project may be delayed or rejected?

- By its own terms, this is a "Policy Framework" – this raises the question of the means by which it can be enforced – to what extent is it binding on decision makers across Government? Given its lack of definitions or precision, by what means will Saskatchewan ensure that the obligations of individual decision makers are understood by those decision makers and properly carried out?

- How, if at all, does the Draft Policy apply in specific factual situations, such as in respect of Environmental Assessments? First Nations have repeatedly raised concerns about the lack of any meaningful inclusion of their rights in environmental assessment processes – in the scoping of assessments, development of information requirements in terms of reference, etc. Nothing in the Draft Policy would provide guidance in this important area – First Nations are often told that environmental assessments are not about rights, but activities, and they are told that the impacts/effects that will be studied are only those determined by the regulator, irrespective of whether, for the First Nations, a much wider array of impacts ought to be studied

- By what means, if any, will changes be made to legislation and regulations to ensure that all decision making is consistent with discharging the Crown's duty to consult? A set of vague Guidelines, as the Draft Policy appears to be, gives little or no comfort to First Nations in respect of decision making on industrial development – how is a decision maker or departmental employee to determine the degree of impact based on the matrix at p. 8 of the Policy?

- There are no specifics in respect of capacity – a regulatory review of a large project can be costly and time-consuming – First Nations require the capacity to consult their 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 Draft Policy provides no information on whether Saskatchewan is prepared to fully fund First Nations in those processes[3]

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[3] Any discussion of funding and capacity must ensure that our First Nations have adequate resources to engage in consultation: many projects are large and complex and require our First Nations to obtain technical and legal assistance – we expect consultation-related funding from Saskatchewan to reflect this reality – we are prepared to work cooperatively with Saskatchewan to develop realistic budgets for such consultation, which would include:

- Sufficient funding for our First Nations to develop TUS and TEK information

- Sufficient funding for project-specific studies

- Sufficient funding to develop the capacity within our First Nations to carry out consultations – staffing of consultation office, obtaining proper resources/equipment

- Sufficient funding to obtain technical, legal and other advice on project-related referrals – we note that the Crown and Industry often spend tens or even hundreds of thousands of dollars to carry out studies, to develop and analyze information and to consult, yet we are being asked to accept very little money from Saskatchewan for <u>all</u> consultation-related activities, irrespective of the number or complexity of those referrals

- There is no discussion of how First Nations input will be gathered in consultations, 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 Nations concerns about information requirements are largely ignored

- 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 (see discussion above of information considered essential by our First Nations in regulatory review processes) – First Nations have long sought a say in developing terms of reference or criteria by which impacts ought to be assessed – there is no indication in the Draft Policy that this will be part of any consultation

- So far as we understand, the Draft Policy expressly rejects the need for consultation at the tenure-granting stage (page 6, bullet three) – 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 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 Saskatchewan 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 yet more tenures are granted. <u>There is no legal impediment to consultation prior to posting lands for sale or disposition. British Columbia, as one examples, consults prior to the grants of tenure/sale of lands. This is simply a choice by Saskatchewan and one we feel is wrong-headed</u>.

- The Draft Policy is silent on whether or not consultation ought to take place in respect of what the Province terms "private" lands - our First Nations do not accept that there is no duty to consult where lands are deemed to be "private". We were not consulted on decisions to turn Crown lands into private lands. Moreover, we note that such consultation is required, notwithstanding that the lands are private, where:

    - There are renewals or extensions of any approvals /tenures that created the private lands;

    - Where development on private lands has the potential to directly, indirectly, or cumulatively adversely impact our rights on our Reserves, T.L.E. or Crown lands; and

    - Where development on private lands has the potential to injuriously affect our rights on our Reserves, T.L.E. or Crown lands

A SECTION-BY-SECTION ANALYSIS OF THE GUIDELINES

PART B – OBJECTIVES OF CONSULTATION

The Draft Policy sets out three fundamental objectives for consulting with First Nations. Principle 1 refers to the objective of the proposed consultation process. This principle should refer to the consultation *and accommodation* process. The objectives of the policy should be to clearly implement the common law as it relates to both the Crown's obligation to consult as well as the Crown's obligation to accommodate the interests and ambitions of First Nations. The omission of reference to the Crown's obligation to accommodate First Nations is notably absent. Unfortunately, the absence of reference to the Crown's duty to accommodate First Nations is noticeable throughout the Draft Policy and flows it seems from the failure to recognize the significance of the duty to accommodate First Nations from the beginning of the Draft Policy.

In the second fundamental objective of the Draft Policy referring to the reconciliation of Aboriginal and Non-Aboriginal peoples, the implementation of the Crown's duty to accommodate First Nations interests and ambitions is key to that reconciliation. Again, the lack of proper recognition of the Crown's duty to accommodate First Nations' interests and ambitions renders somewhat meaningless.

With respect to the third fundamental objective of the Draft Policy, reference is made to seeking a balance between Aboriginal peoples, and society's interests as a whole, while the Courts have referred to this as a consideration or factor to be considered in the consultation and accommodation process, the aboriginal and treaty rights of First Nations must still receive the constitutional protection they are entitled to under Section 35 of the *Constitution Act, 1982*. Saskatchewan's reference to balancing Aboriginal peoples and society's interests as a whole suggests that the interests of First Nations and society as a whole are to be maintained at an equal level. Unfortunately, in today's world those interests are not in balance. The interests and ambitions of First Nations falls far behind the interests of Non-aboriginal peoples. The Draft Policy does little in practice to advance the interests of Aboriginal peoples to "catch up" with the interests of Non-aboriginal people in society. **[This paragraph needs to be considered carefully]**

Furthermore, the third fundamental objective of the Draft Policy refers to the need for "providing certainty, predictability and a stable and secured investment climate". While these objectives may be shared to some extent by First Nations, these are primarily objectives of the Government of Saskatchewan and industry operating in Saskatchewan, the inclusion of these concepts in the fundamental objectives of the Draft Policy does more to advance or promote the interests of Saskatchewan and industry rather than to recognize or give effect to the interest and ambitions of First Nations and their constitutional rights to exercise their aboriginal and treaty rights in their traditional territories. **[This paragraph needs to be considered carefully]**

[Has Saskatchewan omitted any other objectives of the Crown's duties to consult and accommodate which need to be mentioned?]

PART C - IN RESPONSE TO THE INTRODUCTION OF THE DRAFT POLICY

1. THE NEED FOR A CONSULTATION POLICY FRAMEWORK

In this section Saskatchewan makes reference to the Government of Saskatchewan Guidelines for Consultation of May 2006. It indicates that this policy was rejected by First Nations due to their lack of involvement in its development and the nature of some of the content. While both of these are reasons why the guidelines were rejected by First Nations, it minimizes the objections of Saskatchewan First Nations to that policy. The Government of Saskatchewan Guidelines fell far short in Saskatchewan's constitutional obligations to consult and accommodate First Nations. Again, as now, the Crown's duty to accommodate First Nations in some circumstances was all but ignored. As well, it is now and has always been First Nations' position that any policy on a matter as fundamental as this in relation to Saskatchewan First Nations' constitutional rights should be arrived at jointly between Saskatchewan and First Nations rather than unilaterally imposed upon First Nations. First Nations are of the view that this policy should be "negotiated" and arrived at by consensus and agreement between Saskatchewan and First Nations. Unless and until Saskatchewan's policy in relation to this issue is agreed upon by First Nations, Saskatchewan cannot expect First Nations to accept a policy which does not reflect the full extent of the obligations of the Crown that have been recognized by the Courts.

In the second bullet in this section Saskatchewan makes reference to a desire to "develop a protocol" with First Nations in relation to the Crown's obligation to consult and accommodate First Nations. That is not happening now. As mentioned above, First Nations have repeatedly indicated that any policy of Saskatchewan in this regard must be negotiated in order to achieve agreement between Saskatchewan and First Nations. However, despite these requests, Saskatchewan has again proposed a Draft Policy which, as seen below, falls far short of its constitutional obligations as established by the Courts.

However, Saskatchewan continued "business as usual" through this period even though their actions fell short of their legal obligations to First Nations in this regard.

The fourth bullet in this section indicates that all parties are "seeking greater certainty and clarity" in relation to the legal duty of the Crown. Unfortunately, as will be seen below, this Draft Policy would not achieve this goal.

In the fourth bullet in this section, Saskatchewan indicates that First Nations are interested in "broader based consultation" dealing not only with their rights but with other interests and their "strong desire to be meaningfully engaged in the development of Government policies, programs, plans and legislation that impact them". This is not accurate. Saskatchewan First Nations do wish to be based in "broader based consultation", however, that broader based consultation *is* in relation to their rights. The broader based consultation that First Nations seek is with respect to the much broader principles that the Courts have enunciated in regard to the Crown's duty to consult. First Nations desire to be meaningfully engaged in the other items mentioned is not a desire to seek consultation outside of issues that affect their rights, but rather a desire to seek consultation with respect to *all* issues that relate to their rights, together with *all* issues that relate to various forms of accommodation that can be implemented when those rights are impacted in various ways.

2. WHAT WE HEARD

In this section Saskatchewan makes reference to the Roundtable on First Nations and Métis Consultation and Accommodation which was held on May 12 and 13, 2008 in Saskatoon. The Draft Policy refers to the purpose of that conference as being "to seek common ground among the diverse parties respecting their perspectives on consultation and accommodation". The Participating First Nations submit that the Roundtable in May of 2008 proceeded on an incorrect and improper assumption. The Roundtable should not have sought "common ground" but should have sought First Nation input, and should have been followed with the engagement of First Nations, in mechanisms to fully implement the constitutional rights of First Nations to be consulted, and, where appropriate, accommodated. Seeking "common ground" is irrelevant. The role of the Roundtable should have been to fully implement the Crown's constitutional obligations in this regard. In this area, in many cases the interests of First Nations differ from the interests of Saskatchewan or industry. Seeking "common ground" does nothing but seek to limit the extent and degree of consultation and accommodation that First Nations are afforded in these circumstances. Accordingly, the Roundtable started off on the wrong footing. This section attempts to outline the common ground that the province considers emerged from the Roundtable and subsequent meetings.

3. COMMON GROUND

This section attempts to outline the common ground that the province considers emerged from the Roundtable and subsequent meetings. While the items listed may be common ground between the parties, the list excludes a number of the issues and principles that arise in relation to both the duty to consult and the duty to accommodate from recent court decisions that were raised and will be relied upon by First Nations as consultation in Saskatchewan proceeds. The exclusion of issues and principles, to the detriment of a legitimate consultation and accommodation process, is the result of Saskatchewan having entered the process looking for "common ground". Again, First Nations will not accept a consultation and accommodation process that fall short of meeting the principles established by the courts with respect to this issue.

It is clear from this section of the Draft Policy that Saskatchewan did not wait until all of the submissions of the First Nations were made before preparation of the Draft Policy, and in particular, the Treaty No. 6 First Nations Position Paper.

4. WHAT THE DRAFT CONSULTATION POLICY FRAMEWORK DOES NOT ADDRESS

Saskatchewan refers to a number of areas that are not included within the scope of the Draft Policy. These items include sharing in Saskatchewan's economic growth, environmental stewardship and land use planning, traditional land use studies and mapping, funding and dispute resolution. With the exception of dispute resolution, the remaining items listed are matters that should be addressed in a consultation and accommodation policy. These items relate to the efficacy of a proper consultation process, and the options available to the parties in accommodating the interests and ambitions of First Nations where there aboriginal or treaty rights are affected by the proposed action of the Crown. In fact, these items are central to an effective consultation and accommodation policy.

Saskatchewan First Nations will not accept a consultation and accommodation policy which ignores these items listed and which the province proposes to be offloaded to another venue.

Furthermore, it is clear form this section that Saskatchewan does not propose that further steps be taken to address the mechanisms available for the accommodation of First Nations' interests and ambitions where circumstances where their aboriginal or treaty rights will be affected.

PART D - POLICY AND PROCESS FOR THE LEGAL DUTY TO CONSULT

1. TREATY CONTEXT

Saskatchewan outlines its understanding of the First Nations interpretation of the treaties in respect of extinguishment and mineral resources below the surface of the ground. Saskatchewan simply rejects this point of view and indicates that this approach has not been accepted by the courts. However, Saskatchewan does not provide any legal authority in support of its position. To date the courts have not specifically dealt with this issue. While there have been passing comments of the courts which reflect a traditional non-aboriginal understanding of the circumstances the courts have never addressed this issue, nor have they been asked to address the issue. Under these circumstances it is not appropriate for Saskatchewan to reject the First Nation position outright, particularly in the context of a process that is supposed to reconcile the interests and ambitions of both First Nations and the Crown. Such an approach is short-sighted and will inevitably lead to further conflict between First Nations and the Crown.

2. GOVERNMENT VIEW ON TREATY RIGHTS PERTAINING TO THE DUTY TO CONSULT

Saskatchewan takes the view that a key element of the treaties was the extinguishment of aboriginal title in order to open up the west for peaceful settlement. It states that in return First Nations received commitments that would provide for the continuation of their customs, lifestyles and traditions. However, this did not happen. Obviously there was no meeting of the minds between the Crown and First Nations on this aspect of the treaty relationship. The question arises – what steps will be taken to reconcile these computing understandings of the treaties? Because of extensive development, First Nations were not allowed to continue their customs, lifestyles and traditions. This is particularly true in the southern part of Saskatchewan.

Nor is Saskatchewan prepared to move toward accommodations similar to those that are occurring in the rest of Canada in exchange for the loss of First Nations' abilities to exercise their aboriginal and treaty rights in the southern part of Saskatchewan. This attempt by Saskatchewan to ignore its duty to accommodate and its preference that First Nations not be accommodated as is occurring across the country has not gone unnoticed.

By its insistence that Saskatchewan's views of the treaty are the only legitimate views, and by its refusal to consider the First Nation position, Saskatchewan merely invites non-reconciliation of these issues and further increased conflict between First Nations and the Crown in Saskatchewan.

Furthermore, Saskatchewan seeks to unilaterally impose its version of the effect of the treaties upon First Nations and refuses to discuss alternate approaches to the reconciliation of these issues. This is hardly in accord with the concept of reconciliation of interests and ambitions that the Supreme Court of Canada has made clear is the objective of the duty to consult and accommodate.

Finally, while the Government says that it acknowledges the First Nation perspective on treaty rights, it indicate that it will exercise its duty to consult in accordance with *its* understandings of treaty rights. Accordingly, Saskatchewan intends to ignore First Nations views on their position on the treaties. No recognition or consideration of the First Nation position on theses issues will be given.

3. MÉTIS ABORIGINAL RIGHTS CONTEXT

4. GOVERNMENT VIEWS ON MÉTIS ABORIGINAL RIGHTS PERTAINING TO THE DUTY TO CONSULT

PART E - PRINCIPLES AND PROCESS ELEMENTS

1. KEY PRINCIPLES

In this section Saskatchewan seeks to list key principles that the courts have identified as relevant to the Crown's duty to consult and accommodate. This list of principles will be provided to Government of Saskatchewan officials charged with the task of implementing the Crown's duties to consult and accommodate. Accordingly, this list of principles will be the full extent of their knowledge of the Crown's obligations to consult and accommodate, and will, in the end, prescribe the limit of the implementation of the duty to consult and accommodate in Saskatchewan. How can government officials be expected to implement any of the other principles that the courts have set out with respect to the Crown's duty to consult and accommodate if they are not made aware of what those other principles are? The list of key principles provided outlines, at most, a very skeletal outline of the extent of the Crown's duty to consult and accommodate. Many principles, and many examples of how those principles apply, have been left out of the list of key principles. To this extent, the list of key principles is inadequate and misleading and will have the effect of insuring that Saskatchewan *does not* fully comply with its duties to consult and accommodate. This, in turn, simply invites conflict between First Nations and the Crown. The shortcomings in the key principles referred to are as follows:

[Comments regarding the specific key principles and principles omitted could be included here]

In bullet number eight, Saskatchewan points out that court decisions have indicated that First Nations do not have a veto over governments' decisions that may adversely affect their treaty or aboriginal rights. This is correct. However, in explicit disregard for the Supreme Court of Canada, Saskatchewan then indicates that consent by First Nations is not required. This is done

despite the fact that First Nations have, on a number of occasions, explicitly pointed out to Saskatchewan that First Nations' consent *is* required in some circumstances. Saskatchewan knows, and has had it pointed out to it, that the Supreme Court of Canada has indicated that in some cases, for example, on very serious issues, the full consent of a First Nation to a particular action may be required. This was clearly set out in the Supreme Court of Canada decision in *Delgamuukw*. Again, Saskatchewan's attempt to ignore its legal obligation to First Nations has not gone unnoticed.

2. KEY PROCESS ELEMENTS

In this section Saskatchewan indicates that it intends to consult and accommodate in regards to the treaty rights to "hunt, fish and trap for food". However, Saskatchewan knows full well that this is not the extent of the rights that the courts have recognized that First Nations have in this regard.

In the case of *Mikisew Cree First Nation* v. *Canada*, the Supreme Court of Canada recognized that "the Crown promised that the Indians' rights to hunt, fish and trap would continue after the treaty as existed before it." This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines. … 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 for First Nations response. Accordingly, the promise that First Nations would be entitled to continue to earn a livelihood after the treaty as before has been recognized by the Supreme Court of Canada. The treaty rights in issue, and to which the duties to consult and accommodate apply, are considerably more extensive than merely the right to hunt, fish and trap. Full recognition of this oral promise to continue to be able to earn a livelihood after the treaty as existed before it has huge implications for both Saskatchewan First Nations and the Crown. The right to hunt is considerably more than merely a right to pick up a gun and shoot a deer at any time of the year in Saskatchewan. The right to hunt encompasses all of the legislative and regulatory steps required to ensure that First Nations can continue to earn a livelihood after the treaty as existed before it from that and the other rights mentioned. Furthermore, Saskatchewan knows full well that First Nations consider that they also have an aboriginal and/or treaty right to gather. [Saskatchewan's refusal to acknowledge the aboriginal or treaty right to gather, and the right to continue to earn a livelihood as before, is an attempt by Saskatchewan to reduce the number of times it must consult with First Nations, and reduce the extent of consultation and accommodation that Saskatchewan will have to engage in with First Nations].

Accordingly, Saskatchewan seeks to limit the nature and extent of the rights that it must consult with First Nations about, and the infringements upon those rights that it might accommodate. Saskatchewan does this knowing full well that the Supreme Court has recognized First Nation rights to a much larger extent. Saskatchewan's attempt to restrict the recognition of First Nations rights in this area has not gone unnoticed.

Under bullet number three in this section, Saskatchewan indicates that consultation must take place with the individual First Nation elected leadership. This is correct. However, subsequent references in the Draft Policy suggest that Saskatchewan proposes that it deal only with the Chiefs of a First Nation. For example, in that same bullet it indicates that First Nation Chiefs may delegate the duty to consult to a regional or provincial organization. Below in bullet number seven, for example, Saskatchewan indicates that it will report back to the specific First Nation Chief being consulted to explain how First Nations' concerns were considered. It is noteworthy that Saskatchewan does not intend to report back to the First Nation government itself, but only to the Chief of a First Nation. Saskatchewan appears to be trying to isolate First Nation Chiefs from the First Nation government, in order to make it easier for Saskatchewan to consult with the First Nation. In other words, rather than proposing that it deal with the First Nation government as a whole, Saskatchewan would prefer to deal only with a Chief. First Nations will have to decide whether or not this is acceptable to them.

PART F - MATRIX ON CONSULTATION INTENSITY

In the proposed matrix of the Draft Policy Saskatchewan outlines how it proposes that consultations intensify as the level of potential impact increases. However, as above, Saskatchewan gives no recognition whatsoever to the Supreme Court of Canada's determination that in some cases, for example, on very serious issues, the full consent of a First Nation to a particular action may be required. Again, Saskatchewan's refusal to acknowledge the Supreme Court of Canada's determination in this regard has not gone unnoticed.

1. DEFINITIONS FOR MATRIX CELLS

Saskatchewan indicates that definitions have not been provided for impact on rights since some of the objectives of consultation is to ascertain the nature of the potential impact. With this First Nations generally agree. However, Saskatchewan then proceeds to indicate below that only notification will occur, and no consultation, in some cases. Saskatchewan indicates that this will be the case under circumstances where Saskatchewan may not even know of the impacts upon aboriginal and treaty rights. Notification, without consultation, increases the risk of circumstances where impacts on aboriginal and treaty rights can occur without Saskatchewan knowing of them, resulting in a lack of consultation in circumstances where consultation should occur.

Furthermore, Saskatchewan indicates that "government" will assess the impact of an action on First Nations' rights. Such a unilateral assessment by Saskatchewan is inappropriate. Assessment of an impact should be done by a shared entity, as has been proposed by Saskatchewan First Nations. There should be a shared form for this assessment. If there is not, Saskatchewan is in a conflict of interest, in being in the position of making a unilateral assessment of impacts when a determination that there are no impacts will benefit Saskatchewan by requiring less consultation, and no accommodation. Saskatchewan would be entitled to permit fees and royalties as a result of its authorizations, and in the position of determining that consultation is not required. This is not appropriate.

Generally speaking, Saskatchewan proposes very short notification and consultation periods. These timelines are inadequate in most cases unless First Nations are provided with a means to acquire substantial capacity to deal with the numerous authorizations that Saskatchewan deals with in First Nations' traditional territories. In other words, First Nations must be provided with sufficient funding to deal with the numerous proposals for development in First Nations' traditional territories if Saskatchewan expects First Nations to meet these proposed short timeframes.

There are considerable shortcomings in the proposed consultation process. Saskatchewan has been repeatedly advised by First Nations that it should negotiate the terms and conditions of a consultation process with First Nations, rather than seek to unilaterally impose its restricted views and preferences on First Nations in this regard. Until a process is negotiated between First Nations and the Crown, Saskatchewan will simply have to "keep trying" until it gets it right. First Nations are not prepared to accept inadequate consultation and a complete lack of accommodation from Saskatchewan until that time.

2. CONSULTATION SPECTRUM DEFINITIONS AND CONSULTATION TIMELINES

3. NOTIFICATION: 30 DAYS

4. LIMITED CONSULTATION: 30-60 DAYS

While Saskatchewan proposes a consultation process be implemented in circumstances requiring deeper consultation, no consultation process is proposed under these circumstances. Furthermore, no capacity funding is to be provided, no traditional use studies are to be conducted and no use planning is to be done with respect to circumstances requiring limited consultation.

5. MODERATE CONSULTATION: 60-90 DAYS

It is noteworthy that Saskatchewan does not propose that traditional use studies or land use planning be done with respect to circumstances require a moderate consultation.

6. INTENSIVE CONSULTATION: UP TO AND OVER 1 YEAR

It is noteworthy that Saskatchewan doers not acknowledge that consent may be required in circumstances requiring intensive consultation. In this regard the principles of the Draft Policy fall short.

7. MAJOR DEVELOPMENT OR GOVERNMENT ACTION

In this section Saskatchewan proposes that a factor to consider when deciding whether a development is "major" or not is the size of the geographic area that the development covers. However, the Supreme Court of Canada has already determined that the size of the geographic

area is not relevant. In *Mikisew Cree First Nation* v. *Canada*, the Supreme of Canada determined that the taking up of only a small portion of the territory of the Mikisew Cree, being approximately 23 square kilometres out of the 44,807 square kilometres of the Wood Buffalo National Park and out of 840,000 square kilometres encompassed by Treaty 8, still resulted in significant impacts upon the exercise of the aboriginal and treaty rights of the Mikisew Cree. Geographic area, while relevant in some circumstances is completely irrelevant in others. Accordingly, a geographically small development can have significant impacts upon the exercise of aboriginal and treaty rights, requiring intensive consultation and accommodation. Saskatchewan should be aware of this.

Furthermore, Saskatchewan proposes that it looked to the significant or long-term disturbance to the environment of a proposed major development. While effects upon the environment are relevant to the exercise of aboriginal and treaty rights in some cases, this is not always the case. Saskatchewan should be looking to the potential significant or long-term effects to the exercise of aboriginal treaty rights, rather than to the immediate environment.

The approach proposed by Saskatchewan suggests that Saskatchewan is again attempting to minimalize the level of consultation that it must engage in with First Nations.

8. LARGE TO MODERATE PROJECT OR GOVERNMENT ACTION

9. SMALL PROJECT OR GOVERNMENT ACTION

Saskatchewan proposes that consultation will be restricted for “small projects”, as mentioned above, even a small project with a small geographic impact can have substantial impacts upon the exercise of aboriginal treaty rights, as indicated by the case of *Mikisew Cree First Nation* v. *Canada*.

PART G - STEPS IN THE CONSULTATION PROCESS

1. STEP 1 – ASSESSMENT OF IMPACTS ON RIGHTS

2. STEP 2 – CONSULTATIONS CONCERNING POTENTIAL IMPACTS ON RIGHTS

3. STEP 3 - ACCOMMODATION

Saskatchewan's proposed approach to the accommodation of First Nations' interests and ambitions where the exercise of aboriginal and treaty rights will be affected, is grossly inadequate. None of the principles recognized by the courts in relation to the duty to accommodate are indicated. Government officials are expected to implement the Crown's duty to accommodate without any of the principles or options for accommodation being listed. Government officials, accordingly, will not be in a position to implement the Crown's duty to accommodate without those principles and options being provided to them. This will necessarily result in a lack of accommodation by Saskatchewan of the interests and ambitions of First Nations. Furthermore, Saskatchewan makes no reference at all to the myriad of accommodations that are being implemented in other parts of Canada with First Nations.

Accordingly, there is a clear attempt by Saskatchewan to avoid its lawful obligations to First Nations in this regard. Again, this has not gone unnoticed by First Nations.

4. STEP 4 – IMPLEMENTATION AND MONITORING

5. CONSULTATION AND ACCOMMODATION SUPPORTS

PART G - ROLES AND RESPONSIBILITIES

1. THE PROVINCIAL GOVERNMENT

2. THE FEDERAL GOVERNMENT

3. FIRST NATIONS AND MÉTIS RIGHTS-BEARING COMMUNITIES

4. INDUSTRY AND OTHER PROPONENTS

The Draft Policy indicates that Government expects industry and other proponents to use best practices to engage and build relations with First Nations early in the planning phase. This is not sufficient.

The Draft Policy proposes no guidelines for industry to follow. Furthermore, and more importantly there are no requirements that industry do anything in this regard. In many cases, the best practices of industry and other proponents is simply not enough. Strict guidelines and requirements in regard to the duty to consult and the duty to accommodate should be imposed upon industry prior to industry or proponents being provided with authorization, licenses or permits to proceed with the development. Furthermore, those requirements should be a condition of licenses and permits as development proceeds.

PART H - ENGAGEMENT AND RELATIONSHIP BUILDING

PART I – POLICY FOR INTEREST-BASED CONSULTATION

1. CONSULTATION "BEYOND THE DUTY TO CONSULT"

PART J – CONSULTATION PARTICIPATION CAPACITY