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UNIVERSITY OF CALGARY

Alberta Treaty 8 First Nations:

Government Obligations and Indian Promises

by

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A THESIS

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Abstract

This thesis examines how Government legislation, administration of Indian affairs, legal pronouncements and economic importance has factored into fitting Alberta Treaty 8 First Nations into Canada. Section one is a historical review of this process. It argues government and officials responsible for Indian affairs failed to honour the Crown's pronouncement on Aboriginal rights, treaty rights, and promises made by the Indian Treaty Commissioners. Section two sets out to answer if it would be opportune to engage stakeholders within the Treaty 8 traditional territory on rights issues. This is framed by a review; of events leading up to the *Constitution Act, 1982,* Supreme Court decisions following this Act, and a review of new found economic importance of this traditional area. It argues that factors have emerged in this post 1982 era which open new ground for strategic discussions with the Crown on outstanding Aboriginal and treaty rights issues.

Acknowledgements

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Table of Contents

Introduction

On June 21st, 1899, in the presence of government officials, missionaries, traders and the North West Mounted Police, Treaty 8 was signed with the Indians of Lesser Slave Lake. A number of contributing factors led to both parties signing the Treaty. The Government of Canada (the "Government") was influenced to enter into Treaty negotiations as the expansion of the rail line resulted in easier access to the North. In addition northern missionaries and non-native public wanted the Government to help the inhabitants of the North. Moreover, the potential wealth of the natural resources in the area gave financial incentive to the federal government to complete the process. Indian leaders, heard stories of how the government was helping the southern Indian nations, and wanted to enter into Treaty negotiations in order to receive like treatment. In response, Indian leaders reached out to the trusted missionaries and leaders of the North West Mounted Police and asked them to approach the Government to open treaty discussions. The logistics of Treaty negotiations was not an easy task. Direct open dialogue between the respective parties was a challenge as neither government officials nor Indian leaders were fluent in the language spoken by one another. It was therefore necessary to rely on interpreters who had been appointed by the Commissioners to facilitate the discussion and convey the treaty terms.

"Much of the groundwork for future treaty-making procedures was established by the Robinson-Superior and Robinson-Huron Treaties of 1850s." (Madill, 1986, p. 3) The treaties made with the natives of western Canada, known as the numbered treaties, would follow the precedent set in these earlier agreements. This experience had been used by the Crown's representatives to develop a prototype treaty process. It included the practice

of appointing a Government Treaty Commission team to assume responsibility to negotiate with the natives of the region. The Commissioners in turn were delegated a mandate to secure a signed agreement within preset federal government guidelines covering four areas:

> *Indian Promises*-these were promises made to the British by the Indian. They ranged from "maintaining peace" to "not to molest persons or property." *Government Obligations*-they ranged from "setting up of Reserves" to "commissions to take census". *Annuities*-These were given to members of the band which agreed to the treaty. They ranged from $3 per person per year to triennial suits of clothes to each headman. *Treaty Presents*-These were gifts to members of the band who signed the treaty. They ranged from medals and flags to miscellaneous hunting and fishing equipment. (Frideres, 1974, p. 9)

The federal government in preparing for Treaty 8 had ready access to Treaty Commissioners who had the benefit of treaty making experience. They could also consult bureaucrats well experienced in the treaty legalize and processes that had been followed in the earlier western Canada number treaties. The text of Treaty 8, prepared in advance by federal government officials, was similar in wording to the earlier numbered treaties entered into between the natives of western Canada and the Government in the 1870s. The pre-drafted treaty contained terms and underlying government policy statements to ensure Treaty 8 aligned with the earlier concluded western treaties. In contrast, the treaty making process, terminology, and concepts covering the intended obligations of both parties were foreign to the northern Lesser Slave Lake Indian leaders. (Price, 1999, pp. 71-78)

Thesis Question

The discussion throughout the thesis looks only at Alberta Treaty 8 First Nations and excludes the Métis and British Columbia, Saskatchewan & Northwestern Territories First Nations who live within the treaty territory. It sets out to examine how Government policy, its administration of Indian affairs, legal pronouncements and economic importance of the traditional treaty territory have factored into fitting Treaty 8 First Nations into Canada and the Province of Alberta. The scope of this examination will be limited to Aboriginal rights and treaty rights, two of the four aspects of the treaties detailed above, "Indian Promises" and "Government Obligations".

The first section of the thesis, chapters one through three, completes an historic review to reconstruct the Government intent, First Nations' objectives and their understanding covering Aboriginal and treaty rights in the aforementioned treaty areas. It will focus on how introduction of a new provincial jurisdiction in the traditional area impacted upon both "Indian Promises" and "Government Obligations" rights issues covered in the original agreement with the Crown. This section will also explore if the Government's use of the *Indian Act* obstructed Aboriginal and Treaty rights. The section will conclude by answering the following questions. What were the "Indian Promises" made by Treaty 8 First Nations? What did Treaty 8 understand to be the "Government Obligations"? Have Alberta Treaty 8 First Nations complied with these "Treaty Promises"? Have Aboriginal and treaty rights been quantified and honoured by the Crown? This section will argue as its central theme that the federal and provincial government, as Aboriginal rights expert Thomas Isaac argues, "did little to recognize

Aboriginal rights, and to some extent, even went so far as to obstruct Aboriginal peoples' access to the legal protection of their rights". (Isaac, 2004, p. 1)

The second section of the thesis covering the remaining chapters explores opportunities for Treaty 8 First Nations to engage stakeholders within the traditional territory in a renewed effort to find a remedy to deal with the unresolved issues attached to Aboriginal and treaty rights. This work is framed by the historic review completed in the first section of the thesis, Supreme Court of Canada legal decisions, and a review of non-academic literature on the new found economic importance of this traditional area. It asks if legal pronouncements post *Constitution Act, 1982* have helped or hindered in providing clarity on Aboriginal and treaty rights. Has the Province of Alberta's current energy policy developed in the post 1980 era respected the inherent Aboriginal and treaty rights of Treaty 8 First Nations? Is there an opportunity for Treaty 8 First Nations to leverage the new found economic importance of their traditional territory to bring closure to outstanding treaty rights issues? It argues these post 1980 factors have served to engage all stakeholders in the Treaty 8 traditional territory to revisit the "Indian Promises" and "Government Obligations."A conclusion is reached that the economic importance of the Treaty 8 traditional territory to all stakeholders in the region combined with these legal pronouncements present new ground for strategic discussions with the Crown to deal with outstanding rights issues.

Thesis Definitions

Throughout this thesis the term "Aboriginal" is used to identify native Canadians as defined in subsection 35(2) of the *Constitution Act, 1982* as, "the Indian, Inuit and Métis peoples of Canada". *(The Constitution Act,1982 being Schedule B to the Canada*

Act 1982 (U.K.), 1982, c. 11) The term "Indian" is used to identify those natives registered as Indians within the criteria set out in sections 5 and 6 of the *Indian Act.* (*Indian Act*, R.S.C. 1985, c.1-5) In addition, throughout this thesis there is frequent reference to bands and "First Nations". A review of current Department Justice publications on this topic reveals that there is no strict legal definition of "First Nations." It has, however, become common practice for the Government and Indians themselves to use the term "First Nations" to describe Indian Bands. (First Nation(s), 2009) This approach has been adopted within this thesis and "First Nation" when used makes reference to a band within the meaning of the *Indian Act.* There is also frequent reference to the "Crown" throughout this document. The term Crown is used to describe "both the federal and provincial government; any person that works for these governments, or any department". (Guirguis-Awadalla, Allen, & Phare, 2007, p. 17)

Thesis Conclusion

The thesis concludes by arguing that the Government's decision to negotiate Treaty 8 was driven by an economic and political agenda. The wording of Treaty 8 reflects the stipulated intent to open the region, "for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet,...so that there may be peace and good will between them and Her Majesty's other subjects". (Treaty 8, 1899)

The political environment of the time presented a window of opportunity to appease the non-Aboriginal stakeholders by ensuring a treaty was reached to provide for peaceful settlement within the region. The "Indian Promise" contained within Treaty 8, to allow for peaceful settlement throughout the traditional territory, has always been

honoured by the Alberta First Nations of this region. However, despite the long period that has lapsed since the formal signing of the treaty, it is still not clear, "what allowances [Indians] are to count upon and receive from Her Majesty's bounty and benevolence." First Nations entered into Treaty 8 understanding they held inherent Aboriginal rights and that the treaty terms included both the written and oral promises made by the Treaty Commissioners. The history of Treaty 8 has been marked by an aversion on the part of Government to collaborate with First Nations to quantify the Crown's obligations within the understandings that were set at the treaty signing. This situation prevails to this day even though Aboriginal and treaty rights have been incorporated in the Canadian Constitution and Supreme Court pronouncements have provided guidance on the manner in which the Crown should interpret these commitments. The delay to fully define the "Government Obligations" under the terms of the treaty continues to result in the well being of Treaty 8 First Nation members falling short when compared to non-Aboriginals in the Province. In direct contravention of Treaty 8 covenants, the Government has allowed business interests and commercial pursuits of the private sector to undertake enterprise that has threatened the ongoing way of way of life in the region. Treaty 8 First Nations have been made to fit into a new provincial jurisdiction without the Crown satisfying its obligations under the terms of the treaty agreement. It concludes by arguing that various events have aligned to present a historic opportunity to change the status quo in the relationship between the Crown and Treaty 8 First Nations. It argues Treaty 8 First Nations have gained a position of economic importance and one of influence with all stakeholders in the region. The Treaty 8 leaders are seen as having in hand precedent-setting court decisions that add strength to their argument on interpretation of treaty

rights. It is also noted that it would be in the best interests of oil sand developers and the Province of Alberta that certainty be brought to outstanding issues that could impact on the development of the oil sands basin which is centered in the Treaty 8 traditional territory.

The conclusion put forward recommends a consultative approach. It would involve all stakeholders in the region and be built around goodwill, economic realities and all parties agreeing to seek a remedy, to Treaty 8 Aboriginal and treaty rights. The first step would be for all parties to reach a common understanding on "Indian Promises" and quantify "Government Obligations" based on the principles outlined by the Supreme Court of Canada. It also is most important all stakeholders understand and respect the context under which Treaty 8 First Nations entered into the treaty agreement with the Crown. Minutes from testimony provided at the February 24, 2003, public hearing before the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources includes the valuable contribution by George Calliou, the then acting Chief Executive Officer for the Athabasca Tribal Council and current Chief Executive Officer of Treaty 8 First Nations of Alberta. Mr. Calliou provided the following evidence, a most succinct summary:

> The law of the land compelled Canada to enter into treaties with several independent Indian nations. From that treaty-making process, there are variations of what the understanding is of that treaty-making process. From the understanding that we received from the elders, it was again two sovereign nations coming together to share the land given to us by the Creator. It was intended to share the land.
>
> The understanding of the elders of the day was one of sharing, not of ownership. The concept of fee simple did

not exist in our language, or in our mindset, or in our everyday relationship with the land. But the oral understanding that was reached was somewhat different from the written word that came after the understanding was reached. Hence, the unfortunate legacy of land claims and court cases to clarify what was meant and what was done since the treaty-making process began.

From my understanding, the treaties were intended to have two parties, one representing the Indians, one representing the Queen. The Queen gave a list of promises, including Her Majesty's benevolence, which we have not sought yet. It included promises that are now translated into education, what people would now call health care, or what people would now call economic development.

On the side of the Indian people, they agreed to share the vast lands that were recognized as theirs by the law of the land. My grandmother was present at the signing of Treaty No. 8, and her recollection, in clear words, was use of the land by the settlers for what the settlers would use on the land of the day. The plows of the day were no deeper than the tip of my finger to the bottom of the palm, so any farmer who has a plow that goes from the tip of my finger to the end of my elbow is breaking the treaty, not just breaking ground. There was no discussion of what lay beneath those. Only the written text made reference to that after the verbal understandings were reached. (Canada.Parliament.House of Commons., February 24, 2003)

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Chapter One: Treaty Context

1.1 Introduction

This section provides an historic review examining the reasons why Canada saw need to enter into the numbered treaties with the Aboriginals of western Canada. It will focus on the "Indian Promises" and "Government Obligations" of Treaty 8. The approach followed will include a review, of books and articles on the subject, government reports, and research documents that describe events that cumulated with the signing of Treaty 8. The objective of this chapter is twofold. It is first, to set context to understand the intent of the Crown in its pronouncement covering Aboriginal rights that were to apply within the Dominion of Canada. The second is to examine the obligations and rights attached to Treaty 8 as seen by Government and understood by the Aboriginals of the Treaty 8 region.

1.2 Linking the Crown's commitment to the New Nation

The British Government from the outset of its control over North America set policy parameters to guide its bureaucrats in dealing with the native population in the colony. They were instructed to respect land rights within the traditional native territories and protect the interests of the indigenous population until they could be assimilated into the main stream of society.

> Starting in the 1760's, the primary concern of the British imperial government in setting Indian policy had been to secure strategically placed Indian tribes as military allies. However, by the turn of the century when the Indians' military usefulness declined, and their participation was reduced in the declining fur trade, the need to 'assimilate' became the primary objective, abetted by the other two

> principles of imperial policy to purposefully 'civilize' Indians according to western norms and to 'protect' them until they were assimilated and could look after themselves. (Cunningham, 1999, p. 25)

The British principles to be applied by the government bureaucrats in settling the Colonies were outlined in the *Royal Proclamation.* (*The Royal Proclamation* 1763) The British government had followed up on this by setting out guidelines that would apply to immigrants, those investing in the new empire and to the bureaucracy charged with responsibility for governing the colony territory. Immigrants and settlers aspiring to homestead on the Indian Territory within the new colony would be required to respect the property rights of the native population. (Cumming, 1977, p. 23) The Crown also called upon all those moving to this region to conduct their affairs in such a manner to enable the native population to continue with their way of life. (Cumming & Mickenberg, 1972, pp. 26-27) It was within this general framework that an approach was drafted by the new Dominion of Canada to make way for peaceful settlement of the Indian Territory.

The British parliament, under the 1867 *British North American Act* (*BNA*) also known as the *Constitution Act*, prescribed in Section 91 subsection 24 the authority held by the Government of Canada with regards to Indian affairs.

> It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated;

> that is to say,...Indians, and Lands reserved or Indians. (*The Constitution Act*, 1867)

The *BNA* delegated to the Government the necessary legislative authority to implement its strategic priority of securing safe and undisputed access to Indian Territory. British rule over North America had set the precedent and now called upon all in the colony to respect the Indian traditional way of life and native land rights. The Government of Canada in turn was vested as the only party with legal authority to deal with the sale and settlement of Indian Territory. The intent was to protect the Aboriginal population within the Dominion by treating them as wards of the state. The Government was to shelter the native population and serve as the legal guardian. This approach would result in the Crown honouring its commitment to accommodate and protect the native population in the Colony. This policy approach was designed on the premise that the natives, would over time, be fully absorbed within the way of life being introduced by the new settlers moving to this region. It was thought the interaction between natives, government officials and settlers in these newly settled regions would serve as the catalyst to make the Aboriginal population a part of the main stream of this new society.

Also, at this time, natives in Western Canada were dealing with the aftermath of new diseases that had been introduced within their population by outsiders who travelled throughout the region. This, combined with the destruction in the prairie buffalo herds, which had been the Indian staple food source, devastated the tribes in this region of the Colony. (Miller, 2000, p. 214) There was need for Government help as these hardship issues threatened the very existence of the Indian population. In return for the assurance of peace within the region, the Government would commit to help the Aboriginals adjust

to a new way of life brought about by the loss of buffalo herds and the influx of settlers to their traditional territory. The Government as such was given a license with legal authority to proceed with its new strategy to build a nation on the condition it honoured the Crown's commitment protect the well being of the Aboriginal population in this western frontier.

1.3 Linking the regions of the New Nation

The priority for the new nation was to follow a uniform process to enter into treaties with the different native groups and to take steps to fully assert its sovereignty over the entire Dominion. (Cumming & Mickenberg, 1972, pp. 72, 123-124) The Crown saw no need to invest in further dialogue on native rights beyond the general principles laid out in the *Constitution.* It was seen as inevitable that full enfranchisement of the native population would soon follow after peace treaties were negotiated. (Miller, 2000, pp. 145,255) These treaties would extinguish the need for further dialogue on Indians rights. The envisaged treaty agreements would deliver control over Indian traditional lands and allow the Government to finalize its plan to build a national rail line from coast to coast. It could then link the nation by rail line and be positioned to transport new settlers and supplies to the regions covered by treaties and in so doing ascertain its sovereignty over the Dominion. (Dempsey, 1978, pp. 20-22) The Government of Canada had a nationhood strategy in place.

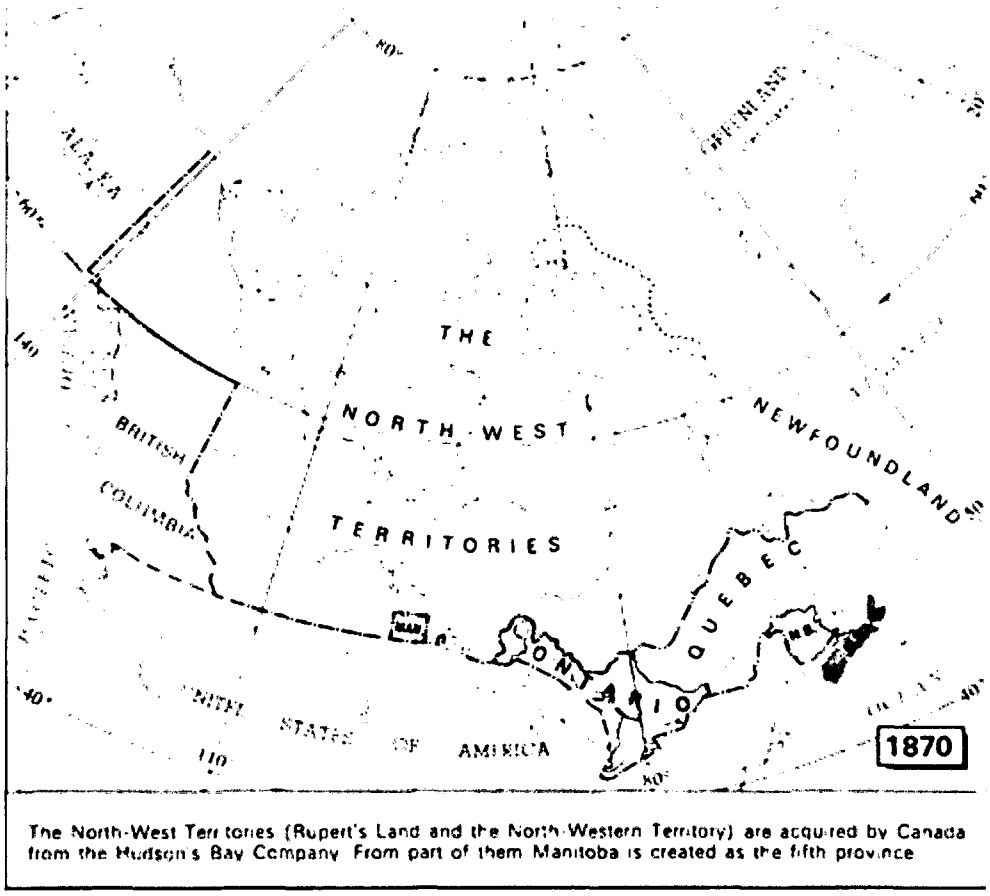
The Government needed to gain control over the territory owned by the Hudson Bay Company (HBC) if it were to execute on its plan to link the nation. The Royal Proclamation had excluded Rupert's Land controlled by the HBC from the territory designated for the Dominion of Canada. Its control extended over much of what would be

today the west and the northern regions of Canada. (Cumming & Mickenberg, 1972, pp. 27-28) The negotiations leading up to the acquisition of this territory by Canada were followed closely by the United States and covered extensively in newspapers such as the *Daily Globe*, Toronto and the *New York Tribune*. The *Daily Globe*, Toronto in its April 7, 1869 edition reported the following, on the sale of land by HBC "estimated to contain 198,000,000 of acres" to Canada:

> It is now two centuries since that Company [Hudson Bay Company] was formed, and although its claim to territorial rights has, of late years been denied by many eminent lawyers in England it has never been practically disputed. That claim is now to be extinguished, upon payment of 300,000 (British pounds) sterling, and already the Canadians are talking of providing some sort of Government of the Red River Settlement, and taking immediate steps to check American encroachments along the western frontier. (The Great Dominion, 1869, p. 2)

In 1870, the Canadian Government agreed to terms to purchase this territory from the Hudson's Bay Co. (see Map One below) resulting in the map of Canada being redrawn. The Order-in Council that brought Rupert's Land and the North-Western Territory into Canada acknowledged that Indian inhabitants, who occupied the territory controlled by HBC, would have the same rights as all other Aboriginals in Canada defined under the 1867 *Constitution Act*. Canada's purchase of Rupert's land included the future Treaty 8 area and brought this vast northern Indian Territory under the control of the Canadian Government. (Cunningham, 1999, pp. 144-149)

1.3.1 MAP ONE-North-West Territories



(Source-Map: 1870 Canadian Confederation Maps Library and Archives Canada (Map:1870, 2005))

1.4 Linking the Nation –Western Treaties

The Government of Canada, in the immediate post Confederation era, turned its attention to settling the western regions of Canada. It had been successful in bringing British Columbia into Confederation in 1871. There was now a need to link the whole of the nation by way of a rail line and clearly establish sovereignty over the unsettled western portion of the Dominion that was in near proximity to the United States.

Government leaders were concerned that without an aggressive and successful settlement plan it could face the risk of losing jurisdiction over this territory.

> The trust of sovereignty over the western provinces came, not from hostile natives, but the rapid expansion of U.S. settlements to the south. The Canadian government was not so much concerned with military clashes with American settlers as with simply loosing jurisdiction by American occupation. (Allen, 1991, p. 21)

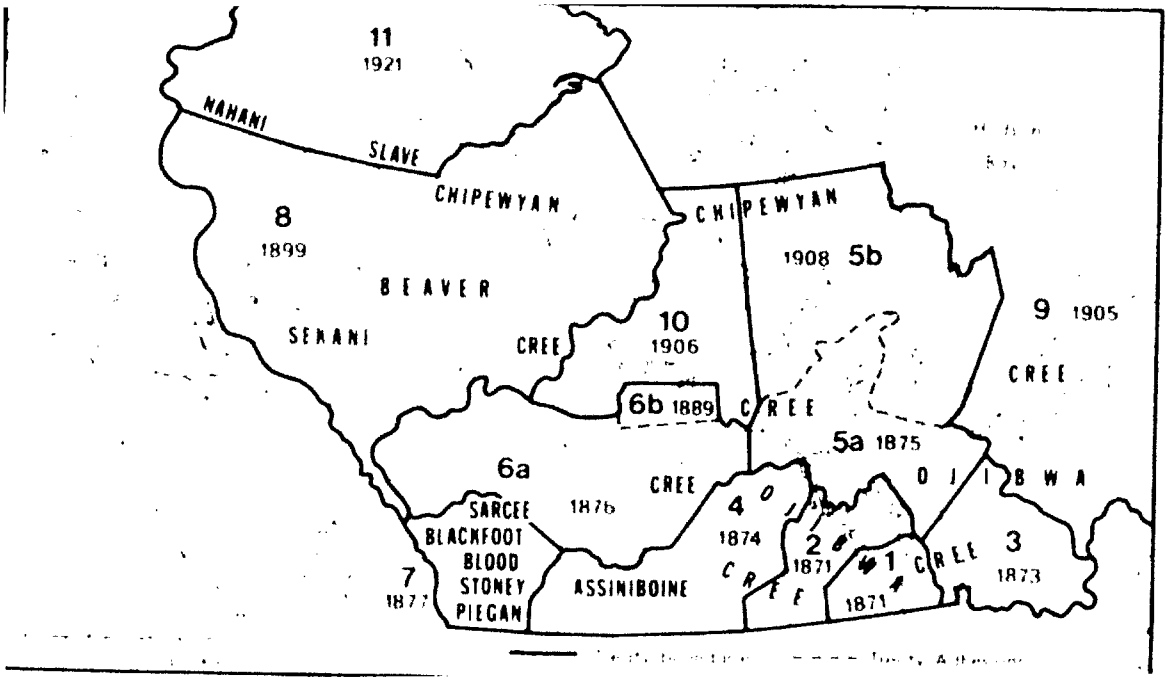
Policy makers thought the best strategy to mitigate this risk would be to attract settlers from eastern Canada and abroad. This would be made possible once the region could be accessed by way of the new rail route. The 1872 *Dominion Lands Act* was also a key policy plank. It provided the framework to incent settlement by providing 160 acres of land to those settlers who would migrate to this region. Pursuant to the *Act* settlers would receive land upon paying a nominal "$10 registration fee" and agree to "a five year- residency requirement." (Allen, 1991, p. 21) As such, the Government believed there was an immediate need to sign peace agreements with the Indian Bands to insure there would be an hospitable environment to accommodate the influx of new homesteaders. In the future Treaty 8 territory this would include the need to seek agreements with both the original Indian population and the mixed bloods or Métis that had resulted from the intermarriage between the Indians and traders of the region.

The Government approach was to follow the protocols that had guided its similar initiatives with the native population of eastern Canada. The core of that policy was accomplished by extinguishing Indian Title through negotiating treaties with those occupying the territory. The western treaties would be the outcome of this policy. The implementation of this policy would be based on a template treaty framework that had

previously been used by the Government. Precedent set in these earlier treaty agreements with the natives provided for compensation, an allocation of treaty lands or right to property to the original inhabitants, and state assurance that the Indians could continue with their way of life within the traditional territory. The intent was to provide the Government with control over the land it needed for both settlement and to construct the railway line. The approach adopted by the Government was to negotiate separately with each First Nation. Initially it would only enter into treaty discussions if the Indian Territory was required to execute upon this nationhood strategy.

The Government, having gained control over the HBC territory, would now approach each treaty like a piece in a puzzle. It adopted a just in time treaty approach where each treaty was negotiated separately as the land was required to build the rail line. This western strategy resulted in seven treaties being signed covering the area in what is known today as Southern Manitoba (Treaties 1 and 2 in 1871), Western Ontario (Treaty 3 in 1873), Southern Saskatchewan (Treaty 4 in 1874), Central and Western Manitoba (Treaty 5 in1875), Central Saskatchewan and Alberta (Treaty 6 in 1876) and Southern Alberta (Treaty 7 in 1877). (Fumoleau, 1973, p. 24) These would be followed with Treaty 8 (1899-1900) Treaty 10 (1906-1907) and Treaty 11 (1921) (Fumoleau, 1973, p. 30) Map Two below details the historical timeline of the numbered treaties.

1.4.1 MAP TWO Western Canada - Historical timeline numbered treaties



(Getty & Lussier, 1983, p. xxi)

1.5 Linking the Nation-Indian Affairs

With the 19th century coming to an end, Indian policy in the new Dominion was entrenched in the *Indian Act*. The Government of Canada, following the 1867 signing of the *BNA,* began to immediately review how it would administer Indian affairs. This resulted in the *Indian Act* which consolidated the previous legislation and regulations that had been put in place to deal with the affairs of Indians. (An Act to amend and consolidate the laws respecting Indians. (April 12, 1876)) The Government adopted a process of making amendments to the *Indian Act* to capture its new policy initiatives and lay out the terms of reference for its administration to deal with the native population. Through an 1880 amendment to the *Indian Act,* the Department of Indian Affairs was created under the direction of the Minister of the Interior. The Minister of the Interior

also held the position of Superintendent General of Indian Affairs. (An Act to amend and consolidate the laws respecting Indians (May 7, 1880)) This structure empowered the Minister of the Interior to deal with the execution of the Government's policy to both negotiate treaties with the Western Indian bands and entice settlers to this area. The day to day administration of the vast powers given under this legislation fell under the control of the Deputy Superintendent General. Lawrence VanKoughnet was appointed to this position in 1874, a post he held for some 20 years. (Leighton, 1983, pp. 104-116) It is within this context that Treaty 8 was structured and designed to align with the government policy of the day and the earlier western numbered treaties. The Treaty 8 agreement, as with the earlier numbered treaties, reaffirmed the principle of compensation in return for extinguishment of Indian claims. It also upheld the rule put in place during British control over the Colony that only the Government had jurisdiction to handle land transactions with Indians.

In the years leading up to Treaty 8 Government policy had been strategically drawn with the intent to assimilate the Indian population into the general Canadian society. The western numbered treaties, already signed by the Indian leaders of these nations, included compensation clauses. In addition to a cash outlay, the Government undertook to provide for schooling, various social services and other specific programs. (Cumming & Mickenberg, 1972, pp. 124-125) This was seen as part of the Government's trustee role put in place to assist the Aboriginal population's transition to a new way of life within the Dominion.

Treaty terms also included Government support for agriculture programs designed to assist band members' transition from their traditional sources of livelihood. Policy

makers held to a belief that with proper direction, the Indian population would over time move away from their way of life and transition into so called full Canadian citizens. Section 93 of the 1869 *Indian Act* articulated this intent and described the process to be followed for full "enfranchisement" of a band member. This was to follow a structured process including such steps as an application for a "location ticket" covering a specific amount of band land. Applicants would then be held accountable to serve a probationary period after which they would receive simple title to the land covered in the location ticket along with a fair share of the band's cash resources. Once the band member met these criteria and qualified for enfranchisement, the incumbent would "thenceforward cease in every respect to be Indians of any class with the meaning of this *Act*, or Indians with the meaning of any other *Act* or law." (Department of Indian Affairs and Northern Development., 1975) The original enfranchisement policy did not initially apply to "any band of Indians in the Province of British Columbia, the Province of Manitoba, the North-West Territories, or the Territory of Keewatin". The belief held by the Government was that Indians in this largely unsettled region, which included all of the future Treaty 8 population, had not benefited from exposure to the immigrant way of life and the outside world. As such, the natives in this vast region had not progressed to a point to where they were able to understand the full benefits attached to enfranchisement and the white man's way of life. This section of the *Indian Act* was amended in 1880 to include all of the Indian population in Canada.

The *Indian Act* set the environment leading up to Treaty 8. This *Act* was based on the ideology that over time the Indian population covered under treaty would transition from a reserve way of life to full enfranchisement. The outcome of this policy and

bureaucratic structure was for the day to day affairs of individual Indians and their bands to come under the total control of onsite Indian Agents. The original intent was to have the Government appoint Indian Agents to perform a fiduciary role to protect band members. In short order these Government appointed positions ended up with full day-to-day control over most aspects of the Indian way of life. Under the Government policy, the Indian Agent held full justice of the peace powers, control over who lived on the reserves, oversaw spending and was the person in charge of how social services would be delivered throughout the territory. They had a profound influence over the operation of a reserve that extended from making decisions on appropriation of native lands to supervising the election of traditional band chiefs and councils. The Indian Agent replaced the traditional form of self-government; the way law was administered within the band, and over time outlawed many of the traditional practices that were an integral part of the way of life for Aboriginals. (Miller, 2000, pp. 260-261)

The Government, leading up to the close of the 19th century, was positioned with firm control over all of Indian affairs throughout the Dominion. This portfolio within the Government was under the control of a powerful Minister who was in charge of all of western development.

> Although created a separate department in 1880, it thereafter normally retained its association with the Department of the Interior by coming under the aegis of the minister of the interior until 1936.Thus, the Indians were viewed always in the context of western development; their interests, while not ignored, only rarely commanded the full attention of the responsible minister. (Hall, 1983, p. 121)

The Government had in hand a template treaty process from work it completed in finalizing the earlier western numbered treaties. It also had ready access to government

officials with recent experience in negotiating treaties with the Western First Nations. The end result was that the Government was well equipped to negotiate further treaties and to bolt any such future agreements on to the existing bureaucratic infrastructure. It could, when needed, respond in short order to use this blue print if an unsettled region within the Dominion were to be deemed of strategic importance.

1.6 Linking the Nation-The state of the region leading up to Treaty 8

The sparsely populated northern territory, not covered in the 1870s western numbered treaties, was not of strategic importance to the government of the day. Prime Minister Macdonald held to a policy, "that the making of a treaty [with the north] should be postponed for some years or until there is a likelihood of the country being requested for settlement purposes". The outcome of this was for the Macdonald Government to not, "feel it had any obligation toward a people with whom it did not have a formal agreement.... [nor] any purpose in making a treaty with Indians whose land was apparently of such little value...". (Richards, 1999, p. 56) The void created by this policy in what was referred to as the, "unceded portions of the Territories," was further compounded by the diminished role of the HBC following its 1870 sale to the Government. HBC officials had established trading practices and support protocols within the territory and as a result were at the center of the economic interface of this region with other parts of Canada. The main contact the Indians of this northern region had with the outside world was through the HBC officials, its missionaries serving in the area and the North West Mounted Police. The Athabasca-Mackenzie Indians, living in this region, were totally dependent upon the traditional way of hunting and trapping for their livelihood. This provided food to live on and furs to trade with the HBC to acquire

necessary supplies. Unlike the Indians to the south, rather than a tribal hierarchy, there were family units that worked together to hunt and trap. The families existed for the most part independent of one another and travelled within set regions throughout this sparsely inhabited territory. The 1870 HBC charter surrender resulted in the HBC withdrawing from the limited role it played as social service provider within the region. The HBC took the position that this role should now be assumed by the Canadian Government. The immediate impact of the HBC withdrawal was to leave the region lacking in an administration and conduit to the outside world. The Government under its policy was in no rush to enter into a formal treaty and took the position that it had no obligation to deal with social issues within this region. (Fumoleau, 1973, pp. 30-31) The Anglican and Catholic missionaries who lived with the Indians filed numerous reports detailing the hardship that existed throughout this northern area. The Government had been made aware of these concerns however no action was taken until newspapers began bringing the severe conditions to the attention of the public. (Madill, 2009, pp. 5-6) The *Calgary Tribune* in an 1887 article entitled, "Starving Indian," made a case that action be taken to address this situation:

> No treaty has been made with those Indians; therefore the government is under no obligation towards them. But as long as Canada claims jurisdiction over the Peace River country and if the demand was made that jurisdiction should be relinquished what a howl would be raised-so long it is under a moral obligation to assist the people whether whites or Indians when they are in (difficulty). If the matter is looked at squarely, it is surely a fearful thing that any community under Canadian rule should perish for lack of assistance that it is possible to render. It is not a duty that we owe to the Indians as much as one that we owe to ourselves and to humanity in general. Not only is the Country under a moral obligation to render assistance to

> these people but it would be good policy to do so. Sometime soon a treaty will have to be made with them as a preliminary to the opening of their splendid country and were timely assistance to be rendered them now in their time of need it would pave the way for a good feeling when the treaty came to be made that would not be to the disadvantage of the Country. (Calgary Tribune, Anonymous, 1886, p. 2)

The plight of the natives of the north was also being expressed elsewhere in newspaper articles such as the *Toronto Globe.*

> Further reports of distress among the northern Indians have been received, and the Dominion Government are being strongly condemned for neglect of the Redskins. Rev. W. Spendlove, missionary at the Mackenzie River, is in the city (Toronto) and tells of many hardships in the Peace River district. Mr Spendlove has heard of many cases where Indians died of starvation and their comrades had to exist on human flesh. (Toronto Globe, 1887, p. 1)

The Indian population, having experienced benefit of some modest government assistance from the exposure of its hardship to the outside world, wanted to proceed with treaty discussions. Receptivity to treaty discussions was in large part motivated by stories that their Indian neighbours to the south had benefited from increased levels of government assistance once they signed a treaty. The Government however held fast to its position of not wanting to proceed in this Northern region as the land was not required for settlement.

The Government's view on the importance of the region to Canada began to change in the latter part of the 1880s. This was driven by an emerging belief, by senior officials in various Government departments, that this northern region was rich in natural resources. Officials made the case there was a high likelihood that news of the resource potential within this region would attract prospectors, investors and result in overall

increased economic activity. Reports of the regions abundance in oil and other mineral resources were coming forward to the Government from the Department of the Interior, the Geological Department and confirmed in the findings of the Senate Committee of the Great Mackenzie Basin. (Madill, 2009, pp. 5-6) The press coverage highlighted the thinking covering the region's wealth potential as articulated in the April 27th 1889 article in the *Edmonton Bulletin*:

> ... but special attention is given to the oil fields of the Athabasca and Mackenzie which are estimated to cover a greater area than those of all the rest of the world combined, and are quite accessible, in the matter of distance, to the markets of the world as either the United States or Russian oil fields.....The completion of the Alberta and North-western railway will assure the development of the oil industry in the vast field described of such proportions as can only be imagined. With that road completed there is no reason why within ten years the Mackenzie basin should not export more oil than either Russia or the United States. The financial effect on Canada in general and on this part of the Northwest in particular would be more than marvellous. (Edmonton Bulletin cited in Fumoleau, R., 1973, p. 41)

1.7 Linking the Nation-The decision to proceed with Treaty 8

It was the potential of the natural resource wealth and not any pressing need for settlement or concern for the hardship of the population that served as the impetus to have the Government consider treaty discussions. The Privy Council report dated January 7th, 1891 from the Superintendent General of Indian Affairs laid out the business case to proceed with a treaty covering this northern region of Canada.

> ...the discovery in the District of Athabasca and in the Mackenzie River Country, that immense quantities of petroleum exist within certain areas of these regions, as well as the belief that other materials and substances of economic value, such as sulphur, on the south coast of

> Great Slave Lake, and Salt, on the Mackenzie and Slave Rivers, are to be found therein, the development of which may add materially to the public wealth, and the further consideration that several railway projects, in connection with this portion of the Dominion, may be given effect at no such remote date as might be supposed, appear to render it advisable that a treaty or treaties should be made with the Indians who claim those regions as their hunting grounds, with a view to extinguishment of the Indian title in such portions of the same, as it may be considered in the interest of the public to open up for settlement. The Minster, after fully considering the matter, recommends that negotiations for a treaty be opened up during the ensuing season. (Daniel, 1999, p. 60)

Initial treaty discussions followed this Privy Council report. However, the death of Prime Minister John A. Macdonald in June 1891 brought a period of political instability. Following his death, the focus of Government policy fell away from development of the north and further treaty discussions. Father René Fumoleau, in his account of events surrounding this time, attributed the interruption in treaty negotiations to this political instability and the politician's disappointment "with the state of oil exploration and exploitation in the north." (Fumoleau, 1973, p. 43) In this political vacuum the Department of Indian Affairs was not allocated money to proceed further with its plan for a treaty and the north once again became a low Government priority. Despite the Government's inaction, the area continued to open during the 1890's as a result of improved access into the Peace and Mackenzie regions. The outcome was the arrival of prospectors and an increase in mining activities as had been earlier predicted by Government officials. This influx of settlers increased the hardship of the native population as it further stressed their traditional means of making a living

> ...It has been thought advisable to discourage as far as possible any immigration into the districts around the Peace and Mackenzie Rivers and northern country generally. The inducement seems to be the presence of Gold: but probabilities are that the search for it will not be paying: they thereupon develop into hunters, traders and trappers and the result is already observable in the scarcity of game and if many more come in, the deplorable results will be even more evident in the starvation of the Indians." (Daniel, 1999, p. 61)

Despite the growing interest by outsiders in the region's natural resource potential, the federal government maintained a very low key approach. They had no clear government policy or strategy covering the region. Publically the federal government discouraged prospectors and settlement within the region; however, it also allowed drilling for oil and mining despite no treaty in place over this unceded Indian Territory.

The discovery of gold in the Klondike region in 1897 dramatically changed settlement in the region. "Train loads of gold seekers" were now attempting to get to the north via Edmonton and Vancouver. The gold find brought immediate worldwide attention to the entire northern region of Canada. The federal government, as was the case with the earlier western treaties, now had an immediate need to confirm its sovereignty over the area. In addition, the sudden economic activity made it necessary to deal with land ownership and social issues due to the accelerated rate at which this region was being populated. In response, the federal government established Yukon as a Territory separate from the North-West Territories. Father Fumoleau concluded that the Government of the time, despite the social upheaval brought on by the rush of prospectors, did not entertain treaty discussions with the Yukon Indians. Father Fumoleau was unsuccessful in his research to locate correspondence that addressed this issue

however surmised the Government of the day may well have been concerned with the price the Yukon Indians would have sought to negotiate terms of a treaty that would have extinguished their Indian title to the land. (Daniel, 1999, p. 51)

The impact of the rush to the Yukon was felt throughout the entire north as it became a route to the Klondike. Reports from both the North West Mounted Police and the Indian Affairs Department articulated the severe conditions under which the Indians were living. They expressed concern with the potential for conflict as outsiders used this region as an overland route to reach the gold find in the Yukon. A November 30th 1897 report from Major Walker, formerly of the North West Mounted Police, to Clifford Sifton, Minister of the Interior in the Wilfred Laurier Government, provided the following update and recommendation:

> From all appearance there will be a rush of miners and others to the Yukon and the mineral regions of the Peace, Laird and other rivers in Athabasca during the next year...others intend to establish stopping places, trading posts, transportation companies and to take up ranches and homesteads in fertile lands of the Peace River...They [the Indians] will be more easily dealt with now than they would be when their country is overrun with prospectors and valuable mines be discovered. (Madill, 2009, p. 9)

Minister Sifton at this time was receiving reports from L. W. Herchmer, Commissioner of the North West Mounted Police, and A. E. Forget, Indian Commissioner of the North West Territories, of unrest throughout the region with both the Indians and Métis. These initiatives cumulated with Minister Sifton recommending to the cabinet to proceed with a treaty over this northern region.

> He stated that the Indians though few in numbers were turbulent and liable to give trouble should isolated parties of miners or traders interfere with what they considered

> their vested rights.... He expressed the conviction that the time had come where the Indians and Half breed population of the tract of territory north of that ceded to the Crown under Treaty No 6 and partially occupied by whites either as miners or traders and over which the Government exercised some measure of authority, should be treated with for the relinquishment of their claim to territorial ownership. (Privy Council Minutes 27 June- 30 June 1898, 2008, pp. 1-4)

This recommendation was approved by Privy Council order (1898-1703) on June 27, 1898. It was recognized by the Minister that due to the remote location and the number of small disbursed Indian settlements there would not be enough time to meet with all the interested Indians and Métis that summer. The recommendation agreed upon by federal authorities was for negotiations to be postponed to the summer of 1899. In anticipation of these negotiations the federal government set aside a budget of $43,165 to settle with the estimated 2700 Indians and 1700 "Half Breeds" that it estimated lived in the region. The Order in Council acknowledged the Department of Indian Affairs had, "limited knowledge of the conditions of the country, and the nature and extent of claims likely to be put forward by its Indian inhabitants". The Commission appointed to negotiate the treaty were to secure, "relinquishment of the aboriginal title". It was recognized from the outset that the treaty would need to include both the Indians and "Half Breeds" as they were both, "closely allied in manner and customs". (Privy Council Minutes 27 June- 30 June 1898, 2008, pp. 4-12)

The Government officials who prepared for Treaty 8 negotiations were well versed in the treaty process as a number of these individuals had represented the Crown in the earlier seven numbered Western Canada treaties. These representatives had a clear

treaty process in mind. They were supported by a bureaucracy with over twenty years of experience in dealing with treaty issues that had arisen since the signing of these first agreements. The process and outcome of these earlier numbered treaties can generally be recapped as follows:

- Negotiating team of Government appointed Commissioners accompanied by clerks, Mounted Policemen, and clergy;
- Commission team would meet with bands of Indians;
- Objective was to obtain surrender of Indian title to the Crown;
- No official transcript of discussions that took place during the treaty negotiations;
- A treaty document signed by the Indian leaders; and
- Post treaty questions surrounding what the Indian people understood and what was told to them by the treaty commissioners. (Taylor, 1984, pp. 57-58)

The 1898 Privy Council minutes recorded the parameters that set the boundaries to be followed by the team appointed to negotiate Treaty 8.

> The Commissioners should be given discretionary power both as to annuities to be paid to and the reservation of land to be set apart for the Indians, with the understanding that no greater obligation will, on the whole, be assumed in either respects than were incurred in securing the cession of the territory covered by the treaties which were made with the Indians of the other portions of the North West. (Privy Council Minutes 27 June- 30 June 1898, 2008, pp. 7-8)

The approach to prepare for Treaty 8 negotiations, the process followed, and the eventual outcome aligned with the protocols established by the federal government in negotiating the earlier numbered treaties. Like previous treaty negotiation, the process was to use respected authority figures who worked in the region to influence the Indian population within the proposed treaty area. It called upon the missionaries who lived with the Indians, traders, and the North West Mounted police to post public notices and

explain how the treaty discussions would take place the following summer in 1899. The native population immediately began to voice concern that the treaty as described would result in loss of their hunting, fishing and trapping rights. Commissioner J.A. McKenna recognized the severity of this discontent and the growing opposition to the idea of reserves and raised this issue in an April 17, 1899 memo to Minister Sifton. The Minister was swayed by his input and on May 12, 1899, issued instructions to "introduce the new policies of reserves in severalty to the extent of 160 acres per person." (Madill, 2009, p. 22) It was with this understanding that Minister Sifton appointed a treaty commission made up of J. A. McKenna of the Department of Indian Affairs, James Ross of Regina, and new Indian Commissioner David Laird, who had been one of the two Treaty Commissioners for Treaty Seven. This was followed up in the spring with the establishment of a "Halfbreed" Scrip Commission made up of Major James Walker, a retired officer of the North West Mounted Police who had also been present at the Treaty Six negotiations, and J.A. Coté, Land Department officer. Charles Mair, a long time friend of David Laird, along with J.F. Prudhomme of Regina also joined the Government treaty team and served as secretaries to the Half Breed Commission. (Madill, 2009, p. 20) Secretary Mair contributed beyond the official secretary role by maintaining a personal diary which recorded his observations covering the Commission's June 1899 journey to Lesser Slave Lake and the events that surrounded the treaty discussions. The Mair diary published in 1908 by William Briggs in a book titled *Through the Mackenzie Basin* provides a personal, firsthand account of Treaty 8 negotiations as seen through the eyes of the negotiating team representing the Government.

The first meeting of the Treaty 8 negotiating team took place with the assembled Indians at Lesser Slave Lake on June 20th 1890. Commissioner Laird made it clear to those present at this opening gathering that he held authority to treaty with the Indians of this region:

> Red Brothers! We have come here to-day, sent by the Great Mother to treat with you, and this is the paper she has given to us, and is her Commission to us signed with her Seal, to show we have authority to treat with you. (Mair, 1999, p. 56)

The Commission team also set context by describing how treaties had benefited the many Indians, who had already settled with the government.

> The Queen's Government wishes to give the Indians here the same terms as it has given all the Indians all over the country, from the prairies to Lake Superior. Indians in other places, who took treaty years ago, are now better off than they were before. They grow grain and raise cattle like the white people. Their children have learned to read and write.....About treaties lasting forever, I will just say that some Indians have got to live so like the whites that they have sold their lands and divided the money. But this only happens when the Indians ask for it. (Mair, 1999, p. 58)

This experience and sense of confidence on the part of the government's representatives was in stark contrast to the assembled band members and their spokespersons. The complex terms that were part of the treaty agreement needed to be explained through interpreters and involved concepts and terms of reference which were not part of the everyday life and language of the northern Aboriginal population. Father Fumoleau in his account of Treaty 11 describes the level of understanding and capability of the Indians who meet with Government representative's and negotiated Treaty 8.

> Many words of the treaty text, their meaning and their consequences, were beyond the comprehension of the

> northern Indian. Even if the terms had been correctly translated and presented by the interpreters, the Indian was not prepared, culturally, economically or politically, to understand the complex economies and politics underlying the Government's solicitation of his signature. The Indian people did know that they could not stop the white people from moving into their territory, and in their minds the treaties primarily guaranteed their freedom to continue their traditional life style, and to exchange mutual assistance and friendship with the newcomers. (Fumoleau, 1973, p. 19)

Those within the government and judiciary held a view the Indian population was neither well informed nor capable of copping with the pressures of civilization. This assessment is best displayed in an 1899 decision by the Minister of Justice. The Minister of the day commuted the death sentence of an Indian from Great Slave Lake basing his decision on the rationale Indians of this region were not capable of making an adult decision;

> ...I have the honour to ask your consideration of the question whether the interests of justice would not be best served by treatment of an Indian unacquainted with civilization in a manner no more severe that would be accorded a child below the age of fourteen years, concerning whom there is a prima facie presumption that he does not understand the nature and consequences of his act. Even the most highly educated Indian until enfranchised is subject to civil disabilities though capable of crime. Whatever his actual age he is still an infant in the eyes of the law... (Fumoleau, 1973, p. 68)

Secretary Mair in his diary describes how the treaty team was surprised to find the Indians of the north to be much different from this preconceived notion held by the government officials.

> Instead of paint and feathers, the scalp-lock, the breech-clout, and the buffalo robe, there presented itself a body of respectable-looking men, as well dressed and evidently quite as independent in their feelings as any like number of

> average pioneer's in the East. Indeed, I had seen there, in my youth, many a time, crowds of white settlers inferior to these in sedateness and self-possession. One was prepared, in this wild region of forest, to behold some savage types of men; indeed, I craved to renew the vanished scenes of old. But alas one behold, instead, men with well-washed, unpainted faces, and combed and common hair; men in suits of ordinary " store-clothes," and some even with "boiled" if not laundered shirts. (Mair, 1999, p. 54)

The well prepared commission team traveled to the unsettled north with guiding principles and objectives written in a draft treaty which was to be negotiated with the uneducated Indians of the Treaty 8 region. Commissioner Laird assured those gathered at the June 20th, 1899 meeting that they had a choice;

> We understand stories have been told you, that if you made a treaty with us you would become servants and slaves; but we wish you to understand that such is not the case, but that you will be just as free after signing a treaty as you are now. The Treaty is a free offer; take it or not just as you please. If you refuse it there is no harm done; we will not be bad friends on that account. One thing Indians must understand that if they do not make a treaty they must obey the laws of the land. (Mair, 1999, p. 56)

Commissioner Laird laid out the Crown's bottom line position. The "Queen owns the country, but is willing to acknowledge the Indian claims, and offers them terms as an offset to all of them". (Mair, 1999, p. 59) He further detailed that Commissioners Walker and Cote would only proceed to deal with the "Half Breeds" after Treaty 8 was signed by the Indians.

Secretary Mair in his published diary describes how these negotiations were different from those concluded with the Indian tribes of the Prairies. Excerpts from his diary describe how the Chipewyan Indians were surprisingly, "adept at cross-examination" and having "keenness of intellect and much practical sense in pressing the

claims". (Mair, 1999, p. 174) The evidence from these recorded events and Elder accounts paints a picture of the Commission team negotiating with much better informed Indian negotiators who in some cases were aware of the earlier Prairie treaty terms. The Indian bands within the region had firsthand experience of how the outside world of settlers, miners and prospectors could impact their way of life. They saw the treaty as a way to mitigate this outsider influence. It was also viewed by Indian leaders as the mechanism by which they could be assured of federal government support similar in terms to what they understood had been granted to their southern neighbours.

There were two critical issues to the Indian population of the Treaty 8 area. The first was fear of losing their land. The proposed agreement also needed to guarantee the Indian leaders that their people would be able to maintain their tradition way of life. Charles Mair describes in his dairy how the Commissioners dealt with these two key areas of concern.

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed....But over and above the provision we had to solemnly assure them that only such laws as to hunting and fishing as were in the interested of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and they would be as free to hunt and fish after the treaty as they would be if they never entered into it. (Mair, 1999, p. 175)

> ....The Indians are given the option of taking reserves or land in severalty. As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required... It would have been impossible to have made a

> treaty if we had not assured them that there was no intention of confining then to reserves. (Mair, 1999, p. 179)

The verbal assurances provided by the commission team mitigated the major concerns of the Indian leaders. Treaty 8 was signed, June 21st, 1899, with the Indians gathered at Lesser Slave Lake. The Commission, having secured this agreement, decided to split into two separate parties to seek the adhesion to the Treaty with other bands who were widely spread throughout the region. The two commission teams did obtain some further adhesions on this initial trip however many of the Indians did not show up at the anticipated treaty points. All told from June 21st to July 27th the Commission was successful in treating with 7 Chiefs, 23 Headmen and 2,187 Indians. (Mair, 1999, pp. 181-185) The Commission over the two months spent in the north did not have sufficient time and resources to meet with any of the Indians and mixed bloods in the more remote inaccessible areas. As a result, a second Commission was set up the following summer under the direction of J.A. Macrae, of the Indian Office in Ottawa. This special commission under his direction secured adhesion of a further 1200 Indians to the Treaty over the May through July timeline. (Mair, 1999, p. 66) Commissioner Macrae in December 1900 reported the following progress to the Government:

> There yet remains a number of persons leading an Indian life in the country north of Lesser Slave Lake, who have not accepted treaty as Indians, or scrip as half-breeds, but this is not as much through indisposition to do so as because they live at points distant from those visited, and are not pressed by want. The Indians of all parts of the territory who have not yet been paid annuity probably number about 500 exclusive of those in the extreme north western portion, but as most, if not all, of this number belong to bands that have already joined in the treaty, the Indian title to the tract it covers may be fairly regarded as being extinguished. (Dominion of Canada Annual Report

> of the Department of Indian Affairs for the year ended June 30, 1900, 2004, p. xli)

The conclusion reached by the Commissioner that Indian title had been "extinguished" makes clear the basic misunderstanding attached to the western numbered treaty process. In the words of historian J. R. Millar the Indian population held a different understanding:

> The land and its resources were the creation of the Great Spirit, and the Indian was but one inhabitant of the world with obligations to use its resources prudently and pass then on to succeeding generations undiminished. They could not negotiate surrender of title because they did not possess it. What the Indians sought in the negotiations of the 1870's was the establishment of a relationship with the Dominion of Canada that would offer them assurances for the future, while agreeing to permit entry and some settlement of the region. To them the treaties were intended to be pacts of friendship, peace, and mutual support; they did not constitute the abandonment of their rights and interests. (Miller, 2000, pp. 218-219)

H.A. Conroy who had served as a clerk with the 1899 Treaty Commission was appointed inspector for Treaty 8 in April 1902. Over the following several years he oversaw the administration of the Treaty and dealt with requests from those within the region who wanted to receive benefit of the treaty terms. There is a record of further adhesions being successfully secured by Inspector Conroy with different bands, individuals and groups. These agreements were usually reached during the summer months when the government officials were on site paying out the annual annuity payment to those who had signed the Treaty. The combined efforts of the government officials resulted in securing the adhesion of, "a total of 3,658 souls to the 30th June, 1906." (Dominion of Canada Annual Report of the Department of Indian Affairs for the

year ended June 30, 1900, 2004, p. xl) However, the process of securing further adhesions went on for a number of years. In 1914 a further 140 Indians were brought into treaty upon the recommendation of inspector Conroy and in 1930 the Métis from the Fort Resolution in 1930 joined in the Treaty. (Madill, 2009, pp. 31,57) Even after all this time and effort there were groups within the territory who because of their isolation or desire for independence continued with their traditional way of life outside of the Treaty. The situation of bands within the territory continuing to live outside of Treaty 8 received little attention until addressed by Indian Affairs in the 1950's and 1960's.

1.8 Summary

The Royal Proclamation of 1763 had entrenched a concept of Aboriginal rights with the Government. The full meaning of Aboriginal rights had not been fully defined by time of signing of Treaty 8; however, it was commonly held they, "prohibited private purchases of Indian lands, prevented colonial governments from issuing patents for unceded Indian lands, and required settlers to remove themselves from such lands". (Reynolds, 2005) The Government, with the help of the North West Mounted Police and the missionaries of the north, was successful in bringing the hard pressed Indian and Métis inhabitants of the Peace River and Athabasca Districts under the umbrella of a treaty agreement. It had set out, in the "Indian Promises" and "Government Obligations" components of the treaty process a mandate, to "extinguish Aboriginal title before resource development and the desire to keep the peace in the Athabasca and Peace River districts." (Irwin, 2000, p. 31) This scope was included in the wording put forward by the Government in the text of the pre-drafted treaty document. It is argued, based on a review of events surrounding the treaty making process, that key amendments outside of these terms of reference were

agreed to orally by the Treaty Commissioners and not fully captured in the finalized treaty document. "There is considerable evidence that many things were said and promised in the treaty talks ... never made it into the printed text." (Miller, 2000, pp. 216-217) In addition, many of the Treaty 8 terms, as with the earlier treaties, were not interpreted in the same way by the Indians, Métis and Government officials. René Fumoleau completed extensive research on this topic in his book *As Long As This Land Shall Last*. His work provides a compelling argument that from the outset there was a non alignment between the Indian and federal government understanding of commitments being made by each of the parties who signed Treaty 8.

> The Treaty was seen by the Indians as a friendship pact, which would permit peaceful settlement of the country; land surrender or relinquishment of title were not issues for them. However, there were certain basic assurances which they wanted from the Government: freedom to hunt, trap, fish, and move freely. When promises were given that these would be protected, the Indians accepted government assistance, satisfied that their livelihood and that of their children would not be endangered. (Fumoleau, 1973, p. 100)

The First Nations looked at the intent of the finalized document and spirit of the agreement as more than a commercial exchange of land in return for promises of money and a list of social services. "It seems clear that Treaty 8 would not have been signed if the Indians had not been assured that their traditional economy and freedom of movement would be guaranteed." (Madill, 2009, p. 49)

The "Government did not make it entirely clear that by taking treaty First Nations people would become subject to the Indian Act, and the agenda of civilization". (Irwin, 2000, p. 2) Reputable oral accounts affirm that First Nation leaders throughout all of the

negotiations were consistent in seeking assurances that they and future Indian generations would not lose their right to the land or way of life. It was their belief Treaty 8 Indian families would share in similar government benefits they understood were now being provided to the Prairie Indians and non-native settlers. In return Treaty 8 First Nations would allow outsiders to share their traditional territory and agree to live in peace with those who would settle in the region. The oral treaty promises made by the Treaty Commissioners satisfied their two conditions precedent. They would not lose access to their land and would be able to maintain their way of life. Canadian historian David Hall concluded:

> The probability that promises were made to the Indians, which they remember and the Whites have forgotten, seem strong. Part of the problem arose from the fact that the negotiators for the government usually attended the meetings with the Indians with draft treaties already in prepared. (Hall, 1983, p. 16)

In the end the Indian Leaders relied heavily upon the recommendation from the missionaries and North-west Mounted Police to sign the treaty and trusted the explanation given to them by the Commissioners. The well known First Nation Chief and politician Elijah Harper while serving as the Member of Parliament for Churchill provided his perspective on the topic of First Nation understanding of treaties while testifying before the Parliamentary Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources:

> Of course, when Canada's officials signed the treaty, they may not have understood or appreciated the aboriginal people, our way of thinking, our culture and our values. They may have recorded the goings-on of the treaty process according to their own understanding. (Standing

> Committee on Aboriginal Affairs and Northern Development,1996)

The possibility of future challenges covering issues of provincial jurisdiction, land ownership, interests in resources and minerals, timber rights or water rights were concepts completely foreign to the Indian leaders involved in the Treaty discussions. Again David Hall has written that these issues were not top of mind for those representing the Crown in the treaty discussions:

> Laird was not being dishonest. He could not foresee, for instance, that the province of Alberta would be formed in 1905, with boundaries extending to the 60th parallel of latitude, thus including much of the land covered by Treaty 8. (Hall, 1983, p. 17)

Unfortunately neither party envisaged future points of contention that would require interpretation of written and oral accounts of the treaty terms. Without an agreed upon remedy process it would prove difficult to deal with these disagreements and to resolve issues that were never contemplated by those who where party to the 1899 signing ceremony. This has resulted in endless rounds of debate attempting to define the obligations of the treaty agreement and the intent of the pronouncements made by the Crown covering Aboriginal rights.

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Chapter Two: The New Jurisdiction in Treaty Territory

2.1 Introduction

René Fumoleau in his book, *As Long As This Land Shall Last*, concludes there were four main themes that are core to an understanding of Treaty 8. The first was the federal government's objective to secure control over the resource wealth of the region. The treaty would empower government and its officials with the necessary authority to deal with related issues attached to the anticipated influx of "settlers and exploiters" who were likely to be attracted to the reports of resource wealth in the region. The second was for government to align its Treaty 8 approach with the established treaty making process that recognized Aboriginal rights "rooted in British legalism". The objective here was to reach agreement with the Aboriginals to insure peace throughout the region and to also extinguish the Aboriginal cloud on title over this northern territory. The third consideration covers each parties understanding of the discussions that took place during the treaty negotiating process and the interpretation of the clauses in the signed treaty. This centres around the assertions that the "cessation of land, extinguishing of title or monetary settlement of aboriginal rights [were] not explained to the chiefs who signed the Treaty." The fourth point centres on the oral accounts detailing the willingness of chiefs to sign the treaty only after being promised by the Treaty Commissioners that the Government would insure their "traditional way of life" and their "freedom to hunt, trap and fish" would be preserved. (Fumoleau, 1973, p. 306)

The federal government perspective on the treaty is captured in excerpts included below from Department of Indian Affairs June 30, 1899 Annual report:

> Although there was no immediate prospect of any such invasion by settlement as threatened the fertile belt in Manitoba and the North-west Territories and dictated the formation of treaties with the original owners of the soil, none the less occasional squatters had found their way at any rate into the Peace River district.
>
> While under ordinary circumstances the prospect of any considerable influx might have remained indefinitely remote, the discovery of gold in the Klondike region quickly changed the aspect of the situation... for the Indian character is such that, if suspicion or distrust be once aroused, the task of eradication is extremely difficult.
>
> For these reasons it was considered that the time was ripe for entering into treaty relations with the Indians of the district, and so setting at rest the feeling of uneasiness which was beginning to take hold of them, and laying the foundation for permanent friendly and profitable relations between the races (Indian Affairs Annual Report June 30, 1899, 2004, p. xviii)

This chapter will review approximately the first fifty years of Treaty 8. It is argued throughout that there was a basic misunderstanding from the outset on the intent of several of these key themes surrounding the Treaty 8 making process covering "Indian Promises" and "Government Obligations." It is also put forward that the Treaty 8 Commissioners had gained the confidence of the chiefs and it was because of this that they trusted the promises made by the Commission team. The 1899 Annual Report of the Department of Indian Affairs cited above puts on record government officials understood that discussions with Aboriginals could only be undertaken if there was "confidence at the outset" and negotiations free of "suspicion or distrust". Chapter two will look within this context at the first 50 years of Treaty 8. It will examine if Government honoured the Crown's commitments and treaty terms as Treaty 8 First Nations were fit into Canada and then the Province of Alberta. It argues that during this period, government policy was

focused on regulation and assimilation and little was done to address the misunderstanding surrounding treaty commitments. It was a period marked by government policies that relied on regulation in an attempt to limit its direct obligations within Treaty 8. In so doing, the federal government of this era was much more aligned with the interests of the non-Aboriginal stakeholders within Treaty 8. One such outcome is seen in the process followed whereby Alberta became a province and gained control over its Provincial Crown lands and natural resources. A case is made that the federal government, in negotiating these new provincial arrangements, gave little consideration to the interests of Treaty 8 First Nations. It concludes by arguing there was no mechanism within the treaty document, or interest on the part of Government, to establish a protocol to facilitate an equitable and timely process to remedy disputes between stakeholders in Treaty 8.

2.2 Environment leading up to Western Canada

A large portion of the Treaty 8 territory had formed part of the 1870 agreement that saw Rupert's Land and the North-Western Territory transferred by the HBC to the Government of Canada. The transfer of this land along with powers granted under the *British North American Act* of 1871 positioned Canada to introduce a new governance and legislative model in the west. The Government from this point forward was positioned with the authority to accord regions provincial status, with similar powers as had been extended to regions in Eastern Canada. The Parliament of Canada was empowered under this Act to,

> establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of

> such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order and good government of such province, and for its representation in the said Parliament. (British North American Act, 1871)

In addition by way of section 5, the *Act* confirmed the validity of both the *Manitoba Act* of 1870, establishing that Province, and the *Act for the Temporary Government of Rupert's Land and the North-Western Territory* of 1869. Treaty 8 members living outside of British Columbia, which had became a Province in 1871, fell within the region of the Dominion known as the North-West Territories. The *North-West Territories Act* of 1875, *Adjacent Territories Order* of 1880, and the *Constitution Acts* of 1871 and 1886, had put in place legislation establishing the institutions that provided for the government and administration of the Territories. (Maton, W F., 2001) The North-West Territories of 1889 was organized by way of an elected Legislative Assembly, four seats in the House of Commons and two seats in the Senate within the Government of Canada. (Canadian Confederation, Northwest Territories, 2005) Its elected Legislative Assembly held power to pass legislation, in the form of ordinances, to provide for the day to day government of the territory. A review of these North-West Territories ordinances for the period 1870-1899 shows few legislative initiatives dealing with the Indian population. In the main these ordinances dealt with issues relating to taxation, hunting and liquor laws. The Territorial government of the time was diligent in its legislation to insure ordinances were drawn to respect both treaty rights and the Dominion Government's jurisdiction. The issue of natural resources and reserve lands were recognized by the Territorial Government as falling within the domain of the Government of Canada. The following

ordinances provide insight into how treaty rights for Indians were recognized and written into law;

> Chapter 70, Part 111, Section 121(2) Page 582 The following shall be exempted from taxation; (subsection 2) all property held by or in trust for the use of any tribe of Indians or the property of the Indian Department.
>
> Chapter 75, Section 132(2) Page 717 All real and personal property situated within the limits of any school districts or income derived by any person resident within the limits of such district within the limits of such district and livestock which is within the limits of a school district for a portion of the twelve months prior to the assessment shall be liable to taxation subject to the following provisions and exemptions. ....All property held by or in trust for the use of any tribe of Indians or the property of the Indian Department.
>
> Chapter 85, Section 20, Section 22 Pages 810-811 No person who is not a resident of the Territories shall hunt, take or kill any of the aforesaid animals or birds unless he has obtained a licence therefor which licence may be issued by the commissioner of agriculture for payment to him of a fee of $15.00. Subsection (22) this ordinance shall only apply to such Indians as it is specially made applicable to in pursuance and by virtue of the powers vested by section 133 of the Indian Act. (Proclamation bringing the Consolidated Ordinances 1898 into force)

The Government of Canada was forced to switch its focus, in the immediate years following the signing of Treaty 8, and deal with the emerging provincial aspirations being put forward by the representatives of the North West Territories. The federal government had leveraged the treaty process to build out policy and a bureaucracy to reinforce its exclusive legislative authority to deal with Indians and the economic development of the Territories. Section 91(24) of the 1867 *British North American Act (* BNA) was clear in its wording and intent that the Government of Canada was to have exclusive jurisdiction,

" over Indians, and Lands reserved for the Indians." (*British North American Act*, 1871) A well entrenched bureaucracy was in place with authority vested in the department under the umbrella of legislation in the *Indian Act*. The combined Ministry, in the immediate years leading up to the region gaining provincial status, was to leverage its virtual control over Indian affairs and the prairies to implement government policy that would benefit the economic well being of the Dominion.

> The main economic consideration, indeed the very root of the agitation for provincial status, was the claim that the public domain in the Territories was "employed for purely Federal purposes". The public lands were enormous in their extent and constituted by far the most "visible" form of "property" in the Territories. The four provisional districts, organized in the North West Territories in 1882--Assiniboia, Saskatchewan, Alberta, and Athabasca--covered a land area of 536,806 square miles or 848,555,840 acres. The first three, comprising the southern surveyed portion of the Territories and awaiting immediate settlement, possessed land area of 298,646 square miles or 187,988,440 acres. The Dominion Lands policy, as applied to this vast area created for the territorial government problems which it felt itself powerless to solve, as long as the North-west remained in its state of "tutelage" under the federal government. For years the Dominion government, through its free homestead, generousim migration, and lavish railway policies had given away millions of acres of the public domain in the Territories. Under the Dominion Lands Regulations, all surveyed, even numbered sections, excepting eight and twenty-six, were held for homestead. The odd-numbered sections were granted lavishly to colonization railroads, and by 1896, in the surveyed area, had almost wholly passed into the hands of Railway companies. (Lingard, 1940, p. 259)

The Minister of the Interior was headed by Clifford Sifton in the period following the signing of Treaty 8 and up to the Province of Alberta being established. Minister Sifton used his influence within government to bring focus on implementation of a

strategy to build out the railway lines, and bring an influx of new settlers to the west. The success of this policy was described in the writing of Cecil Lingard:

> "When Mr Sifton took over the Department in November 1896, the number of entries for the current department year detailed 21,716. In the year of his resignation from Cabinet, 1905, over 146,000 entered Canadian inland and ocean ports. The census of 1901 gave the Territories 165,555 souls, and four years later, when the Prime Minister was moving the first reading of Saskatchewan and Alberta bills, the estimated total [Canadian North-west] had risen to 417,956. (Lingard, 1940, p. 255)

In the immediate years following the 1899 signing the government representatives focused on bringing the isolated bands located throughout the remote region under the umbrella of Treaty 8. This was accomplished by having the isolated groups in this northern region sign on to the treaty by way of an adhesion. The operating practice was to allow these isolated individuals to sign on to the treaty upon the recommendation of the local Indian agent.

The way of life within the region began to change as more of the territory fell under the control of Indian Affairs and as settlers gained access to more of the former Indian Territory.

> In fulfilling its Treaty Eight obligations, the federal government had adopted a rather narrow view compared to that of the Indian. In the immediate post-treaty period, conflicts arising from Treaty Eight were experienced by the Indians and the federal government, and the limitations of the treaty became obvious as political, economic and social changes reached the north. (Madill, 1986, p. note 140)

Policies set by the Minister of the Interior to deliver upon immigration often resulted in new issues for the Indian population. The attention given by the Minster of the Interior within this portfolio to accelerate the migration to the west exceeded the investment the

Government was making in developing an administration to deal with the interests of bands in the Treaty 8 region. The Minister did not follow up with any immediate infrastructure investment in the Treaty 8 territory to provide Indian leaders with easy access to government officials to deal with the emerging treaty and settler issues. It was not until 1908 that the federal government set up a full time administration agency headquartered at Lesser Slave Lake to serve Treaty 8 adhesions. A further appointment of Indian agents would follow in 1911 to service Fort Smith and Fort Simpson. (Madill, 1986, p. note 163) The administration within the Minister of the Interior was challenged to effectively deal with the issues emerging from settlers coming to the traditional Indian area. In addition Indian agents were being called upon by inhabitants to administer and interpret treaty terms throughout this vast region. The relationship between Aboriginals and settlers was further complicated by the difficulty and delays in surveying the vast territory covered under Treaty 8. This was not new to the Minister of the Interior, as this same issue had been encountered in administering each of the earlier numbered treaties. The result was that government departments with accountability for the Treaty 8 did not have the resources to establish and administer a clear policy, to deal with conflicts arising between settler interests and bands exercising their rightful selection of reserve lands.

> Generally, the Indian Affairs agents and administrators supported Indian rights, while those of the settlers were represented by the Department of the Interior. In some cases, however, the main concern of the Indian Affairs administrators was to reduce survey expenses, and this led to a policy of discouraging Indians from choosing land in severalty. Several families, nevertheless, took advantage of the provision for lands in severalty, and several bands split their land entitlement into many smaller reserves, with the result that the reserves of Treaty Eight are larger in number

> but smaller in size than the reserves in the rest of Alberta.
> (Madill, 1986, p. note 173)

The territorial politicians who lead the push for provincial status steered clear of engaging the Indian population of the region in any discussion covering provincial autonomy. It was accepted by the western leaders that administration of the affairs of the Indian population, as defined under the *Constitution*, fell totally within the domain of the Crown. The unresolved differences between the federal government and the Indian population covering the treaty terms, treaty interpretation, and outstanding reserve allocations had created outstanding contingent obligations that were owned by the Federal Crown. Those involved in negotiating the future new western provinces failed to address and quantify treaty issues as part of their due diligence. They did not size the contingent financial obligations faced by the Crown to resolve the outstanding issues attached to the written terms and oral commitments that remained outstanding with the western First Nations. Nor was there any attempt throughout these negotiations to define a remedy process that could be used to bring closure to the unfulfilled treaty promises between Aboriginals and the Government.

The redefining of the Northwest Territories resulted in the creation of the Provinces of Alberta and Saskatchewan in 1905. The new provincial jurisdictions were enacted into law without consulting or involving the Prairie First Nations. In so doing it empowered the new governments of Western Canada with legislative power. This was finalized only a short time after the Crown had recognized and dealt with Treaty 8 and other Aboriginal communities in the treaty negotiations as "Nations". The Government

throughout all of the numbered treaty negotiations had recognized the Aboriginal inhabitants of these traditional Indian lands as the original and legal occupants of the territory that was now being taken up to form the new Western Provinces.

2.3 Pre Province of Alberta Environment

Under the terms of section 109 of the 1867 British North America Act the original provinces within the Dominion were granted control over their resources and public lands.

> All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province (British North American Act, 1871)

This framework covering provincial jurisdiction was not followed in 1870 when the Province of Manitoba was established. Manitoba unlike the provinces already within the federation was denied equal jurisdiction over these two areas. Legislation establishing both the Province of Alberta and Saskatchewan was drawn to align with the precedent set under the *Manitoba Act*. The *Alberta Act* of 1905, proclaiming Alberta a province, set out in Section (3) the ongoing provisions of *the British North American Act of 1867(BNA)*; defined in Section (17) conditions attached to separate schools; and in sections (20 & 21) prescribed that control over the public domain and natural resources would remain with the federal government. (Owram, 1979, pp. 342-347) In view of these caveats the outstanding Treaty 8 issues within the new Province of Alberta remained at first glance within the jurisdiction of the federal government. This was set in a period where the

federal bureaucracy was becoming accustomed to having much more of a free hand in dealing with the Prairie First Nations. Government began to pursue a policy direction built around its in house interpretation that the *BNA Act* gave it a wider scope to deal with Indian affairs.

> The treaty right to hunt was often viewed by the state officials as not having the strength of law. This occurred over time and, according to Bennett McCardle, during the 1880s, the federal government based their definition of Indian hunting rights on the treaties, while in the 1890s their view of hunting rights changed to their general power over Indian under *s.91 (24) of the BNA Act.* ...Thus from 1908 to 1912,"the control of Indian hunting practices moved gradually into provincial hands. (Calliou, 2000, p. 177)

This resulted in Parliament passing numerous amendments to the *Indian Act.* Each of the amendments resulted in the Department of Indian Affairs being empowered with more authority and control over the affairs of First Nation communities.

"The historical circumstances of Treaty 8 make clear that First Nations in the area were promised they could continue their way of life, and that they would not be forced to live on reserves." A review of the records surrounding the Treaty 8 negotiations confirms "economic self-sufficiency was an underlying objective of both the Crown and Aboriginal signatories". (Bell & Buss, 2000, pp. 689-690) This spirit of the agreement is also captured in the Elders' accounts of those present at the Treaty 8 signing. However, the oral promises which covered much of the agreed upon treaty terms were not well documented in the final text and do not appear to have been fully understood by those who would assume power within the new provincial jurisdiction. Those new to running the Province of Alberta would have observed the federal government extending its

authority over Indian policy, using its interpretation of the *BNA Act*, which could be interpreted that there was an opinion being formed that treaty terms were subordinate to the *Act*. It does not appear from the dialogue that shaped the formation of the province there was consideration given to the Crown's embedded fiduciary obligations in the terms of the written and oral promises of Treaty 8.

> The fiduciary obligation of the Crown must also be considered when interpreting the treaty and recognizing individual and collective rights. The obligation of the Crown attaches to both reserve land and to promises made under treaty. The inalienable nature of reserve land requires that the Crown act in a way that preserves and protects the [Treaty 8] Aboriginal land base. (Bell & Buss, 2000, p. 686)

It was within this environment that the Province of Alberta exercised its provincial authority to introduce new regulations that would affect all of its residents including Aboriginals living on and off reserves within the province. It had only been six years between the signing of Treaty 8 and the incorporation of the Province of Alberta. In this short interval there had been little change throughout the remote territory, and with the Aboriginal way of life within the Treaty 8 region. There remained a number of Aboriginal families, in the more remote northern regions of Alberta, who had not as of this date even signed on to the treaty agreement. To a large extent many of the Treaty 8 Aboriginal communities did not have an understanding of the unfolding events that were taking place in the new Province of Alberta. There also was no process put in place by the Federal Government to serve its trust like fiduciary role to vet the impact proposed provincial legislation could have on the rights and interests of the Alberta Indian population. This in hindsight was a key fault in the architecture of the plan designed to

grant provincial status with legislative authority to both the Province of Alberta and Saskatchewan. The Aboriginal community was shut out of the vigorous political debate that was part of the early history of the Province of Alberta. The immediate outcome was to add to the inventory of unresolved Indian issues via the introduction of additional complexities as a result of this new provincial jurisdiction and its legislative power. The Government of Canada did not have a plan to resolve the core Aboriginal issues, nor did it have sufficient representatives in place throughout the north to deal first hand with the community issues. Without a meaningful debate on the underlying terms of the treaty there was a high likelihood the future legislative authority granted to the Province of Alberta would infringe upon the Aboriginal and property rights of the Alberta Treaty 8 Indians. There was no common understanding in place between the First Nations and each level of government covering "Indian Promises" and "Government Commitments". The original inhabitants of western Canada had been excluded from the discussions which led up to this historic decision which reshaped Canada.

2.4 Post Province of Alberta environment

In 1909 the Canadian Society of Equity joined with the Alberta Farmers' Association to form the United Farmers of Alberta (UFA). The political leaders of this movement and its political platform would have a major influence on the development of Alberta and the west. In its initial years the UFA was a farmer's organization, with no political party affiliation, with a set objective of only influencing policies that affected their farm members. Author and University Professor Bradford Rennie, in his book *The Rise of Agrarian Democracy The United Farmers and Farm Women of Alberta 1909-*

1921, describes that the "Alberta farmers [of this era] were quick to exhibit negative attitudes towards Amerindians". Author Rennie further concludes, "Indians were therefore never part of a UFA/UFWA community". (Rennie, 2000, pp. 89-91)

In 1919 the UFA changed focus and in short order leveraged its well organized grass roots movement to win an elected majority in the 1921 Alberta provincial election. It would hold power within the province to 1935. First under Premier Herbert Greenfield (1921 to 1925) and then under Premier John Brownlee (1925-1934). In this period the UFA controlled the provincial legislature and fielded candidates on the federal front where it was successful in having the UFA party hold the majority of Alberta elected officials in the Parliament of Canada.

In 1921 the UFA came forward with a "Declaration of Principles" document which detailed a twelve point "Reconstructive Legislative Program". This platform made no mention of any policy direction covering the provinces Aboriginal population. However it clearly expressed in point (11) of the document its aspirations to gain control over the Province's natural resources.

> (11) Natural Resources: We stand for the immediate handing over of the natural resources by the Dominion to the province of Alberta and the conservation and development of these for the benefit of the people. (United Farmers of Alberta, 1921, p. 3)

The early Alberta government policy, and the further shaping of the agenda in the province by the upstart UFA organization, was framed around the concept that the obligation to consult with the Aboriginal population was vested with the Federal Crown. Throughout the period 1913 to 1932 Duncan Campbell Scott held the position of Deputy Superintendent General of Indian Affairs. His tenure was marked by a period of

administrative and legislative initiatives to further empower bureaucrats to press ahead with two long held Government of Canada major policy initiatives. "One was the extinguishment of Indian title to land, which had developed into the treaty system. The second was the administration of Indians and Indian reserve lands, which was governed by the *Indian Act.*" (Taylor, 1984, p. 5)

The Indian Affairs portfolio was clearly staked out by the Government of Canada as being a national issue under its control. The policy intent was for eventual full enfranchisement of the Indian population and their full integration into the main stream of society. In a Commons committee addressing a 1920 amendment bill to the *Indian Act* Deputy Superintendent General Scott provided the following insight into the government's approach;

> Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill (amendment to the Indian Act) (Taylor, 1984, p. 204)

The federal government throughout this time period frequently used its legislative prerogative to amend the *Indian Act.* This legislative mechanism was called upon to extend further authority to government bureaucrats so they could operationalize policies to deal with the emerging Indian issues attached to the settlement of the west. The overall result was for the amendments to concentrate even more power in the Department of Indian Affairs. The department bureaucrats used the authority granted under these amendments to change the traditional ways of band self government. The department also was vested with authority to prohibit cultural practices and implement economic

initiatives to often appease the two levels of governments, corporate interests or the new settlers of the west. The far reach of the Indian Act amendments included:

> 1885: Prohibition of several traditional Aboriginal ceremonies, such as potlatches.
>
> 1894: Removal of band control over non-Aboriginals living on reserves. This power was transferred to the Superintendent General of Indian Affairs.
>
> 1905: Power to remove Aboriginal peoples from reserves near towns with more than 8,000 people.
>
> 1911: Power to expropriate portions of reserves for roads, railways and other public works, as well as to move an entire reserve away from a municipality if it was deemed expedient.
>
> 1914: Requirement that western Aboriginals seek official permission before appearing in Aboriginal "costume" in any public dance, show, exhibition, stampede or pageant.
>
> 1918: Power to lease out uncultivated reserve lands to non-Aboriginals if the new leaseholder would use it for farming or pasture.
>
> 1927: Prohibition of anyone (Aboriginal or otherwise) from soliciting funds for Aboriginal legal claims without special licence from the Superintendent General. This amendment granted the government control over the ability of Aboriginals to pursue land claims.
>
> 1930: Prohibition of pool hall owners from allowing entrance of an Aboriginal who "by inordinate frequenting of a pool room either on or off an Indian reserve misspends or wastes his time or means to the detriment of himself, his family or household." (Makarenko, J., 2008)

Throughout the period following the First World War the Government of Canada was faced with emerging domestic issues. The western provinces were demanding equal status with the other provinces in the Dominion in particular with respect to gaining control over natural resources. In addition, there was "awareness among Indians of the

possibilities of associations, particularly in western Canada". (Taylor, 1984, p. 169) This was manifest in the form of an increase in Indian political associations which began to focus on defining Aboriginal rights. The common interest of these Aboriginal organizations began to have a sphere of interest that went beyond neighbouring Indian bands. In addition there was growing pressure from Indian bands in British Columbia who were pressing for a remedy to resolve the long outstanding land claims issues within their region. Associations such as, the 1916 Allied Tribes of British Columbia, and 1931 Native Brotherhood of British Columbia, organized to represent the interests of more than one band to deal with government. There was also an attempt made by F.O. Loft, a returning World War One Indian soldier from Six Nations on the Grand River in Ontario, to organize a national Indian movement. At the height of its organizing activities this league attracted over 1500 Prairie Indians to its 1922 conference held at the Samson Reserve in Hobbema, Alberta. The Ontario arm of the organization was wound down in 1924; however, it continued to have a western presence and in 1939 became the Indian Association of Alberta. (Taylor, 1984, pp. 166-168)The efforts of these organizations and in particular the leadership of F.O. Loft was strongly opposed by Deputy Superintendent Scott. The existing *Indian Act* did not provide the Department of Indian Affairs and the Indian Superintendent with legislated authority to deal with these emerging grass roots challenges being brought forward by the new associations. Rather than opening the door for meaningful dialogue to address the underlying issues, Superintendent General Scott again persuaded the Government of the need to amend the *Indian Act*. The March 31, 1927 amendment to the *Indian Act* (Section 149A), drafted and sponsored by Scott to legislators, further restricted Indians and their ability to mount

an organized affront to challenge the Government. Once again legislation was used as the vehicle to amend the *Indian Act* and to vest additional authority within the Department of Indian Affairs. The result was for the Department to have the authority to prohibit band members from engaging representatives, or allowing members to raise funds to pursue claims against the Government without first getting the consent of the Superintendent-General of Indian Affairs. This is reflected in the terse wording of the 1927 amendment to the *Indian Act:*

> Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months. (*An Act to amend the Indian, 1927*)

This amendment would remain in the *Indian Act* until 1951. (*An Act respecting Indians, (1951)*)

The federal government's World War I policies had further impact on the First Nations within the western provinces. The Greater Production program was one such war effort policy. In May 1918 the *Indian Act* was again amended to provide Duncan Scott, the Deputy Superintendent General of Indian Affairs, with full authority to use band funds and reserve land to increase crop production. (*An Act to amend the Indian Act, 1918*) The policy objective was to add to the nation's food production by increasing crop

acreage using the uncultivated agriculture land located on reserve lands throughout Western Canada. (Taylor, 1984, pp. 15-19) A second policy initiative was the approval of federal legislation to provide returning soldiers with the option of accessing funding to assist with the purchase of land upon which to settle and start a farming operation. To facilitate this policy the Government of Canada required agricultural land which it could offer to the returning war veterans. In total some 68,000 acres of reserve land would be taken up under this program within the Prairie Provinces to accommodate this soldier settlement program. (Taylor, 1984, p. 31) There was no evidence of there being any tension resulting from all these initiatives in the annual reports being filed each year by the Superintendent General of Indian Affairs. In the report for the year ended March 31st, 1927 the Superintendent General provides a glowing report on the success of government policies:

> Remarkable progress has been made during the last half century by the Indians of the plains. After the disappearance of the buffalo in 1878, it was necessary for the "Government to issue rations of beef, flour, and so on, to support the Indians who had lost their native food supply. Treaties were entered into with these Indians whereby the native title was extinguished throughout the territory now covered by the provinces of Manitoba, Saskatchewan, Alberta, the Northwest Territories, and also certain parts of northwest Ontario. In consideration of this cession, ample reserves were set aside for the Indians; annual cash payments provided and assistance given for the promotion of agriculture, stock-rising, and other pursuits. In addition to this, the Government undertook the education of their children as in other parts of the Dominion. The treaties have been fulfilled and the Government has in fact gone far beyond their terms in its efforts to care for the Indians and advance their welfare. As a result the aborigines of the Prairie Provinces are now self-supporting, save for cases of destitution such as are to be found in any

> community. (Indian Affairs Annual Report March 31, 1927, 2004, p. 9)

2.5 The Province of Alberta's control over natural resources

The euphoria of having gained provincial status soon passed within Alberta and the general mood turned to frustration. This was fuelled by claims from the leaders of the western provinces that the new jurisdictions which they represented were not being treated as equal partners within the federation. This feeling of alienation became a rallying point within the membership of the UFA party. The result was for the UFA to set its policy direction to press the federal government for control over the Province of Alberta's natural resources. The UFA member policy proposals formed the ground work for the future new government within the Province. The grass root movement included input from a women's auxiliary which had been formed in 1914. This wing quickly gained a strong voice in shaping the direction of UFA policy. The February 1st 1930 edition of the *U.F.A.* newspaper carried the full text of its Presidents address to the 1930 UFA Convention in an article titled, "President of the United Farm Women of Alberta Surveys Activities of Past Year." Mrs. Warr, in her speech at the convention, provided a recap of the fifteen years of progress that had been made by the UFA. She also spoke of a "new social order" that would be required to move the province forward within Canadian Federation. This UFA address completely omitted any reference to the history and role to be played by the Aboriginal population within the Province. The auxiliary was passionate in its support of the government's objective to gain control over natural resources and to influence government policy to invest in the youth of the Province of

Alberta. Mrs Warr address to the UFA Convention included the following comments on these topics:

> A demonstration of this efficient service was recently given in the successful conclusion of the negotiations for the return of the Natural Resources to this Province, which have been carried on since 1905. In the triumphant return of Premier Brownlee from Ottawa with Alberta's Natural Resources, subject only to the ratification of Parliament and the Legislative Assembly, one is reminded of an ancient Greek myth-for like Jason of old, Mr Brownlee refused to be dismayed by the repeated failure of his predecessors in their endeavour to obtain this "Golden Fleece." Was it because he is the chosen leader of a Farmer Government that he was able to plow the ground of progress and sow the dragon's teeth, Provincial Aspirations, from which sprang so unexpectedly the army Procrastination. Undaunted, this modern Jason cast forth the rock of Good-Will, which filled the vast host with confusion and surprise and finally resulted in the destruction of the entire army. Nothing now stood between him and the object of his desire but the drags, Dominion Jurisdiction which guarded the prize; and so guided by the voice of Wisdom as figure head to his ship of state; and accompanied by never-failing Courtesy and Courage-this Jason of today, of whose political leadership the U.F.A. is justly proud, returned in well triumph with the "Golden Fleece," Alberta's Natural Resources, the value of which is inestimable to the people of this Province. (Warr, 1930, pp. 16-17)

The political debate in the formative years of the Province of Alberta had to a large extent been shaped by the UFA who in turn set the agenda. Their priority was to insure the Province of Alberta gained control over government land holdings and natural resources then held by the Government of Canada. In the lead up to the 1930 Alberta Provincial Election the June 2nd 1930 Supplement of the *U.F.A.* newspaper provided a recap of the discussions between the two levels of government and the varying proposals that had been tabled leading up to the final legislation.

> February 20th, 1923, the Dominion Government offered to transfer to the Province its natural resources on condition that the Province should surrender the subsidy paid in lieu of lands.
>
> Between 1922 and 1926, negotiations took place resulting in an agreement which, however, did not become effective, providing that the Province should get its unalienated lands excepting national parks, and to continue the present subsidy of $562,500 per year for all time, but without the increases in subsidy provided under the Alberta Act.
>
> On December 29th, 1928, the Prime Minister offered to transfer to the Province its resources in their entirety, with the exception of national parks, and to continue to present subsidy, in lieu of lands, of $562,500 per year for all time, but without the increases in subsidy provided under the Alberta Act.
>
> On October 5th, 1929, the previous offer was amended to provide that the subsidy in lieu of lands should be continued for all time, including all increases of this subsidy according to population until a maximum of $1,125,000 is paid when the population reaches 1,000,000. (*U.F.A.*, 1930, p. 3)

There is no record of Aboriginal leaders being included in this lengthy negotiation process. The powerful UFA movement and western politicians failed to see need to fully assess how the proposed legislation would affect treaty rights or other Aboriginal issues. The result of this lengthy period of discussion between the federal government and the western provincial governments was legislation whereby the provinces of Manitoba, Saskatchewan and Alberta gained the right to their public lands and natural resources. The legislation would accord equal constitutional status to the three Prairie Provinces by extending to them the same authority, defined in sections 109 and 117 of the *Constitution Act of 1867*, as was already held by the other provinces in the Dominion.

> In 1929 and 1930, the federal government signed the Natural Resources Transfer Agreements (NRTAs) with the three Prairie Provinces to give them ownership of natural resources and Crown lands, and the NRTAs were given constitutional effect by the Constitutional Act, 1930. (Isaac, 2004, p. 207)

The *Alberta Natural Resources Act* 1930 (NRTA) detailed the Alberta terms of the agreement reached with the Government of the Dominion of Canada. Each of the NRTA entered into by the respective provincial governments contained similar wording and a section within the document on Indian reserves. This Indian reserve section of the respective agreements reaffirmed the fiduciary obligations of the Government of Canada to on reserve Indians relating back to Section 91(24) of the *Constitution Act*, 1867. (The Constitution Act, 1867) In the Alberta agreement three paragraphs, 10 through 12 detailed the limitation upon provincial legislative authority with respect to Indians.

> 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 fulfil 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.
>
> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided

> however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access. (Alberta Natural Resources Act (1930, c.3), 2010)

The *NRTA* would have a significant impact on Treaty 8 along with members of the First Nations of other numbered western treaties. It allowed the Province of Alberta to restrict Treaty 8 band treaty rights with regard to hunting and fishing. The Crown initiative was in fact paramount to an amendment to the treaty terms;

> Although (section 12 above) was an important confirmation of the right to hunt and fish regardless of provincial game laws, it also constituted a diminution of what had been promised in treaties because the transfer agreements limited the exercise of the right to occasions when the Indians hunted or fished 'for food.' Moreover, the unilateral transfer to the provinces of jurisdiction over lands and resources constituted an amendment of the numbered treaties without the agreement of the other party to the pact, the First Nations. (Miller, 2000, p. 323)

The final *NRTA* agreement did not cite Treaty 8 or other numbered treaties as prior agreements nor did it acknowledge Aboriginal rights over traditional Indian territories. The omission further clouded title to the public land and resources located within the traditional Indian territory of the Alberta Treaty 8 region. The *NRTA*, in addition to creating these further contingencies, did not provide guidance on how to remedy jurisdictional issues that might arise between treaty rights and provincial legislative authority.

2.6 Summary

The introduction of a new government authority with influence over natural resources and Crown land covering the traditional territory of Alberta Aboriginals materially affected the underlying terms of Treaty 8. This milestone decision resulted in the Crown subrogating much of the federal government's sole jurisdiction and control over traditional Indian Territory. This agreement was concluded with a new government, without the consent of the Alberta Aboriginal people with whom the Crown had a earlier legal binding treaty covering this same territory. Throughout this time, Treaty 8 was administered by a federal government department and was expected to fall in line with the ever expanding prescribed regulations that were incorporated in the *Indian Act*. It was a period when the First Nations saw regulations, implemented by the new provincial jurisdiction within its traditional territory, infringe upon what Treaty 8 First Nations understood to be treaty promises that were put in place to protect their way of life.

> Even though First Nations had rights under treaty, provincial governments tended to view First Nations hunters hunting off reserves as any other hunter and therefore subject to provincial game laws. Provinces attempted to impose their game laws on treaty First Nations hunters. Yet, the Federal Department of Indian Affairs sought to protect the "Indians" treaty hunting rights at times. However since wildlife is a natural resource which provinces had jurisdiction over, the Department of Indian Affairs seemed apprehensive about exerting its authority to regulate Indian hunting. The Department of Indian Affairs was swayed by the arguments that provincial game laws ought to apply to "Indians" who hunted off reserve. (Calliou, 2000, p. 170)

In addition to this intrusive new provincial regulation the addition of the new jurisdiction created uncertainty around who owned accountability for the fiduciary obligations

entered into with the Crown's representatives in 1899. The leaders of Treaty 8 were left with; an inventory of unresolved treaty issues, concerns stemming from the new provincial legislative initiatives and now the *NRTA* legislation which increased the authority of the province within its Treaty 8 traditional region. In addition there was no mechanism, within the treaty agreement or the new agreements entered into between the federal and provincial governments, on how to challenge and remedy infringements upon either Treaty 8 Aboriginal or treaty rights.

It is argued that both levels of government looked to Treaty 8 First Nations to be compliant with legislation the jurisdictions saw need to introduce to satisfy the interests of other stakeholders in their traditional territory. Both the provincial and federal Crown during this period were inattentive to the written terms and spirit of the Treaty 8 promises.

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Chapter Three: Social and Economic Well Being

3.1 Introduction

In World War One more than 3500 Indians, all of whom were exempt from conscription, volunteered for duty. This represented some 35% of the entire Indian male population in Canada. (Taylor, 1984, p. 12) The native participation rate, while not as high, was again very significant in the Second World War. The impact of this war experience was for the Indian veterans to bring back to their reserves a much broader understanding of life outside a First Nation. Their input provided the traditional First Nation leaders with confidence to more openly question the government's policies. They also served as a catalyst to press for improvement in living conditions for on reserve band members. These returning native soldiers, as was the case after World War One, recognized there was more leverage in dealing with Aboriginal issues as part of a bigger association of like minded individuals versus one-off band actions.

The third chapter examines the beginning and evolution of a transition period where First Nations and Treaty 8 leaders became more assertive covering unresolved issues attached to Aboriginal and treaty rights. The historic review will show how they were able to make clear their longer term aspirations to open discussions on self-government and aboriginal rights. This period is marked by a shift in public sentiment with recognition on the part of concerned non-Aboriginal stakeholders who see need to address the living conditions within Treaty 8 and other First Nations. It also is a time when Indian leaders begin to articulate the values they saw in preserving their culture and pressed to have the Government deal with the long outstanding rights issues. This was a

period of quiet influence for Treaty 8 First Nations where much of the work on Aboriginal and treaty rights was shouldered by the southern Alberta First Nations. This chapter also reviews how the discussion on self-government can help to bring further clarity to Treaty 8. It concludes by answering two questions. Have Alberta First Nations honoured the "Indian Promises" made in Treaty 8? How have "Government Obligations" covering Aboriginal and treaty rights been defined and quantified?

3.2 Lobby for change to better the Indian way of life

Leaders of reserve communities began to express their concerns using the League of Indians of Canada, which had emerged as an organization in the 1920's. Its efforts focused on providing a forum to address concerns covering schooling, social services, reserve land allocation and impacts on Indian hunting, fishing and trapping rights. A review of correspondence between Indian Affairs and various Indian leaders during the inter war period provides an insight into work done by the League of Indians of Canada to raise the profile of these core reserve issues. The Chiefs, Councillors and members of various bands of Indians gathered at Saddle Lake in July 1931, for their annual League of Indians of Canada convention. The following motion passed at this convention included many of these concerns:

> Whereas the present Indian education system is found unsatisfactory to the majority of the Indians from the various reserves in the three western provinces and whereas, the majority of Indian parents object to sending their young children away from home until they have reached the age of fourteen....
>
> ...our desire that no further surrender of Indian reserve lands be given by Indians or asked for by the government.

> That should any work be available on Indian reserves, that said work be performed by Indians where possible, in order that Indians may be given an opportunity to earn any monies being expended within the boundaries of the various reserves.
>
> ...certain Indian Trust Funds have been used to pay for the services of Doctors, Farm Instructors and other like employees, be it resolved and it is hereby resolved that in any such cases the Indians be given the right to have any such employees removed from office should they prove unsatisfactory. (League of Indians of Canada, July, 1931)

Indian Leaders were frustrated by the lack of a forum that could accommodate meaningful dialogue with Government. One such example is seen in the text of a November 1934 letter, written by the Indian agent for Hobbema on behalf of Chief Joe Samson of the Samson Band, to the Secretary Department of Indian Affairs. The letter included an invitation to attend their next annual meeting, to open such a dialogue, and a request for twelve copies of the *Indian Act*. The Chief relayed to the government official that he, "finds many Indians do not know anything about it [*Indian Act*]". A. F. Mackenzie, the Secretary Department of Indian Affairs, in his December 6th reply declines the invitation to attend, and brushed aside the initiative to better educate band members in his response:

> I am sending you two copies of the Indian Act for use of the Chief. It is not considered necessary to make a wide distribution of the *Act*. Indians who wish to have information concerning any provision of the *Acts* should apply to their local Agent. (Palmer, November 24, 1934)

The efforts of Alberta First Nation leaders from within the Edmonton and Saddle Lake reserves served as the impetus that led to the establishment of a new organization from the remnants of the former League of Indians of Canada. It was from these roots that the

Indian Association of Alberta (IAA) was established in 1939, with an objective to focus on issues of interest to Alberta Indians.

> The impetus behind the IAA was based on the underlying contrast between living conditions of non-Indian and those of Indian peoples (both status and non-status) in the province. Focusing upon this contrast gave the IAA leadership an early mandate for action, and working with this contrast allowed it to express a vision of how life should be for the Indian peoples of Alberta. (Drees, 2002, p. 27)

The IAA came about also as a result of the past inability of previous Indian leaders to develop a working relationship with the government bureaucracy. These leaders and the previous Indian organizations had been unable to open avenues for meaningful dialogue with those who held authority within Indian Affairs.

> This new Indian Organization continued to challenge the arbitrary power of the Indian Affairs Branch (IAB), which administered Treaty Indians. As noted by one author "because the Indian was a ward of the state and did not have the franchise, there was little political input into Branch affairs. The IAB, run by ex-military men, was virtually immune from political monitoring and was in practice, accountable to no one." The forced isolation of the reserves created common grievances against the IAB and the Indian Act. Yet the isolation, and tribal differences, made it difficult for the Indians to unite. Their lack of political influence, and white indifference or racism, meant they had few outside allies to champion their cause. (Palmer & Palmer, 1990, p. 295)

Johnny Callilhoo its original President, an Alberta Cree Malcolm Morris, of the Alberta Métis Association and John Laurie, a non-native school teacher from Calgary who joined the IAA as its executive secretary in 1944, were the driving force behind this new organization. The efforts of these three activists' legitimized claims brought forward by the IAA. (Palmer & Palmer, 1990, p. 296) Secretary Laurie was successful in setting a

strategy that both developed a working relationship with politicians and bettered their understanding of on reserve living conditions. John Laurie focused much of his effort on working with non-native outsiders to establish organizations made up of people of influence that would support the IAA efforts. Two such organizations were, the Crescent Heights High School Home and School Association of Calgary, and the Edmonton based Friends of the Indians Society. The Calgary organization would focus its efforts on changes to improve education. The Edmonton Friends of the Indians Society went on to place its focus on pressing for changes to the *Indian Act*, and bringing attention to on reserve economic questions. The strategic direction pursued by these two outside organizations aligned with John Laurie's belief that the Indian population needed to be integrated into the main stream of Canadian society. The objective set by Secretary Laurie was to focus on reserve education and economic opportunities. The leaders of the Association believed that with a focus on these priorities the Alberta Indian population would come to better understand the non native way of life, and aspire to be full citizens of Canada. The IAA approach, as articulated by Secretary Laurie, was to make clear throughout this evolution that the Indian population was to keep its culture. It was also built around the premise of revising the *Indian Act* to give band members more say in reserve membership, and over day to day operation of the band affairs. The long term IAA goal was to make the band members productive citizens within Canada. This aligned with both the public sentiment of the time and the philosophy held by the elected federal government. The IAA agenda gained creditability and support as a result of its strategic alignment with outsiders. John Laurie did a masterful job in leveraging the influence of these individuals to gain the attention of elected officials and the Canadian public. The

result was for IAA leadership to gain political capital and public support to be in a position to better press the government for action on the long list of unresolved issues. These included; unsatisfactory reserve living conditions, better education, the delivery of health care to the native population, work opportunities for reserve members, band membership decisions and respect for hunting and fishing rights. The IAA efforts created a forum for Alberta Indian leaders to organize a combined affront on the federal government. (Drees, 2002, pp. 56-65) In so doing they got the attention of Government and opened the door to dialogue on Indian treaty rights. In May 1944 the IAA sent a lengthy petition to "His Majesty the King in the persons of the Ministers of the Government of Canada and the members of the House of Commons":

> (Page 1) ...Fifty-six accredited delegate representing 17 bands of Treaty Indians resident in the Province of Alberta met May 24, 25 to reaffirm certain resolutions passed at a meeting of March 20th and further to consider the position and needs of the Indian people. ... the delegates are of the opinion, that in presenting this Memorial, they are not only expressing the opinion of the 7,500 Indians represented by the delegates, but also are expressing the opinions of other groups of Indians in other provinces and of a considerable body of "white opinion".
>
> (Page 5)...Whereas the Treaty Indians of Canada are subject to the *Indian Act*, and whereas the said *Act* contains many sections which are contrary to principles laid down in the original treaties, be it resolved that the *Indian Act* be amended to conform with the rights granted the Indians of Canada by the original treaties. (Indian Association of Alberta, 1944)

This dialogue process with non-native outsiders introduced by John Laurie, Federal government officials and internal discussion among Alberta Indians served to better educate many more First Nation leaders on issues affecting their current way of life. The

informed Indian leaders began to better articulate the need for change to the *Indian Act* and question the Government on their treaty rights. In July 1945 Secretary Laurie put forward a more decisive petition representing the, "unified opinion of the Treaty Indians of this Province and 140 delegates representing 27 major bands." The formal request was for a Royal Commission to, "investigate the needs of Indians of Canada." The Government was challenged by the IAA to undertake a, "complete revision of the obsolete *Indian Act*". (Laurie, 1945) John Laurie and the non-native organizations that supported the IAA strategically steered away from becoming drawn into a debate on treaty or Aboriginal rights. Secretary Laurie held the following belief,

> ...treaty rights were too esoteric and that asserting them could lead to their degradation. Popular sentiment at the time supported the idea that treaties were not law and that, therefore, they could be ignored. (Drees, 2002, p. 65)

The focus of the IAA centered on bettering all aspects of on reserve life by changing the Act so Indian leaders would have more control over band affairs.

3.3 Political Action directed at challenging the *Indian Act*

The environment within Canada had changed. Unlike after World War One, the Government this time around did not take action to stop Indian veterans from pressing for change, nor thwart efforts of Indian Associations to press for political action. (Dickason, 2002, pp. 310-311) The end of the Second World War also saw a global shift in attitudes towards minorities. Historian and author J.R. Millar provided a perspective on the reasons for the change in the national mood:

> A war against Germany and Japan, countries in which racism had been institutionalized, served to remind thoughtful Canadians that the basis of their own Indian policy was inherently racist. Moreover, there was a general

> feeling at war's end that a brave new age was dawning in which human rights would be much more important than they had been earlier. (Miller J. R., 2009, p. 247)

In 1946 the Minister of Mines and Resources put forward a motion proposing a Committee be drawn from members of both the House of Commons and Senate, with the specific purpose of reviewing the *Indian Act*. The Department of Indian Affairs, which had been reassigned to this Ministry, sought the full involvement of the IAA. This Government decision further entrenched the profile of the IAA, as a leading Indian organization in Canada. The message from the President of the IAA to the directors and delegates at their 1945 seventh general meeting detailed the high expectations for the organization;

> This is the most important year in the history of Alberta Treaty Indians since the years of 1876 and 1877 when treaties were signed. This year Indians all over Canada and Friendly groups are meeting the Parliamentary Committee to discuss Indian Affairs. From these discussions will come the revised Indian Act and we hope it will be a New Deal for the Treaty Indian of Canada. I am very proud to say that the Indian Association has been the first Indian Association to appeal to the House of Commons in Ottawa for a new Indian Act. Other groups of Indian and groups of friendly whites have helped but this Association was the first of all the Indian groups to ask for this. (President Indian Association of Alberta, 1946)

Secretary Laurie surveyed the IAA membership and with the help of the sympathetic non Indian outsiders put forward a detailed submission to Ottawa. The submission focused on three priorities, "the concept of treaty rights, gaining social benefits for Indian peoples, and the shortcomings of the *Indian Act*." (Drees, 2002, p. 118) It took over two years before the Liberal government introduced legislation to the House of Commons to deal with the Special Joint Commission report. Unfortunately the recommendations of the

Commission and the proposed Bill 267 did not align with the recommendations of the IAA. The IAA was quick to react by way of an August 1950 letter to the Honourable W.E. Harris, Minister of Citizenship and Immigration. The letter notified the Minister that a consensus had been reached at their August 24 and 25 meeting attended by seventy-three chiefs, councillors and band members representing 9000 treaty Indians of Alberta. The IAA members outright rejected the proposed Bill 267 and clearly articulated the frustration festering within the Alberta Indian population. The Association in its letter accused the government of stereotyping Indians:

> The bill admits the existence of only two grades of Indians- the incapable old-fashioned Indian who, in mind and mode of life has made no real progress since the coming of the white man, and the Indian whom your government, in spite of all agreements and treaties of any kind at any time, proposes to catapult into the responsibilities of full citizenship. (Indian Association of Alberta, 1950)

The letter also called upon the government to insure that Indians have a say in day to day management of their affairs, and advised of their displeasure with the provincial jurisdictions in particular the Province of Alberta;

> The provisions of the Bill fail to provide that Hunting, Fishing and Trapping rights must be restored to the Indian as at the time of the Treaties or agreements. Every province, but especially Alberta, is constantly limiting these rights and, often by Order in Council, the representatives of the Province are legalized. This is contrary to all British precedent. (Indian Association of Alberta, 1950)

The strong opposition mounted by the IAA resulted in the Government withdrawing its Bill and agreeing to undertake further consultation with Indian leaders throughout Canada. The outcome of this further dialogue was a revised Bill 79 which was

endorsed by the IAA; however it did not have unanimous support within the Indian community across Canada. The IAA held the belief that the revised legislation was the most First Nations could expect from the Government and it would result in much needed changes to the *Indian Act.* The IAA viewed the consultations leading up to passage of Bill 79 as a significant milestone in setting out an ongoing process which could be followed to shape the future of Indians within Canada. It demonstrated to both the federal government and the Indian community that First Nation leaders had a legitimate role to play within the Canadian political process. The result was a revised *Indian Act* which came into force on September 4th 1951. The new *Act* assigned responsibility for status Indians to the "Minister of Citizenship and Immigration, who shall be the superintendent general of Indian Affairs". (*Indian Act.* 1951, c. 29, s. 1.) It made way for the full participation of Aboriginal women in band leadership and eliminated the prohibition on traditional practices and ceremonies. The policy of enfranchisement was kept within the *Indian Act.* The federal minister responsible gained;

> ...broad discretionary powers over the implementation of the Act as well as the daily lives of Aboriginals on reserves. The Act also maintained the government's power to expropriate Aboriginal lands, albeit in a significantly reduced manner.
>
> Concerning the definition of Indian status, the 1951 Act instituted some limited reforms...
>
> The 1951 Act continued with the band council system, with some small alterations. ... The new Act also allowed the full participation of Aboriginal women in band democracy.
>
> The practice of enfranchisement was kept in the 1951 *Indian Act...* However, under the new Act, the minister could only enfranchise an individual or band upon the advice of a special committee established for that purpose.

> The new Act removed many of the prohibitions on tradition Aboriginal practices and ceremonies, such as potlaches and wearing traditional "costume" at public dances, exhibitions and stampedes...
>
> One of the more important reforms concerned the application of provincial law to Aboriginals. Previously, the federal government had asserted exclusive jurisdiction to legislate in the context of Aboriginals. Changes made in 1951, however, provided that whenever a provincial law dealt with a subject not covered under the *Indian Act*, such as child welfare matters, Parliament would allow that provincial law to apply to Aboriginals on reserves. This opened the door to provincial participation in Aboriginal law making. (Makarenko, 2008)

The years of hard work by the IAA, and the efforts of Indian leaders in making representations to special committees on the proposed legislation, resulted in a Bill which stayed the course. It was clear the Government intended to use the Bill to modernize aspects of the *Act*; however it was not prepared to make major changes to the long held Indian policy. The *Act* dealt with changes in management of Indian money, and made amendments to the band council system to allow for the participation of Aboriginal women. It also kept the practice of enfranchisement however lifted many of the restrictions on traditional ceremonies. One of its most significant reforms was centered in paragraph 87 of the *Act.* The amendment stipulated "all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act". The federal government as such had served notice it would allow provincial laws to apply to First Nation reserve members. This legitimized the participation by the provinces in law

making that could affect First Nations, which again was not envisaged in the agreement reached with the Crown in Treaty 8. (*Indian Act.* 1951, c. 29, s. 1.)

The IAA began to lose its position of influence within the political arena throughout the 1950's. The organization fell out of favour with the change in the federal government from the long time ruling Liberal party to the Conservatives. This change in government coincided with a complete turnover in the key leadership positions within the IAA. James Gladstone, a long time leader and President of the IAA, was appointed to the Senate by the new Conservative government. In addition personal health issues had diminished the role of John Laurie within the IAA. He died in 1959. The transition of this leadership team brought with it a temporary end to the era of major influence by western Indian leaders.

The Indian political capital earned by the IAA leadership team had been strategically invested under the direction of John Laurie. He had directed the IAA efforts to better inform the Federal government, the western provinces and the general Canadian public on the key Indian issues. The primary focus of the IAA original leader John Callihoo and the Gladstone/Laurie team had been to press the Government for action to improve education, and better the social welfare system. It brought into focus the help needed within Indian communities to deal with their day to day issues. (Drees, 2002, pp. 157,158) The objective throughout was to work with Government to better the day to day well being of all Aboriginals.

3.4 Defining "Government Obligations" embedded in Treaty 8

The IAA had been successful in increasing public understanding on Aboriginal issues. This increased awareness and increased dialogue by Canadians were also being

augmented by the debate underway covering minority issues raised by the United States (US) Civil rights movement of the 1960's. The tactics used by the US movement was watched by a new wave of better educated youthful members of native Canadian communities. (Cardinal, 1969, pp. 108-109) The Alberta Indian communities had participated and observed how the leadership of the IAA had gained favour and got the attention of the Liberal government. It was clear to the First Nation communities that despite the strategy of working with government they had not shared equally with others in Canada during the post Second World War economic revival period. These events combined with a period of weak leadership gave rise to a new direction being set by the IAA."It changed its constitution and, increasingly, turned its attention to the treaties." The IAA in 1961 changed its charter to limit "full membership to treaty Indians". (Drees, 2002, p. 162)

The First Nation leaders within Alberta had clearly picked up on this mood. Their communities had during the Gladstone/Laurie time become much better informed on the *Indian Act*. In years leading up to the new IAA constitution many First Nation members had been better educated on how government works and became engaged in discussions on Indian policy by participating in community meetings. Native leaders during the Gladstone/Laurie era of the IAA also became accustomed to engaging outside professionals to obtain legal and other expertise to better define their position to government and parliamentary commissions. The new leadership saw need to set an agenda that called for more than doing better on the core well being issues raised by the original founders of the IAA. The leadership of the 1960's and 70's would further

challenge the *Indian Act*, make public their disgust with Indian policy, and increasingly look for a remedy by pressing for resolution of Aboriginal and treaty rights. The IAA was again to be the voice in the shaping the Indian agenda. Its new President Harold Cardinal, who was elected in 1968, would spearhead the revival of the IAA. The Harold Cardinal family had, "long-term ties to the IAA". His father was Frank Cardinal, a close friend of John Laurie and a founding member of the IAA. The new leader was well educated and had both reserve and work experience within government. He was raised on the Sucker Creek reserve in Alberta, attended high school in Edmonton, college in Ottawa and worked for both the Department of Indian Affairs and the Canadian Indian Youth Council. (Drees, 2002, pp. 162-164) The new leadership set a vision of securing federal funding with which it could build a full time national organization. The objective was to have full time professional support to replace the mainly volunteers who had worked in the National Indian Council (NIC) that had been established in 1961. This national body would focus on," advancement and retention of their [Indian] identity." (Miller, 2000, p. 330) Harold Cardinal would clearly articulate what he saw as the shortcoming of the native experience within Canada:

> Small wonder that in 1969, in the one hundred and second year of Canadian confederation, the native people of Canada look back on generations of accumulated frustration under conditions which can only be described as colonial, brutal and tyrannical, and look to the future with the gravest doubts. (Cardinal, 1969, p. 1)

He made clear that "Indians have aspirations, hopes and dreams, but becoming white men is not one of them". Under his leadership the IAA clearly set aside any thought of enfranchisement and pressed government to "honour commitments for treaties signed

with Indians" and to "recognize the aboriginal rights of our people". (Cardinal, 1969, pp. 16-17)

The changing dynamic of the thinking evolving from all these factors combined with media accounts on the native situation served as the impetus for the *Hawthorn Report.* This report was commissioned by the Liberal government in 1963 and released in 1967. Anthropologist Sally Weaver, (1993) who wrote extensively on this subject described the *Report* as resulting from a "convergence of two events: the disenchantment among senior branch officers [Indian Affairs Branch, then a part of the Department of Citizenship and Immigration] with their programs, and a fortuitous incident of public demand". (Weaver, 1993, p.77) Colonel H. M. Jones of Indian Affairs who was retiring from the department had been pressing Indian Affairs to obtain information to better the programs being delivered by the government. In addition, the national executive of the Imperial Order of the Daughters of the Empire (IODE) were also focused on the Indian problem. Officials with Indian Affairs leveraged the IODE initiatives by pressing the minister to agree to this organizations call for a study to identify "how Indians in Canada could achieve equal opportunity with other citizens". (Weaver, 1993, p. 77)

The Commission's recommendations were never adopted as Government policy; however, conclusions drawn by this independent study represented a turning point in the thinking surrounding Aboriginal title and rights.

> The main conclusions of the report, which were very detailed and yet conducted without Aboriginal input, included the idea that First Nations status within Canada should be recognized as that of "citizens plus." The report was based on the philosophy that Indian peoples, as charter members of the Canadian community, possessed certain rights in addition to the normal rights and duties of

> citizenship. The report also stressed that Indian political groups should be supported actively by the government and that Indian peoples should be put in charge of decision making that affects their futures. (Drees, 2002, p. 166)

The study made the case that the substantive amendment to the *Indian Act* of 1951, and changes in Government policy that flowed from these amendments, had not worked. One conclusion of the *Hawthorn* report was that the Government since Confederation had adopted policies to accommodate a long term First Nation model that would work much like a municipal concept type of local government. The municipal approach would insure the federal government was the parent body in full control where it delegated authority deemed appropriate to bands within the First Nation communities. First Nation leaders were concerned that this federal municipal style approach would allow the parent body to delegate more control over First Nation affairs to provincial jurisdictions. Indian leaders also were concerned such a governance model would lead to eventual full assimilation. The rationale behind this thinking was that band leadership, under such a model, would not have control over social programs and economic development which in their view needed to be aligned with Indian culture and values.

> Municipal style local government, commonly referred to in early Canadian Indian policy as 'the elective system' was thus the logical tool to be used by the federal government for exerting its own authority, destroying traditional Indian governments and promoting individual assimilation-and the tool was provided for in major pieces of legislation, including the present Indian Act of 1951. Bands were the only units recognized, with their membership confined to those defined by statue as Indians. (Tennant, 1984, p. 211)

The work of the IAA made it clear to politicians that the government needed to change its approach and get on with addressing its outstanding obligations to the Indian

community. The outgoing Liberal leader Prime Minister Lester Pearson had committed to further consult with Indian leaders on an agenda to make further amendments within the *Indian Act* to address the policy shift proposed in the *Hawthorn* report. (Miller, 2000, p. 328) This all changed with the new incoming Liberal government. Prime Minister Trudeau talked of a philosophical shift that would accelerate the enfranchisement of Aboriginals into the Canadian way of life by putting an end to the *Indian Act* , reserves and avoid going down the path of the "citizens plus" approach. The new Liberal government in 1969 came out with its own stance on Indian policy. It supposedly had solicited and listened to input from First Nation leaders, its own civil servants and elected officials to help shape the new policy direction. The new policy paper in the end very much reflected the opinion held by Trudeau and his new senior Ministerial team. They clearly opposed special status for Indians, and saw no merit in continuing with reviews to further reinterpret treaty rights. Trudeau's thinking is captured in his comment on this issue:

> It's inconceivable I think that in a given society, one section of the society have a treaty with the other section of the society. We must all be equal under the laws and we must not sign treaties amongst ourselves...We can't recognize aboriginal rights because no society can be built on historical "might-have beens." (Trudeau quoted in Miller, J.R., 2000, p. 329)

The outcome of this new government's approach was a "*White Paper*" policy outline presented by the Minister of Indian Affairs and Northern Development. It proposed the following to Parliament:

1. That the *Indian Act* be repealed and take such legislative steps as may be necessary to enable Indians to control Indian lands and acquire title to them.

2. Propose to the government of the provinces that they take over the same responsibility for Indians that they have for other citizens in their provinces. The take-over would be accomplished by the transfer to the provinces of federal funds normally provided for Indian programs, augmented as may be necessary.

3. Make substantial funds available for Indian economic development as an interim measure.

4. Wind up that part of the Department of Indian Affairs and Northern Development which deals with Indian Affairs. The residual responsibilities of the Federal Government for programs in the field of Indian affairs would be transferred to other appropriate federal departments.

5. In addition, the Government will appoint a Commissioner to consult with the Indians and to study and recommend acceptable procedures for the adjudication of claims. (Honourable Jean Chrétien, p. 6)

The Liberal administration argued the federal government had already provided services under the terms of the treaties that went, "far beyond what would have been foreseen by those who signed the treaties". The Minister made a case in the *White Paper* how the government had honoured its treaty obligations to set aside reserve lands, "except for the Indians of the Northwest Territories and a few bands in the northern part of the Prairie Provinces". In addition the federal government tabled that non- specific aboriginal claims to land were, "so general and undefined that it is not realistic to think of them as being specific claims capable of remedy". (Honourable Jean Chrétien, p. 11)

In the opinion of First Nation leaders the *White Paper* was a major step back and it's, "assumptions, arguments and recommendations were the antithesis of what Indians had been saying". To Indian leaders, "nothing had changed in a century". "The formulation of the first post-Confederation Indian legislation in 1869 had not involved

Indians at all; the development of the *White Paper* of 1969 did not involve them in any meaningful way, either." (Miller, 2000, pp. 334-335) The IAA and Harold Cardinal took the winter of 1970 to lead the Indian community in preparing a formal response to counter the federal government's *White Paper* proposals. Using federal funding, available under a new September 1969 Indian organizations program, an outside research firm was engaged to help in formulating a strategic response. The work completed by the IAA would form the basis of the 1970 report of Indian leaders put forward by the National Indian Brotherhood (NIB). The NIB and the Canadian Métis Society had come together in 1954 to set up the National Indian Council to press the government on Aboriginal issues. In 1968 each of the founding members went on their own to represent their individual constituents. The NIB would going forward direct all its efforts on the betterment of status Indians while the Canadian Métis Society would represent all other aboriginal people. (Comeau & Santin, 1995, p. 181)

The NIB official response on behalf of status Indians was contained in the *Citizens Plus, an Aboriginal response to the government's White Paper*, which became known as the *Red Paper*. The *Red Paper* approach represented a turning point in Indian and federal government relations. It had a clear focus on status Indians and expanded the agenda with government beyond social and economic issues. The outstanding historic issues covering unfinished business attached to Aboriginal and treaty rights were tabled for action on the part of the federal government. (Drees, 2002, pp. 168-169) Indian leaders had moved beyond lobbying or using their organizations to inform Canadians and government officials. They responded by taking the lead in laying out concrete policy positions to deal with long outstanding core issues. The strategy was to take charge of the

agenda, rather than provide input, in the hope to influence long held government policy or programs

The dialogue surrounding the eventual withdrawal of the *White Paper* exposed the rift between the intended policy direction of the federal government and the aspirations of the Indian nation, to find their fit within Confederation. The NIB organization would be successful in its lobbying efforts to secure permanent funding from the federal government. This positioned the NIB with the necessary resources to set up a full time national body. The NIB, with benefit of this funding, would be in a position to undertake research and direct policy initiatives to lay out its case not only within Canada but throughout the world. The Aboriginal community was now in a position to make a case as to its legal rights, and communicate its self government aspirations to the Canadian public, federal government and an interested world audience. As Canadian political scientist Alan Cairns has written:

> The defeat of the *White Paper* was not just the defeat of a particular policy, of a bold initiative; it was a repudiation of the historic, basic, continuing policy of successive administrations since Confederation." The defeat destroyed or rendered irrelevant much of our inherited intellectual capital in the policy area, for we were about to change direction. We had prepared for a future-assimilation-which did not happen-and thus were politically and intellectually unprepared for a future in which Aboriginal peoples-as peoples-were to have a permanent, recognized presence in Canada. (Cairns, 2000, p. 67)

The NIB under strong leadership continued, in the immediate years following the *White Paper* discussions, to strengthen its position by putting forward an Indian agenda in its negotiations with the federal government. First Nations gained more control over their

reserve programs in the areas of social services and education. In addition, all of the Aboriginal related issues began to attract increased business, legal, and political interest throughout the 1970's. One common theme was a want for direction on how to proceed with the economic development of resources located on traditional native lands. In Quebec the provincial Liberal government was dealing with the hydro development on James Bay, the province of Saskatchewan wanted to press ahead with uranium development and in Alberta the provincial strategy was to find a way to accommodate the further exploration for oil. At the same time the Nisga'a of British Columbia were presenting their case before the Supreme Court of Canada covering their long outstanding land claim. These developments combined to create further opportunities for the NIB to negotiate with the government on a number of fronts and in so doing leveraged the opportunity to press for further dialogue on Indian-self government. In the midst of all these events Prime Minister Trudeau and the Liberal government locked its focus on constitutional discussions and dealing with the separatist movement in Quebec. The constitutional debate fortuitously afforded the NIB a further opportunity. The NIB leveraged the political environment to make a case that First Nations should be included in the constitutional discussions like other levels of government. This coincided with First Nation Chiefs pressing the NIB to become more of a political organization to represent their respective "nations" in discussions with the Government. The outcome was for the NIB in 1982 to change its name to the Assembly of First Nations (AFN). "With this revision came the name change to the Assembly of First Nations (AFN). From being an "organization of representatives from regions" the AFN became an "Organization of First Nations Government Leaders". (Assembly of First Nations, (n.d))

Despite some setbacks and strong opposition from the western provinces the efforts of the Indian associations would meet with some success. The Assembly of First Nations successfully lobbied the Government to have Aboriginal rights cited within the *Constitution Act* of 1982. This was achieved by having the rights of Aboriginal peoples defined in section 35 of the *Act*:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. (17) (The Constitution Act,1982 being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11)

The entrenchment of these rights and the recognition of Aboriginal peoples within the Constitution represented a milestone achievement for the AFN. However the *Act,* in isolation, provided little guidance on how to interpret the affirmations. "Although they now had their respective Aboriginal and treaty rights recognized and entrenched, no one knew what this meant legally or practically." (Russell, 2000, p. 5)

In December 1982 the federal government appointed a Special Committee of the House of Commons on Indian Self-Government (Penner Committee). In its October 1983 report;

> The Committee made 58 recommendations, all of which accorded with Indian demands and perceptions presented in the hearings. The most sweeping recommendation was that Indian self-government should be recognized as an aboriginal right and that this right should be "explicitly stated and entrenched in the Constitution of Canada" (p.44). The governments of "Indian First Nations" (a term endorsed by the Committee) would thus derive their existence and legitimacy not from Parliament or legislatures, and not even from the Constitution itself-for the Constitution would simply acknowledge or "recognize" a pre-existing right of aboriginal peoples to self-government. Indian First Nation governments would thus "form a distinct order of government in Canada." (Tennant, 1984, p. 213)

Efforts to define Aboriginal rights and the demands by the Assembly of First Nations for self government would be a core component of federal government constitutional conferences in 1983, 1984, 1985 and 1987. (Miller, 2000, pp. 349-352) Despite the extensive discussions and numerous conferences the federal and provincial legislators could not reach an agreement on wording to define the meaning of Aboriginal rights or self-government.

The core issue, constitutional conferences could not resolve, was how to reach agreement on the different interpretation of the right to self-government. The federal government held the position it had the sole right to appoint First Nation self-governments and in so doing set the boundaries covering their delegated jurisdiction. To the Aboriginal people and First Nations self-government had a different meaning:

> Self-government is referred to as an "inherent" right, a pre-existing right rooted in Aboriginal peoples' long occupation and government of the land before European settlement. Many Aboriginal people speak of sovereignty and self-government as responsibilities given to them by

> the Creator and of a spiritual connection to the land. Aboriginal peoples do not seek to be granted self-government by Canadian governments, but rather to have Canadians recognize that Aboriginal governments existed long before the arrival of Europeans and to establish the condition that would permit the revival of their governments. Treaty Indians often point to treaties with the Crown as acknowledging the self-governing status of Indian nations at the time of treaty signing. (Wherrett, J., 1999, p. 2)

Following the 1987 First Ministers' Conference on Aboriginal rights and its failure to resolve the issue the federal government turned its attention to the province of Quebec's constitutional demands. This cumulated in constitutional negotiations between the federal and provincial governments; however excluded all Aboriginal peoples from the debate. The outcome was a 1987 Constitutional proposal known as the *Meech Lake Accord.* Aboriginal communities' strong objection to the *Accord* combined with disagreements between the provinces led, to its defeat of the Federal government in 1990. This was followed by a new federal government initiative with a focus on attempting to find a solution to the constitutional concerns of both Quebec and the Aboriginal community. The outcome was the 1992 *Charlottetown Accord.* The draft agreement, resulting from negotiations with the federal government provincial premiers' territorial leaders and Aboriginal organizations, included an amendment to the *Constitution Act*, 1982. The federal government under the terms of the *Charlottetown Accord* would for the first time recognize the Aboriginal inherent right of self-government within Canada. However an October 1992 national referendum held on the *Accord* resulted in it being rejected. There was also disagreement within the Aboriginal organizations on the terms of *Charlottetown Accord.* In the national referendum on the *Accord* a majority of the First

Nation communities also voted against the proposed agreement. (Wherrett, J., 1999, pp. 3-5)

The 1990's were marked by bringing Aboriginal self-government and constitutional discussions to the national agenda. In addition news coverage of Supreme Court rulings of this era were resulting in more public, federal and provincial government attention across Canada on Aboriginal rights. Despite the increased level of dialogue underway in the courts and with the federal government there was tension growing in many Aboriginal and First Nation communities. The most serious incident was the 1990 Oka crisis. The result was a violent confrontation between the Quebec provincial police and members of the Quebec Kanesatake Mohawk nation. These combined developments resulted in the Mulroney conservative government creating a 1991 *Royal Commission on Aboriginal Peoples*. The *Commission* was co-chaired by George Erasmus, former chief of the AFN, and Quebec judge René Dussault, with four of its seven commissioners being Aboriginal. (Miller, 2000, pp. 379-385) The *Commission* identified the need to work out a new and lasting agreement to insure Aboriginal people could truly coexist within Canada and prevent further violence. The *Commission* was to look for a fair Canadian way to deal with the issues. It was to come forward with recommendations on how to improve the living conditions of Aboriginals and identify a better way to negotiate settlement of the long outstanding grievances. The initial response of many non aboriginals was that the report was too costly, took too long to prepare and in the end fell short of expectations as its central theme rehashed positions that had already been aired. This conclusion was pointed out in a November 27th article in the *Globe and Mail* where

it reported that the report "breaks no new ground on the tough terrain of native rights". (Sheppard, R, November 27, 1996, p. A. 21) Stockwell Day, the minister responsible for native affairs in Alberta, also expressed the Province of Alberta's concern with the recommendations. He was quoted in the *Edmonton Journal* as fearing Ottawa would use the report to, "off-load constitutional responsibilities for aboriginals onto the province". (Johnsrude, November 22, 1996, p. A. 3) The Minister of Indian Affairs for the Government of Canada in an interview given to the *Globe and Mail* summed up the opposing view as to the merits of the *Commission's* findings:

> MIND you, as Native Affairs Minister Ron Irwin noted last week, when asked how he thinks Canadians will react to the royal commission's point of view, "it will depend on your attitude when you open the first page." If you think natives already get too much from government, that groups of 2,500 cannot be nations, you are not going to like it, the federal minister said. "But if you think we created this mess" and that Indian people need, above all else, a token of national respect to get on with their lives, that's another story. And that's the story being told here. (Sheppard, November 26, 1996, p. A. 19)

The furor of press coverage and public discussion did not in the end mobilize public opinion nor did it result in quick action on the part of the federal government. The Government's response was provided well after a year of the date of publication of the Royal Commission report. It took the form of a document titled *Gathering Strength: Canada's Aboriginal Action Plan*. Overall the Government steered clear of the Commission's most contentious recommendations as it had done with the previous *Hawthorn* and *Penner* reports.

> In terms of engaging the debate that the most expensive royal commission in Canadian history merits, the federal response is evasive. The Report's constitutional vision is

> ignored. Proposals for restructuring federal institutions are bypassed with the promise that the federal government is "open to further discussion." (Cairns, 2000, p. 121)

The fact many of its recommendations aligned with the findings of previous studies reinforced the need to press ahead with finding ways for First Nations to take on more responsibility for delivering services and programs to their communities. It resulted in further ongoing dialogue on the topic of self-government. First Nation leaders began to better articulate what this might look like within Canada. In meetings following the publication of the report the *Commission's* co-chair George Erasmus spoke to this and shared how he saw this playing out within Canada.

> We see Canada in the 21st century as a single nation state within which about 60 aboriginal nations would exercise jurisdiction and law-making authority over a wide range of instruments of governance, on a renegotiated and, in most cases, extended land base.
>
> "Aboriginal people would be citizens of their nations and of Canada. The Canadian government's treaty obligations would be to aboriginal nations, rather than to individuals, with those nations deciding how best to spend the resources so allocated." (Comeau, S.;, 1997)

The self-government and Aboriginal rights topics in the *Commission's* report presented more challenges for the federal government. First Nations would have success in making the case that there was need to move ahead with land and resource issues and a human capital agenda covering education, jobs and health care. They would also make the case from work done by the *Royal Commission* that this needed to be designed in such a way as to respect their native culture.

3.5 Summary

The period covered in much of this section details the role played by leaders linked to the Alberta native organizations. Aboriginal people as a result of their efforts would be better informed to press the federal Crown to define and honour its commitments covering "Government Obligations" in the context of Aboriginal and treaty rights. This agenda on "Obligations" was set during the Laurie/Gladstone era of the IAA where their focus on the Aboriginal people of Alberta carried over to the national Aboriginal agenda. The review in this section shows how under their leadership they awoke the Canadian public to the Indian condition. They legitimized the role of native organizations within the Canadian political process, better informed Alberta Aboriginals on treaty terms related to wildlife resources, and brought attention to needed changes in the *Indian Act*. Their pragmatic approach resulted in refreshing the debate with both those in Indian Affairs and elected politicians. The IAA pressed to have its stakeholders share in "Alberta's new economic prosperity' attached to the provincial oil boom. In addition they lobbied to gain more control over federal government funding "Obligations" being directed at their social welfare issues. (Drees, 2002, pp. 127-128)

The agenda within the IAA was again refocused upon "Government Obligations" under the leadership of President Harold Cardinal. He dismissed all discussion around enfranchisement and threw the resources of the IAA behind getting the federal Crown to acknowledge its obligations covering Aboriginal and treaty rights. It was under his leadership that this core issue moved from a strategy to seeing Aboriginal and treaty rights being enshrined in the *Constitution Act, 1982.* This result is most evident in where the Liberal government in 1969 under Prime Minister Trudeau stated we "must not sign

treaties with ourselves" yet in 1982 the Government of Canada formally recognized Aboriginal and treaty rights. The *Constitution Act,* 1982 was significant for First Nations. It recognized Aboriginal people within the Constitution; however it fell short in quantifying the obligations attached to Aboriginal and treaty rights. The attempts to better quantify the "Government Obligations" were subject to further review as part of reports, commissions and a Constitutional debate and continue to this day. It was a period where court interpretations of the 1980s became more supportive of Aboriginal and treaty rights.

Treaty 8 First Nations would however share in the benefits that would accrue to all Aboriginal people as a result of near a century of work championed by Indian organizations to have Aboriginal and treaty rights recognized in the *Constitution Act,* 1982. Throughout this period Alberta Treaty 8 First Nations honoured their "Indian Promises" of peaceful co-habiting with the outsiders who came to their traditional territory. They also throughout this time were clear on what they understood to be "Government Obligations". Government "would not infringe on their usual vocations, that any conservation legislation would be enacted for their benefit, and that they would not be restricted to reserves." (Ray, Miller, & Tough, 2000, pp. 212-213)

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Chapter Four: Legal Matters

4.1 Introduction

"An unlikely independent ally emerged in the 1980s-the Courts." Historically the legal system had not been a usual refuge for First Nations to deal with Aboriginal rights issues. Frideres and Gadacz (2005) in their book *Aboriginal Peoples in Canada* conclude "toward the end of the 1980s, court decisions were supporting Aboriginal claims... and the acknowledgement of Canada's fiduciary responsibility to Aboriginal peoples all gave both moral and legal support to the actions taken by them". (p. 341)

This chapter provides a general overview of the complex area of law, in the post 1980s era, which applies to Aboriginal rights and treaty rights within Alberta Treaty 8 First Nations. Aboriginal rights are defined for this purpose as the inherent rights that exist by virtue of Aboriginal people being the first inhabitants of the Treaty 8 region. Treaty rights in this section are defined as the rights attributed to the unique oral and written agreements entered into by Alberta Treaty 8 First Nations with the Government of Canada, by way of the 1899 treaty and subsequent treaty adhesions. Alberta Treaty 8 First Nations have most of their core Aboriginal and treaty right issues linked to wildlife resources, natural resources, and Crown land related issues within their traditional territory. The previous chapters explain the history of how the federal Crown handed over, either full or joint jurisdiction, covering these core areas to the Province of Alberta. Alberta Treaty 8 First Nations as a result have been left with the challenge of dealing with a new jurisdiction and the unwillingness of the Crown to quantify its accountability covering Aboriginal and Treaty rights. The result is that Alberta Treaty 8 First Nations

have come to rely on court decisions, to provide guidance on rights issues, when there has been conflict with the Crown.

This section reviews post-1982 Supreme Court of Canada decisions to set context and provide a perspective on the current position with regards to Aboriginal and treaty rights in Treaty 8. The objective set out in this chapter is to answer what principles the selected Supreme Court of Canada decisions have put in place to help guide Alberta Treaty 8 First Nations in its discussion with the Crown on Aboriginal and treaty rights. An argument is put forward that recent court decisions are further defining the accountability and obligations of all stakeholders who reside or conduct business in the Treaty 8 traditional territory. They demonstrate that recent Supreme Court of Canada decisions have provided direction to all stakeholders, in the traditional Treaty 8 territory, on Aboriginal rights. It concludes that the Province of Alberta is not in full alignment with the direction provided in these judgments and the Crown's approach is having a major impact upon Treaty 8 First Nations.

The Province of Alberta's interpretation covering its duty to consult and its long held position on juridical issues over Provincial Crown land is an important part of this debate. It will be covered off in chapter five.

4.2 Historical Perspective

The understanding of Treaty 8 First Nations has always relied upon the oral accounts of Elders who were present at the treaty signing ceremony. On the other hand, the Government of Canada and the Province of Alberta have looked to the written text as the reference source to interpret treaty terms. This gap widened in the post Treaty 8

period as a result of decisions made by the Crown whereby it undertook legislative initiatives to appease the provincial aspirations of Alberta. The most significant new issues can be traced back to legislation covering the formation of the Province of Alberta (1905) and the finalization of the *NRTA* (1930).

4.2.1 Treaty rights

A primary issue is the difference in the interpretation of treaty rights between First Nations and the Crown centered on the recollection of Elders present at the treaty ceremony. Their oral accounts record that commitments were made by the government representatives to appease concerns raised by the Aboriginal leaders. This is reflected today in the culture of Treaty 8 where its Elder Council has formulated a list of treaty rights, "as told to us by our Great Grand Fathers, Grand Fathers and Grand Mothers". detailed in the Treaty 8 Bilateral Process Newsletter published by its Director M. Poitras. (Treaty 8 First Nations of Alberta Bilateral Newsletter, 2009, pp. 2,12) It has long been held within the Treaty 8 communities that their forefathers only signed on after getting assurances as to their concerns. However, these agreed upon amendments were never incorporated into the text of the finalized treaty. Important to this debate is the fact that recent Court decisions have affirmed native oral accounts, provided by those present at the treaty signing, are to be treated as credible sources of evidence. (Cumming & Mickenberg, 1972, p. 62)

Another issue is that the Province of Alberta, after gaining legislative authority in 1905, and without input of the native population, placed new controls by way of regulation over the treaty protected "traditional economy" within the province. (Miller, 2000, pp. 277-278) Treaty 8 First Nations were adamant this was an infringement on their

inherent rights and outside the spirit and intent of the agreement reached with the Crown's representative, "to pursue their usual vocations of hunting, trapping and fishing". (Treaty 8) This entire area of jurisdiction and rights within the Treaty 8 territory continues to this day to be a clouded issue. The interpretation by the Province of Alberta as to the authority it holds as part of the 1930 agreement to transfer control and ownership of all Crown land and natural resources to the province of Alberta adds to the complexity of addressing the outstanding issues surrounding the Aboriginal rights of Treaty 8 First Nations. (Passelac-Ross, 2005, pp. 35-38)

4.2.2 Aboriginal Rights

The historic disagreement with Government on the interpretation of the treaty and its adhesions has been carried forward from generation to generation by the leaders and Elders of the Treaty 8 First Nations. The debate with the Crown on Aboriginal rights has unfolded as a national political agenda item and for the most part championed by non-Treaty 8 First Nations. Alberta First Nations within Treaty 8, like other Aboriginal communities, have constitutionally entrenched treaty and Aboriginal rights under the umbrella protection offered by way of the *Constitution Act, 1982*. Section 35.1 of this *Act* "recognized and affirmed" the "existing aboriginal and treaty rights of the aboriginal peoples of Canada". *(The Constitution Act,1982)* The interpretation provided by the Court has evolved to where there is now an understanding that Aboriginals and First Nations have accrued rights which attach on title to traditional lands, as they were the first and continual inhabitants of the area. It has also been affirmed by way of section 52.1 that the, "Constitution of Canada is the supreme law of Canada, and any law that is

inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." *(The Constitution Act,1982)*

The post-1982 Court decisions have entrenched these concepts of Aboriginal and treaty rights and confirmed Aboriginal jurisdiction is protected from federal and provincial laws which do not align with these rights. Court decisions immediately following the *Constitution Act, 1982* appeared at first to provide firm footing to assist First Nations to be better positioned to address with the Crown the long outstanding issues attached to Treaty 8. However, it soon became clear that the *Constitution Act,* 1982 provided only the parameters to define a First Nations Aboriginal and Treaty rights. As detailed above the caveat placed in Section 35 (1), pronounced that the Constitution would only recognize "existing aboriginal and treaty rights".

Treaty 8 First Nations as a result continue to face the century old hurdle of needing to engage the Government to define what was meant by "existing" treaty rights. Treaty 8 First Nations would again need to look to the courts to help define their existing rights.

4.2.3 Post-1982 Supreme Court of Canada Decisions

Six post-1982 Supreme Court cases are referenced whose judgements set precedent and continue to this day to influence decisions affecting Aboriginal rights and treaty rights within Treaty 8 and other First Nation communities. The first three judgements reviewed include, *R .v. Guerin [Guerin]* (R. v. Guerin, p.382), *R. v. Sparrow [Sparrow]* (R. v. Sparrow), *Delgamuuku v. British Columbia [Delgamuuku]* (Delgamuukw v. British Columbia). They focus on Aboriginal title and rights. The other three referenced Supreme Court decisions, *R. v. Horseman [Horseman]* (R. v.

Horseman), *R. v. Badger [Badger]* (R.v. Badger) *and R. v. Marshall [Marshall]* (R. v. Marshall), have been selected to assist in the interpretation of treaty rights.

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4.3 Supreme Court Guidance on Aboriginal Rights

The Court by the 1970s began to recognize that rights were vested based on the fact Aboriginals were the first inhabitants of the region. The concept of having a right to the land was also supported by the long held precedent that there was an inherent Aboriginal interest attached to Indian land that could be, "surrendered or alienated only to the federal Crown". (Hurley, BP-459E, 1998,(Revised February 2000)) In the immediate years leading up to the *Constitution Act, 1982* Supreme Court decisions began to better define Aboriginal title. The 1973 *R. v. Calder [Calder]* decision was a major step forward in this process. The following was put forward on page 328,

> ...when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign". (*R. v. Calder*)

This direction provided by the Court helped others better define these parameters which lead over time to a more common understanding as to the legal terminology of Aboriginal title.

> "Indian title" was a legal right, independent of any form of enactment, and rooted in Aboriginal peoples' historic "occupation, possession and use" of traditional territories. As such, title existed at the time of first contact with

> Europeans, whether or not it was recognized by them."
> (Hurley, BP-459E, 1998,(Revised February 2000), p. 4)

Three Supreme Court decisions built on the foundation put in place by the *Calder* decision would follow shortly after the *Constitution Act, 1982.* They added further clarity to the legal definition of inherent Aboriginal title rights.

4.3.1 Guerin

The *Guerin* decision, delivered in 1984, resulted from action taken by the Musqueam Indian Bank. This First Nation disputed the terms of a lease, covering its reserve land, which the Crown had negotiated on its behalf with an outside party. The Court in its ruling affirmed that the Crown held accountability and an ongoing obligation to best protect the interests of the First Nation in all its negotiations with outside third parties.

> Indians have a legal right to occupy and possess certain lands (reserve lands), the ultimate title to which is in the Crown. The (Aboriginal) interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. The Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. (*R. v. Guerin*, p.382)

The *Guerin* decision traced this obligation back to the *Royal Proclamation of 1763*. It ruled the Crown owned responsibility to be, "between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited". The Court in its decision described this as a "fiduciary obligation" which continues until there is a voluntary cession of these Indian lands to the Crown or title is extinguished by legislation. The Court upheld that the Crown was bound by a duty of trust where it held, "discretionary power" and accountability, "to supervise the relationship" in such a

manner to satisfy in legal terms a "fiduciary's strict standard of conduct". (*R. v. Guerin*, pp. 382-383)

4.3.2 *Sparrow*

The precedent set by the Supreme Court of Canada in its *Guerin* decision was further developed in its 1990 *R. v. Sparrow* decision. (R. v. Sparrow) In *Sparrow* the Court expanded upon the nature of the Crown's fiduciary responsibilities to Aboriginals and held how the "burden" of the Crown is to be understood within the context of the *Constitution Act, 1982*. It provided further guidance on how the Crown was to honour its trust accountability by respecting the history of the long relationship and the need to justify legislation that would infringe upon Aboriginal rights.

> The test for justification requires that a legislative objective must be attained in such a way as to uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation. Section 35(1) does not promise immunity from government regulation in contemporary society but it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1). (*R. v. Sparrow*)

The outcome of the *Sparrow* decision was a judgement which provided greater clarity as to the role of the Crown's trust like relationship with First Nations. However the decision also ruled the Crown was empowered to restrict Aboriginal rights by way of regulation.

Sparrow introduced a test the Crown was to apply before enacting new

regulations which might infringe upon Aboriginal rights. The decision confirmed the Crown holds the power to enact legislation, "that affects the exercise of aboriginal rights ... if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1)". However, it cautioned any infringement by the Crown upon First Nations would need to provide for a "generous, liberal interpretation" of Aboriginal rights and meet, "the test for justifying an interference with a right recognized and affirmed under s. 35(1)". (*R. v. Sparrow*,1990)

The decision laid out new due diligence that the Crown would need to apply when considering future regulations. It delivered to First Nations some level of comfort knowing a legal definition was in place to serve as a check and balance on future government action. The decision further acknowledged that past events may not have met this standard, however it would be difficult to unwind pre-1982 government action that in some manner infringed upon these rights;

> Prior to 1982, these rights could be abridged or extinguished by statute. However, since the enactment of section 35 of the *Constitution Act, 1982* any Aboriginal or treaty right not extinguished before 1982 have enjoyed constitutional protection and can only be limited by Statute when strict standards are met. (Slattery, 2000, p. 263)

4.3.3 Delgamuukw

This was followed in 1997 with a Supreme Court decision that extended the boundaries of admissible evidence which can be used to determine Aboriginal rights. The *Delgamuukw* decision was very significant for Treaty 8. It "affirmed that oral histories rejected by the trial court must be considered in decisions involving Aboriginal rights". (Issac, 2004, p. 9) The Court, in paragraph 87 of its decision, directed Government to

look beyond the text of agreements when dealing with matters of interpretation of Aboriginal and treaty rights.

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. (*Delgamuukw v. British Columbia*, 1997)

The *Delgamuukw* decision also opened for consideration the concept that there could be instances where Aboriginal rights could attach to title on traditional territories of non-reserve lands. Paragraph 140, stated Aboriginal title, "can vary with respect to their degree of connection with the land". Aboriginal title has historically been held by the Crown for account of a First Nation when the property has been designated as part of its reserve lands. However, the Court in its decision also introduced that traditional territories can have accrued Aboriginal rights attached on title even thought the property is not owned in the legal sense by a First Nation. The linkage connecting Aboriginal rights to the traditional territory title is to be made when there is "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right". (Delgamuukw v. British Columbia, 1997) Thomas Isaac, in his book *Aboriginal Law: Commentary, Cases and Materials*, reviewed the impact of this decision:

> *Delgamuukw* affirmed that Aboriginal title confers the right to use land for a variety of activities, including activities that are aspects of practices, customs, and traditions integral to the distinctive cultures of the Aboriginal people concerned. Those activities that are not integral aspects of practices, customs, and traditions are parasitic on the

> underlying Aboriginal title. Aboriginal title includes mineral rights and the right to exploit the land for oil and gas. However these rights are not absolute they must be balanced with the rights of others, particularly those persons holding free simple title. (Isaac, 2004, p. 10)

In *Delgamuukw* the Court, "continues to represent a momentous affirmation of the existence and constitutionally protected status of Aboriginal title in Canada". The decision "provided a compelling impulse to the parties to reaffirm the treaty process through negotiation". "In short, the *Delgamuukw* decision established an unprecedented theoretical framework that represents the basis for developing the law of Aboriginal title in Canada, rather than the culmination of the law's development." (Hurley, BD-459E, 1998,(Revised February 2000), pp. par. 184-186)

Guerin, Sparrow and Delgamuukw provided more certainty within the legal framework to assist First Nations pursue their claims with the Crown. Treaty 8 leaders were better able to engage the Crown in discussions on Aboriginal rights by knowing beforehand the legal parameters set out by the Court. Mary Hurley of the Law and Government Division of the Parliamentary Information and Research Service states in her paper titled "Aboriginal Title: The Supreme Court of Canada Decision in Delgamuukw v. British Columbia" provides insight into the cumulative impact of the *Sparrow and Delgamuukw* judgements. Treaty 8 leaders could look to the principles established by these decisions, detailed below, and be in a position to apply this precedent to pursue future appeals to the Crown on Aboriginal and title rights.

> The Court's section 35 Aboriginal rights decisions prior to *Delgamuukw* largely involved Aboriginal fishing rights. General interpretive principles stated in the Court's

groundbreaking 1990 decision, *Sparrow* v. *R.*, and refined in subsequent rulings through 1996 include the following:

The purposes of subsection 35(1) are to recognize the prior occupation of North America by Aboriginal peoples, and to reconcile that prior presence with the assertion of Crown sovereignty;

In subsection 35(1), the term "existing" refers to rights that were "unextinguished" in 1982, *i.e.*, not terminated or abolished;

Subsection 35(1) rights may limit the application of federal and provincial law to Aboriginal peoples, but are not immune from government regulation;

The Crown must justify any proven legislative infringement of an existing Aboriginal right;

Aboriginal rights may be defined as flowing from practices, traditions and customs that were central to North American Aboriginal societies prior to contact with Europeans;

In order to be recognized as Aboriginal rights, such practices and traditions must — even if evolved into modern form — have been integral to the distinctive Aboriginal culture;

Subsection 35(1) protection of Aboriginal rights is not conditional on the existence of Aboriginal title or on post-contact recognition of those rights by colonial powers;

Aboriginal title is a distinct species of Aboriginal right;

Self-government claims are subject to the same analytical framework as other Aboriginal rights claims;

Aboriginal rights cases are to be adjudicated by the application of principles to facts specific to each case rather than on a general basis;

Courts should approach the rules of evidence in Aboriginal rights matters, and interpret the evidence presented, conscious of the special nature of Aboriginal claims and of the evidentiary difficulties associated with proving a right or rights originating when there were no written records.

> (Hurley, M. C., 1998,(Revised February 2000), p. B. Section 35)

4.4 Supreme Court Guidance on Treaty Rights

Treaty rights prior to 1982 were, "subject to the doctrine of Parliamentary sovereignty, which held that a competent legislature might enact statues infringing the terms of an Indian treaty". (Slattery, 2000, p. 210) Much of the early thinking that laid out the foundation of the approach taken by the government was based on the direction provided in the 1929 *Syliboy* decision rendered by the Nova Scotia County Court. (Slattery B. , 1996, pp. 103-104)

> "Treaties are unconstrained Acts of independent powers." But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it. (*Rex. v. Syliboy*, 1929, par.436)

This approach changed with the 1982 amendment to the Canadian Constitution. It provided a permanent change in the way treaty rights were to be interpreted. Section 35.1 of the *Constitution Act, 1982* wrote into the constitution that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". *(The Constitution Act,1982)*

Three post 1982 Supreme Court decisions will be reviewed to highlight the evolution in thinking surrounding the interpretation of Treaty rights that have followed

from the *Constitution Act, 1982.* The three Supreme Court judgments referenced are the *R. v. Horseman [Horseman]* (R. v. Horseman, 1990), *R. v. Badger [Badger]* (R.v. Badger, 1996) and *R. v. Marshall [Marshall]* (R. v. Marshall, 1999) cases. Both the *Horseman and Badger* judgements center around issues attached to Treaty 8. The direction set in the aforementioned decisions set precedent that widened the scope of treaty rights. It supported the long held position of Treaty 8 First Nations that treaty terms include the promises made by the Treaty Commissioners.

4.4.1 Horseman

The appellant in the *Horseman* decision was a member of a Treaty 8 First Nation. In this judgement "the court affirmed that the onus to prove the extinguishment of a treaty right rests with the Crown and those ambiguities in treaties must be resolved in favour of the Indians". (Isaac, 2004, p. 80) The Court in its decision also provided further direction on how the reference to a "livelihood" contained within the terms of the Treaty 8 agreement was to be interpreted. Again, the Court supported much of the position that had long been put forward by the Treaty 8 leaders based on the Elder accounts.

> Treaty 8 embodied a solemn engagement to Indians in the Treaty 8 area that their livelihood would be respected, but we must also recognize that in referring to potential "regulations" with respect to hunting, trapping and fishing the government of Canada was promising that would continue to be respected. To read Treaty 8 as an agreement that was to enable the government of Canada to regulate hunting, fishing and trapping in any manner that it saw fit, regardless of the impact of the regulations on the "usual vocations' of Treaty 8 Indian, is not credible in light of oral and archival evidence... (*R. v. Horseman*, 1996)

The Court, in part, clarified the ambiguity that had been brought about by the NRTA. It concluded that under the terms of the NRTA, the nature of hunting within Treaty 8 was restricted however the federal government in turn was bound to allow access to other provincial lands to expand the geographic hunting area accessible to First Nation members.

> Obviously at the time the Treaty was made only the Federal Government had jurisdiction over the territory affected and it was the only contemplated "government of the country". The Transfer Agreement of 1930 changed the governmental authority which might regulate aspects of hunting in the interests of conservation. This change of governmental authority did not contradict the spirit of the original Agreement as evidenced by federal and provincial regulations in effect at the time. Even in 1899 conservation was a matter of concern for the governmental authority. In summary, the hunting rights granted by the 1899 Treaty were not unlimited. Rather they were subject to governmental regulation. The 1930 Agreement widened the hunting territory and the means by which the Indians could hunt for food thus providing a real *quid pro quo* for the reduction in the right to hunt for purposes of commerce granted by the Treaty of 1899. The right of the Federal Government to act unilaterally in that manner is unquestioned. I therefore conclude that the 1930 Transfer Agreement did alter the nature of the hunting rights originally guaranteed by Treaty No. 8. (*R. v. Horseman*, 1996)

4.4.2 Badger

In *R. v. Badger* the Court provided clarification to the issue of how to interpret the context under which Treaty 8 was signed by First Nations. *Badger* recognized in paragraph 55 that at time of the treaty signing "the Treaty No. 8 lands were not well suited to agriculture, (and as such) the government expected little settlement in the area". It was "believed that most of the Treaty No. 8 land would remain unoccupied and so

would be available to them for hunting, fishing and trapping". The promise of livelihood from hunting and trapping "was repeated to all bands who signed the Treaty". There was also recognition in paragraph 58 that land could, "be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting". The court concluded that," whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis". The Court went on in great detail within paragraph 52 of its decision to acknowledge the limitations of the treaty text and add credibility to Elder oral accounts. (*R.v. Badger*, 1996) The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement. A conclusion can be drawn from *Badger* that the Court acknowledged Treaty 8 was signed after the Crown's representatives acknowledged to band leaders that their traditional way of life would continue in the post treaty era. The *Badger* decision also confirmed that the honour of the Crown is bound to each decision it makes that affects the treatment of native people. The Crown as such cannot renege on the understanding in place at time of the treaty signing nor arbitrarily introduce new regulations that might infringe on what was understood at the outset covering Aboriginal rights.

> In each case, the honour of the Crown is engaged through its relationship with the native people. ... By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and

> policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation. (*R.v. Badger*, 1996)

4.4.3 Marshall

The third Supreme Court case included in this review is the September 1999 *R. v. Marshall* (*R. v. Marshall*, 1999) case. The case was factually specific to the Mi'kmaq of the Maritimes; however it provides further guidance to help in the interpretation of treaty rights for First Nations throughout Canada. The Supreme Court in paragraph 49 of this decision provided further direction on the honour of the Crown:

> ...the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. (*R. v. Marshall*,1999)

The Court in *Marshall* (paragraph 59) further developed the concept of "necessities" which in turn provided an understanding that First Nations such as Treaty 8 had a "right to a standard of life" in the terms of the Treaty.

> The concept of "necessaries" is today equivalent to the concept of what Lambert J.A., in *R. v. Van der Peet* ....described as a "moderate livelihood". Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth... It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today. (*R. v. Marshall*, 1999)

The affirmation of a standard of life argument brings forward in today's context a new question for Treaty 8 First Nations. What right do First Nations have to wealth created from the extraction of resources, within their traditional treaty territory, to provide for the well being or "day to day needs" of their band members? Paragraph 19 of the *Marshall* decision confined its ruling to "the types of resources traditionally "gathered" in an aboriginal economy and which were thus reasonably in the contemplation of the parties to the 1760-61 treaties". In view of these set parameters it did not opine further on the topic stating "negotiations with respect to such resources as logging, minerals or offshore natural gas deposits would go beyond the subject matter of this appeal. However it left this open for future consideration stating in its ruling "treaty rights are capable of evolution within limits".

Isaac summarized the conclusions drawn in the two *Marshall* cases as follows;

> *Marshall* is another example of the Supreme Court of Canada attempting to balance Aboriginal and treaty rights with the rights of other Canadians, including the authority of governments to regulate the exercise of those rights within justified limits.....In both *Marshall* decisions, the Supreme Court of Canada stressed that treaty rights are not absolute but, in this case, limited to hunting, fishing, gathering, and trading for necessaries. The limitations placed by the *Marshall* decision are many. Treaty rights are always subject to regulation by the Crown and limited to securing "necessaries." "Necessaries" is defined by the Court as being equal to that of a moderate livelihood and does not include "the open-ended accumulation of wealth." Even where regulations do infringe upon treaty rights, those regulations can be justified if they meet the *Badger* justification test. (Isaac, 2004, p. 85)

4.5 Summary

The Supreme Court judgements of this era reviewed in this chapter along with the constitutional protection provided in the *Constitution Act, 1982* have served to build a foundation to better define both Aboriginal and title rights. This has resulted in "Aboriginal people" coming to, "rely upon the courts to recognize and affirm their rights in the lands that they traditionally used and occupied". (Isaac, 2004, p. 1) In the post-1982 context, Treaty 8 First Nations have both benefited from the Supreme Court decisions and been hampered by unresolved issues relating back to the treaty signing and the added hurdles placed by the Province of Alberta. To this day while progress has been made core misunderstanding remain outstanding with regard to the intent of Treaty 8. The decisions rendered have not altered the course of Alberta Treaty 8 First Nations to honour their "Indian Promises" made at the signing of Treaty 8. The Supreme Court decisions selected for study in this chapter add to clarifying the boundaries that must be considered in interpreting Aboriginal and treaty rights. However as was the case with the *Constitution Act, 1982* it has not moved the Crown to quantify the "Government's Obligations" in a more timely manner.

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Chapter Five: An Approach to Work within the Provincial System

5.1 Introduction

In September, 2000 the Government of Alberta set out its policy parameters covering Aboriginal affairs in its "*Strengthening Relationships: the Government of Alberta's Aboriginal Policy Framework*". The stated intent of the framework was not to replace any "existing protocols, agreements, memorandum, legislation or discussions between the Government of Alberta and First Nations". The policy details the, "Federal government has primary responsibility" for Aboriginal people and defines the province as having a "relationship" with the Aboriginal population in Alberta. It set out two goals; "improving social-economic opportunities" and "clarifying roles and responsibilities of federal, provincial and Aboriginal governments and communities". (Government of Alberta, 2000, p. 5) The policy paper went into detail to articulate the boundaries the province had set in how it would interpret treaty rights and NRTA.

> The Government of Alberta has the constitutional mandate to manage public lands and natural resources in the province. It will exercise its responsibilities to benefit all Albertans. First Nations have rights under the *Constitution Acts 1867-1986* and the western treaties signed in the late 1800's between representatives of First Nations and the federal government. When the western treaties were signed, Aboriginal title, including rights on "traditional lands," was "ceded" and replaced by treaty rights. *The Natural Resources Transfer Agreement (Constitution Act, 1930)-NRTA*-transferred from the Government of Canada the ownership of public lands and resources in Alberta to the Province of Alberta. Treaty rights including the rights to hunt, fish and trap are included in the NRTA, along with the Government of Alberta's obligation to provide land in settlement of treaty land entitlement claims. In 1930 the province of Alberta accepted responsibility under the

> agreement for honouring treaty rights as they pertain to public lands. Today, the Government of Alberta honours Aboriginal use of public lands as provided for in the treaties and NRTA, including the rights to hunt, fish and trap on public lands. The Government of Alberta and Aboriginal governments may disagree over assertions and interpretations of treaty and NRTA rights respecting the use of public lands. (Government of Alberta, 2000, p. 14)

The policy position met with little initial reaction from First Nation leaders, industry or the general public. A review of major Canadian newspapers covering a two month period following the release of the policy reveals that there was little provincial or national print news coverage. The *Edmonton Journal* however did cover the policy in its September 23, 2000 issue;

> The framework is an astonishing mix of firm statements and uninformative stalling for time. The vagueness has been reflected in the lack of public comment. Calls to the Yellowhead Tribal Council, the Treaty 7 Tribal Council and the Métis Nations of Alberta have not been returned. The Peigan band office had not received the document as of Thursday. The Alberta Forest Products Association had a copy but no immediate reaction. What does the document say? It recognizes existing treaty and "other constitutional" rights. It commits to participating in settlement of land claims. It says the government has sole legal right to ownership and management of provincial lands and resources. It adds, however, that the government will consult with aboriginals about their role in decisions on resource development. It commits Alberta to economic and social "capacity building" and to improving aboriginal participation in resource businesses in "a fair and reasonable way."The further you read the less clear it is. (Lisac, 2000)

This chapter will examine the post-2000 era of the provincial Crown's relationship with Alberta Treaty 8 First Nations. It will address the thesis question of how during this

period the provincial jurisdiction impacted upon the "Indian Promises" and "Government Obligations" made between Treaty 8 First Nations and the federal Crown.

5.2 Duty to Consult

The authorities of the time held to a prescriptive attitude in approaching government policy in the delivery of services to First Nations. In 2000, the federal government approved plans to construct a winter road that was to run through the Mikisew Cree First Nation located within Treaty 8. The contemplated action would require the Crown to "take up" surrendered reserve land to build the road. The Mikisew Nation challenged the federal government by way of court action arguing that construction of the road would directly affect their right to hunt and trap. The initial Federal Court decision supported the Mikisew; however upon appeal the Federal Court ruled that the winter road was a "taking up" of land within the meaning of Treaty 8 and not an infringement of treaty rights. This decision was appealed to the Supreme Court of Canada and a decision rendered on November 24, 2005 which unanimously allowed the Mikisew appeal. *(Mikisew Cree First Nation v. Canada, 2005)* The Crown, despite the earlier direction provided in recent Supreme Court decisions, had argued for rigid interpretation of the treaty text. It put forward an argument contending that "whatever had to be done was done in 1899". Its position was that the Government "should consider the impact on treaty rights (however) there is no duty to accommodate". The Government argued if taking up of lands, "leaves intact the essential ability of the Indians to continue to hunt, fish and trap, within some other area of their traditional territory then the treaty, promise is honoured". *(Mikisew Cree First Nation v. Canada, 2005)* The Court firmly rejected this argument. The decision set further precedence on the duty to consult and

made clear the Crown has accountability to reconcile the interests of the First Nation by looking beyond just the text of the treaty.

> (para.48)... 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.
>
> (para.54) the contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.
>
> (para.55)... 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. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question. *(Mikisew Cree First Nation v. Canada, 2005)*

The Court also rejected the argument put forward by the Province of Alberta. It had proposed First Nations' treaty rights disrupted by the take up of this small parcel of land

could be accommodated by shifting their hunting and trapping activities to other areas within the vast Treaty 8 territory.

> (Para, 47)... Alberta's 23 square kilometre argument flies in the face of the injurious affection of surrounding lands as found by the trial judge. More significantly for aboriginal people, as for non-aboriginal people, location is important. Twenty-three square kilometres alone is serious if it includes the claimants' hunting ground or trap line. While the Mikisew may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area, it makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and trap lines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf (a suggestion that would have been all the more impractical in 1899). The Chipewyan negotiators in 1899 were intensely practical people, as the Treaty 8 Commissioners noted in their report (at p. 5): *(Mikisew Cree First Nation v. Canada, 2005)*

The *Mikisew* case is a turning point in the history of Treaty 8. It gave roots to their long held argument that the Crown had not been responsive in its duty to consult. The decision also exposed how the Aboriginal policy being followed by the Province of Alberta was not aligned with the guidance being provided by the Supreme Court. The decision firmly embedded the principle of Crown consultation versus prescriptive remedies when dealing with First Nation treaty rights. The Crown was instructed to steward a relationship versus policing the administration of the terms outlined in the treaty text. As such the Crown was charged with accountability to look beyond a strict legal interpretation of the treaty text. It would also be required to consider the "oral promises" which the court ruled were an integral part of the 1899 agreement. The decision also challenged the Crown with its instruction that, "treaty making is an

important stage in a long process of reconciliation, but it is only a stage". *(Mikisew Cree First Nation v. Canada, 2005*) The Court in its ruling called for meaningful consultation with First Nations and not an administrative process to afford First Nation representatives an opportunity to "blow off steam". The Crown was to conduct this consultation, "in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue". *(Mikisew Cree First Nation v. Canada, 2005)* It also confirmed in paragraph 55 of its decision that the Crown has the right to "take up land" however this authority is subject to a caveat which attaches a duty on government to consult and accommodate the interests of First Nations. The Assembly of First Nations reaction was to interpret the decision as "real significant". The decision opened "the door for First Nations to seek relief from the Courts for proposed government actions or developments before an actual infringement of their treaty rights has occurred". (Assembly of First Nations, 2006, p. 7)

It would take some time for Treaty 8 First Nations to fully understand the significance of this decision and for their leaders to organize and come forward with a common agenda to press the Crown on their treaty rights. The bottom line impact was for the *Mikisew* decision and earlier judgements to support much of the argument made by Treaty 8 First Nations relative to their treaty understanding. Treaty 8 leaders began to shape their future strategy by looking to this decision and knowing from earlier court decisions, Elder accounts covering the treaty negotiations could now be introduced as credible evidence. The recent court rulings in total had been empathic in support of the traditional argument made by Treaty 8 First Nations. The Court accepted what had long been told by the Elders that their forefathers had been assured of the right to a livelihood

from hunting, fishing, and trapping throughout the Treaty 8 territory. The precedent set in the above decision made clear that the Province of Alberta has equal accountability with the federal Crown covering its duty to consult with Treaty 8 First Nations. The parameters laid out in the body of Supreme Court pronouncements are to guide both the federal and provincial Crown in defining the "Government Obligations" as set out in Treaty 8.

5.3 Treaty Rights

The Province of Alberta, despite the direction provided by the Supreme Court, held firm on its 2000 policy position. It built a policy position and guidelines around the province's long held interpretation of Treaty 8 rights. This approach again laid bare the issues that remained outstanding between the Crown and the Treaty 8 Nation covering the process that had been followed in legalizing provincial status and the NRTA with the Province of Alberta. Treaty 8 First Nations were recognized by the Crown throughout the treaty negotiation time line as the governing bodies in this traditional Indian Territory within Alberta. They were not however given any legal status to join in these negotiations nor an opportunity to complete their own due diligence on either of the historic agreements before they were written into law. In the period leading up to 2000, Treaty 8 First Nations had sought out the Court to reopen these agreements and in effect complete their missed opportunity for due diligence. Treaty 8 cases presented to the Courts were in the main related to livelihood issues attached to wildlife resources (covering hunting, trapping, and fishing) in the Treaty 8 traditional territories. The Province of Alberta had taken note of these decisions and the "principles" put forward in the Court judgements

were reflected in the policy being set by the province. In general the Court scrutiny of the NRTA had been reviewed in the context of its impact once again on livelihood issues. Treaty 8 First Nations while disagreeing with the NRTA had neither outlined all their objections nor provided a full First Nation interpretation of the 1930 agreement. The Province of Alberta was left for the most part to design its strategy using its interpretation of the NRTA. One could draw a conclusion that leading up to 2000, Treaty 8 First Nations did not have a complete understanding of the full scope of the Province of Alberta's position on the NRTA.

> The *Natural Resource Transfer Agreement* profoundly affected the treaty relationship existing between the Crown and the Aboriginal peoples. Even though the agreement contains provisions which are designed to protect the land-based rights guaranteed to the First Nations by the treaties, it has been interpreted as severely limiting these rights. The Alberta government recognizes that the treaties signatories have rights to hunt trap and fish on traditional lands, but it also holds that it has sole ownership and jurisdiction over provincial lands outside of Indian reserves. Consequently, the government has taken the view that it is entitled to develop and allocate provincial lands and resources to third parties for natural resources extraction and development. (Passelac-Ross, 2008)

Events leading up to the end of the twentieth century had served notice to all of Alberta on the importance of the resource potential in the northern region of the province. All stakeholders with an interest in the resource opportunities within the traditional Indian territories of this northern region began to take a closer look at the NRTA. Alberta Treaty 8 First Nations had no say in the original agreement and that shaped the NRTA. Alberta Treaty 8 First Nations were in a position where the provincial governments'

policies shaped under the Province of Alberta's interpretation of the NRTA was in conflict with what First Nations understood to be "Government Obligations" covering livelihood and resource treaty rights within their traditional territory.

5.4 Policy Approach and Impact on Treaty 8 First Nations

The Province of Alberta did take heed of the changing environment and from 2002 to 2005 adopted what it purported to be a consultative approach focused on round table discussions with First Nations and industry partners. These initiatives were driven by the looming need to build a provincial policy framework and administrative guideline to cover future land management and resource development decisions attached to the oil sands region. The policy position which followed from this process was approved in May 2005 and referred to as *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development.* On September 1, 2006 the Province introduced the administrative procedures covering this policy titled *The Government of Alberta's First Nations Consultation Guidelines on Land Management and Resource Development.* (Government of Alberta Aboriginal Relations, (n.d.)) The reaction of The Assembly of Treaty Chiefs, to what the province had heralded as a consultative approach, was for First Nations to immediately reject the new government policy and its framework guidelines. *The Edmonton Journal* reported the following in its September 15th, 2006 edition;

> Alberta's Aboriginal Affairs minister abruptly walked out of a meeting with the province's First Nations leaders Thursday after they said they want more direct talks with government ministers.

> Minister Pearl Calahasen left the meeting with the Assembly of *Treaty Chiefs* after the group read her a resolution that rejected a new government policy that outlines how native groups will be consulted on land-use issues.
>
> The chiefs -- who said they spoke for all 47 of Alberta's First Nations -- said they now want to talk directly with the premier and Conservative leadership candidates about the policy, which went into effect Sept. 1.
>
> If left unresolved, the issue could have far-reaching consequences for both First Nations and businesses keen to profit from natural resources on the Crown lands that native groups consider part of their traditional territory. (O'Donnell, 2006)

Upon first glance it is unclear why Treaty 8 First Nations would totally discount the work that had gone into preparing the Province of Alberta's Aboriginal policy position. The webpage for the Government of Alberta's Aboriginal Relations includes a "quick history" fact sheet which details the process followed to develop its Aboriginal policy. It makes a compelling case that the Province's post 2000 consultation process was extensive and included all stakeholders.

> September 2000: In *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework*, Alberta committed to consult with Aboriginal people when land management and resource development decisions may infringe their existing treaty or other constitutional rights.
>
> May 2002: Alberta started development of a made-in-Alberta consultation policy.
>
> September-December 2003: First round of discussions about the policy with First Nations and industry.
>
> January-July 2004: Second round of discussions with First Nations and industry.

> August 2004: Draft consultation policy is refined based on input from First Nations and industry.
>
> November 2004-May 2005: In depth discussions begin with First Nations and industry on developing Consultation Guidelines. (Government of Alberta Aboriginal Relations, (nd), p. 1)

The published account however omits reference to the issues raised throughout this process by Treaty 8 First Nations. In May of 1997 the Treaty 8 First Nations had joined to form a provincial organization called Treaty 8 First Nations of Alberta. It set a mandate "to operate as a unified and collective organization that shall promote, preserve and ensure the protection and implementation of the true spirit and intent of Treaty No. 8 (1899)". (Heritage Community Foundation) The First Nation organization was established under a governance model that provided this entity with delegated authority to represent the interests of its Treaty 8 membership in discussions with government officials;

> The Chiefs and council, elected by members of each of the twenty-three respective Treaty 8 First Nations, are the legitimate governing body for that First nation. The Chief and Council for each of these respective Treaty 8 First Nations have agreed by Resolution to work cooperatively with other Treaty 8 First Nations on matters of common concern, and have created both regional Tribal Councils and a provincial Treaty organization-The Treaty 8 First Nations of Alberta-in order to undertake such cooperative efforts. (Grand Chief Arthur Noskey, 2006, p 13 Attachment 3)

The Treaty 8 First Nations of Alberta organization soon became proactive and put forward an August 3rd, 2006 discussion paper to provincial authorities. The paper encouraged a dialogue process that would follow through on the guidance provided by

the Supreme Court to deal with the concerns of Treaty 8 Nations. The intent of the submission was also to articulate issues that Treaty 8 leaders hoped to see addressed in the framework guideline work then underway covering land and resource development in the Province of Alberta.

> Given the scope and scale of resource development within northern Alberta the Treaty 8 First Nations of Alberta are concerned that the multiple/cumulative impacts of existing forestry operations, existing and proposed conventional oil and gas, heavy oil and tar sands projects, pipeline inititatives, and associated infrastructural devleopments, will degrade the boreal forest eco system beyond the limit of ecological sustainability. Our cultural survival, as a peoples of the boreal forest, the ability of our communites to access an equitable share of forest resources to regain economic sustainability and to support our reemergence as self-governing peoples, could potentially be destroyed before we are able to reach honorable negotiated agreement for Crown implementation of Treaty commitments to protect our way of life and livelihood interests within Treaty 8 territory.
>
> These circumstances compel the Treaty 8 First Nations of Alberta to petition Canada and Alberta to undertake a "class environmental assessment" of ecological, economic and social impacts logically associated with implementation of the Mineable Oil Sands Strategy (MOSS), and the range of collateral pipeline projects, industrial infrastructure initiatives, and conventional oil and gas developments within northern Alberta which are currently under discussion. (Grand Chief Arthur Noskey, 2006, p 13 Attachment 3)

Treaty 8 First Nations began to better understand the positon being put foward by the Province of Alberta covering its interpretation of provincial jurisdiction over Crown land and natural resources. Some 100 years after signing of the treaty there was now again need for Treaty 8 Nations to deal with a legal entity which had not signed Treaty 8 to

address what it understood to be "Government Obligations" linked to the treaty agreement. This new provincial entity had entered into agreements and been subrogated an interest over the jurisdiction of the traditional treaty territory and its resources without the original inhabitants having a say in these intergovernment deals. The time was at hand for Treaty 8 First Nations to detail in a position paper its interpretation of Aboriginal and treaty rights covering lands included within the Alberta boundaries of the Treaty 8 territory.

> Generally, as we understand, Treaty 8(1899) established the basis for "shared use" of lands and resources which were then recognized by the Crown as having been previously reserved, in accordance with the provisions of the *Royal Proclamation of 1763*, for the exclusive use of the Indians prior to establishment of Treaty relations. Under the written and oral terms of Treaty 8, these Indians agreed that the Crown could, from time-to-time, "take up land" for a variety of uses, and the Crown agreed that these Indians could continue to use all lands within the Treaty 8 area, not so taken up, to support "their way of life" and for conduct of "...their usual vocations of hunting, fishing and trapping..." In this regard, Treaty 8 did not establish a final blueprint for land-use by either party to the Treaty. The Treaty established some principles for future relations (i.e. Treaty relations) between the Crown and these Indians, and set out a number of mutual and individual commitments and undertakings by the parties....As we understand, historic Crown Treaty commitments and undertakings (1898) compel the Crown to consult with a Treaty 8 First Nation incident to consideration of the taking up of lands or the allocation of resources if these decisions may result in infringement of the First Nations interests within the First Nations' traditional territory. Without limitation, these interests relate to livelihood and cultural sustainability. (Grand Chief Arthur Noskey, 2006, p 15-16 Attachment 3)

The policy and framework guidelines that resulted from the extensive round table discussion fell well short in addressing the core issues that had been put forward by

Treaty 8 First Nation leaders. It appeared to Treaty 8 First Nations that the outcome of the provincial consultation process, as framed by the Supreme Court in the *Mikisew Case,* only provided a form for First Nation leaders to "blow off steam". There was little evidence in the policy wording that the Province took into account the Supreme Court's guidance covering such key principles as need for a process of reconciliation and recognition that the Crown had a duty to consult which was triggered at a low threshold. In stark contrast to the spirit of reconciliation called for by the Court the provincial approach was somewhat abrasive and introduced as, "Alberta's expectations of First Nations and Industry". The Province in its approach appeared to brush aside the direction of the Court. The Crown also placed a caveat on its "duty to consult with First Nations (to) where legislation regulation or other actions infringe treaty rights". This was problematic as the long held view of the Province of Alberta on treaty rights did not align with Treaty 8 leaders' interpretation of treaty rights. In addition the Province of Alberta's administration of the NRTA in such a key area as taking up of land fell well outside of the Crown's responsibility as interpreted by Alberta Treaty 8 First Nations. The new policy also had other troubling clauses for Treaty 8 First Nations. Under the policy the Province would hold sole power to both delegate the Crown's duty to consult to a third party and set the threshold as to when it needed to be directly involved in such talks with Alberta First Nations. The policy and guidelines served notice there was no longer need to respect the long held precedent of the Crown being the only party that could negotiate with First Nations. "Alberta will not engage directly in a consultation process for every proposed resource development activity." "In most cases Alberta will require Project Proponents to conduct procedural aspects of project specific consultation." (Government

of Alberta Aboriginal Relations, 2005, p. 5) The outcome was for Treaty 8 First Nations to reject The *Government of Alberta's First Nations Consultation Guidelines on Land Management and Resource Development* process. The Treaty 8 First Nations of Alberta voiced their collective concern by filing a November 2006 petition with the Deputy Premier, Province of Alberta and Commissioner of the Environment and Sustainable Development Office of the Auditor General of Canada. (Grand Chief Arthur Noskey, Treaty 8 First Nations of Alberta, 2006) The petition concerns were acknowledged by government however it did not alter the course that had been set in motion by the policy and guidelines set out by the Province of Alberta.

Treaty 8 First Nations were ill prepared for the scope of the consultation process, scale of the projects being tabled, and pace at which both the Province of Alberta and project proponents wanted to bring these to market. This new high stake deal making environment severely challenged the limited resources of First Nations. The Treaty 8 provincial organization did not have the experience nor adhere to the envisaged governance model so it could take a lead position in dealing with the Province in this launch phase of the new policy. As such the organization did not have the ability to take the reins and be the lead spokes group for First Nations in dealing with government and industry. The result was a period when Treaty 8 First Nations of Alberta spoke to certain issues, Tribal Councils directed some project negotiations and in other instances individual First Nations such as the Woodland Cree took the lead position in dealing with government and project components.

> Industries operating in the Athabasca region will provide over $4 million in funding to the region's five First Nations

> under a new agreement with the Athabasca Tribal Council (ATC). The ATC All Parties Core Agreement was signed by Chiefs from the Athabasca Chipewyan, Chipewyan Prairie, Fort McKay, Fort McMurray and Mikisew Cree First Nations and 15 executives representing the region's oil sands, energy and pulp and paper industries in a special ceremony in Fort McMurray, Alberta on January 8, 2003. (Syncrude News and Highlights, 2003)

The result was a flurry of activity with project proponents engaging specific First Nations. Project proponent complied with the new government process by strategically focusing their efforts on those First Nation(s) directly affected by the planned project. An article in the *National Post* of August 30, 2006 provides insight into Alberta's Energy Minister's approach to energy policy;

> "Traditionally," according to Mr. Melchin, "we've looked at Alberta's resource wealth from the perspective of stand-alone projects. By taking an integrated approach to energy development, efficiency and conservation we can help the industry reach its full potential, and provide enhanced long-term economic benefits and value-added jobs. (Foster, 2006)

It was a period where the Province placed its priority on policies supporting development of the oil sands with much less attention to the cumulative impact upon the environment and the native way of life within the whole of the Treaty 8 region. This at first glance might appear contradictory to the published May 2005 *Government of Alberta's First Nation Consultation Policy on Land Management and Resource Development.* The Province had a set objective "to avoid or mitigate impacts on First Nations Rights and Traditional Uses". (Government of Alberta Aboriginal Relations, 2005) However it is unclear how this policy objective could be honoured as the Province of Alberta and

Treaty 8 First Nations did not agree on the definition of "First Nations Rights." The Treaty 8 First Nations of Alberta in their June 27, 2005 *Consultation Guidelines Framework* detailed their concerns. The following extract from this document demonstrates the significant rift that existed between government and the Treaty 8 First Nations;

> A number of Treaty 8 First Nations have filed statements before the Courts, asserting that the federal Crown government has failed to fulfill Treaty commitments related to the livelihood interests affirmed by Treaty 8, and that the provincial Crown government has infringed, without justification, the Treaty livelihood rights of Treaty 8 peoples. ...A number of these "specific claims" allege the federal Crown government has not fulfilled Treaty commitments to protect the "usual vocations of hunting, trapping and fishing," provide the Indian peoples with a fair share of lands and resources, and failed to provide them with instrumental support for conduct of livelihood practices. (Treaty 8 First Nations of Alberta, p. 10)

A case can be made that the government policy approach was flawed from the outset. It appears from the review conducted in this section that the approach taken by the Province of Alberta was to use the consultation process as a, "tool for decision making," and not as an "instrument for rights protection". To First Nations the Crown fell short on its duty to consult as defined by the legal parameters and spirit of intent laid out by the Supreme Court in the *Mikisew* decision. It raises the question if rights protection became overshadowed by an emphasis on project management? The policy had in effect been built to allow First Nations and other stakeholders to provide input on a project; however the province positioned itself, as having the power to delegate to industry the fiduciary responsibility historically reserved for the Crown (Passelac-Ross, M., and Potes, V.,

2007) This was set in an environment where many First Nations had little experience in dealing with professional multinational negotiating teams on projects of the size and with the degree or complexity as now being tabled. The result was a laissez-faire attitude on the part of all parties. The focus was on finding ways to move projects forward in a manner to be compliant with the government process with less attention to the outstanding treaty and Crown land obligation that remain unresolved between Treaty 8 First Nations and the Crown. The following *Globe and Mail* article speaks to the attitude of the day;

> Is it right that projects go forward solely on the basis of what companies or governments are prepared to pay, beyond what is covered under the various treaties? Isn't the bigger elephant in the room the one that deals with constitutional rights of aboriginal groups and how far these extend? Why can't there be a clear set of rules that sets out the standards for consultations on both sides of the table?
> .....
>
> At issue is the same old story of traditional lands. While the Dene Tha are covered by the terms of Treaty 8, which effectively covers northern Alberta and northeastern B.C. and sets out regulatory requirements, the aspect of traditional lands in the southern Northwest Territories adds another dimension. This has to do with whether the areas in question, though not included in the treaty provisions, have been traditionally used by the band in question for its livelihood.
>
> Common practice in the oil patch in these cases is to simply pay the group in question if there is an issue regarding access. And this is effectively what will happen here, though on a bigger scale, over a longer time and in the public domain. (Yedlin, 2006)

5.5 Summary

The historic review provided in this study has shown that the new provincial jurisdiction and the large influx of private sector resource companies, who had no say in the terms of the agreement reached with the Crown in 1899, have had a significant impact upon Alberta Treaty 8 First Nations. To date Treaty 8 First Nations have not accepted the 2005 Province of Alberta policy and there has virtually been no change in the province's interpretation on Aboriginal or treaty rights. Throughout, Alberta Treaty 8 First Nations have remained in full compliance with the treaty "Indian Promises" they made to the Crown. They have also honoured the spirit of the "Indian Promises" in their dealings with all new stakeholders that have settled or taken a business interest in their traditional territory since signing the treaty agreement with the Queen's representative of Canada. The Supreme Court, in particular in the post *Constitution Act, 1982* era, has assisted by way of its legal pronouncements and the comments provided in these rulings in setting both the legal boundaries and the spirit of reconciliation that is to apply in the Crown's dealing with First Nations. The Province of Alberta throughout this period has, as demonstrated by its record of meeting commissions hearings etc, made a substantive investment of time and resources to engage Treaty 8 First Nations and other stakeholders within the region. In the following chapter it will be shown that the Province of Alberta policy has been very successful in creating an environment which allowed for orderly development of the resources within the Treaty 8 traditional area. It is argued here, that the success garnered by the Province as a result of this stakeholder dialogue is shadowed by a failure to resolve outstanding issues attached to Aboriginal and treaty rights.

The review of the Alberta First Nation post 2000 period shows that Treaty 8 First Nations have been consistent in carrying forward their historic claim, by way of Court appeals and representations to all levels of government. Throughout, they have claimed that the Crown has failed to fulfill its treaty commitments. They make a compelling case that, despite the extensive dialogue with the provincial and federal Crown, Treaty 8 First Nations have not been consulted in the spirit intended within Treaty 8. Nor does the provincial government approval process covering development activity of stakeholders in the Treaty 8 territory fully comply with the guidance provided in the rulings from the Supreme Court of Canada. Mr Kenneth W. Vollman, Chairman of the National Energy Board, provided the following assessment in an Armchair Discussion at the 2007 CAMPUT Conference in April, 2007;

> The obligation of the Crown to consult and accommodate arises from the principle of the honour of the Crown as outlined by the Supreme Court in the Haida decision. The goal for both parties in the consultation process is the reconciliation of the interests of the Crown and Aboriginals. Proponents or players that start the game in the absence of adequate Crown consultation with Aboriginals, run the risk of being sent to the penalty box either right away or later on in the game. In addition, the nature of the penalty may be such that it cripples the team-perhaps even ending the game altogether. Obviously industry players want to stay out of the penalty box so what can be done? (Vollman, April 30, 2007)

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Chapter Six: Reshaping the Agenda

6.1 Introduction

In this section four key issues are examined which have the potential to reshape the Aboriginal and treaty rights discussion for Alberta Treaty 8 First Nations. A capsule overview is provided to outline the history behind each of these issues. The objective is to answer if these new events are likely to reshape the nature of the dialogue between the Crown and First Nations covering the interpretation of Treaty 8 "Indian Promises" and "Government Obligations". It is argued Treaty 8 First Nations are at a tipping point with a choice between different strategies and tactics that could be employed to readdress the Aboriginal and treaty rights discussion with all stakeholders in the Treaty 8 territory.

The history of Treaty 8 has from the outset been shaped by the economics of the natural resources within its territory. It was the economic activity surrounding development of resources, within this northern region in the 1890's that swayed the Crown to enter into treaty discussions with the First Nations and Métis of the Treaty 8 region.

> The Klondike gold rush was the catalyst for Treaty 8. The risk of conflict between First Nations and miners/prospectors forced the government to address the concerns of First Nations peoples. The Indians sought protection of their livelihood in the forests of the Athabasca and Mackenzie River basin, and they refused to let Canada extend its authority over the region without first addressing the issue of Aboriginal title. (Ray, Miller, & Tough, 2000, p. 212)

Today, it is again the resource potential of the Alberta Treaty 8 traditional territory that is attracting the attention of government as, "eighty percent of Alberta's Heavy Oil deposits

are situated within Treaty 8 Territories". (Frideres, J., Ross, M., & Parlee, B. (n.d.)) History records that it was the influx of prospectors into the Treaty 8 region in the 1890's, combined with the effects of these fortune seekers using the territory as a route to access the Klondike gold fields, which crystallized the need for a treaty. A similar story is being written today. The resource this time is oil and the prospectors are seen to be the multi-national corporate interests. First Nations in the treaty area are voicing similar concerns to those at time of signing of Treaty 8. It is again a case where development brought about by outsiders is threatening the First Nation way of life and the well being of those in the Treaty 8 territory. These concerns were detailed in the December, 2006 petition forwarded by Arthur Noskey, Chief of Treaty 8 First Nations, to the Commissioner of the Environment and Sustainable Development Office of the Auditor General of Canada. The Chief called upon both the provincial and federal government to deal with the effects of oil sands development upon First Nations:

> I want to begin by reiterating the primary concern of the Treaty 8 First Nations of Alberta that resource development in Northern Alberta, especially heavy oil and tar sands developments, are proceeding at an unsustainable pace that threatens the environment upon which First Nations people rely upon to pursue their constitutionally protected Treaty Rights. (Chief, Treaty 8 First Nations of Alberta, 2006)

Monique Ross and Veronica Potes in their 2007 paper, *Consultation with Aboriginal Peoples in the Athabasca Oil Sands Region: Is It Meeting the Crowns Legal Obligations,* provide comment on the "environmental and social costs" attached to the oil sands development resulting from the policies set by the Province of Alberta. They describe the provincial Crown as having assumed the role of a," neutral-broker" in

dealing with development issues that have arisen between project proponents and First Nations in the Athabasca oil sands region.

> More importantly, by assuming a neutral-broker position, the provincial Crown circumvents its overarching obligation to respect and protect constitutional rights and attempts to delegate it to the industry. ...consultations between the communities and the province usually bring up issues beyond the capacity, ability or nature of the project proponents: issues that the Crown is or should be able to address. (Passelac-Ross & Potes, 2007, p. 6)

Throughout the federal Crown has not shielded First Nations from being mandated by the Province of Alberta to deal direct with project proponents on core issues which are linked to Aboriginal and treaty issues.

> The Crown has a general fiduciary duty toward native people to protect them in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands. This general fiduciary duty has its origins in the Crowns historical commitment to protect native peoples from the inroads of British settlers, in return for a native understanding to renounce the use of force to defend themselves and to accept instead the protection of the Crown as its subjects. (Slattery, Dec. 1987, p. 753)

The conclusion drawn is that the federal Crown has delegated its constitutional duty to consult with First Nations to industry through the Province of Alberta's consultation policy and guidelines.

It is further argued the provincial government approach and the impact of the approval process covering oil sands projects within the Treaty 8 region are at odds with the spirit of the direction and guidance provided by the Supreme Court of Canada. Chapter five provided an overview of the new parameters set in several of the post *Constitution Act, 1982* decisions. The Alberta oil sands project proponent process and the

impact of this development, as described by Chief Noskey in his petition, has exposed a regulatory process where the Crown has abdicated much of its accountability for the well being of the Treaty 8 First Nation. Much of the Crown's responsibility to protect Aboriginal and treaty rights within the treaty territory has, as a result, been placed upon the shoulders of Alberta Treaty 8 First Nations and the project proponents. The individual First Nation project approval approach, often driven by expediency rather than underlying principles, introduces risk that over time these decisions will create new protocols covering Aboriginal and treaty rights. This case is made by Professor Dwight Newman of the University of Saskatchewan and featured in an article of the April/May 2010 *Alberta Oil Magazine*:

> In The Duty to Consult (2009), University of Saskatchewan law professor Dwight Newman argues that new rules of engagement will be shaped by the practices and policies of stakeholders. To begin, there is more behind the duty to consult than rights and honour. Channelling legal disputes into negotiations is also about results and efficiency. The courts are inherently slow, and legislative solutions are limited by the fact that natural resources are provincial and Indian treaties are federal. Consequently, the rules will emerge where the behaviour of government, aboriginal groups and companies align. Like international law, parties who engage in a practice all believing that it is required will create customary norms – basically law without courts. Newman suggests that the duty to consult might even stall the court-driven evolution of other aboriginal rights. (Driedzic, 2010)

The result is that Treaty 8 leaders and their administrators engage outside consultants to best protect their interests. These professionals have been required to help shape the First Nation response to emerging legal issues, the political process and the impact project proponent's development will have throughout their treaty region. The conclusion

reached is that First Nations need to fully gauge and take a strategic approach to size the benefits and affects of development within the region. The developments and infrastructure needs of various development projects place both stress on the region and present the possibility for new and historic opportunities for Treaty 8 First Nations. It is the underlying economic importance of the oil sands and how the planned development is impacting upon the Aboriginal and treaty rights that presents a window of opportunity for First Nations. This is set in an environment where outside stakeholders in the Treaty 8 region want certainty and expediency. In this urgency to do business, First Nations in the past, have been left to a large part, to self manage a strategy to protect their Aboriginal and treaty rights. The absence of the federal Crown in many of the project decision steps makes it incumbent upon First Nation leadership to insure that development approvals do not set protocols which over time could set precedent to infringe upon Aboriginal and treaty rights. This theme was also captured in the *Alberta Oil* Magazine article:

> Many industry lawyers agree that their role is to address aboriginal rights, not to help infringe on them. From this perspective, industry's job is to see that government does theirs: Accept delegation of procedural matters and take all steps towards good consultation, but make no decisions about the adequacy of the process. No company can fix the relationship between Aboriginal Peoples and the Crown. The best that can be done is to learn the steps, and perhaps help create the new ones. (Driedzic, 2010)

The premise put forward is that an analysis of the following key issues leads to a conclusion that there is both risk and an historic opportunity at hand for Alberta Treaty 8 First Nations. It is concluded that Treaty 8 First Nations will need to align the support of the consortium of domestic and international stakeholders in the oil sands basin to capitalize on this opportunity and manage the risk component. The view held is that such

a consortium would have the resources and political capital to make a strong business, legal and ethical case to the Crown that the time is at hand to bring closure to the discussion on Treaty 8 Aboriginal and treaty rights. It is therefore incumbent upon Treaty 8 First leaders, to leverage the expertise of their consultants and outside professionals, to more fully engage the non government consortium of stakeholders in the territory on the treaty interpretation discussion. Ideally, the objective would be to work out a non government consortium understanding covering the interpretation of Treaty 8 issues that could then be taken to the Crown and used to find a solution to this long outstanding matter.

6.2 Issue One--Treaty Interpretation

From the outset of the Treaty 8 signing there was a wide gap in the interpretation of the context of Treaty 8 between the First Nations and the Crown. In the earlier chapters much of the fault for the current misunderstanding, covering Aboriginal and Treaty 8 treaty rights, was assigned to the Crown. This conclusion was reached after citing the manner in which Treaty 8 was drafted, negotiated and explained to those present at the signing ceremony. J. R. Miller, Professor and Canada Research Chair in the Department of History at the University of Saskatchewan, writes "many of the treaty expeditions, especially for Treaty 8, were hurriedly thrown together and recklessly executed". (Miller, 2009, p. 296) The treaty issues were further complicated by the decision to establish new provinces and then grant these new government jurisdictions control over provincial Crown land and natural resources. History has recorded that the Crown saw no legal obligation or intent in the spirit of the Treaty 8 negotiations that would require it to engage First Nations in these precedent setting decisions. In so doing, the Government of

Canada both: i) subrogated much of the Crown's duty to consult with First Nations and ii) set the tone on the consultation process to be undertaken with First Nations on treaty terms, for the new provincial jurisdiction. Professor Miller concludes "the way in which the federal government simply ignored its treaty commitments to First Nation in the Natural Resources Transfer Agreements of 1930 was probably the clearest instance of Ottawa's indifference to Aboriginal peoples". (Miller, 2009, p. 298) The approach taken by the Crown in the establishment of the Province of Alberta and the signing of the NRTA set precedent for the legislative behaviour of the new Government of Alberta in its interpretation of Aboriginal and treaty rights. The province, despite extensive dialogue with the First Nations, has from the outset held to a contractual interpretation of the treaty with a focus on the text of the documented agreement. It has been reluctant to move off this position and done so only when directed by the Supreme Court. As a result Treaty 8 First Nations throughout their history as evidenced by the *Badger, Horseman, and Mikisew* Supreme Court cases have found need to rely on the Court.

In recent years Treaty 8 First Nations have been assisted in making their case on the interpretation of treaty and Aboriginal rights by a number of Supreme Court decisions such as, *Sparrow, Badger and Marshall* reviewed in Chapter five. These post 1982 Supreme Court decisions and other recent judgements have been helpful to Treaty 8 First Nations. The direction set in these Supreme Court judgements has added strength to the Alberta Treaty 8 First Nations interpretation covering the parameters to be applied in considering treaty rights. For example, the Court by way of its decisions has directed that oral accounts recounting the treaty negotiations be given an equal weighting with the written terms. "In *R. v. Horseman* [1990] [A Treaty 8 and Treaty Interpretation decision]

the Supreme Court of Canada affirmed that the onus to provide the extinguishment of a treaty right rests with the Crown and the ambiguities in treaties must be resolved in favour of the Indians." (Isaac, 2004, p. 80) The Court also provided further guidance in its *Badger* decision that "treaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation towards aboriginal peoples." (*R.v. Badger*, 1996) It instructed the Crown that there be no "sharp dealings" and "any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians." (*R.v. Badger*, 1996) The parameters put in place by the Court decisions in the post *Constitution Act, 1982* era have assisted First Nations in being able to better define their inherent rights. In turn, First Nations are learning how to leverage these precedent decisions by putting the resource development industry on notice that these ground rules must be honoured. The Special Chiefs Assembly of the Assembly of First Nation at their December, 2008 meeting passed the following motion calling upon industry to uphold "their obligations regarding Consultation and Accommodation...with respect to First Nations Traditional Lands as required both by Law and Government Policy":

> [Resolution no. 69/2008] Chiefs-in-Assembly call upon Resource Development Industries, particularly Oil & Gas in Alberta, to respect the legal duty to consult and accommodate the Treaty No. 6, Treaty No. 7, Treaty No. 8 First Nations as required both by law and government policy.
>
> Chiefs-in-Assembly further reiterate their call upon all Governments to uphold the Honour of the Crown, and ensure appropriate consultation and accommodation of First Nations rights, titles and interests in all matters related to resource development. (Special Assembly Chiefs, 2008)

The 1999 *Gitanyow First Nation v Canada* decision is also helpful to Alberta Treaty 8 First Nations. It ruled that the duty to honour the Crown's accountability and fiduciary responsibilities in dealing with First Nations includes both the provincial and federal Crown. (Isaac, 2004, p. 90)

The economic importance of the oil sands region combined with the post 1982 Supreme Court decisions has introduced a new level of vigour to the discussion on treaty rights. "To the Indians, Treaty 8 was essentially a peace and friendship treaty." They sought a guarantee as to their right to hunt, fish and trap. The recollection of events from those present at the signing provides varying accounts on if they agreed to share or give up rights on land and resources in return for this guarantee. However, "there does not appear to have been any discussion of sharing surface rights, such as those for timber and water, or subsurface rights such as those for oil and minerals." (Dickason, 2002, pp. 366-367) The province of Alberta has shown itself to be reluctant to take into full consideration; i) the Elder accounts of oral agreements that were reached with the Treaty 8 Commissioners and led to the signing of the treaty in 1899 and ii) Treaty 8 First Nations understanding of terms attached to the NRTA. The conclusion is that the province has been hesitant to embrace the general direction being set by the Court.

> The provincial government and the beneficiaries of Treaty 8 take a vastly different view of the terms of the treaty and the *NRTA*, notably the "geographic limitation" on the treaty rights. The provincial position, based on a literal interpretation of the written terms of the treaty, appears to be that the government has an unlimited right to "take up" or "occupy" any Crown lands for resource development, thereby extinguishing treaty rights. However, this view is contrary to the principle of treaty interpretation...and the case law does not support that position. (Ross, 2003, p. 5)

This core disagreement is highlighted by the December, 2008 resolution passed by the Assembly of First Nations:

> [Resolution no. 79] The Chiefs-in-Assembly mandate the AFN to notify and pursue the Federal Government of Canada to take all necessary steps to set aside the purported unilateral agreement between Canada and the Provinces in the Constitution Act of 1930 and to request for the Government of Canada all appropriate compensation to be paid to the First Nations of Saskatchewan, Alberta and Manitoba for the improper and illegal taking up of Memorandums of Agreement between the Dominion of Canada and the respective Provinces of Saskatchewan, Alberta and Manitoba. (Special Chiefs Assembly, 2008)

A conclusion is drawn that it is unlikely new material; factual or historical, information can be brought to the negotiating table by either party to resolve the impasse between Treaty 8 and the federal and provincial Crown. First Nations also face the prospect it is unlikely new Elder oral accounts will materially add to the body of evidence already considered and accepted by the Court. On the provincial front there is little evidence of an eminent change in policy direction or the mindset of the government covering its interpretation of Treaty 8 rights.

> It appears the Alberta government's position is intransigent, and it may indeed battle all the way up to the Supreme Court of Canada before it acknowledges the duty to consult applies within Alberta to decisions it makes regarding the natural resource sector. (Szatylo, 2002, p. 236)

It appears that the current state is one where both the Province of Alberta and Treaty 8 First Nations both have entrenched positions. The *Fort McMurray Today* reported on the intransigence of the Alberta approach compared to some other jurisdictions in its September 2nd, 2009 edition:

> Janes [Robert Janes, Athabasca First Nation counsel] said other province such as British Columbia, operating under the same Treaty 8 agreement, consult with First Nations before they grant tenures. He added that unlike most provinces, Alberta delegates virtually all of its consultation duties to industry, and is the only province that refuses to carry out its own consultation on projects that cause large impacts such as seismic drilling.
>
> While Treaty 8 promised hunting rights to First Nations, Janes acknowledged it did say that the government could use land and take up land but no one ever agreed that over time they could essentially take up everything so that there was no practical hunting right left.
>
> "All we're asking (of) them is to consult with First Nations people (and) to have some kind of respect for the traditional way of life," said Adam [Chief Allan Adam of Athabasca First Nation]. "We want our respect. We want to make sure that they do not trample over sacred sites, burial sites or go over harvesting areas. Those are the kind of fundamental things that we still exercise as part of our treaty.
>
> "We haven't [broken] treaty since we signed treaty in 1899, and we continue to fight over the treaty yet here today. (Christian, 2009)

The proposition put forward here is that there are new factors in play within the treaty region that may well challenge the status quo approach of recent years. The change factors centre on the increasing economic importance of the Alberta Treaty 8 region and the body of law emerging from decisions on Aboriginal and treaty rights. These events have aligned to place Treaty 8 First Nations in a new position of importance with influence to shape future discussion on outstanding rights issues. Individual First Nations however continue to be challenged to effectively manage their individual band interests:

> A small First Nation band in northern Alberta is suing the Alberta government over oil sands development in the region. In a statement of claim, the Chipewyan Prairie First Nation alleges that it was not properly consulted when oil sands leases were acquired in its territory. "Nobody

> respects who we are," Chief Vern Janvier said with tears in his eyes at a news conference. "There's no consideration for us and there never has been." MEG Energy Corp. has several planned projects in the area. The band alleges in its claim the company's projects are located in the "bread basket" of traditional lands that have supplied fish, game and other resources for generations of native people. Janvier said the projects would kill the ecosystem of Winifred Lake. "It's the only lake we have left. It defines who we are as a people," he said. "This project will destroy the lake and destroy us." (Lillebuen, 2008)

Unfortunately, Treaty 8 First Nations such as the Chipewyan Prairie First Nation, face an agenda often outside of their full control. Band resources need to be redirected to deal with projects often initiated by unsolicited third parties. In turn, First Nation leaders and administrators are required to attend to the regulatory process with its set time lines, reports and consultant studies. At the same time, Aboriginal leaders are pressed to engage band membership to inform them on these new emerging issues and to gain an understanding of their expectations. The elected band representatives often find themselves in a difficult position. The challenge is how best to protect treaty rights, embrace new opportunities and also respond to calls to protect the traditional way of its First Nation members. These aforementioned core Alberta First Nation challenges were fully documented in the June, 2007 *Oil Sands Aboriginal Consultation Final Report*; "cumulative impacts, social and economic impacts and the desire to participate in the economic benefits of oil sands development." (Aboriginal Consultation Interdepartmental Committee, 2007, p. 19) This report and other Memorandums of Understanding have served to fully record the issues however the difficulty has always to date been in finding agreement on how to address the outstanding issues attached to "Government Obligations".

Treaty 8 leaders appear headed in a direction where they will have more choice in the strategy to be employed on how best to invest their collective influence to shape a new future for their people. The recent events and prolonged debate on core issues have provided those in the treaty territory with a better understanding of the impact individual First Nations decisions can have on the entire region. There is a better appreciation that individual First Nation initiatives set precedent with the Crown and project proponents likely to influence future discussions between third parties and other Treaty 8 First Nations. There also is a consensus developing that a decision to proceed with a project goes beyond impacting only the way of life of the nearby reserves. Chief Roxanne Marcel of the Mikisew Cree First Nation, in an August 29th, 2008 letter to Honourable Rob Penner Minister Department of Environment (Canada), again put the Province on notice detailing the cumulative effect individual projects are having on the entire region. (Mikisew Cree First Nation, 2008) Initiatives such as this and press coverage of development effects upon the region point to a consensus within the First Nation communities. It is one where stewardship, on the many First Nation issues within the treaty territory, is best served when Treaty 8 First Nations act together.

The interest of multiple constituents within the treaty territory provides Treaty 8 leaders with new options on how to proceed in drawing a strategy to deal with the Crown on outstanding treaty issues. The number of project decisions attached to oil sands and other infrastructure developments under consideration will require extensive engagement with a variety of government, domestic and international stakeholders with an interest in the Alberta Treaty 8 traditional territory. It is argued this new period carries with it risk for both Treaty 8 First Nations and the Crown.

A conclusion drawn is that the recent Supreme Court decisions, calling for reconciliation and the low threshold criteria that trigger a need to consult, would appear to represent increased risk for the Crown.

The risk to Alberta Treaty 8 First Nations is reflected in the growing concern being expressed relative to the cumulative effects upon the environment and traditional way of life that one-off agreements impose upon the region. This concern was clearly articulated in input received from one hundred and eleven First Nation participants, representing twenty-seven Alberta First Nations or community organizations that took part in Phase Two Consultation sessions that followed up on the 2007 provincially funded *Oil Sands Consultation Final Report*. However, the First Nations requested that "their recommendations [from these sessions] be summarized and forwarded to the Ministers rather than filtered through Government of Alberta positional commentary [a further report]". These Phase Two sessions resulted in several Alberta First Nations common recommendations. Two of these recommendations dealt with cumulative factors. The first recommendation called upon the province to "undertake or fund a cumulative impacts study to determine the effects of current and expected oil sands development on First Nations rights and traditional uses". The second again called upon the province to "undertake environmental management on a regional rather than a project-by-project basis". (Aboriginal Consultation Interdepartmental Committee, 2007, p. 23) In addition to these cumulative risk factors, the one-off approach by First Nations could well result in an unintended consequence of setting out the future parameters for discussions with the Crown. Professor McNeil, of the Osgoode Hall Law School Toronto, wrote the following in the *Canadian Bar Review*:

> To the extent that Aboriginal groups exercise authority over their own affairs, the Crown's fiduciary obligations are likely to change, and possibly be reduced. This conclusion is supported not only by general principles of fiduciary law, but also by the leading cases of *Guerin and Blueberry River Indian Band v. Canada.* (McNeil, 2009, p. 6)

Treaty 8 First Nations continue to have the option to press ahead, as in the past, by way of a forensic approach using the courts to reconstruct the understanding and intent of the 1899 treaty signing. However, it is unlikely such a strategy would move the province to reconsider its past pragmatic approach in steering clear of what First Nations would subscribe to be the spirit of Treaty 8. It is argued that with a well thought out strategy and a common agenda Alberta Treaty 8 First Nations can properly manage the new risks. The conclusion reached is that current events present an historic opportunity for the leaders of Treaty 8 to partner with business interests in the treaty territory to press ahead with a new agenda and look to the courts only as a backstop. It is this strategic alliance with business interests in the treaty territory that is seen as the option most likely to gain the necessary traction to move the file forward on Treaty 8 rights with the Crown.

6.3 Issue Two--Duty to Consult

Supreme Court decisions have been helpful in setting clarity as to what is expected of the Crown covering its duty to consult. In the *Sparrow* decision it called upon the Crown to act in a "fiduciary capacity". It instructed the Crown that its approach in dealing with First Nations should be "trust like" and not "adversarial." (*R.v. Sparrow*, 1990) The *Marshall* decision set the expectation there be an accommodation of treaty rights through consultation and negotiation. The themes attached to these earlier Supreme Court rulings outlined in the previous chapters were again reiterated in the *Haida* decision delivered in

2004. Here government was reminded by the Court that the "principle of the honour of the Crown must be understood generously". The decision went on to clarify that to fulfil this duty the Crown is obliged to consult with First Nations even where there is only a "potential existence (of a) Aboriginal right or title" claim. In addition this duty, "cannot be delegated, and the legal responsibility for consultation and accommodation (is to rest) with the Crown". (*Haida Nation v. B.C. (Minister of Forests)*, 2004) It is apparent from the string of cases on this topic that the Supreme Court decisions have consistently lowered the threshold point at which it becomes incumbent upon the Crown to engage in consultation with First Nations.

The Court's further opinion on treaty rights was evidenced in the Treaty 8 *Mikisew Cree* decision. It ruled there was even need to consult with First Nations when the Crown takes up land outside a band reserve however located within the treaty territory. (*R.v. Marshall; Mikisew Cree First Nation v. Canada*, 1999; 2005) Throughout this evolving debate the Province has been tentative in changing its policy guidelines to more fully align with the Court's more broad interpretation of Aboriginal and treaty rights. As previously outlined the provincial Crown has placed little weight on the oral accounts. It has historically taken the position that the Treaty 8 First Nations, as detailed in the treaty text, knowingly agreed to "cede, release, surrender and yield up to the Government of the Dominion of Canada ...all their rights, titles and privileges whatsoever, to the lands". (Treaty 8, 1899) This narrow interpretation has prevented Alberta First Nations from moving forward with the Province of Alberta to reconcile treaty issues except in those instances where there has been direct intervention by the Courts.

The current position of the Province of Alberta is built around its 2000 policy statement *Strengthening Relationships: the Government of Alberta's Aboriginal Policy Framework.* This policy affirmed that the Province holds the "right of ownership and management of provincial lands and resources". (Government of Alberta, September, 2000) The Province further initiated an extensive series of round table discussions with Alberta First Nations from May, 2002 to May, 2005; however throughout held to its unencumbered authority to deal with Crown land. The outcome of this consultation was for the Province of Alberta in September, 2006 to publish The Government of Alberta's *First Nations Consultation Guidelines on Land Management and Resource Development.* (Government of Alberta Aboriginal Relations, 2006) This approach was immediately rejected by all Alberta First Nations. The Province, following this rejection, was diligent in its efforts to continue with various consultation processes and reports to engage Treaty 8 First Nations. The policy direction was explained by the province as the best option to address the needs of all stake holders. The Government of Canada has not been inclined to wade into reconciliation discussions on Aboriginal and Treaty 8 rights within Alberta when it centers on natural resource issues. The Province of Alberta approach has been to look for new ways to engage First Nations; however its focus has been directed at explaining the government position versus using the input from these discussions to shape policy. This provincial strategy is reflected in initiatives such as the consultation process completed by the Aboriginal Consultation Interdepartmental Committee (ACIC). The ACIC between January and May of 2007 in Phase One of its study met with twelve First Nations, three Tribal Councils representing another eight First Nations, the Treaty 8 First Nations of Alberta organization and representatives of the Métis Nations of Alberta.

(Aboriginal Consultation Interdepartmental Committee, 2007) The input from the Alberta First Nations was recapped under six headings in the report titled *Oil Sands Consultations Aboriginal Consultation Final Report.* The objective laid out at the outset for this committee was detailed in the message from the ACIC Chair:

> First Nations and Métis people have been able to put their concerns forward to the Government of Alberta in a manner that allows those concerns to have a genuine impact on Alberta's strategy for developing oil sands. (Aboriginal Consultation Interdepartmental Committee, 2007, p. 2)

Despite this stated objective, the findings filed in its June 30th, 2007 report did little more than confirm the entrenched positions held by both the province and the First Nations community. The Province of Alberta took the position of wanting to engage First Nations in a strategic discussion to move forward on its economic agenda. First Nations for their part used the venue as another vehicle to again table the unresolved issues attached to interpretation of Aboriginal and treaty rights.

In practice both the Province of Alberta and First Nations have a long established track record of engaging one another in various round table and consultation venues. In May, 2008 a further protocol agreement was signed.

> Premier Ed Stelmach and the grand Chiefs from three treaty areas signed a Protocol agreement Thursday aboriginal leaders hailed as historic. The agreement mandates that the premier meet with the Grand chiefs at least once a year and with ministers responsible for land use and conservation twice a year. In practice, it won't change much, but it recognizes the importance of aboriginal leaders speaking directly to elected officials. (Calgary Herald (Anonymous), 2008, p. A. 4)

However there is little to show in the way of results from all that has been invested by government and Treaty 8 First Nations in its published reports, memorandums of understanding and from the round table meetings. Minutes published from the March 16th, 2009 Assembly of First Nations, National Chiefs *Task Force on Consultation & Accommodation Report*, include a regional report on what is happening in Alberta and the results from the protocol agreement:

> In Alberta, there is a protocol in place with the Premier and relevant Ministers responsible for First Nation issues, but this has not been entirely successful. When First Nations have raised issues with the process they have been cut off from notification completely. (Assembly of First Nations, 2009, p. 6)

The Alberta impasse in the Treaty 8 relationship always relates back to the difference in interpretation of Aboriginal and treaty rights. The core issue centres on the historic held position of the province:

> The Alberta government recognizes that the treaties signatories have rights to hunt trap and fish on traditional lands, but it also holds that it has sole ownership and jurisdiction over provincial lands outside of Indian reserves. Consequently, the government has taken the view that it is entitled to develop and allocate provincial lands and resources to third parties for natural resources extraction and development. (Passelac-Ross, M., 2008)

It is proposed in this thesis that events have aligned to make for a convergence in the need for both parties to look for new ways to resolve this impasse. A case is made that events are aligning to make it both a legal duty and a sound business decision to consult and engage in new ways with Treaty 8 First Nations. The April/May 2010 issue of *Alberta Oil* addressed this new reality in its article *Industry and government are slowly defining the duty to consult and accommodate First Nations*:

> The "duty to consult" is everywhere: at the courthouse, in the boardroom, on the ground. This is a major shift in the law, with major implications for energy stakeholders in Western Canada. It froze the Mackenzie Gas Pipeline, caused uncertainty around the Keystone project and fuels new litigation in the oil sands. The stakes are clear, but the law is not. Legal responsibility for adequate consultation falls exclusively on government, yet government can lawfully delegate procedural matters to industrial project proponents. This three-way dance resembles environmental assessments, but the steps are new. As Justice Frans Slatter of the Alberta Court of Appeal stated in 2007, the duty to consult "is still being hammered out on the anvils of justice." (Driedzic, 2010, p. 62)

The stance of the provincial Crown, size and number of projects, multi layers of regulation and outstanding Aboriginal issues all make for an arduous current state for both First Nations and the consortium of other stakeholders in the oil sands region. One example of this is seen in a report filed in the spring 2010 edition of *Alberta Oil Sands Industry Quarterly Update.* It reports that there are forty-six Oil Sands Producers in the region, with approved or applications in progress. In addition, the publication cites eighteen Associations/Organizations which the province has recognized as having an interest in the Alberta oil sands projects. (Alberta Oil Sands Industry Quarterly Update, 2010, p. 16) This creates many challenges for all stakeholders in the region. Co-ordinating information across Ministries, creating a consistent process and maintaining regulatory timelines will be difficult and may affect stability and predictability for industry. (Rappaport, 2006, p. 1) This hub of activity also creates new issues for Alberta Treaty 8 First Nations:

> One danger of having different industry stakeholders involved in carrying out consultations is that it may become difficult for an Aboriginal community to identify when it is or is not engaged in discussions that amount to consultation

> for purposes of the duty to consult. Various industry representatives may engage in discussions that might later be portrayed as part of a consultation process. (Newman, 2009, p. 36)

The conclusion drawn is that the economic importance of the Alberta oil sands region and the need for project proponent certainty is redefining the terms of reference covering the duty to consult for all stakeholders within the Treaty 8 traditional territory. Corporate interests see the full involvement of First Nations in project approvals as good business sense and as a way for project proponents to mitigate the risk of future legal action. On the other hand it is recognized that First Nations need to be very strategic and satisfied they both understand and have mitigated the possible outcome of their decisions. It is argued that the corporate practices and policies emanating from this engagement process and the conditions set by First Nations to enter into such dialogue are poised to be the new way law is written within the region. "In the absence of direct intervention by the courts, the interactions of policy [government policies, Aboriginal communities' policies, and industry stakeholder policies] may yield something amounting to "law"." (Newman, 2009, p. 78)

6.4 Issue Three--Oil Sands

There are six Métis settlements and twenty four First Nations located within or adjacent to the oil sands regions. This places most of the oil sands footprint within the traditional territory occupied by the original native population of the region. The oil sands region also includes the reserve lands of eleven Treaty 8 First Nations. (President Treasury Board, p. 31) "Heavy oil and tar sands developments are estimated to affect 120,000 sq. kms in Treaty 8 territory in Alberta." (Grand Chief Arthur Noskey, Treaty 8

First Nations of Alberta, Nov. 2006, p.1 Footnote 1) The oil sands are of significant importance to the Province of Alberta and the quick pace of development within the region has had a profound impact upon the Treaty 8 First Nations.

> It was not until 1967 that Great Canadian Oil Sands Ltd. established the modern age of commercial oil sands production. Even then it took until 2000-and required many advances in engineering-for the oil sands industry to reach a production level of 600,000 barrels per day (bd), equivalent to the output of a medium-size oil company. But then over the next eight years production growth picked up rapidly and more than doubled. The rise in oil prices from 2002 to 2008, a stable operating environment, attractive fiscal terms, and the open investment climate in Canada-numerous foreign and domestic companies are active-spurred the rise in oil sands output. By 2009 oil sands production reached 1.3 million barrels per day (mbd) ...Putting this growth in comparative terms, if measured as an individual country the Canadian oil sands would be number six in the world in supply expansion since 2000, ahead of Kuwait, China and Iran. (Cambridge Energy Research Association, 2009, p. I 1)

It is argued that the oil sands factor as detailed above jarred the thinking of Alberta Treaty 8 First Nations. The result has been an evolution in both the First Nation approach and strategic thinking surrounding the short and long term impact of development within the traditional treaty territory. Alberta Treaty 8 First Nations throughout the upstart of the oil sands projects were cooperative and worked with both industry and government even thought they did not approve of government policy. This is evident in the approach taken by the Athabasca Tribal Council (ATC) which was formed in 1988 to represent the collective interests of five Treaty 8 First Nations located in north eastern Alberta. The ATC from 1998 to 2002 focused mainly on "capacity building between the regional First Nations and the industry groups of the Athabasca oil sands

region". Under this agreement the industry partners were to work with the ATC First Nations to "develop community capacity" and deal with "regional issues that pertain to industrial development opportunities" within this section of the oil sands basin. In addition, as part of the agreement, industry would commit to work with ATC, "on development of strategies to obtain government support for addressing outstanding First Nation issues". (Athabasca Tribal Council, 2010) The *Globe and Mail* reported on the new agreement in its March 16th ,2001 edition;

> This time the First Nations of north-eastern Alberta are making sure they get their chance, as it were, to tap a gusher. With an anticipated $25-billion expansion of the Athabasca oil sands underway, the Athabasca Tribal Council of five First Nations has brought about the signing of an historic deal with some of the world's largest corporations...as Mobil Oil, Shell, Gulf, Syncrude Canada, Petro-Canada and Suncor Energy. (Globe and Mail, 2001, p. C. 6)

In 2002, the underlying purpose of the agreement was renegotiated and the strategic purpose switched from its original intent of capacity building, to issues management. This all Parties Core Agreement has further evolved to where it today has a charter with specific goals and objectives and is endorsed by all the major industry groups, working within the Athabasca oil sands region, and by all three levels of government (federal, provincial and municipal). (Athabasca Tribal Council, 2010)

It is further argued that outside of any rights or legal discussion industry understands it just makes good business sense to work with First Nations and for the province to insure the ongoing orderly development in the region by addressing the outstanding rights issues of the Treaty 8 First Nations. On the other hand, the Treaty 8

First Nations mindset has moved from their initial focus on individual First Nation project benefits, to a new resolve where First Nation communities want a full say in planning out the future within the whole of the region.

6.4.1 Province of Alberta 2000 Policy Initiatives

The Province of Alberta's 2000 policy initiatives resulted in project proponents being successful in getting development approval by working within the prescribed government framework. Project proponents, to be compliant with the process, were required to engage individual Treaty 8 First Nations, identified as being affected by the development, in what could be described as a procedural process. It was a period when the corporate entities leading these developments were tasked by government to deal with the individual project concerns of the First Nations generally in nearest proximity to the development. This procedural engagement policy approach allowed the Province of Alberta to implement its strategy in the resource sector and deflect dealing with issues attached to its Crown's duty to consult covering outstanding core Treaty 8 Aboriginal and treaty rights. Treaty 8 First Nations throughout this period, of procedural engagement with project proponents, have always claimed their historic rights covering Aboriginal and treaty rights and the need to deal with "Government Obligations". This was evident by action taken in the period leading up to 2006. It was during this time line that Treaty 8 leadership became much more vocal in expressing concern with the way development was being allowed to proceed within the whole of their traditional territory. They began to take a consistent and unified approach in reminding the Crown of its treaty obligations. Alberta Treaty 8 First Nations articulated more forcefully that government policy was

leading to a cumulative negative impact on their combined traditional way of life and livelihood options.

> Each of the member First Nations [Treaty 8] has a historical and current special relationship with certain lands and resources which supports their economic, cultural, and spiritual and health well-being. ... However the scope, scale and pace of resource development (forestry, existing and proposed conventional oil and gas, heavy oil and tar sands projects, pipelines, and associated infrastructural developments) within northern Alberta is becoming a concern to the Treaty 8 and Treaty 6 First Nations of Alberta because of their multiple and cumulative potential to cause significant adverse effects to the livelihood, health, way of life and rights of Treaty 6 and 8 peoples". (Grand Chief Arthur Noskey, Treaty 8 First Nations of Alberta, 2006, p. 1)

A tipping point can be seen in the March, 2006 decision by Treaty 8 First Nations to establish a Bilateral Chief Committee. This Treaty 8 leadership team was constituted under a well defined governance model, supported by an administrative team that held delegated authority to negotiate an overriding bi-lateral agreement with the Crown covering all long term treaty issues. (Treaty 8 First Nations of Alberta, 1998) In November, 2006 this organization served notice by way of a petition to the Deputy Premier, Province of Alberta and the Commissioner of the Environment and Sustainable Development Office of the Auditor General of Canada addressing its concerns covering this lack of a cumulative approach (referenced by Government of Canada as petition No. 188):

> The environmental degradation to the boreal forest ecosystem, and the dewatering of streams and rivers to support heavy oil development beyond the limit of their ecological sustainability, has the potential to affect the cultural survival of Treaty 6 and 8 peoples and

> communities and undermine the efforts being made through bilateral discussions with Canada and Alberta to reach honorable negotiated agreements for Crown implementation of Treaty commitments that would allow Treaty 8 First Nations to become economically sustainable self-governing communities supported by access to equitable shares of resources developed in the Treaty 8 territory.
>
> These circumstances compel the Treaty 8 First Nations of Alberta to petition Canada and Alberta to undertake a comprehensive and collaborative multi-party (government, First Nations, industry and environmental groups) assessment of the cumulative environmental, economic, health and social impacts associated with all reasonably foreseeable resource developments planned within northern Alberta before any further new heavy oil or tar sands projects are approved. (Grand Chief Arthur Noskey, 2006, p. 2)

The Office of the Auditor General of Canada records that six federal Ministries and Agencies responded to this petition in May and June of 2006. Each of the federal government departments included, as part of their response, a plan on initiatives underway or being planned to address the areas identified in the petition. (Office of the Auditor General of Canada) Minister of the Alberta Environment, Rob Penner, responded on behalf of the Province to Chief Noskey by way of a letter dated April 10th, 2007.

> The Province of Alberta is in a period of economic development that brings with it many benefits. We also appreciate and place high priority on the need to understand and manage the impacts of that development. To date, cumulative effects have been included and taken into consideration in the environmental impact assessments supporting the decision-making on each proposed new major project. (Hon. Penner, 2007)

The full text of the Minister Penner's letter is included as Appendix A and reveals little in the way of concert actions to address the cited Alberta Treaty 8 First Nation concerns. The Mikisew Cree First Nation in August of 2008 expressed further concern on the same issues that were outlined by the Treaty 8 First Nations of Alberta organization to the Alberta Minister of Alberta Environment and the Minister of Environment Canada relative to a planned mine project within its traditional territory;

> As we have stated on many occasions to both your Governments, we are extremely concerned about the impacts of oil sands and other development on the quality and quantity of water on which we rely to exercise our rights and which supports the ecosystem. You need to understand that we do not hunt fish, trap and gather merely for sport, recreation or amusement: it is the essence of who we are, how we live, and how we lean and pass down our culture. The impacts of the Project cannot be isolated to narrow environmental or social issues. The more that access to our lands is cut off and blocked and the more that important spiritual and ceremonial sites are destroyed, the more a part of our culture dies.
>
> While governments, industry and regulators assume that all industrial development can be mitigated or conditions placed on approvals, our experience tells us that simply approving projects without full and accurate information contributes to the further destruction of our rights and culture. What is missing from the regulatory review process for the Project is accurate and adequate information to answer this basic question: is there enough land left within the vicinity of the application on which MCFN can exercise our rights now and in the future—so that we are not required, yet again, to go "elsewhere" to do so. (Mikisew Cree First First Nation, 2008)

The conclusion reached is that the petition and action taken by First Nations, such as the Mikisew, served to provide notice to both the federal and provincial Crown that it would no longer be acceptable to only engage individual First Nations on project specific issues.

Going forward the development of the oil sands would need to align with the treaty rights of all Alberta Treaty 8 First Nations. It is of interest to note the wording used by the Office of the Auditor General of Canada to summarize the central theme of petition 188:

> Treaty 8 First Nations of Alberta are concerned that resource development in Northern Alberta, especially heavy oil and tar sands development, is proceeding at an unsustainable pace that threatens the environment upon which First Nations people rely upon to pursue their constitutionally protected Treaty Rights. The petitioners request a regional assessment of the effects of these developments involving all jurisdictions. The petitioners also ask various federal departments specific questions about the ongoing resource development in this territory. (Office of the Auditor General of Canada, p. 1)

The Treaty 8 First Nation organization had served notice to both the provincial and federal Crown that the future discussion on outstanding Aboriginal and treaty rights issues would be directly linked to Alberta resources and in particular the development of Alberta oil sands.

6.4.2 Province of Alberta Post 2000 Initiatives

Ed Stelmach, the current premier of the Province of Alberta, spearheaded the setting of the most recent government strategy. This was shaped in 2008 when the Premier issued mandate letters to each Cabinet Minister setting out the five government priorities to guide their work to "build the province's future". The first priority directed Minister's to "ensure Alberta's energy resources are developed in an environmentally sustainable way". (Premier Stelmach, 2008) As part of this the Province announced, in December 2008, a strategy that laid out a platform of how it planned to proceed on the energy front. It set a vision to be a "global energy leader" with its provincial jurisdiction "recognized as a responsible world class supplier." (Alberta Government, (n.d.)) This direction very

much aligned with that put in place under the previous provincial leader. It focused on the tactical implementation of a policy framework allowing stakeholders in the energy patch to expedite development of the oil sands region. One significant development emanating from this policy was the creation of Traditional Use Studies. These studies would be used by First Nations to map the location of traditional and sacred sites throughout their territory. The completion of a Traditional Use Study by a qualified third party relied heavily on working with Elders to collect the history of the area. The Traditional Use Studies would preserve this baseline information and position the First Nation to be prepared for future discussions with the Crown covering the impact the forecasted development would have on its sacred and culturally important sites within the treaty territory. (Province of Alberta, 2009, p. 1)

Since the introduction of energy as one of its policy priorities the provincial government has produced various reports on progress within the oil sands region. These bulletins and information from government web sites provide updates on the impact oil sands development is having on First Nation employment, investment and other key economic indicators. The Aboriginal Relations department within the Province of Alberta advises that oil sands projects over the most recent ten year period have resulted in Aboriginal Companies earning more than $2.6 billion. (Government of Alberta, 2009, p. 2) It is difficult to find either government or independent reports to assess the facts and figures' covering the impact resource development is having within the Treaty 8 region. However, there are independent reports and studies available which detail the economic impact the oil sands region, of which Treaty 8 territory is a significant portion, will have within Canada and Alberta. One such organization is the Canadian Energy Research

Institute (CERI). It is a cooperative research organization whose membership includes the federal and provincial governments, a university and over one hundred corporate and trade association members. CERI has published a number of extensive reports on the impact the petroleum industry will have on the Canadian economy. Its July, 2009 report *Economic Impact of the Petroleum Industry in Canada*, included a forecast, twenty-five years into the future, modeling the impact the Alberta oil sands resource development will have on Canada. (Canadian Energy Research Institute, 2009) Appendix B recaps the findings and maps the location of the Alberta oil sands cited in the report. It forecasts that over the next twenty-five years the oils sands will add $ 1.7 trillion dollars to the Canadian GDP with Alberta receiving $1.6 trillion of this projected GDP economic benefit. In addition, the CERI forecasts the Alberta oil sands will create 11,419 thousand person years of employment in Canada with Alberta to receive benefit of 77.2% of this total or 8,817 thousand person years of employment. The Treaty 8 traditional territory, as seen by the map, is located at the centre of this region. The CERI forecasts can be extrapolated to make a case that the oil sands development present an historic economic opportunity for Alberta Treaty 8 First Nations.

It is argued that the economic importance of the region makes Treaty 8 First Nations well positioned to engage all stakeholders to address their outstanding issues covering their Aboriginal and treaty rights. However resolution of the outstanding Aboriginal and treaty rights issues is only one part of a full strategy that is needed to address the social and economic needs of Treaty 8 First Nation. Each of the major project proponents in the oil sands basin have in recent years partnered with First Nations to put

in place programs such as Aboriginal training, employment, entrepreneurial opportunities and in some cases support for social programs. Unfortunately, these initiatives have not been able to mitigate what is resulting to be a permanent disruption to the Treaty 8 First Nation traditional way of life. To date the industry and government approach has not been successful in addressing the First Nation social and well being issues that have arisen as a result of this change and the pace at which the development has occurred within the Alberta Treaty 8 region. The conclusion drawn is that Alberta Treaty 8 First Nations to date have not shared equally in the wealth and employment opportunities created, for other Albertans and Canadians, from the resources harvested from within their territory. There is therefore need for all Treaty 8 First Nations to work together with industry and government to bring closure on the Aboriginal and treaty issues and focus on the future. The time has come for all stakeholders in the region to turn their attention to development of a strategy backed by government policy so that the economic opportunity at hand is leveraged to insure that Treaty 8 First Nations have a lasting way of life in their treaty territory.

6.4.3 Possible Outcomes of Oil Sands Influence

The existing government policy framework has been helpful to non-native stakeholders in the region and has provided some economic benefit to specific First Nations in near proximity to approved projects. The policy built a predictable process that project proponents could follow to bring a project on stream. This certainty helped resource and infrastructure companies in attracting shareholders prepared to invest in these capital intensive ventures. This recently concluded phase of commercial

development of the resource sector in northern Alberta was conducted in an era when Alberta Treaty 8 First Nations fell in line with the government's project engagement approach. A case is being made that this era has passed. A review of press coverage and recent public statements emanating from leaders of individual Treaty 8 First Nations presents credible evidence that the lack of progress, in resolving Aboriginal and treaty rights, is bringing uncertainty to the Alberta Treaty 8 region. This new environment carries with it increased risk for project proponents. It raises the question of how much longer the Province of Alberta can continue to defend that its policies and guidelines honour the Crown's obligations within the parameters laid out by the Supreme Court. The uncertainty leaves companies open to legal challenges by First Nations as was the case reported by the Canadian Press in December of 2008 and carried in the *Tar Sands Watch*:

> An aboriginal band has threatened the very basis of Alberta's oil sands industry by filing a court challenge to the province's system of granting land tenure.
>
> A notice filed Wednesday in Edmonton Court of Queen's Bench by the Athabasca Chipewyan First Nation claims that a series of oil sands permits the provincial government sold to Shell Canada and other companies are invalid.
>
> Selling off rights to explore the land without consulting area aboriginals breached the Crown's duty to consult, say legal documents prepared by the First Nation. (Polaris Institute, 2008)

In addition, the recent history of Alberta Treaty 8 First Nations is one where its leaders have repeatedly expressed concern with the current pace of development and manner in which it has placed enormous stress on their traditional territory. This issue has resonated beyond Canada and is attracting the attention of internationally socially minded organizations. This theme is seen in the September 11th, 2009 article in the *National Post*:

> Last month, the U.K.-based environmentalist group PLATFORM helped arrange for members of the Mikisew Cree First Nation and the Athabasca Chipewyan First Nation, who live downstream of oil sands operations, to travel to Climate Camp in London, England, where together they protested against BP and Shell investing in Alberta. The natives appalled their European hosts with stories of allegedly poisoned water, contaminated fish, and the cancers and diseases they suffer from being so near to the oil sands. (Libin, 2009, p. A. 8)

Treaty 8 leaders today have better access to resources to engage both their people and non-native domestic and international public groups to make their case with government. If the provincial government holds to its current position of not dealing with the core treaty issues it would appear there will be little alternative other than for the leaders of Treaty 8 to combine their efforts and again look to the Court. Prolonged court action raises a number of issues for all the stakeholders in oil sands region to consider.

> In a recent study for the Canadian Defence and Foreign Affairs Institute, University of Calgary political scientist Tom Flanagan suggests that while environmental groups worldwide have begun attacking oil-sands development, they lack a presence in the very place they're targeting. It only makes sense, then, for environmental groups to team up with "dissident First Nations" (as opposed to bands that support the industry for prosperity it has brought north) to fight the oil patch on its own turf, he predicts.
> (Libin, 2009, p. A. 8)

Professor Flanagan of the University of Calgary in a June 2009 report prepared for the *Canadian Defence & Foreign Affairs Institute*, and referenced in the above article, also cautioned such groups, "may occasionally slow down or hold up particular projects, but which will probably not threaten the ability of resource industries to continue their operations in the region". (Flanagan, 2009, pp. 11-12) It is argued that extended court litigation or any obstructive tactics in the oil sands would impact upon the economic

benefits from the oil sands projects. This also is a risk to Treaty 8 First Nations. It is likely any drawn out obstructive scenario would adversely affect the ability and willingness of non-First Nation stakeholders in the region to invest into long term programs to address the well being issues of Treaty 8 First Nations.

The conclusion reached is that the best case scenario points in the direction of a new resolve on the part of both Treaty 8 First Nations and the Crown to reopen negotiations with the intent of finding a binding solution to maintain certainty within the region.

6.5 Issue Four-- Future Centres of Influence within the Treaty Territory

For much of the twentieth century the sparsely populated region of Alberta covered under Treaty 8 remained isolated from the issues that affected the settled parts of Canada. The nomadic indigenous population of this region were not well known to those outside of the north and throughout much of their history they have remained dependent on their traditional way of livelihood. The culture of these northern Albertans and importance they placed on hunting, fishing and trapping as their source of livelihood was not fully appreciated by government, its bureaucracy or the general public. Throughout the period leading up to development of the oil sands, Alberta Treaty 8 issues were absent from the national and provincial agendas of the governments in power. The traditional Treaty 8 territory had not from the outset been part of the government strategy of building the railway and settling the western region of Canada. The conclusion reached is that the period from signing of the treaties to development of the economic viability of the Alberta oil sands was a quiet period of influence for Alberta Treaty 8 First Nations.

Richard Daniel in his article *The Spirit of the Alberta Indian Treaties* provided a perspective on this historic misunderstanding between the Province and Treaty 8 First Nations. "Overwhelmingly, the elders of the Treaty Eight area believed that the treaty promised that there would be no restriction on their right to hunt, fish, and trap." (Daniel, 1987, p. 93) In the earlier chapters a case has been made that the provincial government choose to basically ignore issues attached to this long held view of Treaty 8 First Nations covering their interpretation of treaty rights. This period could be characterized as one where the provincial Crown had much of a free hand in implementing its policies and regulations in the Treaty 8 traditional territory. Throughout this era the only check on the Crown was when individual First Nations took it upon themselves to challenge government decisions or legislation by way of court action. There remained throughout this time a basic stalemate "in the Treaty dispute" between the Alberta Treaty 8 First Nations and the Crown. This deadlock was defined in 1973 by René Fumoleau at which time he also detailed the need for, "some manner of compromise". He concluded that change could only occur if there was an alignment of priorities:

> The problems arising from Treaties 8 and 11 were not resolved by 1939, nor have they been to date. Basic differences still separate the thinking of the two parties and always will unless the Indians are induced to substitute other values for their traditional ones. As long as they remain faithful to their culture, there is little common ground with Government for settlement of the basic issues at stake in the Treaty dispute. Priorities for one do not coincide with the priorities of the other. But those two widely divergent world views must find some manner of compromise and coexistence to insure protection for the traditional rights of Indian people. (Fumoleau, 1973, p. 307)

The hypothesis put forward here is that the needs of the corporate world in the oil and gas industry combined with the collective concerns being expressed by all First Nations in the Alberta Treaty 8 territory are creating an opportunity align the priorities of these two groups.

It is proposed in the following section that the resolve of First Nations, combined with new influences from the corporate board rooms of project proponents and influences from international interests are likely to reshape the discussion within the Alberta Treaty 8 region.

6.5.1 The First Nation Resolve

In recent years the Province in response to direction provided by the Supreme Court adopted a process that would engage First Nations. The intent of the provincial process was directed at facilitating discussions between First Nations and project proponents. The objective of these discussions was to focus on resource development issues that had the potential to infringe upon treaty rights. Treaty 8 First Nations throughout have held firm by insisting the Crown's consultative approach be expanded beyond a project review process. They requested repeatedly that a meaningful consultation process must include placing core treaty interpretation issues on the agenda which in the opinion of First Nations the province has historically omitted from such discussions. This was addressed in a May 21st, 2009 letter from the Mikisew Cree First Nation to the Regional Director, Environmental Assessment, Northern Region Alberta Environment (caption Proposed Terms of Reference Environmental Impact Assessment Report Athabasca Oil Sands Corp – MacKay River SAGD Project):

> The federal and provincial governments have a fiduciary obligation to justify any infringement on these rights and uphold the honour of the Crown, including a duty to consult meaningfully and accommodate the Mikisew Cree. The federal and provincial governments have not adequately consulted with the Mikisew Cree on the standardization of all oil sands development ToRs, and on the potential impacts that this Project will bring to the Mikisew Cree. It is Mikisew Cree's inherent right and responsibility to protect and preserve the environment for the future use and benefit of the coming generations (Mikisew Cree First Nation, 2009, p.59-60)

The position put forward by the Mikisew Cree First Nation is one shared by other Treaty 8 First Nations also engaged in discussions with project proponents attached to resource development. This ongoing engagement surrounding the oil sands projects has the potential to dramatically change the status quo approach adopted by the Province of Alberta in dealing with Treaty 8 treaty rights. There is a lot on the line for both Treaty 8 First Nations and the Province of Alberta. Project proponents require timely access to this traditional territory and co-operation of Treaty 8 First Nations if they are to fully develop the potential of the oil sands and benefit all of Alberta. Industry also has been put on notice of the possibility of its own liability arising out of the *Haida* decision:

> ...the recent *Haida Nation* decision of the British Columbia Court of Appeal should put industry on notice that a legal and equitable duty to consult can belong to industry as well as government. Knowledge of the facts of infringement occurring or knowing participation in a breach of the duty to consult could yield industry liability. (Szatylo, 2002, p. 234)

This new forum provides Alberta Treaty 8 Nations with a new opportunity to address their own pressing economic issues and to look at how best to leverage this to better the way of life for their band members. However, First Nations and Industry are

caught in a difficult scenario. It appears, "the Alberta's position is intransigent and [that the province] may indeed battle all the way to the Supreme Court". The oil and gas project proponents on the other hand have endorsed a proactive engagement process with Alberta Treaty 8 First Nations looking to such a strategy as a "positive alternative to court action". It therefore appears that any attempt to move the Province of Alberta in a new policy direction will take the full public support of corporate leaders and the combined efforts of all non government stakeholders in the Treaty 8 traditional territory. (Szatylo, 2002, pp. 235-236)

6.5.2 Corporate Board Room Direction

There is also is a new change agent at work within the treaty territory. That is the influence of the corporate world with a culture of due diligence, governance and accountability to shareholders. The leaders of these entities increasingly need to understand the implications attached to the recent court decisions and the ground swell of support amongst natives in the region calling upon the Crown to deal with the cumulative impact of development within the treaty territory. These unresolved issues between Treaty 8 First Nations and the Crown have the potential to impact upon the license to do business for all business stakeholders in the treaty territory. Industry decision makers need certainty to draw up long term business plans which they can use to attract investors and financiers to raise the necessary funding to build out projects within the treaty territory. It is proposed that the uncertainty attached to the unresolved treaty rights has the potential to destabilize the business environment and adversely affect project proponents. The current state places decision makers in a position where they are unable to fully mitigate usual business risks with the core of this issue centered in the uncertainty

attached to the stalled discussion on treaty rights. This is evidenced by the tone of the First Nation debate within the treaty territory covering how projects should proceed and the concerns with the cumulative effect that all the development is having upon the inhabitants of the region.

> Our hunting, trapping and fishing rights are already infringed upon. The rapid pace and increasing development will further exacerbate this infringement unless long-term strategies are quickly developed and implemented to meet the community's cultural, hunting, trapping and fishing needs. (Fort McKay First Nation-p38)
>
> We're trying to find a way to allow [development] to proceed with some degree of certainty while protecting our rights and interests. (Peace River First Nations p-68)
>
> There are places we can't go anymore. The water has dropped over five feet. The migrating birds didn't come because there was no food for them. These are the birds we hunt. (Fitzgerald First Nation p-68) (Aboriginal Consultation Interdepartmental Committee, 2007)

The current situation is headed in a direction where issues attached to treaty rights and the cumulative impact of development is increasingly ending up as corporate social responsibility (CSR) agenda item in the board rooms of project proponents.

> Governments, activists, and the media have become more adept at holding companies to account for the social consequences of their activities. Myriad organizations rank companies on the performance of their corporate responsibility (CSR), and, despite sometimes questionable methodologies, these rankings attract considerable publicity. As a result, CSR has emerged as an inescapable priority for business leaders in every country. (Porter & Kramer, 2006)

The *Globe and Mail* in its April 6th, 2010 edition reported on such an initiative. The article provided details of a resolution to be put forward by FairPensions, a British consulting group that lobbies pension funds to make "morally right" and "financially

prudent" investments, at the April, 2010 British Petroleum annual meeting in London England:

> British oil giant BP PLC is going into the oil sands, but not without a fight from some of its shareholders. A group of about a 140 shareholders, including Unison - Britain's public-sector workers union - and Boston Common Asset Management, have filed a special resolution at BP's annual meeting demanding that the company publish a full report next year about the financial, environmental, social and reputational risks associated with its planned Alberta oil sands investments. (Reguly, 2010, p. B. 10)

There is a compelling case to be made that the time is at hand for board room support encouraging Treaty 8 First Nations and the Crown to deal with the interpretation of treaty rights.

6.5.3 International Alignment:

Monique Passelac-Ross in a March, 2008 paper prepared for the Canadian Institute of Resource Law provided an overview of "three international instruments that have been used or have the potential to be used to support Aboriginal claims to access and control their traditional lands and resources". These included the International Covenant on Civil and Political Rights (1966), the June 1989 International Labour Organization Convention 169: Convention Concerning Indigenous and Tribal Peoples in Independent Countries and the September, 2007 *Declaration on the Rights of Indigenous Peoples* (2007). To date, Canada has only ratified the International Covenant on Civil and Political Rights. This international agreement was used in 1990, by the Lubicon Lake Cree First Nation in northern Alberta, "to bring a claim against Canada to HRC [Human Rights Committee]". (Passelac-Ross, M., 2008, p. 4) While the claim was partially dismissed, the HRC did rule that "the granting of leases by the government of Alberta for oil and gas exploration

threatened the way of life and culture of the Lubicon Cree". The potential longer term legal impact of these international agreements is outside the terms of reference of this study. The agreements are however cited to put on record that there is mounting international interest and support for Indigenous peoples, such as the First Nations in Canada, "to control resource development" on their lands. (Passelac-Ross, M., 2008, pp. 4-8) Professor Dwight Newman of the University of Saskatchewan in his recently published book *The Duty to Consult New Relationships with Aboriginal Peoples* devotes a full chapter to reviewing this area of evolving international law and how it might impact upon the Crown's duty to consult with Aboriginal peoples. He concludes:

> Whatever Canada does in terms of the duty to consult, it does not act in "splendid isolation". Our relationship with Indigenous peoples exists in the context of a set of developing norms...it is nonetheless the case that international law may affect the future development of Canada's duty to consult doctrine. (Newman, 2009, pp. 91-92)

International attention is also being drawn to Alberta Treaty First Nations as a result of interest by state entities linked to China, Korea and Japan wanting to invest in oil sands projects. The *Globe and Mail* in March, 2009 reported "Chinese and Korean investors are pouring $200-million into a hedge fund focused on resource development on Aboriginal land, further evidence of Asia's appetite for Canadian raw materials and a growing interest in business partnerships amongst Aboriginal people". (Friesen, 2009, p. A. 5) The *Globe and Mail* in a September 1st, 2009 article titled "China's move into oil sands irks the U.S." reported on Petro China Co. Ltd's $ 1.9 billion dollar investment in the oil sands. (McCarthy, 2009, p. B1) *Alberta Venture* magazine in its April 15th, 2010 Biz Beat Editors Blog reported that "Chinese oil giant Sinopec had paid $ 4.65 billion for

a nine per cent stake in Syncrude," adding to the foreign investment in the oil sands. The *Alberta Venture* article went on to provide a perspective on the reason foreign investment is being attracted to oil sands projects:

> I think Sinopec's sizeable presence in the oil sands means the start of something big. You can expect to see a lot more foreign acquisition of the oil sands. ... Canada offers stable government, predictable regulatory regime, reasonable taxes and royalties, with no chance of civil insurrection or nationalism threat of foreign interests. (Marck, 2010)

A conclusion is drawn, that the attraction of substantial foreign investment into the oil sands will open new consultation forums and serve to introduce new business models to engage Aboriginal communities in the development of the resource potential within their traditional treaty territory. A spokesperson of an investment company heading up an initiative to attract foreign investors cited examples such as giving native bands significant roles, "with seats on the corporate boards overseeing these projects and jobs for locals". He went to add that the international state entities with an interest in the oil sands have experience in "emerging markets and can understand emerging market opportunities, such as in Aboriginal communities in Canada, better than mainstream investors in Canada." (Friesen, 2009, p. A. 5) Newman (2009) provides the following insight on this new approach:

> Indeed, the role of the duty to consult doctrine may reshape the business landscape in favour of corporations that are able to enter into effective relationships with Aboriginal Communities. Interestingly, there have been recent moves by Asian nations to enter into "nation to nation" discussions with Canadian Aboriginal communities with the aim of gaining access to natural resources on Aboriginal lands. (p. 76)

The Alberta Treaty 8 First Nations are taking steps to be at the forefront of this strategic opportunity. The *South Pace News* of High Prairie Alberta in its October 14th, 2009 edition reported on Jaret Cardinal, Grand Chief of Treaty 8 and Chief of Sucker Creek First Nations upcoming trip to Europe. The objective for the trip undertaken by the Chief of Treaty 8 was to "build strong international relationships when it comes to climate change discussions and implementation of the Treaties signed between the Queen of England and First Nations of Canada". The article titled "Chief Cardinal rubs shoulders with elite" went on to provide further details on the trip:

> "The numbered treaties are international treaties signed with the Queen of England and a key outcome from this meeting was our need to begin building relationships at the international level," says Cardinal. This is precisely what Cardinal is doing in Europe, says a news release issued by Sucker Creek First Nation. On Sept. 29 he attended the Annual Energy Roundtable Conference in London, where he met national and corporate leaders from across Europe and Canada to discuss building a transatlantic energy partnership. Discussion on industry consolidation, supply, regulation and investment issues in infrastructure and new energy technologies took place. Organized by the Canada-Europe Roundtable for Business, the conference was co-hosted by the Canadian High Commission. (The South Pace News, Anonymous;, 2009, p. 4)

The conclusion is that the multi-billion dollar investments needed to develop the oil sands and the long life of these projects will serve as an impetus for a consortium of international and domestic investors to press for a remedy to these long outstanding Aboriginal rights and Treaty 8 issues.

6.6 Summary

There are new international influences from legal jurisdictions outside of Canada, the influence of our own courts, and corporate practices of North American, Asian and other

foreign entities that will reshape the historic norm of engaging Aboriginal communities in the oil sands region of Alberta. In addition, First Nations are garnering a better understanding of how to leverage this opportunity to reshape the discussion on the duty to consult with those parties who have an interest in the oil sands regions within their traditional territory. The billions of dollars being invested by those in oil sands projects are major commitments on the part of multinational and state owned companies. The timely completion of these projects and orderly access to the oil becomes critical to the success of these businesses. Further the investments by foreign controlled companies may be of strategic significance in meeting the long term energy needs of specific nations. In light of this, it would be reasonable to assume that any nuisance activity or political unrest that threatened to disrupt the oil sands projects would be met with a strong business lobby effort and perhaps even country retaliation initiatives to get the projects back on track. This makes for a strong case that it is timely for the Crown and First Nations to find a domestic solution to the outstanding treaty "Government Obligations".

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Conclusion

The history of Alberta Treaty 8 First Nations has in large part been shaped by non native outsider interest in the resource potential contained within the traditional treaty territory. The land of this northern region was not required to build the railway that would link all of Canada. Government bureaucrats considered its northern location too isolated and harsh to attract a large influx of settlers. The Government of Canada as such had not included this northern region in its post Confederation strategy of negotiating treaties with the western First Nations. The treaty approach provided the central government with undisputed jurisdiction over the land of western Canada, which it needed to build a national rail line to link Canada and open up the territory for settlement. With this in place, the government was able to draw upon its newly acquired land inventory to offer up property ownership as an incentive to attract potential settlers. These settlers could now access the region via the new transportation route. The Government of Canada believed the treaty agreements, to be signed with the indigenous population in western Canada, would both honour the commitment of the Crown as laid out in the *Royal Proclamation* and be compliant with British laws. In turn First Nations would be given assurances as to the land they could occupy. They would also receive assurances that band members could expect to receive a bundle of social services and other benefits from the Crown.

A First Nation member, interviewed for this paper, and who works extensively with First Nation communities throughout Alberta and Saskatchewan provided his interpretation of the treaty making process. It is an opinion he formed through review of

the treaty agreements and from stories told to him by the Elders and leaders of many First Nations he was come to know throughout the west. He is of the opinion that his interpretation would be a common understanding held by most First Nation leaders.

> Indian Treaties were signed as Nation to Nation international agreements to maintain the peace to enable the settlement of newcomers on the traditional homelands of Indigenous Nations. The Treaties were negotiated in good faith and the promises made by Queen Victoria through her representative were sealed through oaths in pipe ceremonies which is a sacred process....The Treaty signing process recognized and respected the fact Indian Nations had their unique spiritual traditions, sovereignty, belief systems, ceremonies, languages, world views, culture, and adherence to natural laws which connected the people to the Creator and Mother Earth." (Blind, 2009)

The historic account of the Government of Canada's policy initiatives following the signing of Treaty 8 and other western numbered treaties fell well short of this First Nation interpretation. The Crown representatives became preoccupied with enfranchisement of First Nation members. It resorted to increased regulation housed in the *Indian Act* with this legislation unilaterally amended by the Government to narrow the interpretation of treaty and Aboriginal rights. In the immediate years following the signing of Treaty 8 the Government of Canada, without input from Treaty 8 First Nations, set up the province of Alberta and transferred control of all Crown land and natural resources within the treaty territory to this new jurisdiction. Throughout this period Treaty 8 First Nations continued on with their traditional way of life relying exclusively on hunting, trapping, and fishing in the treaty territory. Tension immediately followed the treaty signing as the Crown introduced legislation covering game laws and the administration of trapping licences. This Crown intervention had a severe negative

impact upon the traditional sources of livelihood for Treaty 8 First Nations. The legislation restricted fishing, trapping, and hunting for First Nation members and allowed non-natives access to both trap lines and game within the treaty territory. (Fumoleau, 1973, pp. 122-124) The hardship caused by this Crown action received little attention as Treaty 8 First Nations did not benefit from a high profile on either the provincial or national stage. It was a period in time when Treaty 6 and Treaty 7 First Nations took the lead within Alberta and worked with other First Nation groups throughout the nation to press for Aboriginal rights and the eventual entrenchment of treaty rights within the 1982 *Constitution.* The approach of Treaty 8 First Nations was to seek remedies through the courts rather than political initiatives. Treaty 8 First Nations used legal remedies to challenge government legislation on hunting rights, press for land claims and to deal with issues attached to the Crown take up of land.

The forgotten Treaty 8 region began to garner new outside attention throughout the 1970's and 1980's. This was the result of the increased interest in the economic viability of the oil sands basin which was located in the middle of the Treaty 8 traditional territory. The outside interest by investors in the Treaty 8 traditional territory coincided from a timing perspective with Supreme Court decisions. They provided greater clarity on the Crown's accountability covering Aboriginal and treaty rights. The judgments have set direction on the Crown's duty to consult and set precedent on the approach to be taken to reconcile differences in the interpretation of treaty rights. This Court guidance resulted in need for the Province of Alberta to engage First Nations in a review of its resource and land management policies on Crown lands. The Province of Alberta, from 2000 onwards, undertook numerous round table discussions and meetings with First Nation

communities. This resulted in a new provincial policy and guidelines covering resource and land management. These were introduced in 2006 but rejected by all Alberta First Nations. Nevertheless the Treaty 8 First Nations were ill prepared for the pace and complexity of developments attached to the roll out of oil sands projects that were introduced into their traditional territory from 2000 onwards. The government policy resulted in the Province of Alberta delegating elements of the Crown's accountability to a newly designed project consultation approach wherein project proponents would engage direct with individual First Nation communities. The result was somewhat divisive within the Treaty 8 Territory. Project proponents were legislated to negotiate with the First Nations whose reserves would be in the direct way of the project. Other Treaty 8 First Nations in the territory objected to this project approach stating that the government was failing to address the cumulative regional effect all the developments would over time have on the entire treaty area. The result was a patch work approach throughout the treaty territory, where Treaty 8 First Nations did not have benefit of well defined common principles or a common agenda. Individual Treaty 8 First Nation leaders were unable to fully link the direction provided in the court decisions covering treaty rights and Crown land jurisdiction to ongoing development within the whole of the Treaty 8 region. It was in the 2005-2006 time line that the Treaty 8 First Nations of Alberta organization began to evolve and become empowered to represent the treaty territory and start to work on a common agenda. Those living in the treaty territory also gained a better understanding of the economic importance of the oil sands region to Alberta and Treaty 8. Treaty 8 leaders also were faced with growing opposition from within the treaty territory. Band members began to express concern and pressed their leaders to address the impact all of the

development was having on both their health and way of live within the treaty territory. This period of ongoing dialogue between First Nations, industry and government also provided time for both the Crown and Treaty 8 leaders to gain more insight into the implications attached to the recent Supreme Court judgements.

The above events have dramatically changed the current position and outlook for Treaty 8 First Nations. The result is that Treaty 8 leaders are today challenged in new ways. The Treaty 8 band members are looking to their leaders to make the right strategic decisions to insure Treaty 8 Nation can be best served during this period of new found influence. In light of this it would be opportune for Treaty 8 First leaders to crystallise their thinking on the agenda that should be set to leverage the recent direction set by the courts. A prime item on this agenda would be on how best to engage the Crown to bring closure on interpretation of Aboriginal and treaty rights. This strategic planning is complex and needs to be built around a consensus on principles that are shared by all Treaty 8 First Nations. There is ongoing risk that this historic opportunity could be compromised by a further patch work approach where First Nations respond to project proponent requests on individual community basis without long term treaty territory goals being firmly in place. It is incumbent upon Treaty 8 leaders to now engage the Crown and to look at new ways of partnering with international and domestic project proponents to bring closure to the debate on the interpretation of Treaty 8 rights. The objective is to insure future generations of Alberta Treaty 8 First Nation band members need no longer invest resources to interpret the 1899 Treaty 8 or agreements now under consideration. There is an historic opportunity for Treaty 8 leaders to work with all stakeholders as an equal partner to map out the future of this treaty territory. One focused

on a new round of collaborative negotiation between the Crown and Treaty 8 First Nations. The objective would be for Alberta Treaty 8 First Nations and the Crown to reach an agreement on "Government Promises" to satisfy the intent of Aboriginal and Treaty 8 rights. There would be assurance for all stakeholders that First Nations would continue to honour the Treaty 8 "Indian Promise" of maintaining peace in the treaty region.

CONCLUSION WORKS CITED

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APPENDIX A:

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MAY 16 2007

ALBERTA
ENVIRONMENT

Office of the Minister
MLA, Medicine Hat

AR 25851

April 10, 2007

Grand Chief Arthur Noskey
Treaty 8 First Nations of Alberta
Loon River First Nation
P.O. Box 189
Red Earth, Alberta
T0H 0N0

Dear Grand Chief Noskey:

Thank you for your November 9, 2006, letter to the former Deputy Premier Shirley McClellan, asking for a joint federal-provincial assessment of resource development in northern Alberta.

The Province of Alberta is in a period of economic development that brings with it many benefits. We also appreciate and place high priority on the need to understand and manage the impacts of that development.

To date, cumulative effects have been included and taken into consideration in the environmental impact assessments supporting the decision-making on each proposed new major project. In addition, other initiatives currently under way such as the Oil Sands Consultations initiative may make a contribution to cumulative effects management.

One of the visions of the Oil Sands Consultations initiative is the recognition that an orderly pace of development requires "responsible environmental management and appropriate development of services and infrastructure." This vision includes the management of cumulative environmental and social impacts. Other vision elements underline the need for oil sands development that is respectful of First Nations and Métis rights and the importance of not passing on environmental, social/cultural, or economic liabilities to future generations. I am pleased that the Treaty 8 First Nations have been participating in this consultation initiative. It will be important to see what directions the final report (expected in June 2007) recommends.

425 Legislature Building, 10800 - 97 Avenue, Edmonton, Alberta, Canada T5K 2B6 Telephone (780) 427-2391 Fax (780) 422-6259
620 - 3 Street SE, Medicine Hat, Alberta, Canada T1A 0H5 Telephone (403) 527-5622 Fax (403) 527-5112

Premier Ed Stelmach has given me three responsibilities, outlined in my mandate letter. One of those three responsibilities is to develop a new environment and resource management regulatory framework to enable sustainable development by addressing the cumulative effects of development on the environment. Alberta Environment plans on engaging First Nations, Métis and stakeholders on this mandate item this year.

The mandates of other Alberta Ministers could also contribute to progress on cumulative effects management in the north and elsewhere in the province. Examples are the completion of the Land-use Framework and the development of a biodiversity strategy in the mandate letter of the Honourable Ted Morton, Minister of Sustainable Resource Development. The Honourable Mel Knight, Minister of Energy, has been mandated to develop a comprehensive energy strategy for the development of Alberta's renewable and non-renewable energy sources and for the conservation of energy use.

While I understand the interest of Treaty 8 in a northern regional assessment, many initiatives that will contribute in varying ways to cumulative effects management have progressed or have been announced since your letter was written. A variety of interested parties, including the federal government, are or will be involved in these initiatives. Given this situation, I encourage Treaty 8 First Nations to continue to be full participants and to add their value to these initiatives as the best way forward at this time toward our common cumulative effects management goal.

Sincerely,

Rob Renner
Minister

cc: Hon. Ed Stelmach
Premier

Hon. Mel Knight
Minister of Energy

Hon. Guy Boutilier
Minister of International, Intergovernmental and Aboriginal Relations

Hon. Ted Morton
Minister of Sustainable Resource Development

APPENDIX B:

Canadian Energy Research Institute
July 2009 Summary Report
Economic Impacts of the Petroleum Industry in Canada

(Canadian Energy Research Institute, 2009, p. 49)

Alberta: Oil Sands Resources Economic Impact

The following present the impacts associated with investment and operations, respectively, over a 25-year period as it relates to investment and operation in the Alberta

oil sands regions detailed above. (A breakout of Gross Domestic Product (GDP) and Employment are provided for each of the provinces who are significantly impacted)

A) Total GDP Impacts Associated with Investment and with Operation of Alberta oil sands to Canada ($1.7 trillion)

1. 90.6 percent of GDP to Alberta ($1.6 trillion)

2. 3.2 percent of GDP to Ontario ($54.9 billion)

3. 2.6 percent of GDP to British Columbia ($45.5 billion)

4. 1.3 percent of GDP to Quebec ($23.2 billion)

5. 1.1 percent of GDP to Saskatchewan ($18.7 billion)

B) Total Employment Impacts to Canada (11,419-Thousand Person Years-TYPE).

1. 77.2 percent of employment benefit to Alberta (8817-TYPE)

2. 7.1 percent of employment benefit to Ontario (812-TYPE)

3. 6.2 percent of employment benefit to British Columbia (713-TYPE)

4. 3.3 percent of employment benefit to Quebec (376-TYPE)

5. 2.6 percent of employment benefit to Saskatchewan (302-TYPE)

C) Total Federal Taxes

1. Alberta $166 billion

2. Ontario $7.0 billion

3. British Columbia $6.4 billion

4. Quebec $3.1 billion

5. Saskatchewan $2.4 billion

D) Total Provincial Taxes

1. Alberta $94.8 billion

2. Ontario $7.2 billion

3. British Columbia $6.0 billion

4. Quebec $4.1 billion

5. Saskatchewan $2.5 billion

E) Other Highlights (over 25-years of activity)

· Capital cost $218 billion

· Provincial royalties $184 billion

(Data compiled from Canadian Energy Research Institute July 2009 Summary Report "Economic Impacts of the Petroleum Industry in Canada.) (Canadian Energy Research Institute, 2009)