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**Between the Sands and a Hard Place?:
Aboriginal Peoples and the Oil Sands**

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Between the Sands and a Hard Place?: Aboriginal Peoples and the Oil Sands

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So long as the future for oil is good, the future for Fort McKay is good.

- Chief Jim Boucher, Fort McKay First Nation, 2005.²

We're talking about the survival of the Athabasca River, but more than that this is about the survival of our people.

- Pat Marcel, Elder, Athabasca Chipewyan First Nation, 2007.³

The way I look at it...it’s the indigenous people that step up and say, ‘We speak for nature.’ Because that’s their culture, that’s what they believe and feel.

- James Cameron, movie director, 2010.⁴

Abstract: Canada’s aboriginal peoples are one of the constituencies most affected by the oil sands boom that has swept across northeastern Alberta in western Canada since the mid-1990s. This paper considers the reaction of these First Nations to exploiting the oil sands. It argues that the conventional view of the First Nations’ positions is a caricature which pays insignificant attention to the important economic relationships that have developed between oil sands companies and some First Nations. These relationships mean that First Nations are both critics and supporters of exploiting this resource.

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Popular commentary about Alberta’s oil sands is sprinkled liberally with hackneyed phrases and caricatures. Here I contend this claim generally applies to the

¹ I am especially grateful to Andrea Urquhart for the research assistance she provided and for the insights she has given me with respect to aboriginal constitutional issues.

² William K. McIntosh, “Building Sustainable Relationships: A Compendium of Leadership Practices in Aboriginal Engagement and Sustainability,” (Canadian Business for Social Responsibility, 2005), 16.

³ Pembina Institute, “Government Protects Oil Sands Industry, Fails to Protect Athabasca River,” (media release), 2 March 2007. <http://www.oilsandswatch.org/media-release/1384>

⁴ Hanneke Brooymans, “Cameron gets first look at oilsands,” Edmonton Journal, 28 September 2010, A1.

conventional understanding of the relationship between Canada's aboriginal peoples and exploiting the oil sands reserves of northeastern Alberta. That understanding is narrow and blinkered. It privileges a pro-environment/pro-traditional lifestyle view of aboriginal peoples' priorities; the five officially-recognized First Nations in the region so value the customs and practices associated with the "bush" economy and a traditional lifestyle that we should see them as consistent, implacable opponents of the industrial juggernaut that has pulverized Alberta's boreal forest since the latter half of the 1990s. As with all caricatures there is some accuracy to this understanding. Today it describes quite well the positions of the Mikisew Cree First Nation (MCFN) and the Athabasca Chipewyan First Nation (ACFN). They aggressively challenge oil sands companies and the state due largely to the damaging ecological and human health consequences they believe their members suffer as an unintended consequences of oil sands operations upstream from their communities on the Athabasca River. In the Cold Lake Oil Sands Area, to the southeast of the Athabasca bitumen deposits, this environmental ethic animates the concerns of the Beaver Lake Cree First Nation (BLCFN).

But the First Nations' view today is not monolithic; to imagine a consensus about the oil sands' place in the lives and prospects of aboriginal peoples is to conjure an illusion, a myth. Nor is it the case that today's outspoken aboriginal critics of the tar sands, such as the MCFN and ACFN, always have adopted that view. They have not. On the one hand, these two First Nations – especially the ACFN – were anything but uncompromising opponents of development throughout much of the post-1995 period considered here. They refrained from objecting to some of the projects posing plausible threats to the Athabasca River, subsistence activities and human health.

On the other hand, the leadership of other First Nations in the region should be counted among the boosters of oil sands development; their voices and actions seek to accommodate and profit from what may be the greatest resource boom in North American history. The Fort McKay First Nation (FMFN) and aboriginal business associations in the Fort McMurray region offer this aboriginal pro-development perspective.

The first part of this paper supports the suggestion that the First Nations perspective is more complicated than many may believe. The second portion of the paper addresses generally the theme of multi-level governance. How have First Nations governments participated in policy making? “Is it,” as Monique Passelac-Ross and Verónica Potes ask with respect to government consultation with aboriginal peoples, “adequate, is it legal?”⁵

Discoveries of microcores and microblades at the Beyza site in the Athabasca oil sands region suggest the ancestors of today’s First Nations may have been living in northeastern Alberta 4,000 years BP. Millennia later, when white fur traders, explorers and treaty commissioners pushed into the region aboriginal peoples were using bitumen, like we do today, for transportation purposes. Then they caulked canoes with the bitumen that, during the summer’s heat, literally oozed from the banks of the Athabasca River. The Athabasca Oil Sands area sprawls across the territories of several aboriginal cultural groups: the Athabasca Chipewyan, the West Woodland Cree, and the Athapaskan Beaver

⁵ Monique M. Passelac-Ross and Verónica Potes, Crown Consultation with Aboriginal Peoples in Oil Sands Development: Is it Adequate, Is it Legal? (CIRL Occasional Paper #19), (Calgary: Canadian Institute of Resources Law, 2007).

and Slavey.⁶ Shell’s Albian Sands joint venture protected the Quarry of the Ancestors archaeological site despite the fact this meant that 683,000 cubic metres of bitumen ore “would potentially be sterilized.”⁷ Countless other archaeological sites, however, have been destroyed by oil sands mining. Today five government-recognized First Nations are found in the Regional Municipality of Wood Buffalo; together they number 5,504 registered members (see Table One).

Table One: First Nations in the Regional Municipality of Wood Buffalo, Alberta				
	Registered Members (April 2010)	Number of reserve areas	Reserve area (hectares)	Primary Community
Mikisew Cree First Nation	2,592	9	5,111	Fort Chipewyan
Athabasca Chipewyan First Nation	905	8	34,767.1	Fort Chipewyan
Fort McKay First Nation	668	5	14,886	Fort McKay
Fort McMurray #468 First Nation	621	4	3,231.7	Anzac
Chipewyan Prairie Dene First Nation	718	3	3,079.7	Janvier/Chard
Source: Indian and Northern Affairs Canada, “First Nation Profiles,” http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/index.aspx?lang=eng				

⁶ Angela Younie, “Prehistoric microblade technology in the Oilsands region of northeastern Alberta: A technological analysis of microblade production at archaeological site HiOv-89,” Unpublished M.A. Thesis, Department of Anthropology, University of Alberta, 2008, 16.

⁷ Alberta, Energy Utilities Board, Albian Sands Energy Inc., Application to Expand the Oil Sands Mining and Processing Plant Facilities at the Muskeg River Mine, Joint Panel Report, EUB Decision 2006-128, December 17, 2007, 82. Together the Muskeg River Mine and the Scotford Upgrader constitute the Athabasca Oil Sands Project. Shell owns 60% of the project with Chevron Canada and Marathon Oil Canada each holding a 20% share. Shell estimates that 4.3 million barrels of bitumen are beneath the Quarry.

Members of some of these northeastern Alberta aboriginal communities are leaders of today's opposition to future expansion in the oil sands sector. The content on the website of the Indigenous Environmental Network (IEN), for example, speaks well to this point. George Poitras, a former Chief of the MCFN and former Consultation Coordinator with the MCFN's Industry Relations Corporation, charges there:

My people are dying, and we believe British companies are responsible. My community, Fort Chipewyan in Alberta, Canada, is situated at the heart of the vast toxic moonscape that is the tar sands development. We live in a beautiful area, but unfortunately, we find ourselves upstream from the largest fossil fuel development on earth. (sic) UK oil companies like BP, and banks like RBS, are extracting the dirtiest form of oil from our traditional lands, and we fear it is killing us.⁸

Awareness-raising tours of the United Kingdom, protests at and submissions to the annual meetings of companies such as BP, Royal Bank of Scotland (RBS), and Royal Bank of Canada, meetings with members of the United States Congress, efforts to attract support from celebrities such as James Cameron, the director of Avatar and Titanic, appear to be the key elements of the very media-focused campaign IEN is engaged in. Members of the MCFN, ACFN and BLCFN have participated in these activities. But, it seems the participation of First Nations leadership in the IEN campaign may so far have been limited to the Beaver Lake Cree First Nation. That First Nation's Chief, Al Lameman, addressed the Royal Bank of Canada 2010 annual meeting as part of a joint effort between the IEN and the Council of Canadians to convince the bank to phase out

⁸ Indigenous Environmental Network, "Canadian Indigenous Tar Sands Campaign," <http://www.ienearth.org/tarsands.html> Fort Chipewyan actually is downstream from the existing tar sands operations.

its loans to oil sands companies.⁹ The Beaver Lake Cree also were the only First Nation from northeastern Alberta to endorse the publicity-generating full-page advertisement “Canada’s AvaTAR Sands” in the 2010 Oscar edition of Variety. The advertisement asserted that toxic chemicals and future oil spills threatened indigenous peoples and urged readers to help environmentalists and aboriginal peoples stop the tar sands.¹⁰

The limited participation of the region’s First Nations leaders in the IEN campaign does not mean necessarily that the MCFN and ACFN were not opposed fundamentally to further exploitation of the oil sands. For its part the MCFN, in June 2007, recommended that Alberta institute a moratorium on issuing “any further licenses, permits or approvals with regard to any and all activity in the Athabasca oil sands region or what the Mikisew Cree recognize as its traditional territory.”¹¹ A host of reasons were offered for this recommendation: insufficient consultation, lack of consideration for aboriginal and treaty rights, absence of a cumulative effects assessment of development in the region, failure to undertake a comprehensive baseline health study of the residents of Fort Chipewyan, failure to establish a precautionary, scientifically sound instream flow needs framework for the lower Athabasca River, outstanding treaty land entitlement issues, and uncertainty regarding reclamation requirements and standards.

⁹ Joshua Kahn Russell, “Indigenous voices challenge Royal Bank tar sands policies, supported by hundreds at shareholder meeting,” (March 4, 2010), <http://www.rabble.ca/blogs/bloggers/joshua-kahn-russell/2010/03/indigenous-voices-challenge-royal-bank-tar-sands-policies>

¹⁰ The \$20,000 advertisement in Variety, signed by more than 50 environmental and native groups, may be seen at <http://www.forestethics.org/canadas-avatar-sands-ad-in-variety-magazine>.

¹¹ Mikisew Cree First Nation, “Response to the Multi-Stakeholder Committee Phase II Proposed Options for Strategies and Actions and Submission to the Government of Alberta For the Oil Sands Strategy,” (June 2007), 65.

The Mikisew Cree's call for a moratorium should be seen as the product of their growing frustration over the extent to which longstanding ecological and constitutional concerns had been swept aside by either provincial or joint federal-provincial environmental assessments of proposed (and always approved) oil sands projects. During the Joint Review Panel hearings into Canadian Natural Resources Ltd.'s (CNRL) Horizon project the Mikisew Cree submitted a very extensive, technically-sophisticated evaluation of the proponent's project; the quality of the review undoubtedly benefited tremendously from the \$155,000 that CNRL gave to the MCFN to finance the review. During the Horizon review process the Mikisew Cree flagged water as their most significant concern about the project; a healthy traditional way of life could not be pursued without sufficient water from the Athabasca River. They insisted they already were having to cope with lower than normal flows of water and that the thirst of oil sands plants for water would magnify those negative impacts. Not just water quantity, but water quality too, was at the heart of their worries. Claims that the Athabasca's water quality was deteriorating had been raised before the Alberta Energy and Utilities Board (EUB) five years earlier by the ACFN during the EUB hearing into Shell's Muskeg River Mine project. The ACFN drew the regulator's attention to "unnatural foaming of the river water, discoloured river ice, and deformed and tainted fish."¹²

At the Horizon hearing Mikisew Cree elders "reported serious worries about a large number of deaths in a short period of time in Fort McKay and Fort Chipewyan from a range of different ailments." The Fort McMurray Medical Staff Association supported their observations; the elders' testimony suggested to the Association "that aboriginals

¹² Alberta, Energy and Utilities Board, Shell Canada Limited Application to Construct and Operate an Oil Sands Mine in the Fort McMurray Area, Decision 99-2, (1999), 33.

appear to be particularly susceptible to life-threatening diseases, such as cancer and immune system problems.”¹³ Such concerns did not receive the public attention they deserved until 2006 when Dr. John O’Connor, Fort Chipewyan’s fly-in doctor, publicly called on Health Canada to investigate what the doctor believed were abnormally high rates of cancers and immune diseases in such a small community.¹⁴

O’Connor’s concerns arguably never received the government’s serious attention – except in the negative sense that Health Canada filed a complaint with Alberta’s College of Physicians and Surgeons claiming Dr. O’Connor was spreading “undue alarm” among the people of Fort Chipewyan.¹⁵ Alberta’s Cancer Board repudiated O’Connor’s suspicions just four months after he made them, coincidentally, in the Board’s submission to the EUB hearing on Suncor’s Voyageur project. The Board repudiated O’Connor despite the fact its own review was not based on complete sets of data for 2004 or 2005.¹⁶ The incompleteness and hastiness of the review led O’Connor to stand by his initial position and reiterate that a comprehensive study of aboriginal peoples’ health in the region should be undertaken.¹⁷

¹³ Alberta, Energy and Utilities Board, Canadian Natural Resources Limited Application for an Oil Sands Mine, Bitumen Extraction Plant, and Bitumen Upgrading Plant in the Fort McMurray Area, Joint Panel Report EUB Decision 2004-005, (January 27, 004), 71.

¹⁴ Canadian Broadcasting Corporation, “Cancer rate in Fort Chipewyan cause for alarm: medical examiner,” 10 March 2006, <http://www.cbc.ca/canada/edmonton/story/2006/03/10/ed-fortchip20060310.html>

¹⁵ Canadian Broadcasting Corporation, “Oilsands-area hamlet supports whistleblower MD,” 5 March 2007, <http://www.cbc.ca/money/story/2007/03/05/alberta-doctor-070305.html>

¹⁶ Canadian Broadcasting Corporation, “Cancer rates not higher in Fort Chipewyan, investigation concludes,” 19 July 2006, <http://www.cbc.ca/canada/edmonton/story/2006/07/19/caner-northern.html>

¹⁷ Canadian Broadcasting Corporation, “Local doctor doubts report on Fort Chipewyan cancer rates,” 25 July 2006, <http://www.cbc.ca/canada/calgary/story/2006/07/25/doctor-fortchip.html>

O'Connor's views were no more convincing to government regulators in 2006 than the appearance and testimony of First Nations before the EUB had been in 2003. In both the Horizon and Jackpine hearings the EUB would go no further than recommending that federal and provincial health authorities "consider undertaking" a regional health study in the Fort Chipewyan area focused on the aboriginal population.¹⁸ In the Jackpine hearing the MCFN was able to point to the possibility that Shell would help fund a community health study; note though the crucial qualifications to this commitment:

MCFN's agreement with Shell included a commitment by Shell to contribute funding to a baseline health study of the Fort Chipewyan population, provided that the study was conducted independently and with appropriate scientific rigour and provided that other oil sands developers and/or governments agree to participate in the funding of the study.¹⁹

As alluded to earlier such a baseline study still had not been initiated in June 2007 when the Mikisew responded to the multi-stakeholder committee consultation exercise; they caustically reiterated the need for action "even if the baseline study is forty years too late."²⁰

The call for that research was underlined later in 2007 when the Nunee Health Board Society released a report prepared by Dr. Kevin Timoney into water and sediment quality in Fort Chipewyan. Timoney concluded that levels of arsenic, mercury and

¹⁸ Horizon, 72; Jackpine, 87-88. It is not the case, as William Marsden suggests, that the EUB granted its approval to these two projects "with the condition that they fund a baseline health study of the population of Fort Chipewyan." (188) No such condition was part of the respective regulatory approvals.

¹⁹ Jackpine, 86. My emphasis.

²⁰ Mikisew Cree First Nation, "Response to the Multi-Stakeholder Committee Phase II," 51.

polycyclic aromatic hydrocarbons (PAHs), already at high levels, appeared to be rising.²¹

In late May 2008 the people of Fort Chipewyan finally thought they heard what they wanted to: the Alberta Cancer Board announced it would lead a comprehensive study (with Health Canada's participation) into the incidence of cancer in Fort Chipewyan.²²

Perhaps Timoney's study was the straw that broke the state's opposition to conducting the health investigation the local community had been demanding. Another event's potential importance, however, should not be overlooked. On May 6th Suncor convened a community meeting in Fort Chipewyan. There the company revealed that contaminated water from the company's forty year old Tar Island tailings pond was seeping into groundwater and towards the Athabasca River at a rate of 67 litres per second or nearly six million litres per day. These research findings, sponsored in part by Suncor, had been disclosed in a conference presentation the previous November, just a few days before Timoney's report was released.²³ They contradicted the government's consistent message about the tailings ponds, namely, that no evidence suggested ponds affected water quality in the Athabasca River.²⁴

²¹ Kevin P. Timoney, "A Study of Water and Sediment Quality as Related to Public Health Issues, Fort Chipewyan, Alberta," (on behalf of the Nunee Health Board Society, Fort Chipewyan), (November 2007).

²² Canadian Broadcasting Corporation, "'Comprehensive' review of Fort Chipewyan cancer rates announced," 22 May 2008, <http://www.cbc.ca/canada/albertapolitics/story/2008/05/22/edm-fort-chip.html>

²³ Jim Barker et al, "Attenuation of Contaminants in Groundwater Impacted by Surface Mining of Oil Sands, Alberta, Canada," a paper presented to the International Petroleum Environmental Conference, Houston Texas, November 6-9, 2007. http://ipec.utulsa.edu/Conf2007/Papers/Barker_89.pdf Two important qualifications should be noted here: the paper argued that most seepage is collected and returned to the tailings pond and the average flow of the Athabasca River at Tar Island was 860,000 litres per second.

²⁴ On May 15, 2008 Environment Minister Rob Renner responded to Alberta Liberal Party Leader David Swann's question about whether the Athabasca River had been

Regardless of what combination of factors pushed the state to act the government study satisfied neither the consultative nor the methodological expectations of Fort Chipewyan's First Nations. In July ACFN Chief Allan Adam complained that the Cancer Board had failed to consult at all with his community about conducting the study.²⁵ First Nations officials took the extraordinary step of rejecting the study's findings before they were released. MCFN Chief Roxanne Marcel claimed the draft study was identical to the one the community had rejected as incomplete and not comprehensive two years previously. "They just didn't include us," said Steve Courtoreille, the Chair of the Nunee health authority in Fort Chipewyan. "Bottom line, I haven't seen the team come up here. They haven't come to the community to actually meet with the elders or to get some feedback from the community."²⁶

The study's results, released in February 2009, neither confirmed Dr. O'Connor's suspicions nor soothed the concerns of the community he served. The Cancer Board concluded that, between 1995 and 2006, only two of the six cases O'Connor suspected of being cholangiocarcinoma, an extremely rare bile duct cancer, were confirmed cases of that cancer. Two confirmed cases over that period did not exceed statistical expectations. But the overall number of confirmed cancer cases over this twelve-year period was higher than expected (51 confirmed cases vs. 39 expected cases). Furthermore, the

affected by groundwater contamination by saying: "Again, Mr. Speaker, I've answered this question many times over. The answer again is the same. There is no evidence to indicate that there is any impact on the Athabasca River as a result of leaching or leaking or emissions from tailings ponds associated with activity in the oil sands." Alberta, Legislative Assembly, *Hansard (First Session, 27th Legislature)*, (Issue 20a), 762.

²⁵ Canadian Broadcasting Corporation, "Fort Chipewyan Timeline," 9 February 2009, <http://www.cbc.ca/edmonton/features/fort-chipewyan/timeline.html>

²⁶ Canadian Broadcasting Corporation, "Fort Chipewyan rejects Alberta Cancer Board study," 10 November 2008, <http://www.cbc.ca/canada/edmonton/story/2008/11/10/fort-chip-study.html>

incidence of some specific cancers – biliary tract cancers, soft tissue cancers, and cancers of the blood and lymphatic system – also was higher than expected. The study did not address the issue of what relationship might exist between cancer risks in Fort Chipewyan and environmental exposures such as those related to pulp mills, oil sands operations and abandoned uranium mines. Five independent experts reviewed the study and generally agreed with its conclusions.²⁷

The 2009 Cancer Board study, by not confirming Dr. O'Connor's suspicions, could not have strengthened his case before Alberta's College of Physicians and Surgeons. Despite the official support O'Connor received from both the Alberta and the Canadian Medical Associations the College's investigation concluded the Fort Chipewyan physician "made a number of inaccurate or untruthful claims with respect to the number of patients with confirmed cancers and the ages of patients dying from cancer."²⁸ The College's investigation, one that was never made public but instead was leaked to the media, also concluded that O'Connor did not cooperate sufficiently with public health officials and the Alberta Cancer Board. However, neither the College nor the public health officials who lodged the complaint felt that penalizing or punishing the physician was in the public interest. Some may see, at least, some irony in the College's assertion that neither it nor the complainants maintained O'Connor acted inappropriately when he publicized his concerns. "The message that Dr. O'Connor and others may take from this review," said the College, "is the need for advocacy to be fair, truthful,

²⁷ Dr. Yiqun Chen, Cancer Incidence in Fort Chipewyan 1995-2006, (Alberta Cancer Board, 2009); Alberta Health Services, "Fort Chipewyan cancer study findings released," (news release), 6 February 2009, <http://www.albertahealthservices.ca/500.asp>

²⁸ Canadian Broadcasting Corporation, "Doctor's Fort Chip cancer numbers disputed," 9 November 2009, <http://www.cbc.ca/canada/edmonton/story/2009/11/09/edmonton-alberta-college-report-oconnor.html>

balanced and respectful.”²⁹ Some might see the conclusion and implications of the O’Connor episode differently – his reprimand and the fact the College’s intent to keep it private was not respected may well discourage physicians to follow O’Connor’s lead in the future.

The Novelty of Aboriginal Participation and Their Recent Opposition

Whatever one thinks about the merits of today’s aboriginal opposition to exploiting the tar sands it is significant to note that adamant aboriginal oppositional voices are novel. As we have already seen the commitment to expand dramatically the exploitation of the tar sands dates back to the mid to late 1990s. The Mikisew Cree, a prominent opponent today, only made their first appearance before a provincial or joint federal/provincial regulatory or environmental assessment panel in 2003 (See Table 2). They did not participate at all, in other words, in five prior major mining project proposals (all of them upstream from Mikisew traditional lands); the terrestrial and aquatic impacts of the mining projects the Mikisew never objected to in regulatory hearings prior to 2003 constitute one reason for their current concern and opposition to exploiting the oil sands.

Between the Mikisew Cree’s submission to the Horizon project environmental impact assessment hearings in 2003 and the end of 2007 they participated in all five mining project proposals that underwent environmental assessments. In every case the Mikisew negotiated confidential agreements with the project proponents (these agreements are unavailable to the public). The Mikisew Cree were satisfied enough with what they secured in agreements with CNRL and Shell that they withdrew their

²⁹ Ibid.

objections to the Horizon and Jackpine projects. The Mikisew Cree, in other words, effectively approved – through a combination of silence and negotiated agreements – the developing pattern of industrial expansion in their territories. They did not object to the lion’s share of the mining activities they today hold responsible, in large part, for the health and livelihood threats their members may face from oil sands development. With respect to the last three mining projects proposed between 2003 and 2007 – Voyager (2006), Albian Sands (2006) and Kearl (2006/07) – the Mikisew raised objections but in every case at least part of their opposition was satisfied through confidential bi-lateral agreements.

Beginning with the Mikisew Cree’s de facto approval of the Shell Jackpine project in 2004 their participation in regulatory hearings cited a “Non-assertion of Rights Agreement between the MCFN and Alberta,” an agreement the Mikisew would not assert their constitutional rights in the regulatory hearings and Alberta would not challenge the Mikisew’s claim of traditional occupation of project lands. It is hard to see this as anything other than a choice by the First Nation to accommodate the accelerating pace of industrial expansion in the tar sands.

The Athabasca Chipewyan have a longer history in oil sands regulatory hearings than the Mikisew Cree; they first intervened in 1997 with respect to Suncor’s application to proceed with its Steepbank Mine expansion. In six of the eight interventions the Athabasca Chipewyan made between 1999 and 2007 they reached “complete” confidential agreements with tar sands companies – four more than the Mikisew Cree obtained. With these agreements the Athabasca Chipewyan effectively withdrew their

	Mikisew Cree First Nation		Athabasca Chipewyan First Nation³⁰	
	Intervention @ Regulatory Hearing	Confidential Agreement with Company	Intervention @ Regulatory Hearing	Confidential Agreement with Company
Syncrude Aurora (1997)	No	No	No	No
Suncor Steepbank (1997)	No	No	Yes	No
Suncor Millennium (1999)	No	No	Yes	Yes
Shell Muskeg River (1999)	No	No	Yes	No (but Shell funds EIA participation)
True North Energy Fort Hills (2002) ³¹	No	No	No	No
CNRL Horizon (2004)	Yes	Yes (two months after the hearing)	Yes	Yes
Shell Jackpine (2004)	Yes	Yes	Yes	Yes
Suncor Voyageur (2006)	Yes	Partial	Yes	Yes
Shell Albian Sands (2006)	Yes	Partial (Envt) Still objects	Yes	Yes
Imperial Kearl (2007)	Yes	Partial	Yes	Yes

³⁰ The Athabasca Chipewyan were called the Athabasca Fort Chipewyan First Nation when they intervened during the 1997 Suncor Steepbank application.

³¹ Today, after several mergers and partnerships – the latest being Suncor’s 2009 merger with Petro-Canada, Suncor controls the Fort Hills project.

objections to those six projects (see Table 2). Like the Mikisew Cree then, the Athabasca Chipewyan dropped their objections to some of the projects they now may identify as threatening the ecological integrity of the Athabasca River and its surrounding environment.

The accommodating tone struck in the 1997-2007 record of interventions made by these two First Nations in Alberta's regulatory/project approval process was reiterated by their actions in 2010 regarding Total's Joslyn North Mine project application. They, along with the Fort McKay First Nation, reached undisclosed agreements with Total that led them to withdraw their objections to the project. For the Mikisew Cree the price of acquiescence was an undisclosed amount of money and a private "social contract" that likely addressed the economic development aspirations of the Mikisew.³² Richard Secord, the lawyer representing the Oil Sands Environmental Coalition in this application, reportedly was not surprised by the Mikisew-Total agreement since the Athabasca Chipewyan and the Fort McKay First Nations announced similar agreements during the first day of the hearing.³³

Contrary to Secord's view, however, the type of aboriginal opposition noted before now in this paper makes the appearance of these negotiated settlements surprising indeed. How can we account, first, for the timing of significant First Nations participation in the regulatory process? Second, how might we explain a paradox. Given the

³² Hanneke Brooymans, "Mikisew Cree withdraw constitutional challenge of mining project," *The Edmonton Journal*, 23 September 2010.

³³ Fort McKay First Nation actually withdrew its statement of concern on March 16, 2008. See the March 16, 2008 letter from the Fort McKay Industrial Relations Corporation to Alberta Environment Regulatory Approvals Center re "Withdrawal of Statement of Concern Total E&P Joslyn Ltd (formerly Deer Creek Energy Limited), Application for Joslyn North Mine"

vociferous, categorical, opposition some members of those First Nations today direct towards the tar sands industry why has the leadership of every First Nation in the Athabasca Oil Sands region negotiated partial or complete agreements with oil sands companies, agreements that effectively diluted or eliminated altogether “official” First Nation opposition to individual projects?³⁴

The timing of First Nations entry and participation in the regulatory process is explained partially, at least, by First Nations’ institutional or organizational capacity. Not participating in the regulatory process, especially given the technical demands of hearings, may be rooted in the fact the “silent affected interests” simply do not possess the requisite resources. The accommodation of First Nations to oil sands projects between 1997 and 2003, then, may be traced to an inability to supply the expert testimony regulatory processes demand.

But, the sophistication of the Mikisew Cree’s intervention in CNRL’s 2003 Horizon application signals a turning point in both the frequency and the technical quality of First Nations’ interventions. Undoubtedly, CNRL’s financing of that intervention is crucial to understanding the technical sophistication of the Mikisew’s intervention. Did the Mikisew have the organizational capacity needed to assemble the arguments they presented to regulators then without CNRL’s \$155,000 cheque? I don’t think so.

CNRL’s generous contribution to the Mikisew Cree points to the fact that industry, and to a lesser extent governments, financed much of the dramatic improvement

³⁴ The tension between the leadership and members of First Nations is seen, for example, in a coincidence: while the leadership of the Mikisew Cree accepted offerings from Total in order to retract their opposition to Total’s application George Poitras, a former chief of the Mikisew Cree First Nation, was lobbying the Obama administration to reject an oil sands-related pipeline proposal from TransCanada Corp. See Brooymans, “Mikisew Cree withdraw constitutional challenge of mining project.”

in the organizational capacities of First Nations. The first step in this direction was taken in 1998. The Athabasca Tribal Council (the Council the five First Nations in the Athabasca region are affiliated with) and the Athabasca Regional Issues Working Group, an industry association composed overwhelmingly of companies with direct interests in exploiting the oil sands, began to discuss the need for First Nations to build capacity in order to deal with the anticipated blitzkrieg of resource development in the Athabasca oil sands.³⁵ In 1999 the two parties signed a three-year capacity-building agreement.³⁶ Both Alberta and Canada supported this agreement, with Indian and Northern Affairs Canada (INAC) committing up to \$750,000 to help support the economic development activities Ottawa regarded as key to First Nations self-sufficiency.³⁷ Federal support for this capacity-building initiative reflected and complemented Ottawa's more general enthusiasm during this period to promote aboriginal entrepreneurship. The latter was illustrated in northeastern Alberta, for example, by Ottawa's 2000 contribution of \$1.75 million to assist the Fort McKay First Nation's interest in participating in the Athabasca Oil Sands Project. INAC Minister Nault linked this federal assistance to strong public support for the value of government efforts to promote First Nations' self-sufficiency.³⁸

³⁵ In July 2008 the Regional Issues Working Group changed its name to the Oil Sands Developers Group.

³⁶ Alberta Chamber of Resources, Learning from Experience: Aboriginal Programs in the Resource Industries, (Alberta Chamber of Resources, January 2006), 59; Athabasca Tribal Council, "Industry Capacity Building Agreement," 9 August 1999, <http://atc97.org/finance-administration/industry-capacity-building-agreement>.

³⁷ Glenn Luff, "Corporate Alberta and First Nations Meet to Promote Economic Partnership," Grassroots: Aboriginal Business in Alberta, (Ottawa: Minister of Indian Affairs and Northern Development, 2001), 4; "Athabasca Tribal Council inks historic oil sands deal," The Globe and Mail, 16 March 2001, C6;

³⁸ Jim Starko, "Alberta Economic Development Projects Receive Ministerial Kick-Off," Grassroots: Aboriginal Business in Alberta, (Ottawa: Minister of Indian Affairs and Northern Development, 2000), 6.

The self-reliance theme figured prominently, as well, in Fort McKay First Nations Chief Jim Boucher's enthusiastic assessment of what the Fort McKay/Shell Canada Business Agreement would mean for his constituents.³⁹

The effort to increase dramatically the capacity of First Nations to assess and participate in oil sands development took a second, crucial step in 2003. Then fifteen companies, the vast majority of them from the energy sector, joined the three levels of government and the Athabasca Tribal Council (ATC) in signing the All-Parties Core Agreement. Over the Agreement's three year-term industry agreed to provide more than \$4 million to First Nations to assist them in efforts to continue to assemble the organizational capacity needed to address industrial activities in the northeast. Jim Boucher, then the president of the ATC, enthused that: "Industry's commitment to this agreement will enhance our ability to build strong economies and self-sustaining communities... We look forward to a continued productive working relationship in the implementation of our resource development strategy."⁴⁰ The creation of Industry Relations Corporations by First Nations in the region was a key feature of this Agreement. Each First Nation community received \$230,000 to establish an Industry Relations Corporation in order to "create the capacity for each community to deal with Industry and the impacts of industrial development."⁴¹ The federal government renewed its previous financial commitment to the ATC to promote this type of capacity building;

³⁹ Ibid.

⁴⁰ Athabasca Tribal Council, "Industry signs agreement with Athabasca Tribal Council," PR Newswire, 9 January 2003. Thirteen of the 15 corporate signatories identified in the news release were from the energy sector. Alberta-Pacific Forest Industries and ATCO Group of Companies were the exceptions.

⁴¹ Schedule D: Community Industry Relations Corporations, ATC/All Parties Core Agreement, (October 2002), 1.

it offered an additional \$1.2 million over the three year-term of the agreement “to continue to support ATC’s role as a partner” in exploiting the oil sands.⁴²

These welcome corporate and government contributions were far from altruistic. Strings were attached. They came with expectations regarding how First Nations would use this newly created capacity; it should be used to adapt the ambitions of First Nations to the growth of the tar sands industry. The federal government’s use of the word “partner” in its news release is instructive. First Nations were framed in this agreement as something akin to junior partners in exploiting the oil sands, a position First Nations leaders such as Jim Boucher appeared eager to accept as part of their drive for community self-sufficiency. The Standards of Consultation outlined in the agreement make it very clear that signatories were expected to manage their relationships in a non-confrontational way. The Core Agreement stands then as more than just an important milestone in the development of First Nations capacity to engage with oil sands companies. It also signaled an important accommodation regarding the future of industrialization in the Athabasca Oil Sands region. The results section underlined the accommodative nature of the First Nations/corporate relationship forged in the Core Agreement. It read:

The value of results is measured by:

- an increase in the number of agreements negotiated between First Nation communities and industrial proponents; and
- an increase in First Nation access to industrial development opportunities, including, but not restricted to, training, education, employment and contracting; and
- an increase in capacity to consult and build understanding

⁴² Canada, Indian and Northern Affairs Canada, “Minister Nault Signs Capacity Building Agreement with Athabasca Tribal Council to Promote Natural Resource Industry Partnerships,” Canada Newswire, 9 January 2003.

between Industry and First Nation communities.⁴³

The Core Agreement represented a fundamental choice by the leadership of First Nations about how to respond to exploiting the oil sands. The Alberta government's ultra laissez-faire approach to development, illustrated well by its eagerness to lease the rights to rip up the boreal forest to extract bitumen, presented First Nations with a stark choice. They could oppose categorically development or they could try to accommodate to and benefit economically from the future that governments and industry envisioned for their traditional lands.

The leadership of First Nations opted overwhelmingly for the second option. This choice is not hard to understand considering the per capita income situation of aboriginal peoples in northern Alberta in the late 1990s. The Fort McKay First Nation stands out then as a "wealthy" community. But its wealthy status was based on comparing Fort McKay with other northern aboriginal communities. Fort McKay's average per capita income in 1996 was \$16,325 – more than any other northern Alberta First Nations community reporting to Statistics Canada. It was, however, 38 percent lower than Alberta's average per capita income. The vast majority of Indian reserves and settlements in northern Alberta could not even claim a per capita average income level of 50 percent of the Alberta average.⁴⁴ Some First Nations leaders viewed the oil sands, not as a curse, but as the means to a brighter future. "On a whole," Chief Boucher maintained in 2005, "I would say that the opportunities and the benefits far outweigh the risks associated with

⁴³ ATC/All Parties Core Agreement, 2.

⁴⁴ Ian Urquhart, "A Modest Proposal?: Diversity and the Challenge of Governance in Northern Alberta," The Northern Review, Issue 25/26 (Summer 2005), 96.

the environmental degradation of the land...”⁴⁵ Or as he told the American Broadcasting Company in 2008: “If it wasn’t for the oil sand, (sic) we wouldn’t have a new economy. So, to be pragmatic and practical about it, the alternative is to sit there and do nothing and collect welfare, or to be a part of the economy. And I’d rather be part of the economy than to let our people be there collecting welfare.”⁴⁶

Boucher’s embrace of the oil sands appears to have put more money into the pockets of some of his constituents. Statistics Canada reported the 2005 median earnings figure in Fort McKay to be \$31,744 just over \$2,000 more than the same figure for Alberta.⁴⁷ The Fort McKay Group of Companies is a primary vehicle delivering this change. It has been in business with oil sands companies since 1986. In 2004 the group included ten companies that made \$100 million in annual sales.⁴⁸ In 2008 the business arm of the First Nation reportedly did \$120 million in oil sands-related business.⁴⁹

Fort McKay’s behaviour is not atypical. They are not the only ATC member to develop significant economic relationships with oil sands companies. Even First Nations who now criticize the oil sands, such as the Mikisew Cree and the Athabasca Chipewyan, have healthy commercial relationships with the energy and oil sands sectors. All of the eleven companies belonging to the ACFN Business Group, the organization containing

⁴⁵ Paul Haavardsrud, “Environmental tug-of-war clouds oilsands future,” Calgary Herald, 25 October 2005, A8.

⁴⁶ ABC News: Nightline, “Hunting for Oil Canada,” 28 July 2008.

⁴⁷ Alberta’s median earnings figure in 2005 was \$29,738. Statistics Canada, “2006 Community Profiles, Fort McKay,” <http://www12.statcan.ca/census-recensement/2006/dp-pd/prof/92-591/details/Page.cfm?Lang=E&Geo1=CSD&Code1=4816859&Geo2=PR&Code2=48&Data=Count&SearchText=Fort%20McKay&SearchType=Begins&SearchPR=01&B1=All&Custom=> Statistics Canada did not report an average earnings figure for 2005.

⁴⁸ Ibid., 15.

⁴⁹ Elise Stolte, “Band keeps vote close to home,” The Edmonton Journal, 17 March 2009, B4.

the Athabasca Chipewyan First Nations four wholly owned businesses and seven joint ventures, offer services to the petroleum industry.⁵⁰ Denesoline Environment (Waste Management and Maintenance), one of the wholly owned companies, promotes itself as “the waste management company of choice for major oil companies operating in Northern Alberta.”⁵¹ For their part, the Mikisew Cree First Nation own and operate the Mikisew Energy Services Group, described as “a major participant in the resource development sector for the oil sands industry.”⁵² The Group’s vision is “to become a major service provider in the maintenance and construction for Oil and Gas Industry in North Alberta” (sic) and its mission, in part, is described as “(m)aximizing utilization of aboriginal workforce and providing training and employment opportunities to Mikisew members.”⁵³ Mikisew Slings and Safety Ltd. is another MCFN business venture that relies on doing business with oil sands companies. Suncor’s desire to purchase the firm’s products appears to have been crucial to the establishment and early success of this venture.⁵⁴ The profitability of these ventures, and what that profitability means for the aboriginal communities who own them, depends crucially on a vibrant oil sands sector.

The livelihood value of the aboriginal-oil sands relationship forged in the post-1995 round of exploitation may be established in other ways as well. One measure of its

⁵⁰ “Welcome to ACFN Business Group,” <http://acfnbusinessgroup.com/>

⁵¹ “Denesoline Waste and Recycling Division,” <http://acfnbusinessgroup.com/companies/denesoline-environment/waste-and-recycling-division>

⁵² “The Mikisew Energy Services Group,” <http://www.mesg.ca/pages/company.htm#MESG> According to the Group’s website: “The corporate philosophy revolves around the entrenchment of sustainable resource development within the traditional lands of aboriginal people.”

⁵³ <http://www.mesg.ca/index.htm>

⁵⁴ Michelle Dacruz, “First Nations Partner with Suncor in Business,” Fort McMurray Today, 4 October 2002, A8; Mairi MacLean, “This job requires heavy lifting: Mikisew Cree put heart in slings,” Edmonton Journal, 27 September 2002, F1.

importance rests in the vitality of the Northern Alberta Aboriginal Business Association, an association with 105 full members.⁵⁵ Much of their members' business is conducted with oil sands companies. Also, oil sands companies are not shy in applauding the dollar amounts their activities deliver to First Nations companies and employees. Syncrude has had a longstanding record of developing economic relationships with aboriginal peoples. Eric Newell should be credited with instilling this orientation in the company he stewarded; improving the economic dimension of the livelihoods of aboriginal peoples in northeastern Alberta was Newell's passion. Building on Newell's initiatives and legacy, now nearly 500 aboriginal people are employed directly by Syncrude, more than eight percent of its workforce.⁵⁶ In 2007 Syncrude announced it had spent more than \$1 billion with aboriginal companies between 1992 and 2006; in the three years leading up to Syncrude's announcement the company had spent more than \$100 million annually with aboriginal firms; in 2006 Syncrude's twenty-seven contracts with aboriginal companies were worth an estimated \$130 million.⁵⁷ By 2010 Syncrude had done \$1.4 billion in business with First Nations.⁵⁸ In 2009 Suncor declared it too had crossed the \$1 billion threshold, \$367 million of that spending came in 2007/08 alone.⁵⁹ Suncor, lagging behind Syncrude, was left to joke that it intended to best Syncrude when it came to reaching the

⁵⁵ To be a full member in the association the applicant must have more than 50 percent aboriginal ownership. The numbers of members is taken from the membership list in September 2010.

⁵⁶ Syncrude Canada, "Aboriginal Relations," <http://www.syncrude.ca/users/folder.asp?FolderID=5641>

⁵⁷ Syncrude Canada, "Syncrude surpasses \$1 billion in spending with Aboriginal businesses," Canada NewsWire, (news release), 12 January 2007.

⁵⁸ "Syncrude surpasses \$1 billion in spending with Aboriginal businesses," Canada NewsWire, 12 January 2007; Syncrude, "Aboriginal Relations," <http://www.syncrude.ca/users/folder.asp?FolderID=5641>

⁵⁹ Suncor, "Suncor sees possibilities, outlines environmental goals in Sustainability Report," 18 June 2009, <http://www.suncor.com/en/newsroom/2418.aspx?id=1095537>

\$2 billion mark.⁶⁰

The appeal of the oil sands to some First Nations leaders also may be linked to the absence of other economic avenues for earning a living. Some of those who romanticize the traditional bush economy also may have supported the anti-fur campaign waged by environmentalists. That campaign destroyed the Fort McKay First Nation's trapping economy. Government's complete disinterest in managing the boom also helped close the door to other economic possibilities. In the post-1995 land rush to secure oil sands leases First Nations such as the Fort McKay First Nation, literally in an instant, found their treaty lands fenced in by tar sands mining operations. In a very real sense, First Nations were presented with a *fait accompli* by the state – these lands, lands that may have mattered in order to pursue traditional practices, became nothing more than oil sands leases. There is only one state-sanctioned use for these lands – to extract the bitumen needed to produce synthetic crude oil.

Multiplying Multilevel Governance (or a Labyrinth of Veto Points) in Canada?:

What Might We Expect From the Constitutional Duty to Consult With and

Accommodate First Nations

Hendrik Spruyt's paper describes well how multiple veto points can affect the effectiveness of efforts to integrate or balance different objectives with respect to energy and environmental policy making. The politics of Kyoto support that argument to a considerable extent. At first glance though I think the paper's view may flatter the seriousness of the Liberal Party's commitment, under either the administrations of Jean

⁶⁰ Roland Cilliers, "Aboriginal association marks \$1 B in Suncor business," Fort McMurray Today, 27 May 2009.

Chrétien or Paul Martin, to “walk the talk” when it came to implementing Kyoto.⁶¹ Here federalism may be a potential institutional obstacle to pursuing change but, to test federalism’s potential, Canada needed a federal government serious about making greenhouse gas reductions in the first place and an administration prepared to try to journey down the more coercive policy paths of regulation and taxation. I think there is little in the public record to suggest that either Chrétien or Martin seriously considered embarking on that journey.

What is especially important about Spruyt’s paper for this paper’s look at Canada’s First Nations is to see what role First Nations play now and what role they might play in the future with respect to the concept of multilevel governance. Looking ahead, are they likely to join the “labyrinth of veto points?” To some extent the answer to this question depends on which, if any, of the aboriginal voices noted above gains the upper hand. If perspectives such as those attributed to the Fort McKay First Nation prevail then space for aboriginal peoples should be reserved on the economic development side of the economy/environment divide. If, on the other hand, the current questioning of oil sands expansion by members of the Mikisew Cree and Athabasca Chipewyan First Nations prevails Alberta’s First Nations will become an important veto point, one that will strengthen the ecological voice in the policy debate.

The answer also may depend crucially on if Canadian courts are asked to interpret if and to what extent the constitution’s provisions respecting aboriginal rights are affected

⁶¹ Ian Urquhart, “Climate Change Policy: Why Hasn’t Canada Walked Its Kyoto Talk?”, in Thomas M.J. Bateman, Richard M. Myers and Roger Epp (ed.), Braving the New World: Readings in Contemporary Politics (4th edition), (Toronto: Nelson, 2008).

by exploiting the oil sands.⁶² Here the crucial issue may be what the courts may rule with respect to the duty of the Crown (the Crown here means the provincial and federal governments) to consult with and accommodate aboriginal peoples regarding oil sands developments that arguably infringe on treaty rights. The courts' interpretation of what this duty requires is still evolving and, importantly, apparently expanding. This section details what judicial interpretation of the law currently states with regards to the duty to consult and accommodate generally and as that duty pertains to the infringement of treaty rights.

Section 35. (1) of the *Constitution Act 1982* states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."⁶³ It protects aboriginal rights (generally understood as traditional lifestyle practices such as hunting, fishing, and trapping) from federal and provincial action that could unilaterally extinguish aboriginal rights without any consultation whatsoever.⁶⁴ This section also protects aboriginal communities from legislative actions that could render their rights and practices meaningless by altering resources and territories to the point that the particular aboriginal and treaty rights could no longer be exercised.⁶⁵ Monique Ross writes: "Any provincial legislation or regulation that potentially affects treaty rights to hunt, trap and fish must give proper protection to these rights... the health and integrity of the wildlife

⁶² The aboriginal and treaty rights of Canada's First Nations and Métis people are outlined primarily in section 35 of the Constitution Act 1982.

⁶³ Canada, *Constitution Act 1982*, s. 35(1).

⁶⁴ In *Haida Nation v British Columbia (Minister of Forests)* the Supreme Court ruled that the Provincial Crown (government) as well as the federal government had a duty to consult with and accommodate aboriginal peoples. See Canada, Supreme Court, *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511.

⁶⁵ Christina M. Smith, *Aboriginal Water Rights: Paramountcy, Priority & Prior Informed Consent*, (University of Calgary: December 2007), 6.

population and habitat must be maintained at such a level that activities of hunting, trapping and fishing remain viable.”⁶⁶

It is crucial to note that recognizing and affirming these rights under s.35 (1) does not mean these rights cannot be justifiably infringed by the state. Referring to its decision in *Halfway River First Nation v. British Columbia (Ministry of Forests)* the Supreme Court declared in *Haida* that “the duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”⁶⁷ Once it has been established that an aboriginal or treaty right has been or will be infringed by government conduct the next question is whether the government can meet the strict justification requirements for infringement by the Supreme Court of Canada in the case of *R. v Sparrow*.⁶⁸ The first step in the justification analysis is to establish that government is pursuing a valid legislative objective in infringing an aboriginal right.⁶⁹ Second, government must establish that the means to pursue this objective uphold the honour of the Crown and are in keeping with the Crown’s fiduciary duty to aboriginal peoples.⁷⁰ Justice McLaughlin wrote that, at the very least in order for the Crown to establish that it satisfied its fiduciary duty to aboriginal people, government must establish that it consulted adequately with the affected groups. Other factors outlined in *Sparrow* to be considered

⁶⁶ Monique M. Ross, Aboriginal Peoples and Resource Development in Northern Alberta, (Calgary: Canadian Institute of Resources Law, 2003), 8.

⁶⁷ Haida Nation v British Columbia (Minister of Forests). 2004 SCC para 35.

⁶⁸ Canada, Supreme Court, R v. Sparrow, [1990] 1 S.C.R. 1075 [*Sparrow*] para 82.

⁶⁹ Ross, Aboriginal Peoples and Resource Development in Northern Alberta, 7.

⁷⁰ Ibid.

depending on the circumstances of the inquiry are: has there been as little infringement as possible in order to affect the desired result? Is fair compensation available?⁷¹

Canadian courts have stated that consultation is the minimum requirement in the justification analysis once it is established that a right has been infringed. Ambiguity lives though in the Supreme Court's language that "(c)onsultation must be meaningful."⁷²

Courts have resisted specifying what a "meaningful" consultation process demands in all circumstances. The Supreme Court of Canada ruled that the scope of consultation required is proportionate to an initial assessment first, of the strength of the case that is supporting the existence of the right or title and second, to the seriousness of the potentially negative effect upon the right or title claimed.⁷³ The Court envisaged a "spectrum" of consultation. At one end of the spectrum, where the claim to a right is weak or the potential infringement is minor, the duty to consult may be limited to giving notice, disclosing information and discussing any issues raised by aboriginals. At the other end of the spectrum where there is a strong claim to a right, the right is of high significance to aboriginal people, and the risk of non-compensable damage is high, deep consultation would be required.⁷⁴ Deep consultation may demand opportunities for First Nations to make submissions to decision makers and, more significantly, to be formal participants in the decision making process.⁷⁵ According to Passelac- Ross and Potes the low level trigger of the duty to consult requires governments to consult about the nature of the consultation process itself; Justice Tysoe of the B. C. Supreme Court stated this

⁷¹ R. v. Sparrow, para 82.

⁷² Haida, para 10.

⁷³ Haida, para 68.

⁷⁴ Haida, para 43.

⁷⁵ Haida, para 44.

bluntly in *Gitxsan*: “(t)he first step of a consultation process is to discuss the process itself.”⁷⁶

The ultimate responsibility of ensuring that a meaningful consultation process is in place and has been employed rests with the Crown by the very nature of the Crown’s fiduciary duty towards aboriginal people. Canadian courts have been clear that the duty to consult with aboriginals cannot be delegated to interested third parties.⁷⁷ For example government cannot delegate the duty to consult to a corporation proposing to develop natural resources such as the oil sands. If government attempts to do this it is unlikely that the consultation requirement would be adequately met. In *Haida* McLaughlin wrote:

The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development... However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.⁷⁸

Consultation may occur between industry and Aboriginal groups; however, this consultation does not excuse the government from its legal duty to undertake its own consultation with aboriginal peoples.

Does the Crown’s duty to consult mean that government must accommodate the aboriginal right or must reach an agreement with the aboriginal peoples who feel their rights have been ignored? No. The second duty, to accommodate aboriginal peoples when their rights are infringed, may only be necessary when an aboriginal claim is strong and

⁷⁶ Passelac-Ross and Potes, Crown Consultation with Aboriginal Peoples in Oil Sands Development, 20. The case before Justice Tysoe was Gitxsan First Nation v. British Columbia (Minister of Forests).

⁷⁷ Haida, para 53.

⁷⁸ Haida, para 53.

when an infringement on a right is substantial. “The appropriate nature and level of accommodation,” writes Woodward, “will vary significantly from case to case.”⁷⁹ A need to accommodate will arise when good faith consultation suggests that government policy needs to be amended.⁸⁰ In a case such as *Delgamuukw*, where an unsettled claim was at issue, accommodation did not give aboriginal claimants a right to veto land use decisions pending proof of the claim. It required, however, “a process of balancing interests, of give and take.”⁸¹ Subsequent to *Haida* and *Delgamuukw*, where existing treaty rights were at issue in *Mikisew*, the Supreme Court decided that accommodation was likely appropriate and necessary where the right to engage in traditional livelihoods is a treaty right and that right is being affected adversely by government policy. Justice Binnie, writing for the majority in *Mikisew*, held that the Crown, if it wanted to exercise its right to take up lands under Treaty 8, must “consult and, if appropriate, accommodate First Nations’ interest before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights.”⁸² Oil sands leasing decisions do exactly that in northern Alberta.

Accommodating aboriginal rights has not been extensively explored in jurisprudence so it is difficult to state precisely what the Courts intended when they discussed accommodation in their justification analyses. In 2005 the British Columbia Court of Appeal in *Musqueam Indian Band v BC*⁸³, provided some insight into what

⁷⁹ Jack Woodward, *Native Law*, (Toronto: Carswell, 2009), 5.2270.

⁸⁰ *Haida*, para 47.

⁸¹ *Haida*, para 48.

⁸² *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] SCC para 56.

⁸³ *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, [2005] 37 B.C.L.R. (4th) 309 (B.C.C.A.) [*Musqueam*].

accommodation may demand. Justice Hall, following Chief Justice McLaughlin's logic in *Haida*, stated "that at the core of accommodation is the balancing of interests and the reaching of a compromise until such time as claimed rights to property are finally resolved...the appropriate accommodative solutions have to work not only for First Nations people but for all the populace having a broad regard to the public interest."⁸⁴ The Court provided examples of what accommodation may look like: in relatively undeveloped areas of the province the Court suggested accommodation might take on various forms such as a sharing of mineral or timber resources, employment agreements or land transfers.⁸⁵ Jack Woodward, commenting on the decision in *Musqueam*, wrote that when government and aboriginal peoples try to reach mutually acceptable settlements at the accommodation stage a degree of creativity should be utilized by both parties.⁸⁶ In Native Law he suggests the following as some possible accommodation measures:

- 1) Measures designed to mitigate the environmental impacts of a project, such as the rerouting of a proposed road, authorizing construction for time periods when there will be reduced impacts on wildlife, reducing the size of a project, creating wildlife corridors, or adopting wildlife habitat restoration measures.⁸⁷
- 2) Economic accommodation... to compensate aboriginal peoples for negative impacts on s.35; economic accommodation may come in many forms, including land grants, revenue sharing, compensation payments, employment opportunities in a proposed project or investment opportunities in a proposed project.⁸⁸

⁸⁴ Ibid., 97.

⁸⁵ Ibid.

⁸⁶ Woodward, Native Law, 5.2280.

⁸⁷ Ibid.

⁸⁸ Ibid.

- 3) Environmental monitoring to assess the ongoing impacts of a project and ensure that its impacts do not exceed any pre-agreed environmental thresholds.⁸⁹
- 4) A right on the part of aboriginal groups to play a role in decision making that will affect its traditional territory, such as an opportunity to co-manage a park with government, to co-manage a project or part of a project, or to have a seat on a land use committee.⁹⁰

Woodward's list is much more extensive than any of the remedies ordered to date by the courts. So far, when it comes to remedies for violating aboriginal rights, the courts have prescribed quashing a permit issued by government as we saw with a winter access road in *Mikisew*, obtaining an injunction as we saw with a cutting license in *Haida*, and suspending a legislative order as we saw in *Musqueam*.⁹¹

These decisions, however, are suggestive that judicial interpretations of the duty to consult and accommodate may prove to be a valuable legal resource for aboriginal peoples who challenge industrial development on traditional lands. The evolving jurisprudence on accommodation is now pointed in a direction where governments may decide, willingly or not, to offer a more influential role to aboriginal peoples in discussions surrounding development. If a substantive version of accommodation is required government and industry may need to adopt practices that would mitigate the environmental impacts of development on treaty and traditional aboriginal territories.

Alberta's Approach to Consultation and Accommodation: Constitutionally Suspect?

In September 2006 the Government of Alberta published a comprehensive consultation framework entitled *Alberta's First Nations Consultation Guidelines on Land*

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ The legislative order in Musqueam authorized the sale of a piece of Crown land to the University of British Columbia. The legislative order was suspended for two years to give the Crown and aboriginal peoples a chance for meaningful consultation.

Management and Resource Development.⁹² The document purported to provide guidelines for all parties involved in consultation.⁹³ It followed the release of a consultation policy in 2005 and subsequent consultations with aboriginal communities and organizations in the territories covered by Treaties 6, 7 and 8. Provincial representatives met over several months with Treaty 8 leaders to discuss what consultation with aboriginal peoples demanded; the discussions ended with fundamental disagreements separating the respective parties. These disagreements included:

the interpretation of the rights and interests protected by Treaty 8, the need to obtain consent from First Nations on certain decisions, the necessity of a separate consultation process as opposed to incorporating First Nation consultation within existing public consultation processes, and the obligation to negotiate benefit sharing agreements or compensation agreements in relation to infringement of First Nations rights.⁹⁴

Given the breadth and seriousness of these disagreements the Assembly of Treaty Chiefs of Treaty No. 6, Treaty No. 7 and Treaty No. 8 unanimously rejected Alberta's consultation policy and framework.

First Nations leaders are not alone in suggesting that Alberta's consultation policy and guidelines are wanting. Vivienne Beisel criticized Alberta's approach for placing too great of an emphasis on an increased role for industry in the consultation process. She viewed the consultation guidelines as being guidelines that devolve the responsibility of

⁹² Alberta, Aboriginal Relations. Alberta's First Nations Consultation Guidelines on Land Management and Resource Development, (Edmonton: Government of Alberta, 2007) online:

http://www.aboriginal.alberta.ca/documents/First_Nations_and_Metis_Relations/First_Nations_Consultation_Guidelines_LM_RD.pdf

⁹³ Ibid., 1.

⁹⁴ Passelac-Ross and Potes, Crown Consultation with Aboriginal Peoples in Oil Sands Development, 29.

consultation from government to third parties (corporations) without seriously contemplating treaty relationships, obligations and jurisdictions arising therefrom.⁹⁵ Here we should note again that the Supreme Court of Canada in *Haida* indicated that procedural details of the duty to consult may be delegated to industry but the Crown remains ultimately responsible for ensuring the procedural requirements and quality of the consultation are adequate.⁹⁶

Passelac-Ross and Potes offer the most thorough assessment of the adequacy and legality of Alberta's approach to consulting First Nations about exploiting the oil sands.⁹⁷ Their work reaffirms what they argued previously with Nigel Bankes.⁹⁸ Alberta adopts a "neutral arbiter" role with respect to consultation rather than being a protector of aboriginal rights and a promoter of reconciliation between white and aboriginal societies; they argue constitutional interpretation demands Alberta play the protector and reconciliator roles. During the oil sands boom early consultation with aboriginal peoples has been heretical. "Indeed," Passelac-Ross and Potes contend, "no strategic land and resource planning has yet taken place in anticipation of massive developments, and this is probably the greatest failure of the Crown in protecting the constitutional rights of Aboriginal peoples."⁹⁹ Failure characterizes all aspects of oil sands exploitation: the

⁹⁵ Vivienne G. Beisel, Do Not Take Them From Myself and My Children Forever: Aboriginal Water Rights in Treaty 7 Territories and the Duty to Consult (LLM Thesis, College of Law University of Saskatchewan, 2008), 12

⁹⁶ *Haida*, 53-56

⁹⁷ Passelac-Ross and Potes, Crown Consultation with Aboriginal Peoples in Oil Sands Development.

⁹⁸ Verónica Potes, Monique Passelac-Ross and Nigel Bankes, Oil and Gas Development and the Crown's Duty to Consult: A Critical Analysis of Alberta's Consultation Policy and Practice, (Alberta Energy Futures Project Working Paper 14, June 2006).

⁹⁹ Passelac-Ross and Potes, Crown Consultation with Aboriginal Peoples in Oil Sands Development, 45.

disposition of mineral rights process, environmental assessments and project regulatory approvals, and the ERCB's project review and approval process. Little would seem to have changed since they offered their initial assessment. Alberta's consultation process is still "not an instrument of rights protection."¹⁰⁰

Conclusion

Nearly twenty years ago Alberta's massive expansion of its pulp and paper sector invited Albertans to meet and consider one of the province's most-underappreciated and understudied ecosystems – the boreal forest. They were introduced to this mosaic's ecological complexities and services. It is perhaps fitting then that, when it comes to exploiting the boreal's oil sands, an arguably underappreciated complexity characterizes the views towards resource development held by aboriginal peoples, peoples who have called the boreal home for millennia. The popular view, fittingly offered by a famous Hollywood director, portrays aboriginal peoples as uncompromising protectors of Mother Earth. Here I tried to show that, as germane as that opinion is, it ignores a growing commitment from some First Nations in the northeast to the very pattern of industrialization that poses immense threats to ecological integrity. First Nations do not speak with one voice when it comes to the worth of exploiting the oil sands.

Potentially the future of this exploitation depends importantly on which, if any, of these competing voices triumphs. Here the constitutional interpretation of the Crown's duty to consult and accommodate aboriginal peoples could be a very significant political resource for First Nations who fear the ecological consequences of the current pace of

¹⁰⁰ Monique Passelac-Ross and Verónica Potes, "The Duty to Consult and Accommodate: A Legal and Ethical Analysis," (presentation to Treaty 8 First Nations Conference on the Duty to Consult, Slave Lake, Alberta, March 29-31, 2009).

development in the tar sands. To be such a “game changer,” however, the Courts may need to be willing to use aboriginal rights as the basis for interfering permanently and dramatically with the economic development activities threatening those rights. As significant as decisions such as *Delgamuukw*, *Haida*, and *Mikisew* may be none of those decisions challenged economic development this fundamentally. Or, perhaps alternatively, governments and industry may need to believe the courts will warm to embracing the critical aboriginal perspective in future decisions pertaining to the oil sands. In the absence of either development the aboriginal boosters of oil sands development will prevail.