

DIALOGUE AND NEGOTIATIONS BETWEEN FIRST NATIONS, GOVERNMENT AND INDUSTRY

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Prepared by:

Michael J. McDonald

**MCDONALD & COMPANY
BARRISTERS & SOLICITORS**

Vancouver, British Columbia

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FORESTRY

1.0 Introduction

- 1.1 Dialogue, discussions, consultation and negotiation among First Nations, the Forest Industry and Government in Canada have become increasingly important of late. The reasons are of course historic, dating back to the formation and foundations of Canada, including constitutional foundations. There are also political reasons for the heightened sensitivities surrounding these communications. The newspapers, internet and television news bear this out daily, throughout Canada. Yet the most compelling reasons for dialogue between First Nations, Industry and Government are often economic and legal. Economics and law are closely intertwined in that the rule of law that brings the Forest Industry clear rules of ownership of property and greater certainty of access to forestry resources helps encourage investment. Perhaps there is no area of law that is less clear than the conflict between Government's resource development decisions and First Nations rights in respect of their lands. Yet more recently, the law has become clearer so that it encourages, if not mandates, negotiations between the Crown and First Nations. This has a corresponding effect on the Forest Industry to engage in those negotiations, or at least encourage them.
- 1.2 This presentation covers a brief overview of the reasons why negotiation involving First Nations are so important in the forestry context as well as a brief review of some of the significant types of negotiations that currently exist in this area. Of great interest to many, particularly First Nations, is the question how dialogue and negotiations should be conducted between First Nations, forestry tenure licensees and Government, since most First Nations lack the resources and expertise of Industry and Government to structure, prepare for and engage in those negotiations. Hopefully, there is a "fair" process for negotiations that is productive, is meaningful and is in keeping with the honour of the Crown. The courts have even made some remarks about the outcome of negotiations by referencing "accommodation" in several instances. Some might even ask if actual agreements can be made to ensure that Crown duties to First Nations are met, otherwise why mandate negotiations.
- 1.3 Given all these issues, how should the various parties structure their negotiations? Should consultation, information sharing and regulatory reviews be put on hold while negotiations are underway? Alternatively, should negotiations form part of the overall consultation and accommodation matrix?

- 1.4 These questions are best answered by focusing on what type of negotiations have the following key ingredients:
- (a) the negotiations do not prejudice any of the party's rights or interests, including any legitimate bargaining position;
 - (b) the negotiations provide an equal level of resources, information and skill to each of the parties;
 - (c) there is sufficient opportunity in terms of time and bargaining room (flexibility) for the parties to consider numerous and reasonable options; and
 - (d) each of the parties have an incentive to find a resolution to the disputes discussed at the table and express good faith in seeking a resolution.

2.0 Why Negotiations?

- 2.1 To many, the answers are obvious. From a legal perspective though, the Supreme Court of Canada has on many occasions strongly encouraged negotiations between the Crown and First Nations. Given that this same court has mandated Government to legislate and negotiate in dealing with other constitutional rights, perhaps the Supreme Court of Canada will at some point in the future and, under certain circumstances, require negotiations between First Nations and the Crown.
- 2.2 The law is also an impetus to negotiation by referencing the requirement of "accommodation" in some circumstances between First Nations and Government. Typical references to accommodation suggest that there are some serious efforts toward settlement or agreement that might be arrived at between two or more parties that have expressed opinions, positions and transferred good faith offers for resolution. In fact, in considering accommodation, actual "negotiations", short of any required agreement, were contemplated as a counterpart to consultation by the Supreme Court of Canada.
- 2.3 Yet the forest industry company does not owe a legal duty to First Nations for consultation, accommodation or negotiation. Why then should a First Nation negotiate with Industry? The answers are both legal and economic. From a legal perspective, Government (and the courts for that matter) are permitted to take into account the flow of information and opinions (evidence used for consultation and accommodation) shared between a First Nation and third parties. This provides significant benefit to Government and Industry. For Industry, the sooner the obligations of consultation and accommodation are fulfilled, the sooner Industry can carry out its work in acquiring and developing resources. For Government, having a third party assist in fulfilling its duty or "honour of the Crown" reduces costs and is more efficient. From an economic standpoint, Government is also more than happy to have less financial burden where Industry is willing to share the wealth of the land with First Nations.
- 2.4 For First Nations, there is the corresponding benefit on the short term in coming to an agreement with Industry in respect of benefits from forestry resource development where Government is not willing to be as generous, at least on the

short term. However, First Nations do not generally benefit from negotiations with Industry if the details of those negotiations are readily available to a Government willing to use those discussions to fulfill a duty of consultation and accommodation. If no agreement were reached, prejudice to the First Nation would likely result since the record of the negotiations and information sharing may be used as evidence towards consultation.

3.0 Types of Forestry Related Negotiations

- 3.1 The types of negotiations among First Nations, Industry and Government are as numerous as there are differences of opinion on a broad range of issues. For the purposes of this discussion, these are narrowed to issues relating to areas relating to the conflict between aboriginal and treaty rights and Government actions for forestry development.
- 3.2 One of the most common, and perhaps most frustrating, area of dispute relates to the appropriate level or type of governmental decision that triggers (or potentially triggers) the Crown's duty to consult and accommodate. A common example is the review and approval of a forest management plan or forest development plans. Often First Nations have sought to instead consult in respect of higher level issues such as AAC (annual allowable cut) levels in their traditional or treaty lands, the volume and pattern of timber harvesting or a reexamination of timber allocations, including that of the licensee preparing the draft forest management plan. Decision makers in Government are often frustrated by such requests since their mandate and discretion often limits their ability to make decisions on such matters during those requests. Yet, Government should be wary to avoid the situation where there is no forum to discuss legitimate issues raised by First Nations. This could result in a situation of unstructured or unavailable discretion for decision makers. Thus a court could then conclude that the regulatory regime, on its face, constitutes unjustified infringement of aboriginal or treaty rights.
- 3.3 So negotiations about the very topic of the negotiations (the appropriate governmental decision) is important and is common. Another concern First Nations might raise here is the issue of whether First Nation's interests are prejudiced where negotiations or consultation on an administrative decision (such as forest management planning) was originally based on prior higher level issues (such as timber allocation volumes, allocation locations or AAC levels within a Timber Supply Area or Forest Management Unit) where such higher level decisions did not include First Nation's consultation or negotiation.
- 3.4 Another area of negotiation relates to the nature of the First Nation's right at stake. The courts seem to have distinguished several different categories of rights within a spectrum that will inform the type of negotiations:
 - (a) where assertions to unproven aboriginal title is weak, the aboriginal right is limited or there is potential for only a minor degree of infringement;
 - (b) where there is a strong prima facie case for aboriginal rights, the right and potential infringement is of high significance and the risk of non-compensable damage is high;

- (c) situations that fall between (a) and (b) above;
- (d) proven aboriginal rights, including title;
- (e) treaty rights; and
- (f) rights agreed to in modern day land claim settlements.

While the courts have recently given more guidance in respect of the first four categories, the law relating to potential impact by Government decisions is, in the writer's view, still unwritten. Our constitution puts treaty rights arising from agreements reached hundreds of years ago on the same footing as modern day land claim agreements. The First Nation signatories to all Aboriginal treaties (old and new) would not have contemplated that the rights and benefits bargained and agreed as a result of, and part of, the reconciliation of prior occupation of First Nations with the assertion of Crown sovereignty could possibly see those treaty benefits further eroded by the application of a legal test for justification of infringement of aboriginal rights based on yet another assertion of Crown sovereignty. The Crown need only assert its sovereignty once. Reconciliation of aboriginal rights and the assertion of Crown sovereignty in the context of treaty making need only be carried out once.

- 3.5 Broader based negotiations between First Nations and the Crown are often the most fruitful where the parties endeavour to resolve a range of outstanding issues, short of treaty, self-government or claims settlements. These might include discussions surrounding a protocol or other form of agreement as to the details or steps in respect of consultation on issues relating to AAC analysis and review of timber allocations in a timber supply area, or traditional territory, or First Nations concerns in forest management planning in an area region or area of undertaking. Examples of these might be the consultation issues negotiated in north eastern British Columbia in the oil and gas sector, negotiations during the lengthy hearings leading up to Ontario's Timber Class Environmental Assessment, negotiations relating to new timber allocations to First Nations in Ontario, north of the Area of Undertaking, or negotiations relating to the formation of a large federal park out from what was formerly a significant part of MacMillan Bloedel's Tree Farm License in Haida Gwaii.
- 3.6 More recently, British Columbia has instituted a policy to encourage timber tenure allocations to First Nations through Forest and Range Agreements. These negotiations relate to the exchange of timber tenure and economic development funds for agreement by a First Nation as to the fulfillment of the province's duty to consult and accommodate to a broad range of potential infringement. Recently, the manner or scope of these negotiations (somewhat structured) were called into question by the courts because of the province's narrow approach to options available to determine appropriate accommodation.
- 3.7 In spite of the thousands of referrals from numerous governmental agencies that are sent to hundreds of First Nation fax machines every week, the most productive form of negotiations in respect of First Nation's rights and resource development is still with third parties. There are far more joint ventures than there are treaties

in British Columbia. First Nations and Industry have often agreed to disagree but have just as often agreed to small and large scale developments, joint ventures and other arrangements even though there is no legal duty on third parties to do so. These agreements allow continued and uncontentious development of forestry resources as opposed to waiting for changes in government policy or the resolution of lengthy and doubtful treaty or other claims negotiations.

4.0 Without Prejudice Negotiations

- 4.1 Negotiation between First Nations and Industry or First Nations and Government need to be carried out on a without prejudice basis in order for them to have some chance for success and for them to be fair negotiations. By extension, current British Columbia treaty negotiations that require a First Nation not to litigate or assert certain rights while the province continues to allocate and permit development of third party interest for lands and resources is simply not fair. It is perplexing that few First Nations have raised the issue of whether this is in keeping with the honour of the Crown. Perhaps even raising that one issue before the courts would cause a breakdown in treaty negotiations and trigger a significant financial liability resulting from First Nation negotiation financing.
- 4.2 Although Government will seek to have referral and consultation discussions on-the-record, without prejudice negotiations can provide greater latitude for exchange of ideas and options where Government is reluctant to move away from recent practice or policy on-the-record. Also, First Nations can also consider discussions on other aspects to the Crown – First Nation relationship in addition to the initial issue triggering consultation and negotiations. But most importantly, the parties can focus just on problem solving instead of also considering how the dialogue and negotiations might appear to a court in the event that negotiations were not successful. This on-the-record approach is far more cumbersome and filled with legal complexity than without prejudice negotiations.
- 4.3 Negotiations with First Nations and Industry should always be without prejudice if the parties are seeking to find a business solution to what is appropriately a Crown – First Nation problem. As previously mentioned, negotiations with Industry should be kept confidential and without prejudice so that the parties can:
 - (a) share sensitive business, political or traditional knowledge information regarding First Nations rights or the forest company's plans;
 - (b) not have the discussions used by the Crown to pad the record of consultations if negotiations fail;
 - (c) allow for a free exchange of views, opinions and potential solutions on vastly differing perspectives and objectives, without regard for how a court might view the discussions; and,
 - (d) not allow either party's rights in respect of the Crown – First Nation dialogue to be affected one way or the other by the negotiations.

It has been the writer's experience that most businesses (in mining, energy, oil and gas and forestry) seeking to develop large resource projects where First Nations rights are of serious concern, agree to without prejudice negotiations.

- 4.4 The sharing of sensitive information can be handled through a Confidentiality Agreement. One can be used for the sharing of sensitive traditional knowledge between a forestry corporation and a First Nation. Typically, traditional knowledge is needed to make forestry planning decisions of where to cut, not to cut or make roads. However, this same information is highly sensitive and care must be given to ensure the following:
- (a) that sufficient resources are provided to a First Nations so that this information is gathered and formulated in an accurate manner;
 - (b) that the ownership of the information is protected;
 - (c) that the information is not used by the Crown against First Nations in the context of proving or disproving aboriginal rights; and
 - (d) that sufficient traditional knowledge is available to allow Industry and Government to make informed and reliable forest management planning decisions.

While government funding of the gathering of "traditional use" or "native values" (common terms) is common, sufficient care must be taken to ensure protection of the ownership of this data. In addition, agreements to hand over some of this data should provide protection so that the First Nation is not required to provide too much detailed, sensitive and personal information about its lands.

- 4.5 Confidentiality Agreements in negotiations between First Nations and Industry have been fairly common in other industries such as mining and energy. However, few commercial details are generally provided to First Nations in the forestry context. During these negotiations, confidentiality agreements can help First Nations understand the economic impact of their demands and realize the economic risks of a potential business partner. Of course this also allows business to protect important and sensitive business plans and financial models.

5.0 Resourced Negotiations

- 5.1 Negotiations with First Nations in this context also require a level playing field in terms of expertise, knowledge, information and skill. This is often a debated topic since Government and Industry may be wary that First Nations may use any assistance given to First Nations for asserting claims or solely for opposition to a project. They may also be concerned that the process might become too cumbersome or drawn out. First Nations rightly state that they require sufficient resources and ability to negotiate fairly. It appears that British Columbia government has received and accepted this message, based on recent budget announcements. That is good news.

6.0 Conclusion: Suggested Negotiation Agreement

6.1 Attached as an appendix to this discussion paper is a sample form of Draft Negotiation Agreement that describes just the type of negotiations that have been suggested. The negotiations described in the draft are:

- (a) without prejudice to the parties' interests;
- (b) provide for specific time frames;
- (c) provide for sufficient time with accountability of funds;
- (d) require good faith bargaining; and
- (e) allows either party to terminate negotiations on short notice, thus maintaining incentives for each party to reach agreement.

Hopefully more negotiations in this context will take this path so that more negotiations will have clear ground rules and are fair so that a greater number of agreements result.

APPENDIX

NEGOTIATION AGREEMENT

BETWEEN:

[Name of Company/Proponent]

(hereinafter called the “Company”)

AND:

[Name of First Nation or Regional Council]

(hereinafter called the “First Nation”)

(collectively, the “Parties”)

WHEREAS:

- A. The First Nations asserts that it possesses certain aboriginal [or treaty] rights and interests in respect of their traditional territory (the “Traditional Territory”), which includes the **[description of geographic area]** (“First Nation Interests”).
- B. The Company asserts that it holds certain rights and interests to develop **[description of resource to be developed and location of Project]** (the “Project”).
- C. The First Nation is committed to principles of economic sustainability, environmental stewardship, and self-determination in respect of their lands and resources and wishes to establish a cooperative and respectful long-term relationship with the Company in keeping with these principles.
- D. The Company is committed to carrying out a successful Project and wishes to (i) establish a cooperative and respectful long-term relationship with the First Nation; and (ii) provide certainty for investment, access and ownership of resource rights in respect of the Project.
- E. The Parties wish to negotiate a long-term definitive agreement (the “Project Agreement”) to meet their respective general objectives for the Project, which objectives are set out in paragraphs C and D above.
- F. To increase the likelihood that a Project Agreement will be entered into, the Parties wish to enter into this Negotiation Agreement (the “Agreement”) to establish the scope, nature and manner for negotiating the Project Agreement in a manner that encourages efficient

and good faith negotiations on a level playing field (the “Negotiations”), so that the Parties have sufficient time, information and resources to fully engage in the Negotiations.

IN CONSIDERATION OF the covenants and agreements herein contained, the Company and the First Nation agree as follows:

1.0 NEGOTIATION PRINCIPLES AND OBJECTIVES

1.1 The Parties confirm that they have previously recognized, and will continue to recognize, through the implementation of this Agreement, among other things, that it is mutually beneficial to approach the Project in a way that fosters an understanding and awareness of their respective interests, and to cooperate with each other to establish a relationship of trust and certainty. In carrying out the negotiations provided in this Agreement, the Parties agree to act in accordance with the following principles:

- (a) joint cooperation and collaboration,
- (b) mutual respect, and
- (c) open and regular dialogue and communication about each other’s interests and concerns regarding the Project.

1.2 The Parties, through their Negotiation Teams (identified in paragraph 2.1 below), agree to use their best efforts, in good faith, to negotiate the terms and conditions of the Project Agreement in accordance with this Agreement. The Project Agreement will be a comprehensive agreement governing the Project, including permitting, financing, construction, operation and closure of the Project and will address, among other things, the following key topics:

- Objectives of the Parties
- Project Description, including all projected phases of the Project
- Business Opportunities
- Education and Training
- Environmental Protection
- Financial Considerations
- Project Certainty in respect of First Nation Interests
- Protection and use of Indigenous Knowledge
- Social and Cultural Protection
- Dispute Resolution

The Parties acknowledge and confirm that the above list of topics is agreed to for purposes of guidance only and is not exhaustive of the anticipated issues for negotiation between the Parties or the contents of the Project Agreement. It is understood that the Project Agreement will also contain the usual terms and conditions for an agreement of

this nature, and such other terms and conditions as legal counsel to the Parties may advise.

1.3 The Parties agree that although they will jointly settle the final form of the Project Agreement, the Project Agreement will be subject to:

(a) Consideration and approval by the First Nation members prior to signing; and

(b) Consideration and approval by the Company's Board of Directors prior to signing.

1.4 The Parties agree that if during the term of this Agreement, either one of them becomes aware of a situation that will compromise the objectives of this Agreement or its spirit and intent, such Party will disclose the situation to the other Party and seek to resolve it in a mutually acceptable manner.

1.5 The Parties agree to negotiate, where necessary, interim agreements relating to one or more aspects or phases of the Project in a manner which seeks to maintain current Project development timing, provides benefits to the First Nation and does not prejudice the interests of the Parties in respect of all other aspects of the Negotiations.

2.0 NEGOTIATING TERMS AND RELATED COSTS

2.1 Each Party has appointed certain individuals as their respective core negotiating teams responsible for the Negotiations. It is anticipated that the members of each team will be as follows:

<u>First Nation</u>	<u>Company</u>
1)	1)
2)	2)
3)	3)
4)	4)

(collectively, the "Negotiating Teams")

2.2 At any time during the term of this Agreement, the Parties may, at their sole discretion, appoint additional or alternative individuals to their Negotiating Team to assist with the negotiations.

2.3 The Company will be exclusively responsible for its own costs incurred in carrying out the Negotiations.

2.4 Negotiation Expenses. Upon execution of this Agreement, the Company shall pay up to \$_____ (the "Negotiation Funding") to the First Nation in respect of the following:

(a) reasonable legal, financial and other professional and consulting fees;

- (b) community consultation costs, including community consultation personnel, consultation communication costs including material development, translation and distribution;
 - (c) due diligence activities including technical review costs associated with the review and analysis of any existing Project related studies; and
 - (d) reasonable travel, administrative and other related costs
- (collectively, the “Negotiation Expenses”)

actually and directly incurred or accrued in connection with the Negotiations. For greater certainty, the First Nation agrees not to use any of the Negotiation Funding for the advancing of claims asserting the aboriginal [or treaty] rights of the First Nation.

2.5 **First Nation Accountability.** The First Nation agrees to provide summaries of incurred Negotiation Expenses within fifteen (15) days after each month end until all of the Negotiation Funding has been accounted for. Nothing in this Agreement requires the First Nation to divulge matters subject to solicitor-client privilege or any strategies of the First Nation with respect to the Negotiations.

2.6 **Further First Nation Funding Requirements.** The Company agrees to discuss with the First Nation, the extent of any further financial assistance required by the First Nation for their continued participation in the Negotiations.

2.7 **First Nation to Minimize Costs.** To the extent reasonable and possible, the First Nation agrees that in its procurement of goods and services for the Negotiations, it will minimize potential financial liabilities that could result from possible termination or suspension of the Negotiations or from the possible termination of this Agreement.

3.0 SCHEDULE FOR COMPLETING AGREEMENT

3.1 The Parties will set out a schedule for meetings to negotiate the Project Agreement. The target date for completing this negotiation is **[insert target date]**. Thereafter, the target date for execution of the Project Agreement, subject to the final approvals of the First Nation and the Company’s Board of Directors, is **[insert date]**.

4.0 ACCESS FOR PROJECT ASSESSMENT ACTIVITIES

4.1 During the term of this Agreement and subject to successful completion of an agreement among the Parties as contemplated pursuant to paragraph 1.5 hereof, the First Nation confirms that the Company will continue to have full access to the Traditional Territory for the purposes of baseline environmental studies and all other necessary and related assessment activities for advancing the Project.

5.0 MUTUAL CONFIDENTIALITY

5.1 Each Party will take all prudent measures to ensure that any information, including traditional knowledge, documents, reports or other material (the “Information”) provided by it to the other Party pursuant to or in connection with this Agreement is treated as confidential and is not disclosed to any person except:

- (a) as may be required by law;
- (b) where such information becomes generally known or available in the public domain, without a breach of this Agreement; or
- (c) as otherwise consented to in advance by the other Party.

5.2 Each Party agrees that to ensure the foregoing confidentiality obligation is met it will, from time to time, either in writing or verbally, as appropriate for the nature of the Information, expressly identify all Information as either “confidential” or “non-confidential”, to assist the other Party in fulfilling its confidentiality obligation.

6.0 TERM AND TERMINATIONS

6.1 Subject to the termination of this Agreement, as provided below, the term of this Agreement commences on [**insert date**] and will end on the earlier of:

- (a) [**insert date**]; or
- (b) the date that the Project Agreement is executed by the First Nation and the Company.

6.2 This Agreement may be terminated by either Party for any reason on fifteen days’ prior written notice to the other party. Negotiations will cease immediately upon either party providing notice of termination but sections 2.5, 2.7, 5, 7 and 8 shall continue to apply in all respects.

7.0 NON-PREJUDICE TO RIGHTS

7.1 Non-Prejudice of First Nation Rights. Notwithstanding any other provision in this Agreement, the parties acknowledge and agree that this Agreement, the Negotiations and any discussions and correspondence relating to them shall not prejudice:

- (a) any inherent, constitutional, aboriginal (or treaty) rights, claims or interests of the First Nation or any of its members thereof;
- (b) any of First Nation’s rights to or benefits of notice, consultation, negotiation or accommodation from any person, including governmental and regulatory bodies

or agencies, arising directly or indirectly from the First Nation's aboriginal [or treaty] rights; and

- (c) ongoing or future aboriginal land claims or self-government negotiations affecting or relating in any way to the First Nations.

7.2 No Agreement on Further Development. Nothing in this Agreement constitutes any express or implied consent, approval or agreement as to the nature or scope of any environmental assessment, **[include additional references to nature of the development]** by the Company within the Traditional Territory of the First Nation, including the validity or enforceability of any permit, approval, claim, lease or any other interest asserted by the Company in respect of the Project.

7.3 First Nation Objection to Other Regulatory Matters and Programs. Notwithstanding any other provision in this Agreement, the First Nation reserves the right to oppose or take any position contrary to or different from the position of the Company with respect to:

- (a) any permits, licenses or other regulatory matters in respect of the Project; and
- (b) any proposed, environmental assessment processes or operations in respect of the Project.

8.0 GENERAL PROVISIONS

8.1 Enurement. This Agreement will enure to the benefit of and shall be binding upon the Parties and their respective successors and assigns. In particular, it is understood that this Agreement will be binding on any corporation or other legal entity which may acquire control of the Company or any partner the Company may choose to invite to join in the Project so long as the Company or its successors or assignees hold option or rights for the Project. If, during the term of this Agreement, the Company decides to dispose of the assets of the Project, by sale, reorganization, or any other disposition, to another party, the Company will use its best efforts to seek that prior to the completion of such disposition, such other party agrees to be bound by the terms of this Agreement and that such other party enters into an assignment agreement to evidence this.

8.2 Further Assurances. Each of the Parties will execute and deliver all such further documents and do such other things as the other Parties may reasonably request to give full effect to this Agreement.

8.3 Execution by Counterpart. This Agreement may be executed in counterparts, each of which will be deemed to be an original and all of which taken together will be deemed to constitute one and the same instrument. Counterparts may be executed either in original or facsimile form and the Parties to this Agreement adopt any signatures received by receiving facsimile machine as original signatures of the Parties.

8.4 Governing Law. This Agreement and all matters arising hereunder will be governed by and construed in accordance with the laws of **[insert applicable jurisdiction]**, which will be deemed to be the proper law hereof, and the courts of **[insert applicable jurisdiction]** will have the non-exclusive jurisdiction to entertain and determine all disputes in respect of this Agreement, including the validity, existence and enforceability hereof.

8.5 No Agency. The Parties expressly disclaim any intention to create a partnership, joint venture or joint enterprise. It is understood, acknowledged and agreed that nothing contained in this Agreement nor any acts of the Parties will constitute or be deemed to constitute the First Nation and the Company as partners, joint venturers or principal and agent in any way or for any purpose.

AGREED to as of the effective date set out on the first page of this Agreement.

[Name of Company]

By: _____

Authorized Signatory

Print Name: _____

Title: _____

[Name of First Nation/Regional Council]

Per: _____

Print Name: _____

Title: _____

Per: _____

Print Name: _____

Title: _____