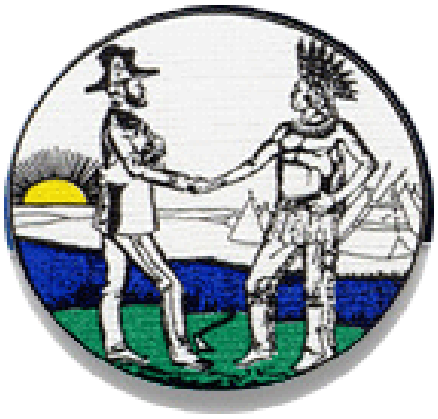


TOWARD THE RECONCILIATION OF INTERESTS AND AMBITIONS -

PARTICIPATING TREATY NO. 6 FIRST NATIONS POSITION PAPER

REGARDING THE DUTY TO CONSULT AND ACCOMMODATE

&

SHARING WEALTH & BENEFITS OF RESOURCES

PART A - INTRODUCTION TO POSITION PAPER

This paper is presented on behalf of the Treaty No.6 First Nations of the central region of Saskatchewan, as indicated on the signature page below.

The traditional territories of our First Nations extend over large areas of Saskatchewan, in regions that can be identified by each First Nation. By the traditional territories of our First Nations, we mean the lands used and occupied by our First Nations in the past, present and future for traditional purposes, as circumstances have and continue to change. Some First Nations consider that their traditional territories, and Treaty lands, are, in fact, one and the same.

Unlike some other First Nations in Saskatchewan, where resource development is relatively recent, extensive development has been underway in the southern part of Saskatchewan in the traditional territories of our First Nations for many generations. Extensive settlement, farming, urban and natural resource development have infringed upon the exercise of the aboriginal and treaty rights of our member First Nations for many years. These activities, which are obvious to all, have had significant impacts upon the exercise of the aboriginal and treaty rights of our member First Nations. These activities were authorized and encouraged by the federal Crown, and subsequently by the provincial Crown, without consultation, accommodation or the payment of compensation to our First Nations. Nevertheless, the members of our First Nations have persevered and maintained our culture and heritage, and to a lesser extent, our way of life, despite the extensive development that has rendered our traditional territories "settled" and largely unavailable for the exercise of our aboriginal and treaty rights.

This paper addresses the steps necessary to begin to bring the principles established by the courts to bear on these circumstances and provides practical solutions to address some of the issues facing First Nations, industry and the Crown.

PART B - THE DUTY TO CONSULT AND ACCOMMODATE

1. THE TREATIES AND LANDS "TAKEN UP" FOR SETTLEMENT

The members of our First Nations are descendants of the First Nation participants in Treaty No. 6. Traditionally our First Nation members lived off the land. There is a long history of this reliance, and much documentation can be provided in support of this reliance. At the time that the treaties were entered into, maintaining our way of life was of the utmost importance to our leaders who negotiated the Treaty. This resulted in promises that our First Nations would be able to continue to live as we had done before, relying on hunting, fishing, trapping and gathering to maintain our lifestyles. As a result, specific promises were included in the Treaties to enable our members to continue to hunt, fish and trap on our traditional lands. Furthermore, it was indisputably promised at the time the Treaty was agreed to that we would be entitled to maintain our traditional lifestyle and live as before.

The evidence of our Elders and First Nation members together generally confirm that in our traditional territories the lands were used for hunting, fishing and trapping on a regular basis. The lands were also used for the gathering of berries for food and plants for medicinal purposes. They have been so used for generations. The trapping provided furs to sell and meat to subsist on. The meat obtained from the hunting and trapping fed many community members and not just the trapper or hunter. Many different types of animals were hunted and trapped. Our First Nations have relied on the lands of our traditional territories for generations to either provide or subsidize our livelihood through, primarily, the hunting and trapping of wildlife. This reliance continues.

Accordingly, members of our First Nations currently have existing aboriginal and treaty rights in our respective traditional territories. These rights include, among others, the rights to hunt, fish, trap and gather and live as we did before the Treaty was entered into.

In short, the aboriginal and treaty rights to hunt, fish, trap and gather provided in Treaty No. 6, in addition to other rights, do not exist only in theory or on paper, but are in use, and an integral part of the tradition and existence of our First Nations. These rights have been exercised by our First Nation members for generations, and continue to be exercised to date, although with ever increasing difficulty and ever decreasing success. The right to continue these activities was, however, made subject in the written version of the treaties, to the right of the Crown to take up lands for settlement.

The written text of Treaty No. 6 specifically provided that the Indian participants in the treaty would be able to continue to make their livelihood from the land, through hunting and fishing activities. The same clauses of the written version of Treaty No. 6 provides governments with the justification which they rely upon to support their activities in our traditional territories. These activities encroach upon our rights to hunt, fish, trap and gather.

This clause in Treaty No. 6 reads as follows:

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and *saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes* by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government. [emphasis added]

These clauses are similar to the clause in Treaty No. 8, which is also relied upon by governments for the same purposes in that treaty area, and which came before the Supreme Court of Canada for consideration in *Mikisew Cree First Nation* v. *Canada*. In that case, the Supreme Court of Canada said with respect to that clause in paragraph 30:

> In the case of Treaty 8, 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. Treaty 8 lands lie to the north of Canada and are largely unsuitable for agriculture. The Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, "the same means of earning a livelihood would continue after the treaty as existed before it."

While the Crown was entitled to take up land for settlement, at the same time sufficient means were to be left to enable First Nations to earn their livelihood after the treaty, as before the treaty. Furthermore, a process was appropriate to oversee this transition. The honour of the Crown is to be invoked in the process. The Supreme Court of Canada also indicated in paragraph 33:

> Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably.

The Supreme Court of Canada also recognized the importance of the traditional territory of a First Nation in paragraph 48, when addressing the fact that First Nations were entitled to a *meaningful* right to hunt:

> The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. *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.* [emphasis added]

This principle enunciated by the Supreme Court of Canada indicates that our First Nations may have a valid claim for compensation against both the federal and provincial governments in that it is very arguable that we no longer have a meaningful right to hunt, fish or trap over our traditional territories (this will be elaborated on below).

The Court also indicated that the Crown's right to take up land carries with it certain obligations on the Crown to consult with the First Nations about the impacts that its actions will have on the treaty rights of the First Nations, affected by the taking up of land. At paragraphs 55 and 56, the Court stated:

> The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns (*Delgamuukw*, at para. 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty...
>
> In summary, the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon. Viewed in light of the facts of this case, we should qualify *Badger*'s identification of two inherent limitations on Indian hunting, fishing and trapping rights under Treaty 8 (geographical limits and specific forms of government regulation) by a third, namely the Crown's right to take up lands under the treaty, which itself is subject to its duty to consult and, if appropriate, accommodate First Nations' interests before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights. Such a third qualification (not at issue in *Badger*) is fully justified by the history of the negotiations leading to Treaty 8, as well as by the honour of the Crown as previously discussed.

And finally, the Court recognized in paragraph 57 that the honour of the Crown in implementing this clause of the treaty gives rise to both procedural and substantive rights of the First Nation.

> As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.

In conclusion to this issue, the Court indicated at paragraph 63:

> Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.
>
> In addition to the above, many other treaty promises have not been kept, with little or no consultation or accommodation of our interests or ambitions by either the federal or

provincial governments. Saskatchewan must be aware of these outstanding and unresolved issues.

It is our view that historically, such a process has not been recognized, followed or respected by the Crown in central Saskatchewan, and in particular with respect to our First Nations. Rather, settlement and the taking up of land occurred without any process for consultation with our First Nations, which were significantly impacted by these actions of the Crown, without any regard for the effect that such taking up of land was to have on the exercise of the aboriginal and treaty rights of our First Nations.

Furthermore, it occurred without any accommodation of our rights in terms of mitigation of the infringements or compensation for those infringements. As the Supreme Court of Canada has indicated, these actions of both the federal and provincial Crowns may be actionable.

These circumstances have resulted in many infringements historically upon the exercise of the aboriginal and treaty rights of First Nations in our area of the Province of Saskatchewan. That, perhaps together with other historical circumstances, has resulted in the marginalization of our people, poverty and many social problems.

FIRST NATION POSITION ON LANDS "TAKEN UP" FOR SETTLEMENT:

I. IT IS OUR POSITION THAT OUR LANDS HAVE BEEN TAKEN UP WITHOUT PROPER CONSULTATION AND ACCOMMODATION OF OUR RIGHTS OR COMPENSATION FOR THESE INFRINGEMENTS AND THIS MATTER MUST BE DISCUSSED BETWEEN THE CROWN AND OUR FIRST NATIONS.

2. THE AGREEMENT TO SHARE THE LAND – NOT CEDE AND SURRENDER THE LAND AND RESOURCES

Fundamental to the treaty relationship between First Nations and the Crown is the fact that First Nations agreed to share the land, animals, plants, birds and water with the European newcomers. We did not agree to cede or surrender our interests in the land, as the written text of the treaties indicate. At the time that the treaties were entered into, our First Nations had aboriginal rights and title in and to the land. Our First Nations have always been and continue to be sovereign Nations. Our sovereignty has never been surrendered. We continue to possess inherent rights, including aboriginal title, over our traditional territories, which transcend all boundaries. We have never abandoned our sovereignty over these territories and resources either at the time that Treaty No. 6 was entered or at any time since then.

There is no record of the 'cede and surrender' provisions of the written texts of the treaties having been explained, or even recited, to the First Nations in attendance when the treaties were entered into. It was only upon the basis that the land would be shared that First Nations were prepared to enter the treaties. There was no discussion at the time that the treaties were entered that our First Nations would cede or surrender the resources on or under the land. Furthermore, ceding and surrendering the land to the European newcomers has no rationale in the circumstances of the day.

This concept was recognized and acknowledged by Justice Linden in the Report of the Ipperwash Inquiry in Volume 2 at page 107, where he stated in relation to Ontario First Nations:

> The failure to recognize the rights and interests of Aboriginal peoples in the development of lands and resources in Ontario stems very much from sharply different understandings about the nature of the lands which Aboriginal peoples agreed to share with newcomers as opposed to those which they retained as reserves for their exclusive use and occupation. First Nations people regarded and continue to regard the lands they agreed to share as their "traditional lands," where the resources had for many years provided their sustenance. Although, in making treaties with the Crown they agreed to give up their exclusive Aboriginal title to these lands, they never intended to abandon them. They continue to regard these lands as a major source of their sustenance, and as fundamental to their identity. The promise of continued access to these lands was a crucial condition of their consent to the treaties.
>
> Every treaty in Ontario supported the expectation that treaty lands outside of reserves would be shared. Promises made by Crown representatives encouraged these expectations, but despite these promises, colonial and Canadian authorities referred to these lands as "surrendered lands". The term "surrendered lands" is inaccurate and misleading. It suggests that the treaties were made after the Indian nations somehow "lost" these lands. Moreover, "surrendered lands" contrary to the terms of the treaties, suggests that the First Nations gave up these continuing rights or interests in their traditional lands. A new approach to Aboriginal relations in Ontario requires a shared understanding of the rights and interests of First Nations in these traditional lands.

The understanding of the Treaties of the First Nations of Saskatchewan is to the same effect as Ontario First Nations.

The First Nation understanding of the Treaties to this effect was also recognized and accepted by the Report of the Royal Commission on Aboriginal Peoples.

Furthermore, as mentioned above, our First Nations have always been and still are sovereign Nations, and our sovereignty has never been surrendered.

Accordingly, our First Nations are not prepared to acknowledge or concede that the land or its resources have been ceded or surrendered to the Crown. From our perspective, First Nations continue to have an interest in both the land and the resources underlying the surface of the land.

It is from this basis that our First Nations are prepared to move forward in the spirit of reconciling the interests and ambitions of our First Nations with the interests and ambitions of the Crown.

At the time of entering into Treaty No. 6, Canada had no significant military presence in the two territories and, in fact, the North West Mounted Police had not yet been created. It would be irrational to suggest that First Nations would surrender vast tracts of land for the promise that Canada would set aside small reserves within the larger areas that were already theirs.

Our Elders have provided us with the First Nation perspective on the Treaties through our oral traditions. This type of evidence has been accepted by the Supreme Court of Canada in a number of cases.

These traditions indicate our understanding at the time that the Treaties were agreed to was that we were simply agreeing to share the surface rights to the land to the depth of a plough. There was no discussion of mineral rights at the time.

Other Elders have indicated that the text of the Treaties, as written by Canada's representatives, do not reflect what First Nations believed; that further discussions were to take place on how First Nations were to share in the White Man's prosperity. In a modern context, this means how we are to share in the wealth or resources of the Province.

Finally, in a similar way, other Elders indicate as well that the Treaties reflect the concept that First Nations were simply to be placed in a position where we could be successful in the White Man's economy.

It is our view that particularly in the provinces, much wealth is and has been generated from the extraction of resources from our traditional territories for generations and much of the provincial revenues are generated from the extraction of resources from our traditional territories. As mentioned above, this wealth has been generated often at the expense of the aboriginal and treaty rights of our First Nations. One only has to look to the glaring statistics of our First Nations people to know that despite the wealth being generated from the resources of our traditional territories, we remain impoverished and continue to be disadvantaged socio-economically. Accordingly, in the spirit of Treaty and sharing, the wealth generated from our resources should be shared as well. The parties should explore ways that would allow our First Nations to share in the wealth of the resources extracted from our lands.

FIRST NATIONS POSITION ON THE AGREEMENT TO SHARE THE LAND – NOT CEDE AND SURRENDER THE LAND AND RESOURCES:

I. **IT IS OUR POSITION, FIRST AND FOREMOST, THAT THE TREATY RELATIONSHIP, WHICH INCLUDED AN AGREEMENT TO SHARE THE LAND, SHOULD BE RECOGNIZED AND RESPECTED BY THE CROWN. SHARING THE LAND INCLUDES SHARING THE WEALTH GENERATED FROM RESOURCES ON OR BENEATH THE LAND, IN THE FORM OF REVENUE SHARING AND RESOURCE AGREEMENTS. THIS WOULD BE A SIGNIFICANT STEP FORWARD, IN THE SPIRIT OF SHARING THAT UNDERLIES THE TREATIES, SINCE IT ALLOWS OUR FIRST NATIONS TO OBTAIN ECONOMIC AND OTHER BENEFITS FROM THE RESOURCES OF THE LAND. WE ALSO VIEW THIS AS A SIGNIFICANT STEP FORWARD IN RECONCILING THE INTERESTS OF THE CROWN AND FIRST NATIONS. WE ELABORATE ON THIS IN MORE DETAIL UNDER PART C BELOW.**

3. *NATURAL RESOURCES TRANSFER AGREEMENT*

The *Natural Resources Transfer Agreement* (herein the "*NRTA*"), dated March 20th, 1930, was entered into between the Government of the Dominion of Canada and the Government of the Province of Saskatchewan, and subsequently ratified by the *British North America Act, 1930, The Saskatchewan Natural Resources Act, S.C. 20-21 George V, 1930, Chapter 41* and *An Act Relating to the Transfer of Natural Resources to The Province, S.S. 20 George V, 1930, Chapter 87*. By virtue of the *NRTA*, the interest of the Crown in all Crown lands, mines and minerals was purportedly transferred from Canada to Saskatchewan. This was done without consultation with or the consent of the Treaty peoples. The First Nations do not in any way admit or acknowledge the validity of the *NRTA* in relation to treaty rights, or any effect of the *NRTA* upon or in relation to treaty rights in general, or the treaty rights of members of our First Nations in particular.

The *NRTA* provides, among other things:

> 1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the British North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province, *subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same*, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals, or royalties before the coming into force of this agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter. [emphasis added]

The *NRTA also* provides:

> 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.

The First Nations say that by the above mentioned terms of the *NRTA*, Saskatchewan acknowledged and accepted an obligation to Indian peoples pursuant to the Treaties to safeguard and maintain the mode of living of the Indians, and more particularly to the First Nations, pursuant to Treaty No. 6. However, this has not been the historical experience of our First Nations.

Canada transferred the administration and control over lands and natural resources to Saskatchewan pursuant to the *NRTA*, as well as to the other two prairie provinces under similar agreements. This was done, as stated above, without the consent of or consultation with First Nations on the prairies. Once Saskatchewan acquired the land, it exercised its administration and control through legislation and policy with little or no regard for the interests of First Nations. In many cases, when First Nations took their concerns to the provinces, they were told that it was "their land" and that they were able to deal with it as they chose. When First Nations took their concerns to Canada, they were told that, unfortunately, Canada no longer "had the land" and that Canada was unable to address their concerns**,** despite having fiduciary obligations towards First Nations. These types of difficulties have arisen with treaty land entitlement, hunting, fishing and trapping rights, and land development projects. First Nations were "caught in the middle" with neither level of government willing or able to address their concerns.

The situation on the prairies was made worse by reason of the fact that Indians and Indian lands are the responsibility of Canada, and not the provinces, pursuant to s. 91(24) of the *Constitution Act, 1867*. Saskatchewan, and the other prairie provinces, considered and have indicated on many occasions that Indians were not their responsibility or concern because Canada had the constitutional responsibility for Indians, not the provinces. This was also reflected in legislation and policy decisions of the provinces, including Saskatchewan.

A particular concern has arisen from the experience of First Nations attempting to fulfil the land entitlement clauses under the various treaties after 1930. Prior to 1930, First Nations dealt with Canada in the establishment of reserves. The *NRTA* agreements included a section that made provision for the establishment of reserves after 1930. After 1930, the provinces were involved in the establishment of reserves. From then on, First Nations had to contend not only with the federal government in the establishment of reserves, but also with provincial governments. Dealing with two governments in the reserve creation process, one of which considered that Indians were not their concern or responsibility, proved to be a major obstacle for First Nations.

These difficulties continue to the present day as First Nations still seek to have their entitlement to land under the treaties fulfilled. These difficulties also arise in many other areas between Saskatchewan and First Nations, as indicated above.

The NRTA also provides in paragraph 10:

> All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, *and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfill its obligations under the treaties with the Indians of the Province,* and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof. [emphasis added]

In light of the fact that that our First Nations may have a valid claim for compensation against both the federal and provincial governments in that we, very arguably, no longer have a

meaningful right to hunt, fish or trap over our traditional territories, an argument can be made that since our treaty rights to pursue our traditional avocations have been, in effect, taken away without consultation, accommodation or consent, that Canada and the Province are obliged to provide compensation, or alternate lands to First Nations as compensation, for these historical infringements upon our rights.

FIRST NATIONS POSITION ON THE *NATURAL RESOURCES TRANSFER AGREEMENT*:

I. **THE NRTA HAS BEEN A SOURCE OF SIGNIFICANT FRICTION BETWEEN FIRST NATIONS AND THE CROWN AND ITS ENACTMENT WAS A SIGNIFICANT BREACH OF TREATY AND OF THE DUTY TO CONSULT AND ACCOMMODATE. FURTHERMORE, OUR FIRST NATIONS VIEW THIS AS A BREACH OF THE FIDUCIARY OBLIGATIONS ON THE PART OF THE FEDERAL CROWN.**

II. **AS A RESULT, THE ABORIGINAL AND TREATY RIGHTS OF FIRST NATIONS HAVE BEEN INFRINGED AS DEVELOPMENT PROCEEDS, WITH LITTLE REGARD BY EITHER THE FEDERAL OR PROVINCIAL GOVERNMENTS FOR THE RESULTING EFFECTS UPON FIRST NATIONS. ACCOMMODATION AND/OR COMPENSATION FOR THESE INFRINGEMENTS IS REQUIRED.**

4. RECONCILIATION

As the opening words of the Supreme Court of Canada in the *Mikisew Cree* case indicate:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.

The Court also stated in *Haida Nation* v. *British Columbia* that 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."

The First Nations seek to work out a process of reconciliation with the Crown with respect to our respective claims, interests and ambitions.

The courts will likely decide what, if anything, First Nations in our position are or may be entitled to as a result of the historical disregard for the aboriginal and treaty rights of our First Nations, as settlement occurred and the resources were transferred to the provincial Crown pursuant to the *NRTA*.

Our First Nations are interested in finding mutually satisfactory ways to follow the direction given by the Supreme Court of Canada, in cases such as Mikisew Cree, to find ways to reconcile the interests and ambitions of both First Nations and the Crown.

FIRST NATIONS POSITION ON RECONCILIATION:

I. THIS PAPER SEEKS TO ADDRESS THESE ISSUES, AND OFFER SOLUTIONS, ALL TOWARDS A RECONCILIATION OF OUR SEPARATE INTERESTS AND AMBITIONS. IT IS OUR POSITION THAT THE BASIS OR STARTING POINT FOR THAT RECONCILIATION IS THE CONSTITUTIONAL OBLIGATION ON THE CROWN TO CONSULT WITH OUR FIRST NATIONS WHERE OUR ABORIGINAL AND TREATY RIGHTS WILL OR MAY BE IMPACTED BY RESOURCE AND OTHER DEVELOPMENT IN OUR TRADITIONAL TERRITORIES, AND TO ACCOMMODATE OUR INTERESTS WHERE APPROPRIATE.

5. INFRINGEMENTS – PAST AND PRESENT

Our lands have always been vitally important to us – both our reserve lands and the lands outside of our reserve boundaries. We have used and still use our traditional territories on a regular basis for subsistence and agricultural purposes. We also have burial grounds, sacred sites and other places of significance in our traditional territories.

The First Nations that make up Treaty No.6 have been struggling with lands issues for many years. From the unlawful surrender of our reserve lands to the taking up of our traditional territories for settlement, the acquisition of private interests and property rights and resource development. Over the last few generations, there has been much development in our traditional territories and it is becoming increasingly difficult to exercise our rights as exploration and development proceeds.

Every day there are decisions being made regarding settlement, the acquisition of private interests and property rights and resource development in our traditional territories. There has been much infringement on our rights, with no consultation and accommodation of our interests. Our people have been forced to observe, while others acquire private interests and property rights in our traditional territories and get wealthy off of our resources and at our expense.

The examples of this are countless. The acquisition of private interests and property rights over generations in the lands which comprise our traditional territories is obvious. However, there are many recent examples as well. Pig farms are being established in our territories. As well, there is significant oil and gas and potash activity in our traditional territories that has an affect on our aboriginal and treaty rights and we have not been able to share in the benefits of this development. This, despite the fact that the prices of potash and oil are at an all-time high and is expected to get even higher in the coming years.

One recent significant example is that Enbridge Pipelines Inc. is seeking to build, refit and operate pipelines that cross the traditional territories of our First Nations. Such pipelines are very disruptive and interfere with the exercise of the aboriginal and treaty rights of the members of our First Nations and we have never been compensated for this.

Furthermore, there has been little or no consultation with respect to the proposed hydro project, involving the Saskatchewan River. This will have a direct affect on our people by disrupting the flow of water, lead to a loss of wildlife and a loss of historical sites. And we have virtually been ignored.

Most recently, Bruce Power identified our traditional territories as one of the most feasible areas to build a nuclear power plant. Our First Nations have yet to be consulted about this project.

As stated above, in *Mikisew Cree*, the Supreme Court of Canada has indicated that First Nations may have a valid claim for compensation against both the federal and provincial governments if that they no longer have a meaningful right to hunt over their traditional territories. In respect of our First Nations, it is very arguable that we no longer have a meaningful right to hunt, fish or trap in our traditional territories as a result of extensive settlement and these other these historic circumstances, and the Crown's failure to consult with or accommodate the interests and ambitions of our First Nations in any way.

Much has been lost by our First Nations people, such as the meaningful right to exercise our aboriginal and treaty rights, environmental destruction to the land, and generally the taking up of our lands without our consent or meaningful involvement. This lack of consultation and accommodation and disregard for our rights and livelihood has to change. It is in the interests of our First Nations and the Crown to work together to find ways to address these infringements in forums outside of the courts.

FIRST NATIONS POSITION ON INFRINGEMENTS – PAST AND PRESENT:

I. IT IS OUR POSITION THAT STEPS NEED TO BE TAKEN TO ADDRESS PAST INFRINGEMENTS AND ONGOING INFRINGEMENTS CAUSED BY RESOURCE AND OTHER DEVELOPMENT IN THE TRADITIONAL TERRITORIES OF OUR FIRST NATIONS, CARRIED OUT WITH PROVINCIAL CONSENT AND APPROVALS.

a. A TABLE SHOULD BE ESTABLISHED BETWEEN THE CROWN AND THE FIRST NATIONS TO NEGOTIATE A RESOLUTION TO THIS ISSUE, INCLUDING A FINANCIAL PACKAGE BY WAY OF COMPENSATION

6. THE TRADITIONAL TERRITORIES OF OUR FIRST NATIONS

The Supreme Court of Canada has indicated that First Nations are entitled to exercise their treaty rights in their traditional territories, in a meaningful way in *Mikisew Cree*. In this case, the court considered an application by the First Nation requiring consultation with respect to a road through their traditional territory. The road, in total, was to take up only a small portion of their territory, being approximately 23 square kilometres out of 44,807 square kilometres of Wood Buffalo National Park and out of 840,000 square kilometres encompassed by Treaty No. 8.

The Court found that for aboriginal people, as for non-aboriginal people, location is an important consideration. The taking up of a mere 23 square kilometres by a road can be serious if it includes a First Nation's hunting ground or trap line. The Court also noted that while a First Nation may have rights under a treaty to hunt, fish and trap throughout the larger treaty area, it is not practical for their hunters and trappers, while their own hunting territory and traplines are being affected, to go to the traditional territories of other First Nations. The Court indicated that the Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it". This promise, the Court said, is not honoured by dispatching the First Nation to territories far from their traditional hunting grounds and traplines.

As stated above, the Court also indicated that a First Nation which lost its meaningful right to hunt in its traditional territory would be in a position to bring an action for infringement of its treaty:

> The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. *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.* [emphasis added]

Accordingly the Court recognized the importance of a First Nation's traditional territory, and indicated that a First Nation is not required to move from their traditional territory in order to exercise their aboriginal and treaty rights. Further, the Crown has an obligation to consult with the First Nation in such circumstances.

Our First Nations wish to continue to exercise our aboriginal and treaty rights in our respective traditional territories, and we rely upon our Treaties and the principles enunciated by the Supreme Court of Canada in this regard. Accordingly, steps must be taken to ensure that we are able to exercise those rights in our traditional territories in a meaningful way, and that our interests and ambitions in this regard are respected.

FIRST NATIONS POSITION ON THE TRADITIONAL TERRITORIES OF OUR FIRST NATIONS:

I. **IT IS OUR POSITION THAT CONSULTATION WITH OUR FIRST NATIONS AND THE ACCOMMODATION OF THE INFRINGEMENTS UPON THE EXERCISE OF OUR RIGHTS MUST TAKE PLACE IN RELATION TO THE FIRST NATIONS IN WHOSE TRADITIONAL TERRITORY THE DEVELOPMENT TAKES PLACE, AND WHO ARE AFFECTED BY PARTICULAR DEVELOPMENTS. THIS INCLUDES LANDS THAT MAY BE DESIGNATED AS PRIVATE LANDS.**

II. **GOVERNMENT AND INDUSTRY NEED TO KNOW WHICH FIRST NATIONS THEY MUST DEAL WITH WHEN THEY WISH TO PROCEED WITH RESOURCE DEVELOPMENT. THIS REQUIRES THAT OUR FIRST NATIONS MAP AND OTHERWISE IDENTIFY OUR TRADITIONAL TERRITORIES IN A MANNER THAT IS ACCEPTABLE TO US. FUNDING TO ENABLE OUR FIRST NATIONS TO MAP OUT OR OTHERWISE IDENTIFY OUR TERRITORIES IS REQUIRED. THIS MAY INCLUDE UNDERTAKING COMPREHENSIVE LAND USE STUDIES.**

III. **THE ESTABLISHMENT OF DECISION MAKING AND SHARED MANAGEMENT PROCESSES IN TRADITIONAL LANDS THAT ARE SHARED WITH OTHER FIRST NATIONS IS REQUIRED TO ENABLE OUR FIRST NATIONS TO MAINTAIN OUR LIFESTYLES AND CONTINUE TO EXERCISE OUR RIGHTS IN A MEANINGFUL WAY.**

IV. **ADEQUATE FUNDING TO ENABLE THIS PROCESS TO BE UNDERTAKEN BY OUR FIRST NATIONS IS FUNDAMENTAL TO DEFINING THESE TERRITORIES AND CLARIFYING THE ISSUES OF OVERLAPS, IF ANY.**

7. LEGAL PRINCIPLES

CONSULTATION

In May of 2006, the Government of Saskatchewan introduced its policy paper entitled, "Guidelines for Consultation with First Nations and Metis People: A Guide for Decision Makers" (herein the "Guidelines"). The Guidelines were replaced with interim guidelines in January of 2008 (herein the "Interim Guidelines").

The Guidelines were not the first "consultation policy" document prepared or established by Saskatchewan. Saskatchewan has realized for a number of years that it has an obligation to consult with First Nations where aboriginal or treaty rights will or may be affected by the actions of government or industry. The Government of Saskatchewan website has, for a number of years, had a "consultation policy" posted on its website. First Nations were not consulted during the development of the policy papers. The result was a vague, discretionary, unenforceable policy that said little of substance about accommodation and only outlined the minimum requirements for consultation.

Some of the basic principles of consultation established by the courts are recognized in the Guidelines and Interim Guidelines. However, these guidelines acknowledge that they are the "minimum legal requirements" established by the courts.

This is one of the fundamental shortcomings of the Guidelines and Interim Guidelines. While they set out the "minimum legal requirements" established by the courts, which may include providing notice to the First Nations**,** they do not recognize or particularize the more rigid legal requirements and principles for consultation established by the courts. This results in provincial government officials taking the position, in the consultation process, that the only requirement of them in the consultation process is to meet the principles set out in the official policy documents of the government of Saskatchewan. And furthermore, no guidance is provided to those same officials even if they were inclined to engage in a deeper level of consultation. In truth, how can they be expected to know what a deeper level of consultation might entail, in appropriate circumstances, if the guidelines do not address the issue?

Our people have said enough is enough. Now is our chance to get it right and come up with a mutually acceptable policy that we can all live with.

The First Nations require that the Crown engage in the consultation process with our First Nations to the full extent of the law. We do not propose to restate the principles that the courts have established to guide meaningful consultation between First Nations and the Crown. Those principles can be reviewed at a later stage in this process. However, we wish to state that such consultation will require good faith adherence to and implementation of certain fundamental principles.

This means that our First Nations will insist that consultation must be meaningful (*Haida Nation*) and must occur before any infringement occurs (*Huu-Ay-Aht First Nation*).

The consultation model to be negotiated must be flexible and must accommodate varying circumstances. The question to determine in each case will be the degree to which conduct contemplated by the Crown or industry might adversely affect the aboriginal or treaty rights of a

First Nation so as to trigger the duty to consult (*Mikisew Cree*). The scope of the duty to consult must be proportionate to the seriousness of the potentially adverse effect upon the aboriginal or treaty rights of a First Nation (*Haida Nation*). The honour of the Crown cannot be delegated and the legal responsibility for consultation and accommodation rests with the Crown (*Haida Nation* and *Taku River*).

At the low end of the spectrum, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice (*Haida Nation*). This is a minimum. This is not happening in most cases in our traditional territories now, even though it is the minimum requirement.

Where the potential infringement is of high significance to a First Nation, and the risk of damage is high, deep consultation, aimed at finding a satisfactory solution, is required. The consultation required at this stage may include the opportunity to make submissions for consideration, formal participation in the decision-making process, and the provision of written reasons by government to show that the First Nation's concerns were considered and to reveal the impact they had on the decision. In appropriate cases, the maximum legal requirements established by the courts, including any future principles established by the courts as well, must be fully implemented. Saskatchewan is not presently meeting even the minimal legal requirements in terms of consultation, let alone the deeper consultation requirements that the courts have ordered, and presently takes no steps whatsoever to accommodate First Nation interests or ambitions. This list is neither exhaustive, nor mandatory for every case (*Haida Nation*). Between these two extremes lie other situations. Every case must be approached individually (*Haida Nation*).

Although the courts have indicated that First Nations do not have a veto over individual resource developments, 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 (*Delgamuukw*). While provincial officials, and the Premier himself, are prone to refer to the former principle, no recognition is given to the latter principle.

Finally, Saskatchewan's consultation policy must be continually updated to be kept current with court decisions as they are rendered.

FIRST NATION POSITION ON CONSULTATION:

I. **THESE PRINCIPLES, TOGETHER WITH THE OTHER PRINCIPLES REFLECTED IN THE LEGAL SUCCESSES THAT FIRST NATIONS HAVE ACHIEVED IN THE COURTS, MUST BE RESPECTED, INCORPORATED AND IMPLEMENTED IN A CONSULTATION PROCESS NEGOTIATED BETWEEN FIRST NATIONS AND THE CROWN. THE POLICY MUST BE FLEXIBLE AND MUST IMPLEMENT ANY FUTURE PRINCIPLES ESTABLISHED BY THE COURTS.**

II. **THE CROWN SHOULD NO LONGER ADVISE ITS OFFICIALS OF ONLY THE "MINIMUM LEGAL REQUIREMENTS." THE MAXIMUM LEGAL REQUIREMENTS OF CONSULTATION MUST BE ADHERED TO AND IMPLEMENTED AS WELL.**

III. **IT IS OUR POSITION THAT THE LEGAL DUTY TO CONSULT AND ACCOMMODATE APPLIES TO PRIVATE, AS WELL AS PUBLIC, LANDS.**

IV. **IT IS OUR POSITION THAT ANY PERMITS AND LICENSES ISSUED BY THE CROWN WITHOUT PROPER CONSULTATION AND ACCOMMODATION ARE ILLEGAL.**

V. **THE ESTABLISHMENT OF A TREATY NO. 6 CONSULTATION SECRETARIAT OR OFFICE, OR FIRST NATIONS GOVERNMENT HOUSE, SHOULD BE IMPLEMENTED, SIMILAR TO OTHERS ACROSS CANADA.**

8. LEGAL PRINCIPLES

ACCOMMODATION

The Guidelines and Interim Guidelines fall short in their treatment of the accommodation aspect of the obligation on the Crown. While there is clearly an obligation on the Crown to consult, there is also an obligation on the Crown to accommodate the concerns of First Nations in appropriate circumstances. The Guidelines recognize that "the effect of good faith consultation may be to reveal a duty to accommodate." The courts have addressed various ways that the concerns of First Nations can be addressed when accommodation is required or appropriate.

Unfortunately, the mention of the duty to accommodate in the Guidelines and Interim Guidelines was inadequate. The difficulty is that even if government officials conclude that some form of accommodation is required, the Guidelines did not give them adequate options to consider to meet this constitutional obligation. This may have been the case because they were intended to reflect the "minimum legal requirements" established by the courts. Nevertheless, from a practical point of view, Crown officials must be provided with a comprehensive list of the types of accommodations that are available, and direction to use them where aboriginal and treaty rights may or will be affected by the actions of government or industry.

It is necessary that the Crown provide its officials with a more comprehensive list of the types of accommodations that are available. The approach of government officials who are accustomed to dealing with developments "the old way," where First Nations were not recognized as having an interest in the development of a project, must be changed. The Crown must advise its officials of the various forms of accommodation, including the payment of compensation that may be appropriate in different circumstances.

Practical steps can be implemented to accommodate First Nation's interests and ambitions. The purpose of accommodation is to seek compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. Balance and compromise are inherent in the notion of reconciliation. Saskatchewan's existing policy is virtually silent on the matter of accommodation, even though in many respects, it is more important than the obligation to consult.

How can our interests be properly accommodated? First of all, our First Nations want to be treated like First Nations elsewhere in the country, where steps are being taken to accommodate their interests. In other words, an industry standard is developing across the country and we want at least what other First Nations are receiving. This is more than reasonable.

As well, Courts may require that First Nations and industry negotiate and enter into a memorandum of agreement regarding employment, contracts, a consultation process, impacts upon hunting, trapping and fishing, participation in the decision making process, environmental impacts, payment of compensation and funding. In fact, agreements are a common method of accommodation. As a way to accommodate the interests of First Nations and attain certainty in First Nation's traditional territories, industry enters in to a variety of agreements with First Nations.

There are many ways that our First Nations can be accommodated. However, to take this a step further, it is often unclear who is to accommodate First Nations. Industry often takes the position

that the duty to consult and accommodate rests with the Crown and they refuse to accommodate First Nations on that basis. While we agree that this is a correct statement of the law, it is often industry that holds and can provide the accommodation measures. The Crown recognizes this and often takes the position that they are simply a facilitator between industry and First Nations when it comes to accommodation measures. In this regard, there needs to be sufficient clarity between the obligation to accommodate and how to practically fulfil the obligation.

Finally, Saskatchewan's policy in reference to accommodation must be continually updated to be kept current with court decisions as they are rendered.

Our First Nations are convinced that until this happens, there will be increasing conflict between First Nations, on the one hand, and government and industry on the other hand. There will be no happy medium and tension will continue.

FIRST NATIONS POSITION ON ACCOMMODATION:

I. **IT IS OUR POSITION THAT A DISCUSSION NEEDS TO TAKE PLACE BETWEEN THE CROWN AND OUR FIRST NATIONS AS TO HOW TO BRIDGE THE GAP BETWEEN THE OBLIGATION TO ACCOMMODATE AND HOW TO PRACTICALLY FULFIL THE OBLIGATION.**

II. **ONE SUGGESTION TO BRIDGE THIS GAP IS FOR THE CROWN TO REQUIRE INDUSTRY TO TAKE APPROPRIATE STEPS TO ENSURE THAT OUR FIRST NATIONS ARE PROPERLY ACCOMMODATED, WHERE RESOURCE DEVELOPMENTS WILL IMPACT UPON ABORIGINAL AND TREATY RIGHTS. AS AN EXAMPLE, THE GRANTING OF LICENSES AND PERMITS SHOULD BE CONDITIONAL UPON INDUSTRY ENTERING INTO AGREEMENTS WITH FIRST NATIONS THAT PROVIDE FOR THE ACCOMMODATION OF FIRST NATION INTERESTS. OTHER PROVINCES, SUCH AS ONTARIO, HAVE BEGUN TO IMPLEMENT THIS MEASURE, AS A WAY TO PROVIDE ASSURANCES THAT FIRST NATIONS INTERESTS WILL BE ACCOMMODATED. AGREEMENTS ARE ALREADY IN PLACE ACROSS THE COUNTRY WHICH DO EXACTLY THIS. WE WILL ELABORATE ON THE NATURE OF THESE EXISTING AGREEMENTS BELOW.**

We turn now to a review of the various forms of accommodation that First Nations consider appropriate with respect to infringements upon the exercise of our aboriginal and treaty rights.

9. ACCOMMODATION – SUSTAINABLE WILDLIFE, FISH AND WATER RESOURCES AND ENVIRONMENTAL MATTERS

First and foremost, First Nations are concerned for the protection of the resources necessary for the successful exercise of our aboriginal and treaty rights. This requires protection of the environment. Protection of the environment is fundamental and necessary for the continued ability of our First Nation members to exercise our aboriginal and treaty rights in our traditional territories. Much of our ability to exercise our rights in this regard has already been infringed to the point where there is, as mentioned above, very arguably no longer any meaningful right to hunt in our traditional territories. First Nations do not want further impediments created or allowed to interfere with our ability to exercise our aboriginal and treaty rights.

Accordingly, our people are concerned about the environment. This means that although we are not opposed to development, we are not in favour of development at any cost. We need to respect Mother Earth and preserve our environment. Someone once said, "We do not inherit land, we borrow it from our children." We must always be mindful of this. Our First Nations people are strong believers that without a healthy environment, we cannot be a healthy people. We are also concerned about losing our sacred, ceremonial and historical sites. We have a strong connection to the land and in many instances, our ties to the land run deeper than the resources beneath. We want to ensure that places of spiritual and historical significance, despite its monetary worth, are protected and respected.

Just as important is the fact that environmental issues are central our First Nations continuing ability to exercise our aboriginal and treaty rights. Without a healthy environment, the wildlife resources necessary for the meaningful exercise of aboriginal and treaty rights cannot be maintained.

Steps need to be taken to address the adverse effects of all projects on First Nation rights, First Nation communities and First Nation traditional territories with the intent of mitigating these impacts to the extent possible and to provide compensation to the First Nations where these impacts cannot be avoided. This can be accomplished by implementing environmental protection, mitigation, monitoring and reporting on all aspects of all projects, to establish and promote measures intended to protect the environment and minimize the adverse environmental effects of projects on the exercise of aboriginal and treaty rights.

FIRST NATION POSITION ON SUSTAINABLE WILDLIFE, FISH AND WATER RESOURCES AND ENVIRONMENTAL MATTERS:

I. **OUR FIRST NATIONS EXPECT TO BE CONSULTED AND ACCOMMODATED IN A MEANINGFUL WAY ON ALL MATTERS THAT DIRECTLY OR INDIRECTLY AFFECT THE ENVIRONMENT. THIS INCLUDES OUR SACRED, CEREMONIAL AND HISTORICAL SITES. PROTECTING THESE SITES FROM INTERFERENCE AND RESOURCE DEVELOPMENT IS OF UTMOST IMPORTANCE TO OUR FIRST NATIONS.**

II. **IT MAY ALSO INCLUDE PARTICIPATING IN COMPREHENSIVE AND THOROUGH ENVIRONMENTAL ASSESSMENTS, EVEN AT THE EXPLORATION STAGE. THIS MAY REQUIRE LEGISLATIVE CHANGES, AS CURRENTLY ENVIRONMENTAL ASSESSMENTS ARE NOT UNDERTAKEN UNTIL THE DEVELOPMENT STAGE.**

III. **CONSIDERATION MUST BE GIVEN TO THE BENEFIT AND ROLE OF LAND USE PLANNING, ANTHROPOLOGICAL AND CULTURAL STUDIES, AS WELL AS ENVIRONMENTAL AND CULTURAL MONITORS IN THE DUTY TO CONSULT AND ACCOMMODATE PROCESS.**

IV. **RESPECT FOR AND UTILIZATION OF OUR TRADITIONAL KNOWLEDGE AND PERSPECTIVES ON THE ENVIRONMENT IS REQUIRED. THIS WILL ENABLE OUR FIRST NATIONS TO PARTICIPATE IN THE DEVELOPMENT OF ANY ENVIRONMENTAL STEWARDSHIP AND MANAGEMENT STRATEGIES THAT MAY BE DEVELOPED. THIS MAY RESULT IN A MORE HOLISTIC APPROACH, REFLECTIVE OF OUR CULTURE AND KNOWLEDGE.**

V. **OTHER MEASURES MAY BE DISCUSSED AND NEGOTIATED BETWEEN THE CROWN AND OUR FIRST NATIONS.**

10. ACCOMMODATION – COMPENSATION AND BENEFITS

Both compensation and benefits are appropriate in most circumstances. First Nations draw a distinction between the payment of compensation and benefits that should accrue to First Nations as development proceeds, although both are forms of accommodation. Compensation should be paid to individual First Nations as a result of infringements to the exercise of the aboriginal and treaty rights of particular First Nations whose traditional territories are negatively affected by resource or other development.

The payment of compensation in appropriate circumstances has been recognized by the Supreme Court of Canada in *Delgamuukw*, where the court indicated that the amount of compensation payable will vary with the nature of the particular aboriginal or treaty right affected, with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated. We elaborate more on compensation in parts 9 and 10 of the paper.

In addition to any compensation payable, First Nations also seek benefits from resource or other development for particular First Nations whose traditional territories are the subject of resource or other development because the lands being used for these developments are “shared” lands.

In *Platinex*, the courts required that First Nations and industry negotiate and enter into a memorandum of agreement regarding employment, contracts, a consultation process, impacts upon hunting and trapping, participation in the decision making process, environmental impacts, and funding, as well as the payment of compensation.

First Nations want to have their interests and ambitions accommodated as development proceeds in their traditional territories. In this regard, First Nations must participate in the benefits that accrue from development in the shared lands of our traditional territories. As stated above, First Nations agreed to share the lands with the European newcomers, we did not cede and surrender the land or give up sovereignty over the land and resources. Furthermore, there was no agreement that the resources below the land were to be ceded or surrendered. Accordingly, First Nations wish to benefit from the development that occurs in our traditional territories, such as through meaningful employment and business contracts. Both long and short term benefits are required and must accrue to all First Nation members.

FIRST NATIONS POSITION ON ACCOMMODATION – COMPENSATION AND BENEFITS:

I. **IT IS OUR POSITION THAT COMPENSATION AND BENEFITS ARE BOTH IMPORTANT ASPECTS TO ACCOMMODATION AND A DISTINCTION MUST BE MADE BETWEEN THEM. OUR FIRST NATIONS TAKE THE POSITION THAT COMPENSATION MUST BE PAID FOR INFRINGEMENTS UPON OUR RIGHTS. AS WELL, BENEFITS MUST ACCRUE TO FIRST NATIONS BECAUSE THE LANDS WERE TO BE SHARED AND THE RIGHTS BEING INFRINGED ARE COLLECTIVE.**

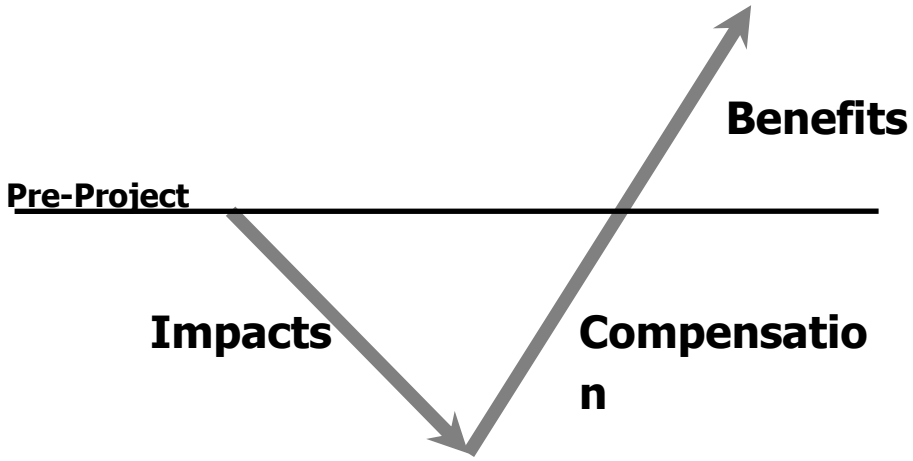
II. **BENEFITS MUST ACCRUE TO ALL FIRST NATION MEMBERS, NOT SIMPLY A FEW WHO HAPPEN TO BE THE BENEFICIARIES OF EMPLOYMENT OR BUSINESS CONTRACTS. THIS IS IMPORTANT, SINCE, GENERALLY SPEAKING, INFRINGEMENTS OF ABORIGINAL AND TREATY RIGHTS OCCUR TO ALL MEMBERS OF A FIRST NATION. FIRST NATIONS WANT TO ENSURE THAT THE FIRST NATION AS A WHOLE BENEFITS FROM RESOURCE DEVELOPMENT IN A FIRST NATION'S TRADITIONAL TERRITORY.**

III. **BENEFITS OVER AND ABOVE COMPENSATION FOR THE INFRINGEMENTS TO OUR RIGHTS IS APPROPRIATE BECAUSE THEY ARE "SHARED" LANDS. IF FIRST NATIONS WERE ONLY TO BE COMPENSATED FOR INFRINGEMENTS TO THE EXERCISE OF OUR RIGHTS IN OUR TRADITIONAL TERRITORIES, WE WOULD ONLY BE PUT BACK TO THE SAME POSITION THAT WE WERE IN BEFORE DEVELOPMENT OCCURS. IN OTHER WORDS, WE WOULD SIMPLY BE "MADE WHOLE." WHILE THIS IS REQUIRED, IT IS NOT SUFFICIENT.**

IV. **PURSUANT TO OUR INHERENT RIGHT TO SELF-GOVERNMENT, AND OUR CONTINUED SOVEREIGNTY OVER OUR LANDS AND RESOURCES, WE MAY CHOOSE TO ENACT A RESOURCE LAW WITH RESPECT TO OUR LANDS AND RESOURCES, WHICH WE EXPECT THE CROWN TO RESPECT AND ADHERE TO.**

These concepts can be seen in the following illustration:

Compensation vs. Benefits



Accordingly, our First Nations expect that measures be implemented to ensure that this concept is followed.

11. COMPENSATION FOR PAST INFRINGEMENTS

As mentioned above, the Supreme Court of Canada has indicated that First Nations may have a valid claim for compensation against both the federal and provincial governments if First Nations no longer have a meaningful right to hunt over their traditional territories. The Court in *Delgamuukw* stated that compensation may be greater if the interdependence of traditional uses to which the land was put is greater. The court further stated, at paragraphs 203 and 204, that compensation must be viewed in terms of the right and in keeping with the honour and good faith of the Crown:

> 203 Under the second part of the justification test, these legislative objectives are subject to accommodation of the aboriginal peoples' interests. This accommodation must always be in accordance with the honour and good faith of the Crown. Moreover, when dealing with a generalized claim over vast tracts of land, accommodation is not a simple matter of asking whether licences have been fairly allocated in one industry, or whether conservation measures have been properly implemented for a specific resource. Rather, the question of accommodation of "aboriginal title" is much broader than this. Certainly, one aspect of accommodation in this context entails notifying and consulting aboriginal peoples with respect to the development of the affected territory. Another aspect of accommodation is fair compensation. More specifically, in a situation of expropriation, one asks whether fair compensation is available to the aboriginal peoples; see *Sparrow*, *supra*, at p. 1119. Indeed, the treatment of "aboriginal title" as a compensable right can be traced back to the *Royal Proclamation, 1763*. The relevant portions of the *Proclamation* are as follows:
>
> > . . . such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them [aboriginal peoples] or any of hem, as their Hunting Grounds. . . .
> >
> > We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians . . . but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name. . . . [Emphasis added.]
>
> Clearly, the *Proclamation* contemplated that aboriginal peoples would be compensated for the surrender of their lands; see also Slattery, "Understanding Aboriginal Rights", *supra*, at pp. 751-52. It must be emphasized, nonetheless, that fair compensation in the present context is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown. Thus, generally speaking, compensation may be greater where the expropriation relates to a village area as opposed to a remotely visited area. I add that account must be taken of the interdependence of traditional uses to which the land was put.
>
> 204 In summary, in developing vast tracts of land, the government is expected to consider the economic well being of all Canadians. But the aboriginal peoples must not be forgotten in this equation. Their legal right to occupy and possess certain lands, as

confirmed by s. 35(1) of the *Constitution Act, 1982*, mandates basic fairness commensurate with the honour and good faith of the Crown.

It is very arguable that our First Nations no longer have a meaningful right to hunt, fish, trap and gather for sustenance purposes and live as we did before over our traditional territories in central Saskatchewan, as a result of extensive settlement and development, other historic circumstances and the Crown's failure to consult with or accommodate the interests and ambitions of our First Nations in any way.

FIRST NATIONS POSITION ON COMPENSATION FOR PAST INFRINGEMENTS:

I. OUR FIRST NATIONS CONSIDER THAT THE GOOD FAITH AND HONOUR OF THE CROWN DICTATES THAT COMPENSATION IS OWED FOR PAST INFRINGEMENTS, WHICH HAVE RESULTED IN THE LOSS OF A MEANINGFUL RIGHT TO HUNT, FISH, TRAP AND GATHER FOR OUR LIVELIHOOD, AND LIVE AS WE DID BEFORE, OVER OUR TRADITIONAL TERRITORIES.

12. COMPENSATION FOR PRESENT AND FUTURE INFRINGEMENTS

Based on the same principles above, our First Nations consider that the situation will only be exacerbated if steps are not taken now to address infringements from ongoing and future resource development in the traditional territories of our First Nations. The Courts have stated that our First Nations should not have to go outside of our traditional territories to exercise our meaningful right to hunt. Thus, this should be a consideration as well.

FIRST NATION POSITION ON COMPENSATION FOR PRESENT AND FUTURE INFRINGEMENTS:

I. IT IS OUR POSITION THAT COMPENSATION, OR OTHER ACCEPTABLE FORMS OF ACCOMMODATION TO BE NEGOTIATED, ARE NECESSARY TO ADDRESS INFRINGEMENTS FROM ONGOING RESOURCE DEVELOPMENT IN OUR TRADITIONAL TERRITORIES.

13. ACCOMMODATION FOR PRESENT AND FUTURE INFRINGEMENTS - AGREEMENTS WITH FIRST NATIONS

INTRODUCTION

There are countless examples across Canada and in Saskatchewan of resource companies coming into our traditional territories, interfering with the practice of Aboriginal and Treaty rights, taking natural resources and leaving without any compensation or benefits accruing to the impacted First Nations.

Any benefits that were offered to First Nations were at the pleasure of industry – there was no legislative requirement or other impetus for industry to provide any compensation or benefits to First Nations. The few companies that as "good corporate citizens" adopted an internal Aboriginal relations policy did make efforts to contact and involve First Nation and other Aboriginal communities. However, even in these cases the benefits were generally limited to a few short-term employment opportunities and some small business contracts.

Past practices have shown that it is unrealistic to expect that industry, who are understandably concerned primarily with their shareholders and their bottom line, will voluntarily seek to involve First Nations in any meaningful way through employment opportunities, business opportunities, sharing of the financial benefits and in providing opportunities to participate in the company's environmental management of the project, unless they are required to do so.

Things are changing. There are three key factors that have changed the landscape for the relationships between First Nations and industry – First Nation resolve, court decisions and investor confidence.

First Nations in recent years have developed a clear resolve not to allow industry to continue to reap the benefits from the resources in our traditional lands while ignoring the impacts on our First Nations. As mentioned above, from a First Nation perspective, our traditional lands are shared lands – not ceded lands.

A range of court decisions in the past ten years have begun to provide clarity on the nature and scope of First Nation rights within traditional territories. Landmark decisions including *Dene Tha*, *Mikisew Cree* and *Platinex* have established the right of First Nations to be consulted if resource projects may impact aboriginal and treaty rights. Where First Nations identify their interests, accommodation of these interests must be considered.

The federal and provincial governments vary in their interpretation of these court decisions, but none, including Saskatchewan, can ignore the impacts of these decisions on their government as the duty to consult is clearly an obligation on the Crown, not industry. Where First Nations are not consulted, the Crown faces significant liability as shown in the recent $25.0 million settlement by Canada with the Dene Tha' who were not adequately consulted on the Mackenzie Valley pipeline project.

While the duty to consult is a Crown obligation, there are significant implications for industry who hold many of the accommodation remedies including employment, business opportunities and financial benefits. Currently, there are no Saskatchewan policy or legislative requirements linking industry to the duty to consult through licensing or permit conditions.

Investors are increasingly knowledgeable about the risks of ignoring First Nation interests when projects are located within our traditional territories. High profile protests such as the KI blockade and resulting court case, Six Nations at Caledonia, Clearwater River Dene Nation on oilsands development, and the recent Enbridge blockades, have alerted investors to the perils of ignoring First Nation interests. Simply put, projects which have not reached agreements with First Nations are a greater investor risk – and industry recognizes this fact.

To deal with these issues, First Nations and industry across the country have begun to enter into resource agreements. Resource agreements are legally binding agreements between a resource company and a First Nation(s) whose aboriginal and/or treaty rights may be impacted by the activities of the proposed project.

The primary purposes of resource agreements are two-fold:

- First, to address the adverse effects of the project on First Nation rights, First Nation communities and First Nation traditional territories with the intent of mitigating these impacts to the extent possible and to provide compensation to the First Nations where these impacts cannot be avoided; and,
- Second, to ensure that First Nations receive benefits from the activities taking place in their traditional territories and from the resources that are being taken from their lands.

Resource agreements include exploration agreements, negotiation agreements and impact benefit agreements (IBAs).

In this context and others, when we speak of government, we refer not only to the provincial government, but we also refer to all levels of the provincial government, Crown corporations and municipalities which derive their mandate and authority from the Province. When we speak of industry, we refer to all levels of industry, including development proponents, Crown corporations, municipalities and the provincial government itself when involved in development activities.

EXPLORATION AGREEMENTS

Exploration agreements are entered into with resource companies at the exploration or advanced exploration stage. These agreements:

- provide a detailed description of the exploration activities;
- set out interim measures including employment and business opportunities;
- set out environmental impact mitigation measures the company will take;
- detail compensation with respect to the impact of the exploration activities and may include access fees;
- ensure capacity for the First Nation(s) to be consulted and to conduct due diligence with respect to the exploration activities; and
- contain commitments with respect to the negotiation of an IBA if the project proceeds to the operations stage.

NEGOTIATION AGREEMENTS

Negotiation agreements are entered into once a decision has been made by the proponent that they want to move to the operations stage based on their bankable feasibility study. Negotiation agreements:

- set out the terms and conditions for negotiation of an IBA;
- include interim measures for benefits while an IBA is being negotiated;
- set the agenda, topics and schedule for IBA negotiations; and,
- identify negotiation funding to support First Nation participation.

IMPACT BENEFIT AGREEMENTS

Impact benefit agreements are entered into prior to the commencement of operations and normally apply during the entire operational period of the project. IBAs typically address the following:

1) Consent: The proposed approach to IBAs is based on the aboriginal and treaty rights of Saskatchewan First Nations and the principle of their required consent for projects taking place in their traditional territories. Successful conclusion and First Nation ratification of an exploration agreement or IBA constitute First Nation consent for that phase of the project based on the terms and conditions of those agreements. It follows therefore, that without an exploration agreement or IBA, First Nation consent has not been granted and the project should not be allowed to proceed;

2) Non- Derogation: Provisions to protect Treaty and Aboriginal Rights;

3) Education and Training: Provisions to provide ongoing opportunities for First Nation members to become qualified for employment opportunities during all phases of the project;

4) Employment Opportunities: Provisions to enable First Nation members to secure employment during all phases of the Project, at all job levels, and to reduce barriers to First Nation members employment on the Project;

5) Workplace Conditions: Provisions to promote a workplace and working conditions that are safe, healthy and supportive of First Nation employees and which are respectful and supportive of First Nation culture;

6) Business Opportunities: Provisions to maximize the benefit from business opportunities associated with all phases of the project;

7) Financial Participation: Provisions to set out financial benefits from the resource and compensation for project impacts on First Nation and First Nation traditional territories;

8) Meaningful Provisions: In negotiations with First Nations, companies must be instructed to negotiate agreements that contain meaningful provisions – not token "best efforts" clauses. Provisions must include processes to accommodate First

Nation concerns with respect to environmental effects and First Nation values as well as clear commitments to business, employment, compensation and financial benefits.

9) Compensation: Compensation for interference with aboriginal and treaty rights must be provided at the exploration stage as well as the operation stage of projects. Compensation must be for more than direct losses and should include interference and loss of use compensation.

10) Benefits: Benefits should be provided as a share of the revenues or of the profits of Projects at the operational stage. This can be provided as a percentage of net cash flow, a royalty stream, equity or a combination of the above.

11) Consultation and Protection of Aboriginal and Treaty Rights: To establish a consultation process and promote measures intended to minimize the effects of the Project on the exercise of aboriginal and treaty rights by First Nation and its members;

12) Environmental Protection, Mitigation, Monitoring and Reporting: To establish and promote measures intended to protect the environment and minimize the adverse environmental effects of the Project;

13) Social & Cultural Protection: To outline activities to promote a positive relationship between the First Nations and their members, to support Cree culture and to minimize any negative impacts of the project on the First Nations social and cultural values including their relationship to Mother Earth.

14) First Nation Capacity: First Nations involved in negotiations will incur legal, technical, negotiation and community consultation costs. These are costs First Nations wouldn't incur had industry not been interested in proceeding with projects in their traditional territories. Governments and industry have a shared obligation to ensure First Nation have the required funding for all aspects of the Resource Agreement processes.

15) Ratification: Because IBAs provide First Nation consent for projects to proceed and compensation for the infringement of Aboriginal and Treaty Rights, they must be approved by the First Nation membership. This approval, usually referred to as ratification, must be conducted by First Nations in accordance with local practices and traditions for decision making by its members.

16) Ongoing Communications and Consultation Between the Parties: To set out implementation processes that will guide the ongoing relationship between the parties including a dispute resolution process;

17) Other topics as may be agreed specific to the project (e.g., winter road agreement right of ways).

The proposed approach to impact benefit agreements is based on the aboriginal and treaty rights of Saskatchewan First Nations and the principle of their required consent for projects taking

place in their traditional lands. First Nations view IBAs as legally binding documents which set out the conditions under which a First Nation(s) can provide consent for a project to proceed.

Assuming that the First Nation(s) are prepared to support a project subject to an acceptable agreement being in place, negotiations toward such agreements can be undertaken. Successful conclusion and First Nation ratification of an Exploration Agreement or IBA, constitute First Nation consent for that phase of the project based on the terms and conditions of those agreements. It follows therefore, that without an Exploration Agreement or IBA, First Nation consent has not been granted and the project should not be allowed to proceed.

It has been the experience of our First Nations that, in most cases, industry will not voluntarily take steps to enter into agreements with First Nations unless they are forced to do so. Ignoring First Nations is not going to bring certainty to resource developers or to the Province, who seek to develop the resources in the Province. In this regard, steps must be taken to accommodate our interests for present and future infringements of our rights.

FIRST NATIONS POSITION ON ACCOMMODATION FOR PRESENT AND FUTURE INFRINGEMENTS - AGREEMENTS WITH FIRST NATIONS:

I. IT IS OUR POSITION THAT THE CROWN MUST TAKE STEPS TO MAKE LEGISLATIVE AND POLICY AMENDMENTS TO REQUIRE COMPANIES TO HAVE AGREEMENTS WITH FIRST NATIONS, AS A CONDITION OF ISSUING A LICENCE OR PERMIT FOR ACTIVITIES RELATED TO ANY PROJECT ON OUR TRADITIONAL LANDS. OUR FIRST NATIONS SHOULD BE CONSULTED AND ACCOMMODATED REGARDING THESE LEGISLATIVE AND POLICY AMENDMENTS. SUCH PROVISIONS MUST ALSO APPLY IN ANY SITUATION WHERE PERMITS OR LICENCES ARE NOT REQUIRED, SUCH AS IN MINING.

II. THE CROWN MUST LEGISLATE INDUSTRY AND INDUSTRY ASSOCIATIONS TO FOLLOW THE INDUSTRY STANDARD THAT IS EMERGING IN OTHER PARTS OF CANADA.

14. OTHER JURISDICTIONS

A lesson can be learned from other jurisdictions who chose not to follow the legal principles enunciated by the Courts and had to learn the hard way, usually through costly and lengthy litigation, that the duty to consult and accommodate is not something to be taken lightly.

Saskatchewan lags behind other jurisdictions in Canada in its recognition of the steps that need to be taken to properly consult with and accommodate the interests and ambitions of First Nations and our First Nations are becoming increasingly frustrated. Not following the law will only cause more intense friction between the Crown and First Nations and will likely result in unnecessary litigation. Taking steps to accommodate the interests of First Nations, as in done in other jurisdictions, is a way to avoid unnecessary friction between the Crown and First Nations.

In Newfoundland & Labrador, companies seeking permits for projects in Labrador are being advised that they must first ensure that the interests of First Nations and Inuit have been accommodated. The recent Tshash Petapen Agreement between the Province of Newfoundland & Labrador includes, among other provisions, the establishment of a 9,000 square mile Innu economic development zone, within which, impact benefit agreements are a perquisite for the issuance of permits by the Province.

In Ontario, changes to the Mining Act are in process which will put an end to the "free entry" system which allowed exploration on Crown lands in First Nation traditional territories without consultation and accommodation of First Nation interests. As well, ongoing negotiations at the Ministerial-Grand Chief level supported by technical tables are discussing mechanisms for revenue sharing, First Nation consent, impact benefit agreements, land use planning in First Nation traditional lands and First Nation involvement in licences and permits.

In British Columbia, similar high level talks are underway, an early result of which is the recent announcement on project by project negotiations for revenue sharing on mining projects.

In Alberta, Manitoba, Nova Scotia and New Brunswick processes have been established driven by the Duty to Consult and Accommodate to address mechanisms to allow those provinces to meet their legal obligations and to ensure appropriate accommodation measures for First Nations. In all cases, First Nations are seeking commitments to revenue sharing and impact benefit agreements as conditions of their consent for resource based projects in First Nation traditional territories.

Our First Nations wish to be treated at least as well as other First Nations in Canada, in terms of the accommodation that is made of their interests and ambitions when government and industry propose development for the traditional territories of First Nations.

FIRST NATION POSITION ON OTHER JURISDICTIONS:

I. IT IS OUR POSITION THAT IN ADDITION TO LOOKING TO THE ACCOMMODATION PRINCIPLES ENUNCIATED BY THE COURTS, SASKATCHEWAN SHOULD LOOK TO OTHER JURISDICTIONS FOR EXAMPLES OF PRACTICAL MEASURES TAKEN TO ACCOMMODATE FIRST NATION AND ABORIGINAL INTERESTS.

15. EMPLOYMENT, TRAINING AND BUSINESS OPPORTUNITIES

Exploration and impact benefit agreements should provide that members of affected First Nations are given the first opportunities to apply for positions with industry where industry is involved in resource development in a First Nation's traditional territory. Access should be provided to all positions, including senior management positions, not simply labour or unskilled positions as is often currently the case. Training should be a requirement where necessary.

Exploration and impact benefit agreements should also provide that businesses of affected First Nations are given the first opportunities to provide all goods and services to industry where industry is involved in resource development in a First Nation's traditional territory.

These are matters that require further explanation and discussion between First Nations and Saskatchewan.

An added element to this is that presently, Saskatchewan looks to other jurisdictions to fill the "labour shortage" in Saskatchewan. The Premier is reported as having invited workers from Ontario to come to Saskatchewan to work. Nurses have been enticed to Saskatchewan from the Philippines. Saskatchewan should work more closely with First Nations to ensure that First Nation members are employed in Saskatchewan before efforts are made to entice workers from other jurisdictions. It makes little sense in the long run for the Premier to continue to look to other Provinces to fill the labour shortage when our people are ready, willing and able to work right now. Sometimes all we require is a meaningful opportunity. Requiring that Saskatchewan First Nation members be given the first opportunity to apply for positions with industry where industry is involved in resource development in a First Nation's traditional territory is one way to deal with a number of problems, particularly in the long term.

If you consider that by 2045, aboriginal peoples will make up approximately 1/3 or 32.5% of Saskatchewan's population, it makes sense for Saskatchewan to find ways to invest in its aboriginal peoples for the long term. In fact, given the high aboriginal population, it may be a necessity.

A new study by the C.D. Howe Institute, entitled "A Disastrous Gap," reports low high school completion rates for aboriginals in Canada. In fact, only 38 percent of our First Nations children, who attend schools on-reserve in Saskatchewan, actually complete high school. The report points out that the employment rate is nearly double for Canadians with a high school education. Accordingly, with the dismal levels of education of our children and the shortage of labour in this Province, measures have to be taken now.

A "First Nations Government House" should be established to act as an umbrella group to oversee these processes, as one of its potential functions.

FIRST NATIONS POSITION ON EMPLOYMENT, TRAINING AND BUSINESS OPPORTUNITIES:

I. **IT IS OUR POSITION THAT THE CROWN MUST MAKE IT A REQUIREMENT THAT INDUSTRY GIVE FIRST NATIONS PEOPLE THE FIRST OPPORTUNITY FOR ALL EMPLOYMENT POSITIONS WITH INDUSTRY, AT ALL LEVELS OF MANAGEMENT, AND THE FIRST OPPORTUNITY TO PROVIDE ALL GOODS AND SERVICES TO INDUSTRY WHERE INDUSTRY IS INVOLVED IN RESOURCE DEVELOPMENT IN THAT FIRST NATION'S TRADITIONAL TERRITORY.**

II. **OUR FIRST NATIONS RECOGNIZE THAT WE MAY NOT BE ABLE TO FILL ALL POSITIONS OR SUPPLY ALL GOODS AND SERVICES. HOWEVER, SASKATCHEWAN SHOULD MAKE EFFORTS TO INVEST IN OUR PEOPLE, FOR THE LONG TERM, WHEN IT COMES TO EDUCATION, TRAINING, EMPLOYMENT AND BUSINESS OPPORTUNITIES. CREATIVE WAYS TO DO THIS CAN BE ADDRESSED WITH INDUSTRY AND BOTH LEVELS OF GOVERNMENT.**

III. **A "FIRST NATIONS GOVERNMENT HOUSE" SHOULD BE ESTABLISHED AND AS ONE OF ITS FUNCTIONS, IT SHOULD ACT AS AN UMBRELLA GROUP TO OVERSEE EMPLOYMENT, TRAINING AND BUSINESS OPPORTUNITIES FOR FIRST NATION MEMBERS AND OTHER SITUATIONS RELATED TO THE CROWN'S DUTY TO CONSULT AND ACCOMMODATE.**

16. PERMITTING AND LICENSING

As mentioned above, licenses and permits should be conditional upon industry entering into agreements with First Nations that provide for the accommodation of First Nation interests. Agreements are already in place across the country, which do exactly this.

Furthermore, First Nations want to be part of the licensing and permitting processes in Saskatchewan. This is the only way that we can be assured that our interests and ambitions will be properly taken into account as development proceeds. We cannot depend upon provincial government bureaucrats to recognize, protect or accommodate our interests.

A process to involve First Nations in the licensing and permitting processes in Saskatchewan needs to be negotiated. A "First Nations Government House" is recommended for this purpose as well.

This is consistent with the continuing sovereignty of our First Nations. As a result, our First Nations intend to develop our own licensing and permitting legislation and processes to ensure that our interests and ambitions are protected and accommodated as development continues. Existing First Nation laws and First Nation legislation to be developed should be implemented in this process, particularly since the courts have now recognized and relied upon First Nation traditional knowledge.

Furthermore, the Province has announced that it will be "business as usual" in Saskatchewan while the resolution of these issues with First Nations in Saskatchewan is negotiated. It is apparent that there are significant deficiencies in Saskatchewan's approach to the duties to consult and accommodate First Nation's interests and ambitions. That is why Saskatchewan has agreed to the current process with First Nations in the Province.

However, the Courts have clearly indicated that meaningful consultation should occur *before* development proceeds. The courts have also indicated that the first step in the consultation process is to discuss the nature of the process itself. This issue is dealt with below. The negotiation of a meaningful consultation process between First Nations and Saskatchewan is presently underway across Saskatchewan. Meaningful consultation is not occurring with respect to many developments underway and proposed in Saskatchewan today as a result of Saskatchewan's inadequate consultation and accommodation policies.

Furthermore, some Saskatchewan treaty land entitlement First Nations have not yet reached their "shortfall" acres. Land must yet be purchased to fulfill these outstanding treaty obligations. As well, treaty land entitlement claims remain outstanding in Saskatchewan. As mineral dispositions continue to be granted by Saskatchewan, and First Nations seek to purchase land to fulfill these outstanding Crown obligations, it is increasingly difficult for First Nations to obtain lands free of mineral dispositions. First Nations should not be relegated to a position of disadvantage in this regard while waiting for Saskatchewan to begin to fulfill its constitutional obligations to First Nations in a meaningful way.

Finally, there should be no further sale or disposition of Crown lands without full and complete consultation with and accommodation of First Nation interests and ambitions, or licenses or permits granted with respect to either Crown or private land, until these issues are resolved with First Nations.

FIRST NATION POSITION ON PERMITTING AND LICENSING:

I. **SASKATCHEWAN SHOULD INSTITUTE A MORATORIUM AND STOP ISSUING PERMITS AND LICENCES TO INDUSTRY UNTIL A PROCESS IS IN PLACE TO ENSURE THAT MEANINGFUL CONSULTATION TAKES PLACE. THAT WAY, NO FURTHER INFRINGEMENTS TO THE ABORIGINAL AND TREATY RIGHTS OF FIRST NATIONS WILL OCCUR WITHOUT MEANINGFUL CONSULTATION TAKING PLACE.**

II. **LICENSES AND PERMITS SHOULD BE CONDITIONAL UPON INDUSTRY ENTERING INTO AGREEMENTS WITH FIRST NATIONS THAT PROVIDE FOR THE ACCOMMODATION OF FIRST NATION INTERESTS. THIS WILL ENABLE OUR FIRST NATIONS TO BE PROACTIVE AND ENGAGE IN MEANINGFUL CONSULTATION, RATHER THAN ALWAYS BEING ON THE DEFENSIVE.**

III. **FURTHERMORE, A PROCESS TO INVOLVE FIRST NATIONS IN THE LICENSING AND PERMITTING PROCESSES IN SASKATCHEWAN IS REQUIRED. THIS MAY INCLUDE THE ESTABLISHMENT OF A FIRST NATION PERMIT AND LICENSING SYSTEM OR, IN THE ALTERNATIVE, A JOINT PERMIT AND LICENSING SYSTEM BETWEEN SASKATCHEWAN AND FIRST NATIONS.**

IV. **A FURTHER FUNCTION OF A "FIRST NATIONS GOVERNMENT HOUSE," AS REFERRED TO ABOVE, SHOULD BE TO ALLOW FIRST NATIONS TO PARTICIPATE IN THE LICENSING AND PERMITTING PROCESSES IN SASKATCHEWAN.**

17. CAPACITY AND FUNDING

First Nations are in the unenviable position of having constitutionally protected rights to be consulted and accommodated, requiring the Crown to engage in often complex and time consuming consultation and accommodation discussions and negotiations, yet having no resources to participate in the same in a meaningful way. Large amounts of material, complicated technical data and considerable time commitments are involved in First Nation's consultation efforts. Government and industry should recognize that since there is a legal duty to consult on the Crown, funding allows the First Nation to move more quickly toward conclusion of the consultation process. It must be remembered that it is government and industry that want access to the resources.

FIRST NATIONS POSITION ON CAPACITY:

I. **IT IS OUR POSITION THAT OUR FIRST NATIONS CURRENTLY DO NOT HAVE THE CAPACITY OR FINANCIAL RESOURCES TO PARTICIPATE IN MEANINGFUL CONSULTATIONS WITH THE PROVINCE AND INDUSTRY. IN THIS REGARD, FUNDING ARRANGEMENTS NEED TO BE NEGOTIATED TO ENSURE THAT FIRST NATIONS HAVE THE REQUISITE RESOURCES AND PERSONNEL TO ENGAGE IN THE CONSULTATION AND ACCOMMODATION PROCESSES IN A MEANINGFUL WAY. CREATIVE WAYS CAN BE EXPLORED TO BUILD CAPACITY, BETWEEN OUR FIRST NATIONS, INDUSTRY AND THE TWO LEVELS OF GOVERNMENT.**

18. NEGOTIATION OF A CONSULTATION AND ACCOMMODATION PROCESS

And finally, and of the utmost importance at this stage, are the legal principles that refer to the nature of the consultation process itself. As the courts have indicated, the first step in the consultation process is to discuss the process itself. To engage in an ad hoc series of meetings and correspondence fails to accomplish the first step in a consultation process. The Crown is obligated to design a process for consultation that meets the needs for discharge of this duty before operational decisions are made (*Huu-Ay-Aht First Nation*).

Accordingly, and most importantly, the Crown must realize that the consultation and accommodation processes to be used by the Crown and our First Nations as development proceeds must be negotiated with our First Nations. It will not be appropriate or acceptable for the Crown to unilaterally decide, as it has done to date in setting out its consultation policies, what the consultation process will be with First Nations in the Crown. Negotiation of a consultation and accommodation process is of paramount importance to our First Nations. Failure of the Crown to engage in such negotiations, and a unilateral determination by the Crown as to how to meet its constitutional obligations to our First Nations, will be viewed as a failure of the Crown to live up to the standards that have been set by the courts for resolving these issues, and for attaining the reconciliation mandated by the Supreme Court of Canada.

FIRST NATIONS POSITION ON NEGOTIATION OF A CONSULTATION AND ACCOMMODATION PROCESS:

I. **AS INDICATED PREVIOUSLY, OUR FIRST NATIONS OBJECT TO A CONSULTATION AND ACCOMMODATION POLICY BEING IMPLEMENTED WITHOUT OUR DIRECT INVOLVEMENT. IT IS OUR POSITION THAT AS THE COURTS HAVE REQUIRED, THE FIRST STEP IN THE CONSULTATION PROCESS IS TO DISCUSS THE PROCESS ITSELF. THE CONSULTATION AND ACCOMMODATION PROCESS IN SASKATCHEWAN NEEDS TO BE ARRIVED AT THROUGH NEGOTIATIONS.**

II. **AT A MINIMUM, OUR FIRST NATIONS WANT THE LEGAL PRINCIPLES, AS OUTLINED BY THE COURTS, TO BE FULLY IMPLEMENTED AND REFLECTED IN ANY POLICY THAT IS NEGOTIATED.**

PART C - SHARING WEALTH AND BENEFITS – RESOURCE REVENUE SHARING

As discussed previously, as a result of the concept of shared lands and the treaty relationship, revenue sharing must be discussed and negotiated. This is in contrast to consultation with and accommodation of infringements upon the exercise of the aboriginal and treaty rights of First Nations, where compensation and benefits should accrue to First Nations affected by a particular development, the First Nations suggest that revenue sharing should occur on a treaty basis.

Currently, there is no policy on sharing the wealth of the resources in this Province with our First Nations. It is our position that the Province must adopt a formal policy that recognizes the need to institute a revenue sharing approach, as a means of accommodating our interests. Our First Nations have received limited benefits from the resource developments in our traditional territories, while the Crown and industry share in the wealth.

Sharing the wealth and benefits among the Saskatchewan and our First Nations is proposed to be undertaken through revenue sharing agreements. The fundamental principle underlying the requirement to conclude revenue sharing agreements is that Treaty lands are shared lands not ceded lands. As such, the First Nations who traditionally used and benefited from those lands, must continue to benefit from the revenues collected from companies operating in their traditional territory.

Revenue Sharing Agreements (RSA) are agreements between or among governments to equitably share the revenues collected by those governments from companies who have been granted permissions and approvals to access natural resources including, but not limited to mining, forestry, fisheries, water, tourist camps and hunting. The First Nations position is that we are entitled to both impact benefit agreements and RSA agreements.

There are Canadian precedents for such agreements. In the Province of Newfoundland and Labrador, resource revenue agreements are in place between the Province and each of the Innu and the Inuit to share the mining tax from the Voisey's Bay Nickel Mine. These groups also have impact benefit agreements with the company. In British Columbia, it was recently announced by the province that they will be negotiating revenue sharing on a project by project basis.

There is significant national and international recognition with respect to rights of First Nations to benefit from developments in their traditional territories.

UN DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The United Nations on September 13, 2007 adopted by an overwhelming majority the United Nations Declaration on the Rights of Indigenous Peoples. One hundred and forty three member states voted in favour, eleven abstained and four opposed. Voting against the resolution were Canada, the United States, New Zealand and Australia.

There are two articles from the United Nations Declaration on the Rights of Indigenous Peoples that speak directly to the issue of Indigenous lands:

ARTICLE 27. RETURN OF LANDS

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

ARTICLE 30 RESOURCE DEVELOPMENT

Indigenous people have the right to determine their own priorities for the development of their traditional lands and resources including environmental assessment on projects affecting indigenous lands. Fair compensation will be paid to indigenous peoples where damage has been done or to lessen the effects of development.

ROYAL COMMISSION ON ABORIGINAL PEOPLES (1996)

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

"The treaty nations maintain with virtual unanimity that they did not agree to extinguish their rights to their traditional lands and territories but agreed instead to share them in some equitable fashion with the newcomers."

MIKISEW DECISION

"[T]he fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions."

IPPERWASH FINAL REPORT

"Every treaty …… supported the expectation that treaty lands outside of reserves would be shared. Promises made by Crown representatives encouraged these expectations, but despite promises, colonial and Canadian authorities referred to these lands as "surrendered lands." The term surrendered lands is inaccurate and misleading.

It is to the benefit of all Ontarians that Aboriginal peoples share in the bounty of the province and in the care of its resources. Sharing resources and revenues is one way for Aboriginal peoples to take control of their lives, build viable economies, and improve the dire conditions under which many of them are forced to live. It is also a way for all Ontarians to avoid the costs of Aboriginal occupations and protests."

SASKATCHEWAN PARTY ELECTION PLATFORM

"The Saskatchewan Party recognizes the Treaties as the foundation of the partnership between First Nations and non-First Nations people in our province.

A Saskatchewan Party government will respect the Treaties and develop economic policies in the spirit of the Treaties to achieve the shared goal of prosperity for all people in Saskatchewan."

FIRST NATIONS POSITION ON SHARING WEALTH AND BENEFITS:

I. **THIS MATTER HAS BEEN FORMALLY RAISED WITH THE PROVINCE AND WE HAVE BEEN TOLD THAT THE PROVINCE, AT THIS POINT, WOULD ONLY AGREE TO HAVE FURTHER DISCUSSIONS ABOUT "SHARING IN THE WEALTH OF THE PROVINCE." IT IS OUR POSITION THAT THIS MUST INCLUDE A MODEL FOR REVENUE SHARING; THE PARTICULARS OF WHICH CAN BE NEGOTIATED BETWEEN OUR FIRST NATIONS AND SASKATCHEWAN.**

II. **DUE TO THE PROBABILITY OF OVERLAPPING TRADITIONAL TERRITORIES WITH OTHER FIRST NATIONS, IT MAY BE REASONABLE TO ESTABLISH A REVENUE SHARING MODEL THAT INVOLVES A COLLECTIVE APPROACH. FIRST NATIONS HAVE TRADITIONALLY USED THESE MODELS IN OTHER INSTANCES, WHERE SHARING OF A REVENUE STREAM IS A NECESSITY, IN THE SPIRIT OF SHARING.**

PART D - PROPOSED PROCESS

Our First Nations propose that Saskatchewan agree to the establishment of a number of Tables to negotiate resolution of these issues. The proposed process would be a forum whereby discussions can take place between our First Nations and Saskatchewan, and whereby protocols can be developed in each of the areas discussed within agreed upon timeframes.

We propose the establishment of the following three (3) Negotiation Tables, to deal with the issues that we've identified and that remain outstanding between our First Nations and the Crown:

1. Treaty Consultation Table;

2. Accommodation Table; and

3. Sharing the Wealth Table

Work on the establishment of these Tables should begin immediately after receiving a formal written commitment from Saskatchewan with respect to this process and agreed upon timeframes.

PART E - CONCLUSION

First and foremost, the First Nations of Treaty No. 6 want the spirit and intent of Treaty and all rights arising out of treaty, as well as aboriginal rights, to be respected. Treaties are unique and *sui generis* and should always be the basis for moving forward.

We want what other First Nations in Canada are receiving in terms of a process, consultation and accommodation of our interests and ambitions. We want the legal principles, as articulated by the highest court in our country, to be implemented, to the fullest extent of the law. A moratorium on permits and licenses needs to be instituted while the Crown decides how it prefers to move forward with First Nations on these issues.

In this regard, we want to be involved in the process of developing a policy for consultation and accommodation. It is not acceptable for the Crown to unilaterally put in place a policy and expect us to live with it.

We want meaningful employment and other benefits for our people. We want to be active participants in development, while taking measures to sustain the environment. As Justice Linden indicated in the Ipperwash Inquiry, in Volume 2 at page 109:

> The duty to consult and accommodate is extremely important. It offers the real prospect of reconciling Aboriginal rights and interests in land, water, and resources by promoting peaceful, meaningful consultation and participation in decision-making with respect to natural resources. Thus, the duty to consult and accommodate, if properly and effectively fulfilled, offers the very real potential to significantly reduce the number of Aboriginal occupations and protests. Equally important, the duty to consult and accommodate offers the very real potential to promote Aboriginal economies and economic self-sufficiency.

This will give government and industry the certainty they need and move the parties forward, towards reconciliation. Together, we can achieve reconciliation. The Treaty No. 6 Chiefs of Central Saskatchewan hereby endorse and support this position paper on this the ___ day of_____, 2008.

Ahtahkakoop First Nation	Beardy's & Okemasis First Nation
Big River First Nation	Kinistin First Nation
Mistawasis First Nation	Moosomin First Nation
Muskeg Lake First Nation	Muskoday First Nation

One Arrow First Nation	Onion Lake First Nation
Pelican Lake First Nation	Red Pheasant First Nation
Saulteaux First Nation	Sweetgrass First Nation
Thunderchild First Nation	Whitecap First Nation
Witchekan Lake First Nation	Young Chippewayan First Nation
Little Pine First Nation	