KAPAWE'NO FIRST NATION

P.O. Box 10, Grouard, Alberta T0G 1C0

Telephone (780) 751-3800
Fax (780) 751-3864

January 30, 2025

The Commission of the Canada Energy Regulator
Canada Energy Regulator
Regulator Policy Department

via email: rppr@cer-rec.gc.ca

Attention: Rumu Sen, Regulatory Policy
The Commission of the Canada Energy Regulator

Re: Phase I – *Canada Energy Regulators Rules of Practice and Procedure Review*
"Comment Submission" on Practices, Procedures, *and,* Processes as related to Canadian Energy Regulator Act, 2019 *and,*
Type and Scope of Amendments currently Considered

On September 9, 2024, our Sovereign Rights Holding First Nation received an email by the Commission of the Canada Energy Regulatory (CER) inviting Kapawe`no First Nation to participate in a PUBLIC ENGAGEMENT PROCESS - regulatory engagement for the Commission of the Canada Energy Regulator (CER) Rules of Practice and Procedure (the Rules). The following is a response to your email September 9, 2024 titled "Invitation to Participate in the Commission of the Canada Energy Regulators Rules of Practice and Procedure Review".

Please be informed that as Rights Holding Sovereign Kapawe'no First Nation, the Government of Canada as Crown Representative is obligated to consult with our Nation not only by the *Canadian Constitution, 1982*, but by many Canadian caselaw. There is also specific case law that states when a First Nation has its own laws, policies and procedures they must be respected as such and that no Federal or Provincial laws, policies, or procedures will supersede them. Please see the attached Kapawe`no First Nation Law on Consultation. As such, we are advising your department and Ministry that your duty to consult has been triggered as I am formally informing you that this process, as well as the current rules and practices and procedures, *The Canadian Energy Regulator Act*, all of which came in to force and effect without our Free Prior and Informed Consent in 2019. This includes this current review process, the amendments being considered in this review with the Rules and Procedures, as well as the Governance Structure established such as the Board and Directors, the Commission of the CER, the recruitment/selections thereof, also adversely affect our Inherent Aboriginal and Treaty Rights. That being said, we are formally requesting a meeting to discuss further.

In our brief preliminary review of the CER Act, and governance and structures of the CER, the authority granted to The Commission of the Canada Energy Regulator, the current practices and procedures under the National Energy Board Rules of Practice and Procedure, 1995, every copy of the consolidated statute(s) and/or consolidated regulations published by the Minister(s) were

conducted without our Free Prior and Informed Consent. In fact, these processes were conducted and implemented without consultation or engagement with our Rights Holdings Sovereign Nation. This process adversely affects our Nations autonomy, jurisdiction, and authority. And the decisions made of any project within our lands, waters, and territories have been impacted.

After extensive review of the current process, the *CER Act 2019*, and the current *National Energy Board Rules of Practice, 1995*, some initial statements of concerns are as follows, but not limited:

1. The index of the CER Act does not reflect the materials within the Act.

2. Cost apportionment and compensation should be for the life of the project, inclusive of the impacted First Nation(s), baseline formula given that all projects have an impact on our Inherent, Aboriginal and Treaty Rights.

3. Although it is great to see there is a concern by the Crown to ensure the Indigenous knowledge is protected, we have recommendations with regard to steps thereof.

4. We have serious concerns on the representation and Roles of the Crown Consultation Coordinator, the Commission of the CER, the Board and governance structures thereof, all of whom have ultimate decision-making authority in a process that adversely impacts our Inherent, Aboriginal and Treaty Rights as well as the autonomy, jurisdiction and authority our Rights Holding Nation.

5. Hard copies of permits should be required to be on site at all times and available upon request to anyone who may ask. First Nations (I) have firsthand knowledge of company's operation on the lands without proper authorizations or permits. We have several monitors and land users who have a right to know what is going on.

6. Communications, publications, notices, access to the Canada Gazette, are not effective means of consultation, engagement and discussions with Rights Holding First Nations. It is important that this is rectified and reflected in this process.

7. How is the Government of Canada ensuring its Provincial Governments are adhering to these laws, regulations and procedures and are aligning their First Nation consultation processes with Canada's guidelines and processes not only in the CER Act, but in all legislations related to Energy exploration and Resource extraction including projects, abandoned infrastructure, enhancing competitiveness, et al., especially in our lands, waters, and Territory?

8. Resource listings should be made available, to know who to contact when an incident occurs on the lands in relation to a proponents project. Ie. When there is a DFO concern, who do you call?

Additionally, where a First Nation participates in a public consultation process, such participation does not deprive them of the constitutional protection given under Aboriginal or Treaty rights under section 35(1) of the Constitution nor alter the division of powers between the federal and provincial governments. If the Crown does not establish a distinct process of consultation with the Rights Holding First Nation, the First Nation's refusal to participate in any generic public consultations will not be considered to be a breech of the First Nation's reciprocal duty to consult in good faith with the Crown (*Mikisew Cree First Nation v. Canada* 2005: par. 64).

Accordingly, please be advised that our Rights Holding First Nation insists upon a distinct First Nation Consultation Process. Please contact my Consultation Manager, Michelle Knibb at [redacted] or michelle.knibb@kapaweno.ca , to arrange a suitable time for a meeting. Further information on background to our consultation policy is attached to this letter as Appendix A.

Respectfully,

[redacted]

Hereditary Chief Sydney Lee Halcrow

Appendix A
Consultation Policy Background Information

This document states the policy of the participating First Nations of Kapawe'no First Nation and the Sawridge First Nation (hereinafter referred to as the Member First Nations) regarding off-reserve consultation pertaining to all decisions and actions by the Crown and private parties that may infringe upon or impact the Member First Nations' Inherent, Aboriginal, Treaty and Constitutional rights as they relate to the Traditional Territories (but not the Indian Reserves) of those Nations.

This document is based on constitutional requirements, as interpreted by Canadian courts. Accordingly, it sets out the approach to consultation that the Member First Nations will insist upon in all dealings with the Governments of Canada and Alberta, or subsidiary extensions of those respective Governments, and with private parties seeking to operate within the Member First Nations' Traditional Treaty Territory.

BACKGROUND

Originally, First Nations in Canada fell under inherent sovereignty, which arose from their existence as Nations predating colonization by other Nations (Jorgensen 2007:19). Following that, Treaty 8 was signed and ratified by Order in Council in 1899, then later, in 1982 Aboriginal and Treaty rights were entrenched in Section 35(1) of the *Constitution Act* (1982), which is the highest law of the government of Canada; nonetheless neither Canadian or Provincial government laws and constitutions do not super cede First Nations government constitutions and laws which give First Nations' *sui generis* land tenure over Treaty Lands and Resources, hereinafter referred to as '*distinctive rights*' (over and above other stakeholders). Accordingly, the Governments of Canada and Alberta are constitutionally bound to uphold and protect Aboriginal and Treaty rights of First Nations.

As well, the *United Nations Declaration on the Rights of Indigenous Peoples* (2007: Article 29) states: "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources."

And, the *Natural Resources Transfer Agreement* (1930), states:

> "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 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". Accordingly, provincial legislation, policies or regulations, in

regard to land and natural resource use or management in Alberta, shall not subvert or reduce the distinctive rights of the First Nations.

In accordance with our Inherent, Aboriginal, Treaty and Constitutional rights, which have been upheld by numerous Supreme Court decisions (*Haida Nation v. British Columbia* (2004), *Mikisew Cree First Nation v. Canada* 2005, *Delgamuukw v. British Columbia* 1997) and others, the NRTA (1930), and the United Nations, our First Nations desire healthy sustainable ecosystems, so as to continue, for the long-term to be able to continue to use our Treaty Lands and Resources in accordance with our inherent and distinctive rights.

The Governments of Canada and Alberta are constitutionally bound to respect the Aboriginal and Treaty rights of the Member First Nations, and can be held legally accountable when they fail to do so.

NATURE OF THE DUTY TO CONSULT

In *Delgamuukw v.British Columbia* (1997), the Supreme Court of Canada made it clear that in regard to the duty to consult:

- "There is always a duty of consultation";
- At the very least, this consultation "must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue";
- "In most cases, it will be significantly deeper than mere consultation";
- "Some cases may even require the full consent of an Aboriginal Nation" (*Delgamuukw v.British Columbia* 1997:par. 168).

KEY CONSTITUTIONAL PRINCIPLES

This policy is based on fifteen key constitutional principles. These principles will form the starting point of any consultation with Governments, Government representatives, or Industry:

Rights and Obligations

1. The Member First Nations have and assert Inherent, Treaty and Aboriginal rights. These rights are protected by s. 35(1) of the *Constitution Act (1982)*. The governments of Canada and Alberta are constitutionally bound to respect, honour and protect these rights, and are subject to legal recourse when they fail to do so.

2. Both the federal and provincial Crown stand in a fiduciary relationship to the Member First Nations. "The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development"; nonetheless, the "duty to consult is distinct from the fiduciary duty" (*Haida Nation v. British Columbia* 2004: par. 53 and 54).

3. Actions of the Crown, as well as actions of third parties authorized by the Crown, that are inconsistent with the Member First Nations rights, are culpable according to fiduciary principles and the test laid down by the Supreme Court of Canada in *R. v. Sparrow* (1990).

4. Neither the *Natural Resources Transfer Agreement* (1930), nor provincial legislation, policies or regulations regarding land and natural resource use or management in Alberta, reduces the constitutional or jurisprudential rights of the Member First Nations or the obligations of the governments of Canada and/or Alberta to the Member First Nations (*Haida Nation v. British Columbia* 2004: par. 58 and 59).

Infringement and the *Sparrow* Framework

5. Actions taken by the Crown since 1982 that directly or indirectly limit First Nation's rights are presumed to infringe s. 35(1) of the *Constitution Act* (1982) and must be justified according to the Sparrow test (*R. v. Sparrow* 1990).

6. The burden of justification is high and lies solely on the Crown. If infringement is unavoidable, the Crown must prove that the infringement of First Nations' rights:

   (1) serves a compelling and substantial objective; and

   (2) is consistent with the Crown's fiduciary obligation.

7. Justification under the Sparrow test (*R v. Sparrow* 1990) requires the following:

   - adequate consultation in good faith, to identify and address First Nations' interests and concerns;
   - adequate priority to First Nations' rights versus those of other stakeholders;
   - minimal impact on First Nations' rights;
   - mitigation measures to avoid infringements and impacts and to ensure that any impact that does occur is "as little as possible";

- fair compensation for unavoidable infringements; and
- other efforts to ensure sensitivity and respect for First Nations' rights.

Nature of the Consultation Process

8. The requirements can only be met through a First Nation specific consultation process. The Member First Nations are entitled to insist upon, a distinct process directed to their own rights, and separate from any existing public processes (*Mikisew Cree First Nation v. Canada* 2005: par. 64).

9. Should a First Nation not participate in consultation, this does not absolve the Crown of its positive obligation to provide "all necessary information" to the First Nation.

10. Where a First Nation participates in a public consultation process, such participation does not deprive them of the constitutional protection given under Aboriginal or Treaty rights under section 35(1) of the Constitution nor alter the division of powers between the federal and provincial governments. If the Crown does not establish a distinct process of consultation with the First Nation, the First Nation's refusal to participate in any generic public consultations will not be considered to be a breech of the First Nation's reciprocal duty to consult in good faith with the Crown (*Mikisew Cree First Nation v. Canada* 2005: par. 64).

11. The requirement to consult is triggered without the First Nations first having to go to court to prove their rights. In *Haida Nation v. British Columbia* (2004: par. 35) the court ruled when the duty to consult might arise. The duty the Court ruled **"arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal Right or Title and contemplates conduct that might adversely affect it"**. Consequently, governments are under a positive duty to be alert to possible infringements and/or impacts of Treaty and Aboriginal rights that might result from the exercise of Crown authority, and to be pro-active in avoiding or limiting any infringements and impacts.

12. Although the *R. v. Sparrow* (1990) requirements are a pre-requisite for the validity of Crown action, they do not end at the decision-making stage. They are ongoing and continuing for as long as Crown authority is being exercised.

13. Where a third party is acting under Crown authority, the duties are owed both by the third party carrying out the activity, and by the Crown in its ongoing fiduciary role. The obligations of the Crown and the third party run parallel. However, this does not reduce or replace the Crown's own constitutional and fiduciary duties to First Nations. The Crown's duties can be delegated, however, "the Crown alone remains legally responsible" (*Haida Nation v. British Columbia* 2004: par. 53).

14. The duty to consult imposes a positive obligation on the Crown to seek a workable accommodation between the interests of the First Nation(s) and the objectives of the Crown and third parties; in other words, the Crown must be careful to ensure that the substance of the First Nation's concern is addressed. In *Delgamuukw* (1997) the court ruled that **"the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation"** (*Delgamuukw v. British Columbia* 1997: par. 168).

15. The duty to consult requires the Crown to provide funding to the First Nations for the purpose of facilitating the review and analysis of the information provided in respect of any activity which may affect the Aboriginal or Treaty Rights of the First Nations.

Kapawe'no First Nation

A FRAMEWORK FOR RELATIONS

With

GOVERNMENTS and INDUSTRIES

Within

TREATY No. 8 TERRITORY

A FRAMEWORK for RELATIONS

With GOVERNMENTS and INDUSTRIES within TREATY No. 8 TERRITORY

The Policy of

KAPAWE'NO FIRST NATION

OVERVIEW

This document states the policy of the Kapawe'no Kapawe'no First Nation regarding consultation pertaining to all decisions and actions by both the Crown and private parties that may impact Kapawe'no First Nations' Treaty or Aboriginal rights. It is intended to govern all such relations between the Kapawe'no First Nation and governments and industry.

This policy is based on fiduciary principles and constitutional requirements, as interpreted by Canadian courts. It sets out the approach to First Nations consultation that the Kapawe'no First Nation will insist upon in all dealings with the Governments of Canada and Alberta, and with private parties seeking to operate in the First Nations' traditional or Treaty territory.

Part I of this paper describes the background and present status of First Nations consultation in Alberta, as well as the key constitutional principles. Part II sets out the Consultation Framework itself.

PART I

1. BACKGROUND

Treaty 8 was signed and ratified by Order in Council in 1899.

From the outset, the Crown often chose to ignore its Treaty obligations. It regularly acted in breach of both the oral promises and the written terms of the Treaties. For many years, First Nations had no legal recourse for broken Treaty promises or other breaches of their rights, apart from appealing to the honour of the Crown.

That changed in 1982 when the Governments of Canada and the provinces, including Alberta, agreed to entrench Treaty and Aboriginal rights in the Constitution. Section 35(1) of the *Constitution Act, 1982* now gives First Nations' rights constitutional protection from Crown infringement. This means that the Governments of Canada and Alberta are constitutionally bound to respect the Treaty and Aboriginal rights of the Kapawe'no First Nations, and can be held legally accountable when they do not.

2. PRESENT STATUS

Despite this new constitutional reality, both Canada and Alberta have failed to produce any strategy that complies with existing law for protecting Aboriginal and Treaty rights from Crown interference. The guidance provided by the Supreme Court of Canada and other courts in numerous judicial decisions has been ignored by Canada and Alberta, who fail to recognize and implement their obligations under s. 35(1).

3. KEY CONSTITUTIONAL PRINCIPLES

This policy is based on sixteen key constitutional principles. These principles will form the starting point of any discussions with governments or industry:

Rights and Obligations

1. The Kapawe'no First Nation has and asserted Treaty and unextinguished Aboriginal rights. These rights are protected by s. 35(1) of the *Constitution Act, 1982*. The governments of Canada and Alberta are constitutionally bound to respect these rights, and are subject to legal recourse when they fail to do so.

2. Both the federal and provincial Crown stand in a fiduciary relationship to the Kapawe'no First Nations. Private third parties also owe fiduciary obligations to the Kapawe'no First Nation when they act under Crown authority in ways that might affect the rights and interests of the Kapawe'no First Nations.

3. Actions of the Crown, as well as actions of third parties authorized by the Crown, that are inconsistent with the Kapawe'no First Nation rights, are invalid unless they can be justified according to fiduciary principles and the test laid down by the Supreme Court of Canada in *R. v. Sparrow*.

4. Neither the *Natural Resources Transfer Agreement, 1930*, nor provincial "ownership" and control of natural resources in Alberta, affect the constitutional obligations of the governments of Canada and Alberta to the Kapawe'no First Nations.

Infringement and the *Sparrow* Framework

5. Actions taken by the Crown since 1982 that directly or indirectly limit Kapawe'no First Nations' rights are presumed to infringe s. 35(1) of the *Constitution Act, 1982* and must be justified according to the *R. v. Sparrow* test.

6. The burden of justification is high and lies solely on the Crown. The Crown must show that the infringement of Kapawe'no First Nations' rights:

   (1) serves a compelling and substantial objective; and

(2) is consistent with the Crown's fiduciary obligation.

7. Justification under the *Sparrow* test requires the following:

- adequate consultation in good faith, to identify and address Kapawe'noFirst Nations' interests and concerns;
- adequate priority to Kapawe'no First Nations' rights versus those of other stakeholders;
- minimal impact on Kapawe'no First Nations' rights;
- mitigation measures to avoid impacts and to ensure that any impact that does occur is "as little as possible";
- fair compensation for unavoidable infringements; and
- other efforts to ensure sensitivity and respect for Kapawe'no First Nations' rights.

Nature of the Consultation Process

8. These requirements can only be met through a First Nations-specific consultation process. The Kapawe'no First Nation are legally entitled to, and will insist upon, a distinct process directed to their own issues, interests, and concerns, and separate from any existing public processes.

9. Should the Kapawe'no First Nation not participate in consultation, this does not absolve the Crown of its positive obligation to provide "all necessary information" to the First Nation.

10. Where Kapawe'no First Nation participates in a public consultation process, such participation does not deprive them of the constitutional protection given to Aboriginal rights under section 35(1) of the Constitution nor alter the division of powers between the federal and provincial governments. If the Crown does not establish a distinct process of consultation with the First Nation, the First Nation's refusal to participate in any generic public consultations will not be considered to frustrate the First Nation's reciprocal duty to consult in good faith with the Crown.

11. The requirement to consult is triggered without the Kapawe'no First Nations first having to go to court to prove their rights. Governments are under a positive duty to be alert to possible infringements of Treaty and Aboriginal rights that might result from the exercise of Crown authority, and to be pro-active in avoiding or limiting any impacts.

12. Although the *Sparrow* requirements are pre-requisites for the validity of Crown action, they do not end at the decision-making stage. They are ongoing and continuing for as long as Crown authority is being exercised.

13. Where a third party is acting under Crown authority, the duties are owed both by the third party carrying out the activity, and by the Crown in its ongoing supervisory role.

14. The obligations of the Crown and the third party run parallel. However, this does not reduce or replace the Crown's own constitutional and fiduciary duties to the First Nation. The Crown's duties cannot be delegated.

15. The duty to consult imposes a positive obligation on the Crown to seek a workable accommodation between the interests of the Kapawe'no First Nation and the objectives of the Crown and third parties; in other words, the Crown must be careful to ensure that the substance of the First Nation's concerns is addressed.

16. The duty to consult requires the Crown to provide funding where the Kapawe'no First Nation lacks the capacity to provide the information sought by the Crown.

PART II

CONSULTATION FRAMEWORK

The Kapawe'no First Nation Consultation Framework sets out the process that the Kapawe'no First Nation will insist upon in their dealings with Governments and industry. The validity of any action having an impact on the Kapawe'no First Nation is conditional on the ongoing fulfillment by Canada, Alberta and third parties of their constitutional and fiduciary obligations to consult with the Kapawe'no First Nation in accordance with this Framework.

1. PURPOSE

The Kapawe'no First Nation accepts that federal and provincial decision-making and economic development in Alberta will affect them in both positive and negative ways. They do not seek immunity, but to be full participants in decisions that affect them. They seek to ensure that their rights and interests are respected, so as to minimize harmful effects and maximum beneficial ones. In this regard:

- The Kapawe'no First Nation is deeply concerned about the social, environmental, ecological and cultural impacts of Crown decision-making and Crown-authorized activity on their lands and peoples. They are concerned about the resulting direct and indirect restrictions on the exercise of their Treaty and Aboriginal rights, and about the impact this will have on their traditional way of life.

- The Kapawe'no First Nation is not opposed to economic development or other forms of change, but seeks to share in its benefits. They need to ensure that development of resources and other assets takes place in a manner that is sensitive to their rights, traditions, values and culture. The Kapawe'no First Nation must be involved in the control and management of development that affects them, and they *demand a share of* the social and economic benefits that follow.

This Consultation Framework is the means to give effect to these goals. It will guide and structure the relationship of the Kapawe'no First Nation with government and industry in all future dealings.

2. APPLICATION

This Framework applies to all Crown decision-making and action, by the governments of both Canada and Alberta, that has the potential to affect the rights and interests of the Kapawe'no First Nation. This includes all Crown activity relating to the granting, renewal or transfer of tenures, rights, interests, leases, licences or permits by the Crown. It also includes all other activities of government, whether legislative, regulatory or administrative in nature.

This Framework also applies to the actions of third parties, such as members of private industry, operating under Crown authority. These third parties also owe fiduciary obligations to the First Nations in carrying out activities that affect them.

This Framework is not restricted to Crown decision-making, but applies to the ongoing exercise of Crown authority. It would thus apply not only to the Crown's decision to grant a permit, but to all work carried out under that permit.

This Framework applies to impacts on the Kapawe'no First Nations, wherever they occur within Alberta – whether on reserves, traditional territory or any other territory where Treaty and Aboriginal rights are exercised.

3. NATURE OF THE DUTY TO CONSULT

In the *Delgamuukw* case, the Supreme Court of Canada made it clear that

- there is always a duty to consult;
- the nature and scope of the duty will vary in the circumstances;
- at the very least, consultation requires a genuine attempt to address the concerns of the Kapawe'no First Nation;
- normally, the duty will be "significantly deeper" than mere consultation;
- in some cases, it will require full Kapawe'no First Nation's consent.

The duty to consult must be carried out in good faith, based on full recognition of the rights and interests of the Kapawe'no First Nation. The purpose of consultation is to find an accommodation between First Nations' interests, and those of the Crown and industry. The accommodation of Treaty and Aboriginal rights extends to their economic, social, religious and cultural interests.

The first goal of consultation is to avoid any negative impacts on the Kapawe'no First Nation and their members. Where some impact is unavoidable, the goal is then to ensure that it is minimized and that the First Nations are properly compensated.

In general terms, the duty to consult requires

- that affected First Nations be fully informed in a timely manner;
- that they be given a meaningful opportunity to express their interests and concerns; and
- that their views be given serious consideration and adopted wherever possible.

The duty to consult will not be fulfilled by simply treating First Nations the same as other stakeholders. At the very least, First Nations are entitled to a distinct consultation process, addressed to their unique rights, interests and concerns.

4. CONSULTATION GUIDELINES

The Governments of Canada and Alberta, as well as third party industry, must consult with the Kapawe'no First Nation according to the following guidelines:

✓ Acknowledgment of Rights

The consultation process must begin with an express acknowledgment by the Crown and third parties that the Kapawe'no First Nation has constitutionally protected rights and interests. They must accept that protecting and honouring the Kapawe'no First Nations' rights is the starting point of consultation, and the overriding goal of the consultation process.

These constitutionally protected rights and interests include Treaty rights under Treaty No. 8 which must be given a fair, large, and liberal construction in favour of the Kapawe'no First Nations. It is the expectation of the Kapawe'no First Nation that the full spirit and intent of the Treaty will be honoured. The rights under Treaty No. 8 were not frozen at the date of signature and include modern practices which are reasonably incidental to the core Treaty right in its modern context. Finally, because Treaty No. 8 was concluded verbally and afterwards written up by representatives of the Crown, the Crown cannot ignore the oral terms while relying on the written terms.

✓ Provision of Information

The Kapawe'no First Nation must be provided with all relevant information concerning a proposed decision in a timely way. They must be fully informed, not just about the details of the proposed decision or action, but about its potential impact on them – what it will mean for the Kapawe'no First Nations' lands, peoples, rights, title and existing relationships and activities.

The Crown and third parties have a positive duty to gather and assemble the necessary information and provide it to the Kapawe'no First Nation. This will often require commissioning independent studies and/or providing the Kapawe'no First Nation with the resources and capacity to undertake the necessary analysis (see "Capacity-building"). This must be done at the earliest possible stage.

The information must extend beyond the specific decision or proposal to examine broader, cumulative impacts. Impacts cannot be considered in isolation, but only in the context of pre-existing impacts already experienced by the Kapawe'no First Nation. The exercise of Treaty and Aboriginal rights will often require an intact ecology to accommodate the Kapawe'no First Nations' traditional mode of life. Therefore, when land use decisions are being made, impact assessments must be made at a landscape level, and not just at a site-specific one.

The provision of information is only the critical first step in the consultation process. On its own, it cannot satisfy even the most minimal consultation requirement. The Kapawe'no First Nation must also have an opportunity to respond, be heard, and have their input taken seriously (see "Two-way Process").

✓ Consultation Protocol

Consultation with the Kapawe'no First Nation will occur according to the consultation protocols adopted by Kapawe'no First Nation. These consultation protocols will establish the official lines of communication with the First Nation and how consultation will occur. Regulatory authorities or project proponents wishing to consult must respect Kapawe'no First Nation's consultation protocol. Bypassing the Chief and Council or their duly authorized representatives to "consult" with other community members will not result in a proper or complete determination of impact, and the obligation to avoid infringement cannot be discharged thereby.

The consultation protocols will establish a process of consultation and land use planning with the Kapawe'no First Nation on a government-to-government basis, rather than one based on public hearing, multi-stakeholder or roundtable-style models. However, if one or all of the Kapawe'no First Nation do participate in such a process, this does not deprive them of the constitutional protection given to Aboriginal and Treaty rights under section 35(1) of the Constitution, nor alter the division of powers between the federal and provincial governments. Therefore, participation by the Kapawe'no First Nation cannot be construed by project proponents or regulatory authorities to discharge or obviate the requirements for meaningful consultation.

✓ Capacity-building

For consultation to be meaningful, the Kapawe'no First Nation must be provided with the time and resources to enable them to participate effectively. This requires funding for the hiring of the necessary in-house personnel and outside expertise. The Kapawe'no First Nation require sufficient resources to enable them to process and respond to applications, to conduct their own analysis and impact assessments, to undertake traditional land use studies, and to engage in meaningful discussions with the Crown and third parties.

Capacity funding is also required to ensure ongoing First Nations involvement (for example, in the case of environmental monitoring). This includes the necessary training of the Kapawe'no First Nation members for employment and other opportunities.

✓ Two-way Process

Consultation with the Kapawe'no First Nation must be a two-way process. This involves much more than the mere provision of information or the communication of decisions after-the-fact. The Kapawe'no First Nation must be given an opportunity to express their interests and concerns and have them addressed in a meaningful way.

Problems or concerns identified by the Kapawe'no First Nation must be specifically responded to. Suggestions offered by the Kapawe'no First Nation cannot be ignored; they must either be adopted, or valid reasons for rejection provided.

✓ Confidentiality Protocols for Traditional Information

Significant portions of data collected on traditional land use will be culturally or spiritually sensitive. Controls on the raw data that is gathered are essential. Furthermore, restrictions are needed in order to prevent inappropriate data dissemination so that inevitably incomplete and inadequate information cannot be used by other-than-intended regulatory authorities to make impact determinations regarding other projects without meaningful consultation with the affected First Nation. To ensure that the confidence of Elders and other community members participating in any impact assessment study is maintained, and the values of the community are respected, the consultation process must adhere to Kapawe'no First Nations' confidentiality protocols.

✓ Avoiding Impacts

The first goal of consultation must be to avoid impacts on the Kapawe'no First Nations' rights and interests' altogether. The onus is on the Crown (and third parties, if any) to ensure that all reasonable alternatives that do not negatively impact on Treaty and Aboriginal rights have been considered.

✓ Minimizing Unavoidable Impacts

If some degree of impact is unavoidable, the goal of consultation is to ensure that every possible effort is made to minimize the impact on Kapawe'no First Nation. Again, the onus is on the Crown and third parties to examine all reasonable alternatives and to adopt the approach that impacts on the First Nation as little as possible. By definition, the Kapawe'no First Nation must be directly involved in this process.

✓ Priority

Minimizing impacts requires that the Kapawe'no First Nations' interests be given first priority in relation to the Crown's objectives and the interests of third parties. Kapawe'no First Nation's priority is required by fiduciary principles. The fiduciary relationship requires that Crown not allow the interests of a third party, or its own interests, to trump its overriding obligations to the Kapawe'no First Nation.

✓ Fair Compensation

Even where impacts are minimized to the greatest extent possible, Kapawe'no First Nation must be provided with compensation for impacts that remain. Consultation is necessary to determine the level and form of compensation.

✓ Kapawe'no First Nation's Involvement and Benefit-Sharing

Part of the process of ensuring adequate priority, minimal impact and fair compensation is to ensure that the Kapawe'no First Nation are actively involved in decision-making, in the ongoing control and management of projects, and that they share in economic and other benefits. This includes ensuring employment opportunities for Kapawe'no First Nations' members, as well as revenue-sharing for Kapawe'no First Nation. The Kapawe'no First Nation must also remain active in any monitoring of the project, to ensure that the requirements of consultation, priority, minimal impact and fair compensation are met on an ongoing basis.

✓ Mitigation, Accommodation and Compensation (MAC) Plan

The above efforts to minimize impacts and ensure fair compensation must be set out in a detailed Mitigation, Accommodation and Compensation (MAC) Plan. The MAC Plan must lay out specific commitments in the way of mitigation, accommodation and compensation measures (such as, for example, steps to reduce impacts on wildlife movement and habitat, and commitments to environmental restoration, employment and job-training).

The MAC Plan is binding on both the Crown and third parties. The Crown, as fiduciary, has the duty to supervise and enforce compliance with its terms.

✓ Timing and Consequences

Consultation for the purpose of avoiding and minimizing impacts and accommodating the rights and interests of Kapawe'no First Nation must be completed prior to the decision being made, the action carried out or the authorized activity taking place. Otherwise, the decision can be invalidated.

The duty does not end there. Mitigation and accommodation measures must continue for the duration of the authorized activity; otherwise, both the decision and any action taken pursuant to it are subject to invalidation, and both the Crown and third parties are potentially liable for damages. This could include an accounting for profits.

✓ Individual vs. Collective Treaty and Aboriginal Rights

In any one geographic area, both individual and collective Treaty and Aboriginal rights exist simultaneously, and that both must be addressed concurrently. For example, a Kapawe'no First Nation member may have a trap line or land in severalty claim within an area that is also critical for the continued exercise of the collective section 35(1) rights of the First Nation. Consulting with one but not the other will not be construed as adequate consultation.

5. REQUIREMENTS FOR INDUSTRY

Based on the above guidelines, the Kapawe'no First Nation will insist on the following terms in their relations with industry:

- A clear written acknowledgment by the company of the Treaty and unextinguished Aboriginal rights of the Kapawe'no First Nation.

- Detailed information not only on the specific project proposed, but on the company's short-, medium- and long-range plans in the area. Where there are information gaps, independent studies will need to be commissioned by the First Nation and at the expense of the project proponent or the Crown. All proposals must be analyzed in relation to other existing and planned development, both by the company concerned and others.

- All company documentation must expressly identify the rights and interests of the Kapawe'no First Nations. This includes all information provided to shareholders, purchasers, lenders, governments and members of the public. This will put all interested persons on notice that the company's interests are encumbered by the rights and interests of the Kapawe'no First Nations. Failure to do so will render the company liable as a constructive trustee.

- Specific commitments to ensure that Kapawe'no First Nation is compensated for impacts and losses from the project, and that they share fully in its benefits. (This will normally

be done through the MAC Plan). These commitments will address matters such as revenue sharing, employment opportunities, capacity funding, trappers' compensation and environmental restoration (to name only a few).

- A written commitment not to proceed with a project until the consultation process and necessary accommodations are complete. This includes the design and implementation of the MAC Plan.

- The company must also acknowledge that its obligations continue for the duration of the project, and must agree to cease all activity if disputes arise as to compliance with the Plan.

- The company must provide written acknowledgement that any of its subcontractors or affiliates or related companies are bound by the same fiduciary duty to consult with the Kapawe'no First Nation as the company itself, and that the consultation cannot be avoided by "contracting out activities" which infringe Treaty rights.

6. THREE PHASES OF CONSULTATION

The Kapawe'no First Nation sees the elements of consultation as breaking down into three phases:

1. Pre-consultation
2. Public Regulatory Processes
3. First Nations-Specific Processes

Phase 1: Pre-consultation

This is the information stage, where the Crown and third parties gather and assemble all relevant information and provide it to the Kapawe'no First Nation. This includes project-specific information, as well as information regarding impacts on Kapawe'no First Nation, including cumulative impacts. As well as being provided with objective and comprehensive information, Kapawe'no First Nation must be given the time and resources to enable them to properly analyze and process it. Any information gaps will then need to be filled, at the expense of the project proponents or the Crown. This may entail biophysical, socio-economic, archaeological, traditional land use, and other studies.

Phase 2: Public Regulatory Processes

In many cases, a given project or decision will be subject to public regulatory processes (such as National Energy Board or Alberta Energy and Utilities Board hearings). These processes do not represent First Nation consultation, since they are not directed to First Nations' issues, interests and concerns. They cannot substitute for a Kapawe'no First Nations-specific consultation process.

The Kapawe'no First Nation is entitled to take part in these processes, just like other stakeholders and interested parties. However, whether they do so is entirely up to them, and this decision is strictly "without prejudice": a decision by the Kapawe'no First Nation to participate in an existing public process cannot be seen as adequate First Nation consultation, nor can a refusal to take part be seen as an attempt to frustrate the consultation process.

Phase 3: Kapawe'no First Nation's-Specific Processes

Kapawe'no First Nations-specific consultation involves both direct, two-way consultation between Kapawe'no First Nations and the Crown; and three-way consultation with the First Nation, the Crown and industry. This phase of consultation always involves, at a minimum, a positive duty to accommodate the Kapawe'no First Nations' unique rights, interests and concerns. The outcome must meet all of the *Sparrow* justification factors, including priority, mitigation and compensation.

Where impacts cannot be avoided entirely, the Crown and the Kapawe'no First Nation must agree on the necessary mitigation, accommodation and compensation measures. Any third parties will then be brought in to work out the details of implementing these measures through a Mitigation, Accommodation and Compensation (MAC) Plan. This recognizes the fact that mitigation and compensation measures will, in practical terms, often fail to be implemented at the ground level by third parties operating under Crown authority.

The requirements of Phase 3 consultation are ongoing. Kapawe'no First Nations-specific consultation must continue for the duration of the project or activity, as a condition of its ongoing validity. Both the Crown and third parties are bound by their parallel fiduciary obligations to ensure that the *Sparrow* requirements continue to be met.

CONCLUSION

These are the "rules of engagement" that the Kapawe'no First Nation will insist upon in all future dealings with the Governments of Canada and Alberta, and with industry.

The Kapawe'no First Nation has developed this policy not as a threat or ultimatum, but as an attempt to provide certainty in the face of the continuing refusal of the federal and provincial Crown to present any coherent strategy for First Nation consultation. This failure is in clear breach of the Crown's fiduciary and constitutional obligations.