Principles for Proponents working in the Traditional Territories of the Saugeen Ojibway Nations

The Saugeen Ojibway Nations consist of the Chippewas of Saugeen and the Chippewas of Nawash Unceded First Nation. The traditional lands of the Saugeen Ojibway Nations extend east from Lake Huron to the Nottawasaga River and south from the tip of the Bruce Peninsula to the Maitland River system (11 miles south of Goderich). The traditional waters around these lands include the lakebed of Lake Huron from the shore to the US border and the lakebed of Georgian Bay to the halfway point.

The following principles will form the basis of any future relationship with the proponent and a negotiated protocol for consultation and accommodation.

1. Rights and Interests

The rights and interests of the Saugeen Ojibway Nations are as follows:

a) Pursuant to our 19th century Treaties with the Crown, the SON occupy large Reserves bordering Lake Huron or Georgian Bay. Because these reserve lands were exempted from the surrender in the Treaty, the SON have Aboriginal title to those lands. Those reserves sustain the SON's future in various ways. They are our residential communities, include places of cultural and spiritual significance, and are the base for our fisheries and other economic opportunities, including valuable recreational properties. Those proprietary rights and interests depend on a safe and stable, toxic-free environment, including clean water from Lake Huron or Georgian Bay.

b) The SON have subsistence fisheries and land-based harvesting practices and rights throughout our territory. These provide vital support for our Aboriginal culture and way of life, as well as the economy, health and social relationships in the SON communities.

c) The SON also have commercial fishing rights in Lake Huron and Georgian Bay. These Aboriginal and Treaty rights were confirmed in *R v Jones and Nadjiwan*, [1993] 3 CNLR 178, and are an interest of growing economic importance, in light of the large scale settlement and development in the territory.

d) The SON also have two major land claims before the courts. One is an aboriginal title claim to the lakebeds of our traditional waters. The other affects the whole of Bruce Peninsula, including the land under navigable rivers and lakes.

2. Consultation

The Supreme Court of Canada has recently explained the Crown's legal obligations to consult aboriginal peoples, in three decisions*: Taku River Tlingit v British Columbia* [2005] 1 CNLR 366, *Haida Nation v British Columbia* [2005] 1 CNLR 72, and *Mikisew Cree v Canada* [2006] 1 CNLR 78. In subsequent decisions by courts in British Columbia and Ontario, further details have been clarified – see e.g., *Musqueam Indian Band v Canada* [2005] 2 CNLR 212 (B.C.C.A.), *Platinex Inc. v Kitchenuhmaykoosib Inninuwig First Nation* (Ont. SCJ, July 28, 2006).

It is now settled that a government must engage in consultations with an Aboriginal people when considering a decision that might adversely affect their Aboriginal or Treaty rights or interests intended for protection by section 35 of the *Constitution Act, 1982*. If there is a potential for substantial adverse impacts or infringement, there is a corresponding obligation to protect and accommodate the affected rights or interests.

These consultation and accommodation obligations are based on the honour of the Crown. They reflect the ongoing requirement to pursue the reconciliation of pre-existing Aboriginal rights and interests with Crown sovereignty. These are continuing obligations that emerge from the Crown-Aboriginal relationship, and which arise whenever there is a reasonable likelihood that Aboriginal interests could be at risk. If governments do not fulfill these obligations, the courts may disallow authorizations for proposals that triggered the duty.

Therefore, in the context of the SON:

a) The process must focus on the impacts/infringement. The Crown must genuinely seek to inform itself about and substantially address the First Nation's concerns.

b) The focus must be on the outcome and not just the process. The appearance must not triumph over content.

c) The key is to focus the consultation process on the constitutionally protected aboriginal rights in question. This is not just a chat. This is not a discussion about "interests". This is a process required because the Crown is proposing to allow something to take place that could infringe a right or rights protected by s.35 of the Canadian Constitution. The scope and nature of the consultation and accommodation are inextricably linked to the rights at stake.

d) The substantive requirement is that the Crown "demonstrably integrate" the rights and title claims raised by the First Nation into the decision making process.

e) The Crown's legal duty to consult with the Saugeen Ojibway Nations cannot be delegated to third parties.

f) Consultation cannot proceed in the absence of the Crown.

g) The SON, after the Environmental Assessment process, will be consulted about any subsequent permitting, approval and licensing processes that are a part of the overall project.

3. Protection of the Environment

The Saugeen Ojibway Nations' traditional territories have been their home long before contact and will continue to be their home for generations to come. The full expression of Saugeen Ojibway Nations' rights depends on healthy, biologically diverse ecosystems. Therefore:

a) The SON must have full participation in any environmental screening or assessment process.

b) The SON are entitled to share and have access to all necessary information relating to environmental screening or assessment reports and processes, especially those that might reveal potential impacts on Saugeen Ojibway Nations' rights, claims and way of life.

c) The SON must have full participation in the ongoing monitoring of the project.

d) A separate Environmental Agreement will be required. Components of the Environmental Agreement would include (but would not be limited to):

   i. terms and conditions that are necessary as identified by the SON's environmental review of the project;
   ii. a determination of the level of engagement of the SON in the ongoing environmental management of the project, including decommissioning of the project;
   iii. delivery of environmental monitoring data, studies and other information to the SON for periodic evaluation;
   iv. periodic independent evaluation of the proponent's environmental performance;
   v. the collection of baseline data for use as environmental health indicators.
   vi. environmental reporting to the SON on a regular basis;
   vii. review and approval authority by SON of environmental management plans (especially closure/decommissioning plans);
   viii. an endorsement of the precautionary principle;
   ix. agreement on the preservation of sensitive naturally occurring ecologies, including species of particular cultural interest to the SON;
   x. restoration, where practical and appropriate, of indigenous species;
   xi. compliance with regulations, standards and best practices of the day.

4. Sustainability of the First Nations

In the past, many projects, legislation, policies and practices have proven incompatible with the Saugeen Ojibway Nations' rights, interests and way of life. Therefore:

a) The proponent must accommodate the rights and interests of the SON such that the project contributes to the SON's well-being and does not undermine it.

b) Any adverse impact or infringement upon the SON's rights and way of life and the sustainability of these interests within their traditional territories must be fully addressed and mitigated by the proponent. This would include impacts on harvesting rights, particularly SON rights to a commercial fishery.

c) The proposed project must be consistent with the SON's vision for the land and waters of their traditional territories, respectful of their rights and interests and it must contribute to the cultural, economic and social vitality of their people.

5. Protection of Culturally Specific Sites (burial grounds, ancient habitation sites etc.)

Areas within the traditional territories of the Saugeen Ojibway Nations are sacred and are of significant cultural value. It is imperative that these sites are properly identified and protected. Therefore:

a) The proponent must, with SON participation, determine whether the site for the proposed project is of any cultural significance to the SON.

b) The proponent and the SON must assess whether the project will have an adverse impact on any existing culturally specific site(s).

c) If the heritage resource potential of any site(s) proposed for surface disturbance has not yet been assessed for archaeological potential, then, prior to any disturbance, the proponent must conduct a site archaeological survey according to terms agreed to by the SON.

d) If artefacts or remains are found, all work at the site must cease and the SON notified immediately. The proponent and First Nation representatives will then enter into negotiations regarding the disposition of artefacts and the protection of remains.

e) Socio-cultural impact assessment studies may need to be conducted at the proponent's expense.

6. Experts and Assessments

a) The proponent must seek the approval of the SON for the appointment of experts who will conduct traditional land use studies, archaeological studies and ethnographic studies that assess the impacts of the project.

b) The SON must play a meaningful role in any assessments or studies regarding the project and its impact on their rights and way of life and the sustainability of these

interests within their traditional territories. This role might include the setting of terms of reference and the peer review of such studies.

7. Mitigation Strategies

Accommodation is an integral part of consultation. Therefore:

a) The proponent and the SON must jointly develop mitigation strategies that fully address the SON's concerns.

8. Information Sharing

An open and transparent process, conducted in good faith is at the heart of proper consultation. The Saugeen Ojibway Nations must be able to make informed decisions, understand fully the effects that a decision may have, and ensure their decisions are consistent with the needs, aspirations and concerns expressed by their communities. Therefore:

a) The proponent must provide the necessary vital and detailed information pertinent to the project and its impacts on the SON's rights and interests and the sustainability of these interests within their traditional territories.

b) The SON must share all information with the proponent that addresses their concerns regarding potential impacts of the project and any other information that is necessary in terms of assessing and or monitoring the project as well as designing and implementing any required mitigation measures.

c) All information must be provided in a timely manner.

9. Capacity

a) The proponent must provide the Saugeen Ojibway Nations with sufficient funding to ensure that the SON can participate fully in the negotiation of a Protocol Agreement and in the consultation process itself, which includes the various studies, and stages of the assessment process.

10. Benefits

The SON is generally excluded from the educational, employment and business opportunities that industry brings to others in their traditional territories. Therefore:

a) The proponent and SON will negotiate an agreement that will include, but is not limited to, compensation, employment, training and business opportunities.