

IN THE MATTER OF THE JOINT REVIEW PANEL ("JOINT PANEL")  
ESTABLISHED TO REVIEW THE JACKPINE MINE EXPANSION,  
FORT MCKAY, ALBERTA, ("PROJECT") PROPOSED BY SHELL  
CANADA LIMITED ("SHELL")

AND IN THE MATTER OF ALBERTA ENERGY RESOURCES  
CONSERVATION BOARD ("ERCB") APPLICATION NO. 1554388

AND IN THE MATTER OF CANADIAN ENVIRONMENTAL ASSESSMENT  
AGENCY ("AGENCY") CEAR NO. 59540

AND IN THE MATTER OF THE *ENERGY RESOURCES CONSERVATION*  
*ACT* R.S.A. 2000 C. E-10

AND IN THE MATTER OF THE *OIL SANDS CONSERVATION ACT*,  
R.S.A. 2000, C.0-7

AND IN THE MATTER OF THE *CANADIAN ENVIRONMENTAL*  
*ASSESSMENT ACT*, 2012, S.C. 2012, C. 19, S. 52

BY THE  
ALBERTA ENERGY RESOURCES CONSERVATION BOARD AND THE  
GOVERNMENT OF CANADA

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PROCEEDINGS AT HEARING

NOVEMBER 21, 2012

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Held at:  
Four Points by Sheraton Edmonton South  
7230 Argyll Road  
Edmonton, Alberta

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**Wednesday, November 21, 2012**

**Volume 17**

**Edmonton, Alberta**

**(8:00 a.m.)**

THE CHAIRMAN: Good morning, everyone.

Is there any housekeeping? I take it not.

Ms. Gorrie, are you going to continue?

MS. GORRIE: Yes, I am.

THE CHAIRMAN: Thank you.

**FINAL ARGUMENT BY THE OIL SANDS ENVIRONMENTAL COALITION,  
BY MS. GORRIE (Continuing):**

MS. GORRIE: So good morning, Panel.

Before I return to discussing the key issues at play regarding Shell's Assessment, I'd like to take a moment to respond to comments that were made yesterday about Dr. Schindler and that he did not put forward alternative information and he relied on the research of others. Simply that is not accurate. Dr. Schindler brought scientific information to the attention of the Panel, including his own, and that of Environment Canada, and other scientists. He relied mostly on industry monitoring of past emissions and industry



1 consultants' modelling of future impacts. Shell  
2 agreed that Schindler's original research has been  
3 important in identifying deficiencies.

4 Successive expert panels have confirmed that  
5 far more contaminants are getting into the  
6 environment than industry has reported and this  
7 pollution is toxic and can cause harm.

8 The issue is not so much past impacts in the  
9 last decade, but what will happen in the next  
10 decade when bitumen production doubles. It seems  
11 that Shell has picked through publications to find  
12 selected papers and quotes to support its  
13 arguments.

14 And there is no validity to this approach.

15 Shell's consultant even went so far as to  
16 quote an editorial summary of a study; the Aherne  
17 and Shaw comment was again cited by Shell in its  
18 final argument.

19 This is a clear example of the problem that  
20 the expert review panels have identified; the lack  
21 of systematic credible analysis by persons who are  
22 qualified to do so.

23 And let's not forget that the discredited  
24 RAMP program is run by the same consulting firms  
25 who have done most of the past EIAs, including this

1           one.

2                   Shell also essentially accused Dr. Schindler  
3 of being a fear monger because the Kelly et al.  
4 research identifies PAHs as carcinogenic. So does  
5 Shell's EIA. The only difference is he identified  
6 that these pollutants are increasing and there may  
7 be cause for concern, whereas Shell dismisses or  
8 denies this.

9                   Scientific truth may be inconvenient, but  
10 continued attacks on Dr. Schindler does not advance  
11 the public interest in protecting people and the  
12 environment.

13                   So I'd now like to turn to speak about air.  
14 NO<sub>x</sub> emissions have been steadily rising in the  
15 region. This is confirmed by Wood Buffalo  
16 Environmental Association's monitoring stations and  
17 satellite images. Shell predicts annual NO<sub>x</sub>  
18 emissions at their fence line will be above the  
19 Alberta Ambient Air Quality Objectives.

20                   The annual maximum emissions at the  
21 Millennium monitoring station were 30 micrograms  
22 per metre cubed in 2011. That measurement must be  
23 put in context, as that data is based on production  
24 levels of 500,000 to 1.5 million per day or less  
25 over the last 10 years, which is approximately half

1 of what has since been approved. It's also  
2 important to note that this Project will add 5.8  
3 tons per day of NO<sub>x</sub>.

4 Modelling of NO<sub>x</sub> emissions were based on the  
5 assumption that the entire mine fleet would be  
6 replaced by equipment meeting TIER-IV standards by  
7 the end of 2024 at the latest. This assumption was  
8 made not just for this Project, but for all mines.  
9 Yet Shell testified it could not commit to ensuring  
10 their fleet met TIER-IV standards by 2025.  
11 Therefore, Shell's predictions of future ambient  
12 air concentrations of NO<sub>x</sub> is not conservative; a  
13 view shared by Environment Canada.

14 It is very likely that this additional  
15 Project will not meet the regional standards of  
16 annual average of 45 micrograms per metre cubed.

17 Shell testified it was going to experiment  
18 with alternative fuel for its mine fleet and did  
19 not plan on any retrofits to reduce emissions.

20 Shell, however, did not provide any  
21 information regarding what measures it could take  
22 to reduce emissions if monitored air quality  
23 exceeds thresholds.

24 Without any evidence of mitigation being  
25 undertaken, approving this Project will contravene

1 the LARP Air Quality Management Framework.

2 Now, Shell states that that framework will  
3 only apply if monitored ambient air levels exceed  
4 the guidelines. However, LARP was intended to  
5 guide decision-makers, including the ERCB,  
6 according to the **Land Stewardship Act**. The purpose  
7 of the threshold set by the plan is not to manage  
8 existing developments, but also to guide decisions  
9 about what activities will occur on the landscape.  
10 This is recognized in ERCB Bulletin 2012-22.

11 This bulletin requires applicants to submit  
12 sufficient information to enable an assessment of  
13 compliance with LARP thresholds.

14 The NO<sub>x</sub> emissions are also important because  
15 they are acidifying emissions. They also emit  
16 particulate matter, trace metals and PACs. Mine  
17 fleet emissions, however, are not measured, so we  
18 have no hard data on what they actually emit. The  
19 provincially appointed expert Water Data Review  
20 Committee released a report in 2011. These experts  
21 agreed that the Kelly et al. research indicates  
22 that considerably more particulate matter and trace  
23 metals are being released from oil sands facilities  
24 than are being reported to the National Pollution  
25 Release Inventory, or NPRI.

1                   It is important context that the NPRI  
2                   excludes fleet emissions from the reporting  
3                   requirements.

4                   The recent research from Environment Canada  
5                   confirmed the Kelly et al. findings of  
6                   concentrations of PAH and metals close to the mine  
7                   sites.

8                   The lake sediment studied by Muir et al.  
9                   shows the highest concentrations were deposited in  
10                  2009 to 2010, which corresponds with increasing  
11                  bitumen production during this time.

12                  The effects of this pollution is starting to  
13                  become apparent. Muir states that industrial  
14                  pollution and climate change (as read):

15  
16                                 "Have forced freshwaters  
17                                 towards new ecological states,  
18                                 largely distinct from those of  
19                                 previous centuries of lake  
20                                 ecosystem history."

21  
22                   The Water Monitoring Data Review Committee  
23                   notes in their report that (as read):

24  
25                                 "Recent studies show that

1                   levels of PAHs in sediments of the  
2                   Athabasca delta and mercury in the  
3                   eggs of birds nesting there have  
4                   been increasing, as have arsenic  
5                   concentrations in the sediments of  
6                   Lake Athabasca."

7  
8                   Now, Kelly et al. on the subsequent  
9                   Environment Canada studies have found significantly  
10                  elevated mercury levels near oil sands facilities  
11                  in the snowpack.

12                 The Water Monitoring Data Review Committee  
13                 believes that fugitive sources were likely an  
14                 important source of local deposition of mercury.  
15                 Even RAMP reports that a general increase in  
16                 frequency of measurable concentration of mercury  
17                 among all baseline and test stations monitored by  
18                 RAMP occurred.

19                 Mercury and metal depositions are relevant to  
20                 this Project because fugitive emissions in mine  
21                 fleets are a source of these contaminants.  
22                 According to Dr. Schindler, the 2010 Kelly study  
23                 implicated combustion sources for metal and PAHs  
24                 out of the stacks. They are relevant because the  
25                 compensation lake will be subject to the pollutants

1 from the upgraders and mine fleets. Most  
2 importantly, mercury levels are already high from  
3 various sources and methylmercury rapidly  
4 accumulates in the food chain.

5 The precautionary approach as set out in **CEAA**  
6 **(2012)** and other legislative instruments is  
7 practical.

8 We have heard at many oil sands hearings that  
9 RAMP's monitoring improves the absence of impacts,  
10 but the absence of evidence of impacts is not  
11 evidence of their absence. Several important  
12 Scientific Reviews have recently established that  
13 RAMP is incapable of detecting changes in the  
14 environment caused by oil sands development.

15 Alberta's Acid Deposition Management  
16 Framework is designed to prevent acidification  
17 problems from developing. However, Shell's EIA  
18 shows that the Base Case will already exceed target  
19 and critical levels for 2 grid cells and 21 lakes  
20 and these emissions will increase under the Planned  
21 Development Case.

22 A paper tendered by Shell indicates  
23 significant exceedances of critical loads of  
24 acidity in forest soils in the region.

25 While RAMP has been unable to detect changes

1 in acidification of lakes, Dr. Schindler notes that  
2 RAMP's monitoring design was based on a  
3 misunderstanding of the deposition process. The  
4 provincially appointed Water Monitoring Review  
5 Panel also noted that RAMP's monitoring was based  
6 on faulty assumptions about lake chemistry.

7 The framework says new emission sources  
8 should only be approved in a manner that will not  
9 increase depositions in the grid cell and meet  
10 reduction targets.

11 Shell has not identified how the Project will  
12 avoid increasing acid deposition.

13 In answer to one of the Supplemental  
14 Information Requests, Shell states that (as read):

15  
16 "The JME air emissions will  
17 increase incremental acid  
18 deposition in the region. This is  
19 despite the proposed mitigation  
20 measures outlined in the EIA."

21  
22 Shell supported this framework and it was  
23 approved by CEMA and therefore it should be  
24 prepared to accept its requirements.

25 In summary, this Project will cause



1           exceedances of the LARP maximum limit for NO<sub>x</sub> and  
2           the Acid Deposition Management Framework and is  
3           therefore not in the public interest.

4           At minimum, Shell should be required to  
5           measure end-of-pipe emissions from their mine fleet  
6           and report these annually.

7           Further, prior to any approvals, mitigation  
8           measures to reduce emissions should be required.

9           I'd now like to turn to discussing end pit  
10          lakes.

11          The proposed pit lakes will cover an area of  
12          about 40 square kilometres, the largest ever  
13          proposed. During the life of the mine, tailings  
14          will be stored in the four pit lakes. Over a  
15          15-year period, the Northeast Pit Lake will receive  
16          consolidation flux of about 2 million cubic metres  
17          a year, tailings seepage of 1.5 million cubic  
18          metres per year, and process water from the  
19          centrifugation of MFT, or mature fine tailings, of  
20          about 1 million per year.

21          About 15.6 million cubic metres of centrate  
22          water will be placed in that pit lake after 2051.

23          Throughout its life, water from the Kearl  
24          project's pit lake will also flow into Shell's,  
25          with Kearl's pit lakes having been approved to

1 store MFT. No active treatment of contaminated  
2 water has been proposed for Shell's pit lakes.

3 Shell's modelling indicates that the pit  
4 lake's water quality will exceed Alberta's Water  
5 Quality Guidelines and several Chronic Effects  
6 Benchmarks.

7 Dr. Miller testified that metals are a  
8 concern as well as the high salt load. Shell also  
9 predicts high salinity. While salts can be  
10 diluted, they will remain in the pit-receiving  
11 environment.

12 The success of pit lakes depends very much on  
13 their chemistry and the few successful pit lakes  
14 that have been cited, like gravel pits, have  
15 contained clean water, which will not be the case  
16 for these EPLs.

17 Now on the point of other pit lakes, Shell  
18 states that the hard-rock pit lakes are comparable  
19 to oil sands pit lakes when the former are  
20 successful. But when they are shown to be  
21 problematic, Shell says that they are not  
22 comparable. This is classic double talk.

23 Further, Shell states that Dr. Miller's  
24 evidence should be disregarded because he is not an  
25 oil sands pit expert. We note that Shell's

1 consultants are not experts either. No one is.  
2 This is because no oil sands pit lake has been  
3 completed.

4 Shell's witnesses professed a high degree of  
5 certainty that the pit lakes will be ecologically  
6 self-sustainable, especially after 100 years. They  
7 describe the predicted condition of the pit lake a  
8 few decades after closure as a "best guess."  
9 Mr. Denstedt stated that EPLs are a matter of when,  
10 not if. We completely disagree. It is very much a  
11 question of if.

12 Both Dr. Miller and Environment Canada  
13 described multiple sources of uncertainty,  
14 including the reliance of multiple models and  
15 assumptions, errors in climate change modelling,  
16 and lack of a demonstration lake.

17 Shell's definition of ecologically  
18 self-sustaining pit lakes is that they will  
19 eventually contain fish, but not necessarily the  
20 same fish as currently exist in the area. This  
21 does not equate with Environment Canada's  
22 definition of ecological integrity.

23 Accordingly, even if the pit lakes meet  
24 Shell's criteria, there will be a permanent loss of  
25 ecological integrity.

1           Dr. Schindler emphatically disagrees with  
2           Shell's prediction in part because few pit lakes  
3           have been successful to date. He also notes that  
4           the pit lakes will likely never provide a fishery  
5           comparable to what will be lost or the similar  
6           biodiversity.

7           No water quality standards have been  
8           developed yet for pit lakes despite CEMA  
9           undertaking this work in 2003. Shell has also  
10          stated that it will not undertake a demonstration  
11          lake. Rather, it is relying on Syncrude's Base  
12          Mine Lake to demonstrate the viability of the pit  
13          lake. That research is not publicly available and  
14          was not made available to the Panel.

15          On that note, during final argument, counsel  
16          for Syncrude made several claims regarding  
17          Syncrude's activities and the alleged science of  
18          pit lakes that are not in evidence. As such, those  
19          final arguments should be disregarded by the Panel.

20          Dr. Miller described the proposed pit lake as  
21          a "grand experiment." The CEMA guidance document  
22          also refers to it as a "large-scale experiment."

23          Shell says it will use adaptive management,  
24          which appears to mean that Shell hopes that it will  
25          be able to figure out a solution in the future.

1 But as the CEMA guide says (as read):

2

3 "Worldwide, adaptive  
4 management has a poor track record  
5 of performance."

6

7 Therefore, the CEMA guide stressed the need  
8 for a concrete plan for the various failures that  
9 may occur.

10 The Oil Sands Advisory Panel to the Federal  
11 Minister of Environment also found that a clearly  
12 focused set of objectives and a statistically sound  
13 decision-making process that can allow for adaptive  
14 management in a rapidly changing oil sands  
15 environment does not exist.

16 Canada also recommended contingency plans be  
17 developed because it was concerned about Shell's  
18 ability to predict and control effluent quality  
19 from the end pit lakes.

20 Despite this, Shell has no concrete  
21 mitigation plan and provided no data to enable the  
22 Panel to assess whether any mitigation measures are  
23 technically or economically feasible.

24 As such, the Panel is unable to discharge its  
25 obligations under CEAA and should not recommend

1 approval of this mine.

2 And this is important, as that contingency  
3 plan can cost billions of dollars, posing a  
4 significant risk to the future taxpayers of this  
5 province.

6 Alternatively, we note that the 2004 CNRL  
7 Decision Report, and the Total Joslyn Mine Report,  
8 that previous Panels gave conditional approval to  
9 the end pit lake concept, subject to full-scale  
10 demonstration of its success in 15 years, which  
11 would be 2019 for CNRL. Shell testified that the  
12 information regarding the viability of Base Mine  
13 Lake to enact as a water treatment system will not  
14 be available for 10 years; that takes us to 2022.  
15 Therefore, the ERCB's condition of 2019 will not be  
16 met. Shell does not plan to begin construction  
17 until 2015 and there is no commitment from Shell to  
18 make an investment decision by 2015.

19 The pit lakes are integral to the Mine Plan.  
20 We therefore request that before any approval be  
21 given, there be a proviso that Shell propose a Mine  
22 Plan with an alternative to the pit lakes. If  
23 Shell can demonstrate pit lakes are viable by the  
24 date of its investment decision, or has a fully  
25 developed contingency plan, then it can be granted

1 leave to apply for a review in variance.

2 If Shell can take three years or more to  
3 ensure this Project meets the interest of its  
4 investors, then this Panel can surely take the time  
5 necessary to ensure the public interest is  
6 protected.

7 I'd like to move on and talk about water  
8 issues.

9 The Athabasca Management Framework is another  
10 example of how Alberta and Canada have failed to  
11 manage the cumulative effects of oil sands  
12 development in a responsible manner. This means  
13 that it falls to this Panel to ensure projects do  
14 not contribute to the regional cumulative effects.

15 In 2003, at the first Jackpine hearing, DFO  
16 said it would make every effort to get an in-stream  
17 flow needs in place by 2005. An Interim Framework  
18 was put in place in 2006. And a Base Flow was  
19 deferred to further study.

20 Work on the Phase 2 Framework started in  
21 2007. The Joint Review Panel for the Kearl Project  
22 recommended Phase 2 be implemented by January 2011.  
23 And DFO undertook to do so that year.

24 Both Scientific Reviews conducted by DFO in  
25 2006 and 2010 determined there is a need to

1           establish an Ecological Base Flow, or EBF, to  
2           protect the river. We are now in November 2012 and  
3           this has still not been done.

4                     DFO suggested that a Base Flow of 87  
5           centimetres is reasonable, although we do not know  
6           what the ultimate number will be.

7                     Water will be reduced below the 87  
8           centimetres because Syncrude and Suncor's  
9           allocation of 2 centimetres each have been  
10          grandfathered under the **Water Act**. Shell and CNRL  
11          each are entitled to withdraw 0.2 centimetres, so  
12          the 87 centimetres may be reduced during critical  
13          low flows.

14                    Shell has committed to restricting water  
15          withdrawals from the Athabasca River to 0.2  
16          centimetres during low-flow conditions. Even so,  
17          negative effects on fish habitat may occur. Flow  
18          levels are important not just for fish habitat but  
19          also because the river is being used to dilute  
20          contaminants released from the mine.

21                    Most importantly, Shell has not provided the  
22          details of how it will cut withdrawals. It  
23          referred to using freeboard from its tailings  
24          facility or aquifers. OSEC is concerned that Shell  
25          and other operators may effectively withdraw more



1           than 0.2 centimetres by purchasing unused  
2           allocations from Syncrude or Suncor.

3           The Oil Sands Developer Group agreed for the  
4           winter of 2011 to 2012 that it indicates that  
5           operators will indeed allocate unused licence  
6           allocations between themselves.

7           The effect of this agreement is to enable  
8           withdrawals greater than would be permitted by an  
9           87-centimetre Base Flow.

10          We therefore believe the Panel has an  
11          important role to play in protecting the river:

12                 First, by affirming the need for an EBF  
13          forthwith;

14                 Second, by conditioning any approvals on  
15          Shell's limiting its water withdrawal to 0.2  
16          centimetres for both Shell Phase I and the  
17          Expansion Project, and doing so without purchasing  
18          additional withdrawals from other operators;

19                 Third, we're recommending that Shell retrofit  
20          diversion infrastructure so withdrawals during  
21          low-flow periods reach zero in the future.

22                 I'd like to speak briefly about the Muskeg  
23          River.

24                 The Muskeg River watershed is approximately  
25          1400 square kilometres. This Project will be the

1 first project to mine a large area of the mainstem  
2 of the Muskeg River, 21 kilometres. If the Project  
3 is approved, 45 percent of the watershed will be  
4 mined.

5 According to Dr. Schindler, there is evidence  
6 of existing adverse impacts to the watershed and it  
7 is ridiculous to assume no permanent biological  
8 damage from 10 mines operating in the watershed.

9 Shell has assessed components of the impacts  
10 to this watershed in discrete components, but there  
11 is no integrated assessment of the aquatic and  
12 terrestrial components of the impacts. In other  
13 words, it was not specifically chosen as a spatial  
14 area to assess. As such, there is no assessment of  
15 whether the Project will significantly impair the  
16 watershed and its ability to provide resources for  
17 current and future generations, which is required  
18 under **CEAA (2012)**.

19 There is also no direct assessment by Shell  
20 of the impacts to the watershed as a unit and  
21 therefore no information for the Panel to conclude  
22 that the policy goal of maintaining the ecological  
23 integrity of the basin will be met.

24 In 2003, Shell was part of CEMA's Muskeg  
25 River Integrity Working Group. This group was

1           charged with developing a plan for maintaining the  
2           ecological integrity of the Muskeg River watershed.  
3           After repeated delays, the task was abandoned. The  
4           Government of Alberta produced an Interim Framework  
5           in 2008. Alberta adopted the recommendations of  
6           past Panels to manage the cumulative effects on a  
7           watershed basis.

8           THE CHAIRMAN:                   Excuse me, Ms. Gorrie, we  
9           need to take a short break. I beg your pardon.

10

11                           **(Brief Interruption: Two-minute break required)**

12

13           THE CHAIRMAN:                   My apologies, Ms. Gorrie.  
14           Please continue.

15           MS. GORRIE:                        I hope I didn't say anything  
16           too offensive.

17           THE CHAIRMAN:                   Nothing to do with you.

18           MS. GORRIE:                        I want to step back a  
19           sentence or two.

20                           The Government of Alberta produced an Interim  
21           Framework in 2008. Alberta adopted the  
22           recommendations of past Panels to manage the  
23           cumulative effects on a watershed basis. The  
24           Interim Framework was intended to be in place for  
25           one year until a comprehensive framework could be

1 developed. That is, one that includes the  
2 important terrestrial and land use components of  
3 the ecology of the basin, as well as aquatic  
4 health, and one that includes pollutants of concern  
5 like naphthenic acids and PAHs. It also said that  
6 social, cultural and economic considerations would  
7 be addressed in the final plan.

8 This comprehensive plan was never developed  
9 and the Interim Framework was extended  
10 indefinitely.

11 As a result, there is no guidance for this  
12 Panel beyond the broad policy objective of  
13 maintaining the ecological integrity of the Muskeg  
14 watershed, as stated in the Interim Framework.  
15 LARP does not contain any specific objectives or  
16 thresholds to guide decision making for this  
17 watershed beyond the general intent to manage  
18 cumulative effects.

19 Although the ERCB and past Joint Review  
20 Panels asked Alberta Environment to come up with a  
21 management plan, the Interim Framework only deals  
22 with water quantity in the lowest reaches of the  
23 river and specifies some water quality parameters.  
24 It also states as an objective to ensure that no  
25 physical diversion or rerouting of the mainstem of

1 the Muskeg River.

2 However, it then goes on to say that this  
3 Project was announced later in the preparation of  
4 the plan and the Interim Framework does not attempt  
5 to deal with it in any way. In essence, Alberta  
6 Environment has said that it's up to the ERCB to  
7 determine if mining the river is in the public  
8 interest.

9 Now, Shell states it can maintain the  
10 integrity of the lower reaches of the river, but  
11 that is not the same as maintaining the ecological  
12 integrity of the watershed. Based on the evidence  
13 before the Panel, this Project cannot be approved.  
14 It is inconsistent with maintaining the ecology of  
15 the basin.

16 While past decisions of Joint Review Panels  
17 were instrumental in at least getting an Interim  
18 Management Framework in place, Alberta Environment  
19 has again dropped the ball. Without a management  
20 plan, permanent loss of ecological integrity will  
21 occur. This includes loss of rare patterned fen  
22 and the creation of 40 kilometres squared of pit  
23 lakes, which do not resemble the pre-existing  
24 ecology of the area.

25 Now I'd like to turn to speaking about

1 greenhouse gas emissions and climate change, which  
2 is my final topic.

3 So Shell has stated that because climate  
4 change is a global issue, the assessment of  
5 greenhouse gas emission impacts should be done in a  
6 global context. Such an assertion is utterly  
7 misguided. While Shell states that assessing  
8 impacts at the LSA level is nonsensical because  
9 impacts will always be found to be significant, we  
10 submit that what is actually nonsensical is scoping  
11 out the assessment to a global scale when assessing  
12 the impacts of greenhouse gas emissions.

13 Taking such an approach will mean that  
14 effects are virtually never found to be  
15 significant. And I suppose that is why Shell's  
16 advocating for such an approach, despite the fact  
17 that it is not supported in law.

18 The fact that climate change is a global  
19 issue that affects us all does not provide an  
20 excuse to ignore the impacts caused at a local and  
21 regional scale. If anything, it provides even more  
22 reason for action to be taken at those levels. On  
23 that basis, the Provincial and Federal Governments  
24 have developed greenhouse gas emission reduction  
25 targets.

1                   However, the Government of Canada and Alberta  
2                   are currently not on track to achieve their 2020  
3                   reduction targets. As stated by the National  
4                   Roundtable on the Environment and the Economy:

5  
6                   "Canada will not achieve its  
7                   2020 GHG emission reduction target  
8                   unless significant new, additional  
9                   measures are taken. More will have  
10                  to be done. No other conclusion is  
11                  possible."

12  
13                  Now, at the same time, the Federal Government  
14                  has continually delayed enacting regulations to  
15                  limit greenhouse gas emissions for the oil sands  
16                  industry. Environment Canada has stated that oil  
17                  sands regulations will be drafted next year, but it  
18                  was not able to speak to whether they will actually  
19                  include emission limits or when any such  
20                  regulations will be implemented.

21                  We submit that approval of this Project will  
22                  clearly undermine the ability of the Provincial and  
23                  Federal Governments to meet their reduction  
24                  targets. The Project will produce a total volume  
25                  of greenhouse gases amounting to 1.18 megatons of

1 CO<sub>2</sub> each year over the Project life.

2 However, Shell has failed to show how it will  
3 be able to mitigate these emissions.

4 Given Shell's failure to provide sufficient  
5 information to demonstrate that the impacts of the  
6 Project will be fully mitigated, the Panel cannot  
7 recommend that the Project proceed. The Project  
8 will further undermine the ability of the  
9 Provincial and Federal Governments to meet its  
10 greenhouse emission goals and therefore it is not  
11 in the public interest.

12 I also wanted to respond to a few points  
13 Shell made in its Opening Statement.

14 There Mr. Broadhurst stated that Shell's goal  
15 is to:

16  
17 "... become the world's most  
18 competitive and innovative energy  
19 company..."

20  
21 However, Shell is failing to increase its  
22 emission intensity targets from what they were  
23 eight years ago, which is far from innovative.

24 Mr. Broadhurst also stated that Shell has a  
25 long and proven track record of delivering on its



1           commitments. However, Shell is currently failing  
2           to meet its last two greenhouse gas emission  
3           reduction commitments, both for Muskeg River Mine  
4           and Shell Phase I. During cross-examination, Shell  
5           tried to explain the failure to meet its  
6           commitments by again trying to take the focus off  
7           of the Project-specific impacts by referring to the  
8           efforts of Shell, the company, through all of its  
9           projects and activities.

10                   Shell stated that it aspires to meet the  
11           targets that it committed to for the last two  
12           projects but has not offered sufficient means by  
13           which it will be able to do so. They have stated  
14           that they currently have no plans to undertake  
15           carbon capture and storage to mitigate the specific  
16           impacts of this Project. They rely on the Quest  
17           project, but that is not a Project-specific  
18           mitigation, and no evidence has been proffered to  
19           suggest that the Quest project is intended  
20           specifically to mitigate the effects of this  
21           Project as opposed to the numerous other operations  
22           Shell has undertaken.

23                   In fact, the Quest project would have to be  
24           dedicated just to addressing emissions from this  
25           Project if it were going to be able to mitigate

1           those emissions.

2                       So in the event that the Panel finds this  
3           Project to be in the public interest, approvals for  
4           the Project should not be granted until Shell  
5           provides a detailed plan demonstrating the  
6           following:

7                       1. How it will mitigate all of the  
8           greenhouse gas emissions caused by the Project.

9                       2. How it will meet greenhouse gas emission  
10          reduction targets for the Project equal to the  
11          emissions of a conventional oil and gas operation  
12          of similar size at start-up, which is the same  
13          condition that was included for the past two Shell  
14          mines.

15                      And 3. An operational carbon capture and  
16          storage system in place by 2020 that will  
17          specifically offset emissions from this Project.

18                      So given the foregoing, OSEC submits that  
19          this Project is clearly not in the public interest.  
20          If the Project were to proceed, it would contravene  
21          numerous legislative obligations and government  
22          policy objectives. The list of legislative and  
23          policy objectives that will be breached is long,  
24          and includes the following:

25                      Approval would be contrary to the vision and

1 objectives set out in LARP and the Integrated  
2 Resource Plan to protect biodiversity and ecosystem  
3 health and to avoid and minimize impacts.

4 It is also contrary to the purpose of the  
5 **EPEA**, which is to protect the environment and to  
6 avoid and minimize impacts.

7 The Project will likely not meet the Alberta  
8 Ambient Air Quality Standards and contravene the  
9 LARP Air Quality Management Framework.

10 It will also exceed the targeting critical  
11 levels of Alberta's Acid Deposition Management  
12 Framework and will contribute to the failure of the  
13 Provincial and Federal Governments to meet their  
14 commitments to reduce greenhouse gas emissions.

15 The water quality in the end pit lakes will  
16 likely exceed Alberta's Water Quality Guidelines  
17 and several Chronic Effects Benchmarks.

18 The reductions in biodiversity resulting from  
19 the Project are contrary to both the UN Convention  
20 on Biological Diversity, to which Canada is a  
21 signatory, and **SARA**.

22 The significant loss of habitat for species  
23 at risk is also contrary to **SARA**.

24 It's also important to note that Shell's own  
25 assessment shows that projects that have already

1 received approval, never mind the development that  
2 is planned, including this Project, will have  
3 impacts that exceed the region's environmental  
4 protection limits. Approving further projects to  
5 be added to such a landscape is clearly not in the  
6 public interest.

7 Now, the decision of the EUB in Whaleback is  
8 instructive for determining whether the Project is  
9 in the public interest. In that case, the Board  
10 turned down a licence for an application to drill a  
11 well on the basis of public interest issues. It  
12 refused it on a number of reasons that are  
13 applicable to the current Application:

14 First, they denied the application because  
15 there was not a sufficiently robust mitigation plan  
16 in place for the anticipated impacts, which for the  
17 reasons discussed, OSEC submits is the case here.

18 A second reason was that the well would be  
19 inconsistent with the Provincial Government's land  
20 management goals for the region, as expressed in  
21 the Integrate Resource Plan for the area. This  
22 Project would also be inconsistent with provincial  
23 management goals, including the Integrated Resource  
24 Plan.

25 Thirdly, the Board in Whaleback was also

1           concerned that the region could be significantly  
2           negatively affected before the Province's then  
3           Special Places 2000 initiative could evaluate its  
4           importance in the overall provincial context.

5                       This demonstrates that the Board was prepared  
6           to hold off approving drilling pending Provincial  
7           Government policy determinations.

8                       In the present case, government policies and  
9           frameworks are also pending, particularly under the  
10          LARP. And we submit that in accordance with  
11          Whaleback, the Project should not be allowed to  
12          proceed until those government determinations are  
13          made. To put it another way, to allow Shell to  
14          sneak this Project in under the wire before  
15          important pending government planning decisions are  
16          made would not be in the public interest. The  
17          pending policies and frameworks are intended to  
18          provide guidance direction for the future  
19          developments of this province. They provide a  
20          roadmap. And so it is in the public's interest  
21          that the roadmap be available before any decisions  
22          are made with respect to this Project.

23                      Now, in Polaris Resources Limited, the ERCB  
24          stated that:

25

1                    "As all projects may have  
2                    some element of risk, a great deal  
3                    of the Board's attention must be  
4                    focused upon the level of risk and  
5                    the ability and willingness of the  
6                    applicant to mitigate or eliminate  
7                    such risks.

8                    An applicant's ability to  
9                    take the appropriate measures to  
10                   deal with risk is therefore  
11                   critical to the Board's final  
12                   determination as to whether the  
13                   project can be found to be in the  
14                   public interest."

15  
16                   In the present case, Shell is clearly  
17                   unwilling to take the necessary measures to  
18                   mitigate the risk, particularly with respect to  
19                   conservation offsets.

20                   Failing to provide adequate mitigation  
21                   measures is also contrary to CEAA and the Panel's  
22                   Terms of Reference and the requirements therein to  
23                   provide an opportunity for public participation in  
24                   the assessment process. If mitigation measures are  
25                   not available for review during the assessment, it

1 is impossible for the public to participate in a  
2 meaningful way.

3 When considering whether the Project is in  
4 the public interest of Alberta, it is important to  
5 note that the bitumen that will be produced will be  
6 predominantly for export, it's not going to be to  
7 meet Albertan or Canadian needs. Shell also  
8 acknowledged that only 3 percent of the money it  
9 will spend on construction will be spent locally,  
10 including labour.

11 It is also important to note that Shell has  
12 failed to provide a contingency or mitigation plan  
13 for the end pit lakes, even though such plans could  
14 cost the taxpayers billions of dollars. It is not  
15 in the public interest for Albertans to be kept in  
16 the dark about potentially significant costs that  
17 they may be liable for in the future.

18 One further note is with respect to the  
19 failure of governments to follow-up on past  
20 recommendations from Panels. And we respectfully  
21 request that if the Panel finds this Project to be  
22 in the public interest, that where possible, it  
23 provide for binding conditions instead of  
24 recommendations, as the failure to follow through  
25 on past Panel recommendations or to do so in a

1           timely manner has been demonstrated time and time  
2           again.

3                       Now, I've already talked about the EBF issue,  
4           Ecological Base Flow, but in 2007 the Joint Review  
5           Panel in Kearl recommended that one be established,  
6           and it's now 2013, almost, and we still don't have  
7           an EBF flow or a Phase 2 Management Framework.

8                       With respect to the Muskeg River, the Kearl  
9           Panel recommended that a final management framework  
10          or a management plan, rather, be completed no later  
11          than March 2008. So here we stand five years later  
12          and we still don't have a final management  
13          framework.

14                      There's also been a failure by Shell to  
15          complete a technical review of wildlife corridors  
16          and their effectiveness in facilitating wildlife  
17          movement as recommended by the Panel in Shell  
18          Jackpine Phase I.

19                      The 2006 Panel for Albian Sands recommended  
20          that Environment Canada and the Government of  
21          Alberta collaborate to determine mitigation options  
22          to minimize the impacts on yellow rail. Such  
23          mitigation measures have yet to be developed.  
24          Environment Canada has confirmed that it will be  
25          2013 or later before they are produced.



1           The Panel for Total also recommended that  
2           specific water quality objectives be developed for  
3           naphthenic acids, but Environment Canada has  
4           admitted that they are a ways away and could not  
5           give a specific timeframe for completion of those  
6           objectives.

7           These examples demonstrate that  
8           recommendations to take action after the fact  
9           cannot be relied upon by the Panel to mitigate  
10          project impacts.

11          So in conclusion, the information provided by  
12          Shell is insufficient in order for the Panel to  
13          discharge its duty to assess the Project. Shell  
14          has failed to consider important impacts caused by  
15          the Project as outlined throughout this submission.  
16          What is clear from the information provided is that  
17          the impacts will be significant.

18          Virtually the entire LSA will be destroyed  
19          during the mine life resulting in extreme habitat  
20          loss to wildlife, including species at risk, and  
21          loss of important vegetation, particularly wetlands  
22          and old-growth forests.

23          The ecological integrity of the Muskeg River  
24          basin will potentially be lost, and unproven and  
25          untested pit lakes, for which no contingency plan

1 exists, will become a permanent fixture on the  
2 landscape.

3 The Panel should disregard Shell's attempt to  
4 define significance solely in relation to the RSA.  
5 Further, determinations made by Shell with respect  
6 to significance should be dismissed as they are  
7 based on Shell's own subjective analysis, which is  
8 not supported by the evidence that has been  
9 provided or CEAA and its guidance documents.

10 Despite the significant adverse effects,  
11 Shell has failed to provide adequate mitigation  
12 that it is technically and economically feasible.  
13 The Federal Government has even clearly stated that  
14 the mitigation measures provided are not  
15 sufficient. Where mitigation measures are  
16 available, Shell has even refused to provide them.

17 Shell also relies on adaptive management,  
18 particularly as it relates to pit lakes. But as  
19 confirmed by CEAA, adaptive management cannot be  
20 relied upon. If this is Shell's answer to the many  
21 unknowns and uncertainties surrounding this  
22 Project, given that adaptive management has proven  
23 to be a failure, we urge the Panel that they cannot  
24 rely on it as a cure for this Project's many  
25 ailments.

1           Further, Shell's position is that if there is  
2           a potential significant adverse effect, the answer  
3           should be monitoring and adaptive management.  
4           Taking that approach would mean that all projects  
5           would be allowed to proceed, even where there will  
6           be significant adverse effects. Such an approach  
7           is unacceptable and contrary to the governing  
8           legislation.

9           Mr. Broadhurst testified that production will  
10          not begin until 2018. During the next five years,  
11          the available technology and mitigation options  
12          will very likely change. More monitoring data and  
13          research will advance our understanding of the  
14          potential impacts and best practices. The  
15          regulatory landscape is also quickly evolving and  
16          many management frameworks are not in place or are  
17          only preliminary.

18          Approving the Project now, as proposed, will  
19          effectively grandfather in old technology and  
20          mitigation measures. Shell recognizes the value of  
21          regional planning as it relies on it to address  
22          many of the concerns raised during this process.  
23          As such, Shell should agree with the proposition  
24          that regional frameworks and policies that are  
25          forthcoming in the next few years should be in

1 place before decisions regarding this Project are  
2 made.

3 OSEC requests that the Panel conclude that  
4 the Project will have significant adverse effects  
5 that cannot be mitigated and that it is not in the  
6 public interest.

7 However, if the Panel determines that this  
8 Project is in the public interest, we request that  
9 it recommend that the ERCB only give provisional  
10 approval to this Application. That is, it be  
11 subject to the right of anyone potentially affected  
12 by the Project, and the Board itself, to review the  
13 ERCB's decision. We also request that any  
14 approvals be conditional upon compliance with the  
15 requirements that we've requested in this  
16 submission.

17 Thank you.

18

19 **QUESTIONS BY THE JOINT REVIEW PANEL, BY THE**

20 **CHAIRMAN:**

21 THE CHAIRMAN: Ms. Gorrie, I do have one  
22 question. At the end of your argument, you  
23 requested that the Panel recommend that the ERCB  
24 only give provisional approval to the Application  
25 and that it be subject to the right of anyone

1           potentially affected by the Project, and the Board  
2           itself, to review the ERCB's decision.

3                   And I wondered if you could expand on that,  
4           how that would work, and why it's different than  
5           what other appeal provisions already exist.

6   MS. GORRIE:                   With reference to a review, I  
7           was thinking of the review in variance provision in  
8           the ERCB legislation. And, you're right, already  
9           there is an ability to seek a review in variance.

10                   Our position is that, instead of it being the  
11           onus of interveners or other interested parties to  
12           come and seek a review in variance when, you know,  
13           to ensure that conditions are met, that it would be  
14           on the Proponent to seek a review in variance so we  
15           have strong conditions in place at first, and then  
16           if they can prove that they can, you know, if they  
17           provide a contingency plan or whatever, the other  
18           condition might be that they need to do before  
19           approval can be given, they can come back and seek  
20           a review and variance themselves as opposed to  
21           relying on interveners to have to take that step.

22   THE CHAIRMAN:               Thank you, Ms. Gorrie.

23   MS. GORRIE:                   You're welcome.

24   THE CHAIRMAN:               I have 8:55. We'll take  
25           10 minutes.

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**(Brief Break)**

THE CHAIRMAN: Ms. Biem, would you like to  
continue for ACFN?

MS. BIEM: Yes, thank you.

**FINAL ARGUMENT OF THE ATHABASCA CHIPEWYAN FIRST NATION,  
(CONTINUING), BY MS. BIEM:**

MS. BIEM: Good morning Panel, staff,  
counsel, and parties in attendance.

So I'm going to pick off where Mr. Murphy  
left off with ACFN's final submissions and I'll  
start out by discussing some of the problems that  
ACFN has identified with Shell's Environmental  
Impact Assessment.

Shell's Environmental Impact Assessment does  
not provide this Panel with the information it  
needs to find that the Project is in the public  
interest, or, that the proposed Jackpine Mine  
Expansion would have insignificant effects. It  
does not accurately depict the direct, adverse and  
cumulative impacts of the Project on ACFN and  
ACFN's Treaty and Aboriginal Rights, nor upon the  
resources upon which the exercise of those rights  
depends.

1           I'll discuss several fundamental problems  
2           with the Environmental Impact Assessment, beginning  
3           with Shell's apparent confusion over the use and  
4           application of the concept of significance,  
5           especially as it applies to ACFN's traditional use  
6           and Treaty Rights.

7           And I'd first like to note that impacts to  
8           Treaty Rights need not be significant in order for  
9           Crowns to do something to avoid, minimize and  
10          mitigate or accommodate those effects. However,  
11          once a significance determination is embarked on,  
12          it should involve local communities in developing  
13          significance to criteria.

14          Shell has taken contradictory positions about  
15          how significance of impacts on traditional uses and  
16          Treaty Rights should be assessed. On one hand,  
17          Shell says that the environmental consequences to a  
18          particular Aboriginal Right or interest will be  
19          closely tied and in most cases directly related to  
20          the environmental consequences to the supporting  
21          environmental or biological Key Indicator Resource.

22          However, Mr. Kovach told this Panel on  
23          October 30th that when considering significance in  
24          relation to the effects on a First Nation or  
25          Aboriginal group, what has to be taken into

1 consideration is the effects as they apply and what  
2 that means to the communities.

3 Shell has been in possession of ACFN's  
4 assessment of impacts of the Jackpine Mine  
5 assessment on Athabasca Chipewyan's traditional  
6 knowledge and use since the spring of 2011. That  
7 assessment included a significance evaluation that  
8 was based upon what the effects of the Project mean  
9 to the community. And that assessment concluded  
10 that the Jackpine Mine Expansion Project alone was  
11 likely to have significant adverse residual effects  
12 on ACFN knowledge and use. However, as  
13 acknowledged by Mr. Kovach, Shell's review of  
14 ACFN's assessment of impacts to traditional use and  
15 knowledge did not change Shell's assessment of the  
16 impacts of its Project upon ACFN.

17 Besides being problematic, because it does  
18 not take into account what the effects of this  
19 Project mean to ACFN, Shell's own assessment  
20 underestimates the likely residual Project effects  
21 and cumulative effects on ACFN traditional  
22 knowledge and land use in part because:

23 The Local Study Area was not based on Project  
24 effect or footprint;

25 The EIA exhibits considerable confusion



1           between trapline rights and Aboriginal or Treaty  
2           Rights;

3                     The EIA also contains several inappropriately  
4           vague or unsupported conclusions regarding impacts  
5           to traditional use. For example, Shell concluded  
6           that with regard to fishing, the Project will not  
7           have a direct effect on traditional fishing. And  
8           further concluded that the Jackpine Mine Expansion  
9           will not change the ability of Aboriginal groups to  
10          use the fish and fish habitat resources in the  
11          Lower Athabasca River.

12                    It's unclear what kind of data this strong  
13          conclusion is based upon, and, in fact, that  
14          conclusion contradicts the evidence that ACFN has  
15          placed before this Panel.

16                    Further, there's an inappropriate reliance in  
17          this Environmental Impact Assessment on optimistic  
18          and distant future reclamation objectives as  
19          mitigation for Project impacts on traditional use  
20          and rights. Even if the assumptions that  
21          reclamation will be successful and provide  
22          opportunities for ACFN knowledge and use that are  
23          equivalent to what naturally exists, and those are  
24          two highly questionable assumptions, the removal of  
25          lands from Aboriginal use for periods of time that

1 exceed one generation is considered permanent.

2 And that's because of the interruption of  
3 knowledge transmission regarding the disturbed  
4 areas.

5 The other major piece of work that Shell  
6 offered this Panel as a means for understanding  
7 Jackpine Mine Expansion impacts on ACFN was its  
8 cultural assessment in response to the Panel's  
9 January 2012 Supplemental Information Request 30.

10 And we've heard extensive submissions on why  
11 the cultural assessment did nothing to remedy the  
12 problems with Shell's earlier assessment of impacts  
13 of the Project on traditional use and Treaty  
14 Rights. Once again, Shell was willing to proceed  
15 with developing information for this Panel that was  
16 not based on adequate information from ACFN and  
17 that misinterpreted what information it did  
18 include.

19 Ms. Havers, the lead author responsible for  
20 the conclusions of the study, is clearly not an  
21 expert in Dene culture, yet decided she had enough  
22 information to proceed with her assessment in the  
23 face of clear indications from Athabasca Chipewyan  
24 First Nation themselves that more was required.

25 And ACFN has provided critiques by

1 Dr. McCormack whose academic background involves  
2 45-years worth of study, research, fieldwork and  
3 publishing about Fort Chipewyan and other northern  
4 histories and cultures that indicate just how  
5 deeply flawed this cultural assessment was.

6 In ACFN's submission, this Panel should  
7 exercise extreme caution in considering or relying  
8 upon any of the traditional use rights or cultural  
9 information or assessments that have been put forth  
10 by Golder and Shell in relation to this Project.

11 Throughout the process to date, ACFN has  
12 raised numerous other types of issues and gaps with  
13 the Environmental Impact Assessment, and in ACFN's  
14 view, these issues remain largely outstanding. A  
15 high-level listing of many of the most important  
16 outstanding problems with Shell's EIA can be found  
17 at Exhibit 006-013-N. And it's a summary report of  
18 the results of all of ACFN's technical reviews of  
19 the EIA materials. So it's an 11-page list, and I  
20 don't propose to take you through it all. Just  
21 suffice it to say that the problems relate to the  
22 assessment of impacts on wildlife, vegetation,  
23 biodiversity, traditional land use, the  
24 reestablishment of traditional resources,  
25 socio-economics, hydrology, hydrogeology, water

1           quality and quantity, fisheries, aquatic health and  
2           air quality.

3                   And the issues go beyond simple disagreements  
4           about methodology as suggested by Shell.

5                   Some of the specific examples of problems  
6           with Shell's EIA include a failure to provide  
7           information regarding where wildlife will go during  
8           the Project lifespan or where animals will  
9           originate from to recolonize the disturbed  
10          landscape after closure and reclamation should  
11          reclamation be successful.

12                   Shell has not provided an answer to the  
13          question of how wildlife will be allowed to move  
14          through the Muskeg River watershed and it's unclear  
15          whether various wildlife corridor design will  
16          simply be a function of minimizing resource  
17          sterilization or whether they are actually intended  
18          to be effective wildlife corridors. No targets  
19          have been set for the reestablishment of  
20          traditional resources. There are species gap in  
21          baseline surveys. There's no apparent  
22          consideration of reestablishing wildlife  
23          distribution and abundance to pre-industrial  
24          disturbance conditions. And finally, there has not  
25          been a direct assessment of potential Project

1 impacts to waterfowl.

2 An overarching problem with the EIA is  
3 Shell's position that an EIA is about assessment  
4 alone rather than about also including scientific  
5 research. And its ACFN's submission that where  
6 development is of an unprecedented scale, and given  
7 that this Project would be contiguous with others  
8 across the landscape, it may be necessary to  
9 generate new scientific knowledge in order to  
10 actually conduct a meaningful assessment. And the  
11 failure of oil sands EIAs to generate new  
12 scientific understandings has been highlighted by a  
13 number of independent Review Panels, including the  
14 Royal Society of Canada and the Water Monitoring  
15 Data Review Committee that was set up by Alberta.

16 Another problem I wish to highlight in the  
17 EIA is that Shell's disturbance analysis  
18 underestimates the amount of linear disturbance  
19 currently present in the RSA. Mr. Jalkotzy  
20 testified that Shell used the most current dataset  
21 available in order to complete the disturbance  
22 layer of its mapping, for example the disturbance  
23 mapping that can be seen at Figure 2, Appendix 4,  
24 of Shell's May 2012 SIR Response. However, that  
25 map does not show existing linear disturbances in

1 the southeast and eastern sections of the mapped  
2 area. Those disturbances can clearly be seen on  
3 both Google Earth maps and on the mapping completed  
4 by MSES on behalf of ACFN using less refined  
5 datasets than the data that Shell's disturbance  
6 mapping is ostensibly based upon. And this failure  
7 to accurately represent linear disturbance in the  
8 terrestrial RSA remains unexplained and it should  
9 act as a caution to this Panel in relying upon the  
10 cumulative impact data presented by Shell.

11 In addition to the list of outstanding issues  
12 with the EIA that were provided in  
13 Exhibit 006-013-N, which I've highlighted a few,  
14 Dr. Martin Carver has also provided this Panel with  
15 an in-depth analysis of problems with the EIA that  
16 are specific to Shell's climate change assessment  
17 and the integration of climate change into various  
18 hydrological assessments that underpin several of  
19 the major conclusions of the EIA.

20 Dr. Carver explained how Shell's hydrological  
21 assessments are riddled with uncertainty and  
22 subjectivity. For example, a systematic chain of  
23 subjective considerations led to Shell's Volume 4A  
24 finding that critical minimum winter flow in the  
25 Athabasca River below Fort McMurray will not be

1 affected by future climate change.

2 There are two other invalid conclusions I'd  
3 like to highlight.

4 One is that the mean annual flow for the  
5 Athabasca River could potentially decrease by about  
6 10 percent over the next 60 years.

7 The second is Shell's conclusion that the  
8 seven-day low-flow for the Athabasca River would  
9 remain unchanged.

10 As explained by Dr. Carver, those conclusions  
11 are invalid due to the nested and systemic  
12 subjectivity and unscientific methodologies that  
13 were used to arrive at the conclusions.

14 Now, these basic conclusions are used  
15 elsewhere throughout Shell's EIA Hydrology  
16 Assessment to justify further conclusions about a  
17 lack of cumulative effects from its Project.

18 Another overarching problem with the  
19 Hydrological Assessment is that Jackpine Mine  
20 Expansion simulations of modelling is based upon  
21 the Phase I rules, and as Dr. Carver has  
22 demonstrated, the Phase I rules are based on  
23 hydrograph that no longer reflects reality, as  
24 current hydrographs are substantially lower than  
25 those upon which the Phase I rules are based.

1           There are further deficiencies in relation to  
2           the EIA's cumulative effects assessment of  
3           Athabasca withdrawals, including that climate  
4           change magnitude has been assessed incorrectly,  
5           climate change is assumed to have no effect on  
6           winter flows in the Lower Athabasca River, and  
7           information is not available in the EIA to  
8           demonstrate that the Phase I rules, inadequate in  
9           themselves, have actually been adequately modelled.

10           Dr. Carver also found that Shell's overall  
11           subjective conclusions of negligible effect in the  
12           Peace-Athabasca Delta were not supported by the  
13           information provided by Shell.

14           And as you're aware, the Peace-Athabasca  
15           Delta is of particular importance to my client and  
16           it does merit a proper Environmental Assessment.

17           In summary, the assessments Shell has  
18           provided for water quantity demonstrate extensive  
19           imbedded unscientific subjectivity which  
20           invalidates various key conclusions. There's an  
21           implied bias in several of the key methods used.  
22           There are high levels of uncertainty that are both  
23           unquantified and not communicated to the  
24           regulators. And, finally, it's based upon an  
25           incomplete simulation of the Phase I rules, which



1 on their own don't adequately protect river values  
2 in the face of climate change and increasing water  
3 withdrawals.

4 These gaps and scientific errors build on  
5 each other to reach erroneous conclusions of  
6 negligible effects, including a disregarded  
7 potential for key cumulative impacts. As a result,  
8 the EIA conclusions end up contradicting the  
9 regulator's own science as demonstrated in the  
10 Phase 2 Framework Committee science, and therefore  
11 should not be relied upon.

12 Another problem that ACFN wishes to highlight  
13 regarding Shell's EIA relates to mitigation.  
14 However, I'm going to first discuss some of the  
15 problems ACFN has experienced in consultation with  
16 Shell in relation to this Project as those problems  
17 have a direct relationship and flow into the issue  
18 of mitigation.

19 So ACFN has provided an extensive record on  
20 the subject of its consultation with Shell and the  
21 Panel has heard a lot of oral testimony regarding  
22 consultation on the Project. From ACFN's  
23 perspective, the problems can be summarized as  
24 follows:

25 First, despite ACFN's good-faith efforts to

1 work with Shell to manage impacts on its rights,  
2 nothing changed in the Project plan.

3 Second, nothing changed because there's no  
4 motivation for Shell to seriously consider and  
5 substantively respond to ACFN concerns. Neither  
6 the Crown in Right of Alberta nor the Crown in  
7 Right of Canada requires that of Shell. And Shell  
8 is not a party to the Treaty. Shell's here to make  
9 money.

10 ACFN participated in this hearing in the  
11 hopes that the Panel would not consider this  
12 Project for approval until such time as ACFN's  
13 substantive concerns have been addressed. And  
14 while legal counsel for each Crown submitted that  
15 further consultation will occur with ACFN, and that  
16 its concerns could be dealt with at some future  
17 date, there's simply no evidence before you to  
18 support such assertions.

19 The third major problem is that neither the  
20 Crowns nor Shell have properly informed themselves  
21 of what is required to sustain ACFN's Treaty Rights  
22 now and into the future despite ACFN's best efforts  
23 to move the TRUMP process forward. This Panel is  
24 being asked to determine whether the Project is in  
25 the public interest and whether it will have

1 significant impacts upon ACFN's traditional lands,  
2 traditional use and resources, but you're being  
3 asked to make that decision without the information  
4 required to do so.

5 Fourth, as explained in detail by  
6 Ms. Nicholls, there are several flaws in the  
7 process that prevent the design and implementation  
8 measures that would actually address the impacts of  
9 projects like the Jackpine Mine Expansion on ACFN's  
10 rights. At present, mitigations that are to be  
11 achieved must be negotiated behind closed doors  
12 with the Proponent, the problems get swept out of  
13 the view of the regulators, and then there's no  
14 ability for this Panel or the regulators to follow  
15 up on the actual effectiveness of those  
16 mitigations.

17 Yesterday, my friend provided a summary of  
18 consultation law. And it's somewhat unclear to me  
19 why he would have done so when Shell clearly  
20 opposed this Panel considering the adequacy of  
21 Crown Consultation. As will be discussed below,  
22 Shell's clearly acting for the Alberta Crown as a  
23 procedural delegate and, in fact, the evidence is  
24 that they are engaging in conduct which goes far  
25 beyond the procedural aspects of the duty to

1           consult, such as assessing rights claims, assessing  
2           impacts to rights, and determining the appropriate  
3           level of engagement with various Aboriginal groups.

4           I got the sense that Mr. Denstedt was  
5           inviting the Panel to determine that Shell's  
6           consultation in relation to this Project was  
7           adequate. But with Shell so clearly standing in  
8           the place of Alberta in relation to Alberta's  
9           consultation duties, both procedural and  
10          substantive, and with this Panel's determination  
11          that it lacks the jurisdiction to determine the  
12          adequacy of Crown consultation, I'm unsure where my  
13          friend was trying to take you with that.

14          I am going to take you through some aspects  
15          of the consultation case law, however, simply as  
16          background to help you understand how the process  
17          has unfolded between Shell and ACFN and why ACFN is  
18          seeking some of the relief it has requested. And  
19          that relief does not require this Panel to assert  
20          any type of jurisdiction over the Crown.

21          So first I'll take you to the seminal case of  
22          ***Haida Nation v. British Columbia.***

23          In that case, Justice McLaughlin noted that  
24          when Crown decision-makers contemplate conduct that  
25          may adversely impact an Aboriginal Right, they must

1 engage in consultation with the affected Nation.  
2 And the controlling question governing the level of  
3 engagement and the steps that must be taken is what  
4 is required to maintain the honour of the Crown and  
5 to effect reconciliation between the Crown and  
6 Aboriginal peoples with respect to the interests at  
7 stake.

8 And this is why we say that Shell has moved  
9 far beyond being a procedural delegate for the  
10 Crown in relation to this Project. The evidence is  
11 that Shell is deciding what level of engagement is  
12 appropriate. And Shell is deciding what is  
13 required to maintain the honour of the Crown in  
14 relation to its Project. And this is simply  
15 inappropriate.

16 Madam Justice McLaughlin also noted that the  
17 Crown is bound by its honour to balance societal  
18 and Aboriginal interests in making decisions that  
19 may affect Aboriginal claims. And ACFN had raised  
20 the issue of adequacy of consultation at the  
21 beginning of these proceedings precisely because  
22 it's ACFN's experience that that balance is lacking  
23 in the regulatory approval system in the Oil Sands  
24 Region.

25 I would next direct your attention to the

1 leading Treaty 8 consultation case of **Mikisew Cree**  
2 **First Nation v. Canada**. And in that case, the  
3 Supreme Court of Canada made it clear that  
4 consultation is not intended to simply be an  
5 opportunity for First Nations to blow off steam.  
6 It's not intended to be limited to an opportunity  
7 to comment, particularly in cases where the level  
8 of engagement should be deep.

9 And certainly the consultation process  
10 between ACFN and Shell has been characterized, you  
11 know, as it's been an opportunity to comment and  
12 not much more.

13 ACFN does not disagree that Shell has  
14 provided some capacity funding to enable  
15 commentary. We don't disagree that Shell has  
16 devoted time and ink to meetings and correspondence  
17 with ACFN. However, nothing substantive has  
18 changed, ACFN's core concerns remain outstanding,  
19 the concerns have not been meaningfully addressed  
20 as they were raised.

21 Turning to another point raised by my friend  
22 Mr. Denstedt yesterday, Shell takes the position  
23 that removing the ability of individuals to  
24 exercise rights in the footprint does not affect  
25 the community as a whole. And this shows that they

1           just simply have not been listening to ACFN over  
2           the course of their 15-year engagement.  
3           Traditional resources are shared by hunters and  
4           distributed among members of the community and when  
5           one hunter is pushed off the land, this affects  
6           many community members. And this Panel heard  
7           evidence about that sharing tradition from  
8           Mr. L'Homme-court on November 8th.

9                        Next I would turn to Mr. Denstedt's  
10           submission that **Taku River Tlingit** stands for the  
11           proposition that, in this case, the EIA process is  
12           an appropriate vehicle to meet any obligation for  
13           deep consultation. The **Taku River** case simply does  
14           not support that proposition in this context. In  
15           **Taku River**, the EIA process was quite different  
16           than the one in which we find ourselves today. The  
17           Supreme Court of Canada said it could be relied  
18           upon, because in that case the First Nation had  
19           been a full participant on something called a  
20           "Project Committee." And the Project Committee was  
21           the primary driver, it was the primary engine that  
22           drove the assessment process. As part of the  
23           Project Committee, the First Nation had the  
24           opportunity to provide to the decision-maker and  
25           the ministers, expertise, advice, analysis, and

1 recommendations, including advice about the  
2 potential effects of the project and measures for  
3 the prevention or mitigation of adverse effects.

4 This is a far cry from the situation before  
5 you where ACFN has been provided with some capacity  
6 to comment, but has no legislated role in the  
7 assessment process. ACFN does not have the type of  
8 influence or level of participation in this process  
9 that the **Taku River Tlingit** had as members of the  
10 Project Committee under the **B.C. Environmental**  
11 **Assessment Act**.

12 And I'll just note that even subsequent case  
13 law from B.C. has distinguished the **Taku River** case  
14 on the grounds that project committees no longer  
15 exist in that environmental assessment project --  
16 or sorry, in that environmental assessment process.  
17 So without the project committees, which provided a  
18 legislated role for First Nations, **Taku River**  
19 doesn't really apply.

20 I would also like to direct the Panel's  
21 attention to the finding of the B.C. Supreme Court  
22 in **Halalt First Nation v. British Columbia**. And in  
23 that case, a proponent, and I'm directing it to you  
24 because my friend invited the Panel to review  
25 Shell's Consultation Logs as testament to the



1 amount of effort that Shell has invested in  
2 consultation with ACFN. And in the **Halalt**  
3 decision, the proponent did something similar. And  
4 Justice Wedge remarked:

5  
6 "[655] The District  
7 argued that the length of the  
8 record itself illustrated the depth  
9 of the consultation in which the  
10 EAO engaged. Counsel for the  
11 District pointed to Mr. Finkel's  
12 affidavit, which included 639  
13 exhibits and was over 5,000 pages  
14 in length, and reminded the Court  
15 that the affidavit of Mr. Finkel  
16 was only one of many filed in this  
17 case.

18 [656] One cannot quarrel  
19 about the length of the record in  
20 this case. It is a testament to  
21 the length of the environmental  
22 assessment itself, which exceeded  
23 the statutory timeline by more than  
24 five years. That in turn speaks to  
25 the complexity of the environmental

1                   issues raised by the Project and  
2                   its several iterations. However,  
3                   the length of the record does not  
4                   establish that the Province  
5                   discharged its constitutional  
6                   duty."

7  
8                   And I would submit that that applies to this  
9                   case, the length of the record and the volume of  
10                  Consultation Logs submitted by Shell detailing  
11                  phone calls and meetings does not mean that  
12                  consultation, that meaningful consultation has  
13                  occurred.

14                  And this takes us back to the first problem I  
15                  mentioned in the consultation process between ACFN  
16                  and Shell, which is that despite ACFN's good faith  
17                  and efforts to engage and achieve reconciliation,  
18                  nothing changes, nothing substantive anyways.

19                  And there's clear evidence before you that  
20                  that's the case in relation to the Jackpine Mine  
21                  Expansion.

22                  On October 30th, Mr. Kovach candidly admitted  
23                  that, despite the extensive concerns raised and  
24                  issues presented by ACFN in relation to the  
25                  Application, no changes were made to Shell's plans.

1 In response to the question:

2

3 "But Shell hasn't actually  
4 changed any of its plans in  
5 response to ACFN's technical  
6 reviews or in response to its  
7 traditional use information, have  
8 you?"

9

10 Mr. Kovach replied:

11

12 "I think that's fair to say  
13 that as far as the plans we're  
14 proposing for this Project, we  
15 haven't made any changes."

16

17 Shell has leaned quite heavily on a few minor  
18 adjustments that they say respond to ACFN's  
19 concerns. And I'm going to take you through those.

20 First, you've heard repeatedly about their  
21 decision to switch from diverting the Muskeg River  
22 through a pipe to diverting it through a channel.  
23 And as you've heard from Athabasca Chipewyan First  
24 Nation, they were not consulted about that option  
25 and they do not support that approach. It does not

1 address their concerns.

2 On October 31st, Shell said that an ACFN  
3 specific example of where they changed their plans  
4 in relation to the Project was that:

5  
6 "... Albian Sands will  
7 support implementation of seed  
8 collection for traditional use  
9 plants and ACFN members will  
10 collect seeds and help replant them  
11 on the reclamation sites. And we  
12 support that commitment."

13  
14 However, as explained by Ms. King on  
15 November 8th, that was an existing commitment  
16 negotiated under a prior agreement in relation to  
17 one of Shell's other mines; it has nothing to do  
18 with the Jackpine Mine Expansion Project.

19 Yesterday, my friend suggested that Shell has  
20 mitigated concerns about the loss of fish habitat  
21 in the compensation lake by planning to stock the  
22 compensation lake with fish species preferred by  
23 local Aboriginal peoples. ACFN has not asked for  
24 this. Rather, it opposes the destruction of the  
25 natural fish habitat and the replacement of the

1 same with an unproven mitigation in the form of a  
2 compensation lake.

3 And again, those minor changes don't  
4 represent a substantive response to the various  
5 concerns that ACFN has raised.

6 And certainly the Alberta Court of Queen's  
7 Bench is alive to this type of issue. In the  
8 recent ***Cold Lake First Nation v. Alberta*** decision,  
9 the Court held that consultation had been  
10 inadequate even though, in that case, a number of  
11 substantive modifications and commitments had been  
12 made to a proposed development in order to  
13 accommodate Cold Lake First Nation's Treaty Rights  
14 and protect Aboriginal interests. The Court found  
15 that, despite the substantive modifications, more  
16 work remained to be done to properly effect  
17 reconciliation.

18 In the context of ACFN's good-faith efforts  
19 over the past five years to engage with Shell on  
20 this Project to raise concerns, and Shell's failure  
21 to substantively respond or to change its plans,  
22 Ms. Jefferson's mantra that "consultation is  
23 ongoing" is highly inappropriate. Based on  
24 engagement to date, ACFN has little faith that  
25 continued consultation with Shell will actually

1           move the parties towards reconciliation or towards  
2           a reconciliation of Crown/ACFN interests. And  
3           that's the ultimate objective of the process.  
4           That's why Shell engages.

5                     Intervention is required, but neither Crown  
6           has demonstrated a willingness to do so to date.

7                     Which leads to the second problem that I  
8           mentioned with the process. Shell does not respond  
9           substantively to ACFN's concerns because they don't  
10          have to. Nobody requires it of them. Consultation  
11          is occurring in a flawed regulatory system that  
12          does not protect Treaty Rights, and where  
13          applications that, in ACFN's view, result in  
14          significant impacts to ACFN are approved as a  
15          matter of course.

16                    The testimony of Ms. Jefferson and  
17          Mr. Plamondon on October 31st between transcript  
18          pages 499 and 538, and again at page 559, is  
19          instructive regarding the structure of consultation  
20          in Alberta. In short, the evidence is that Shell  
21          summarizes Shell's view of consultation events and  
22          in a manner that is administratively convenient for  
23          Shell and Alberta, and that's the standard form  
24          Consultation Log. Presumably Alberta reviews those  
25          logs, but they are not here to give evidence on

1           this matter, so we can't be sure.

2                       Then Shell meets with Alberta behind closed  
3 doors, without ACFN, without taking minutes that  
4 can be reviewed by ACFN, and in those meetings,  
5 they discuss any questions that Alberta has about  
6 ACFN's issues, about the Consultation Logs, and  
7 about ACFN's concerns.

8                       And although ACFN has raised concerns with  
9 each of Shell and Alberta on several occasions  
10 regarding the effectiveness and accuracy of the  
11 Consultation Logs, Alberta has not followed up with  
12 ACFN at all. Alberta has not inquired further as  
13 to the nature of the concerns not being recorded on  
14 the logs, or the nature of the concerns with the  
15 logs themselves, or how the logs could be improved  
16 to actually reflect the substantive issues that are  
17 being raised in the process between ACFN and Shell.

18                      Neither has Alberta followed up with Shell or  
19 required that Shell respond to ACFN's concerns or  
20 change its logs in a manner that reflects the  
21 actual issues of concern.

22                      And while Alberta has been willing to meet  
23 quarterly with Shell to discuss its consultation  
24 activities, ACFN's requests to meet with Alberta  
25 directly about this Project, which have been

1 ongoing since about 2009, have been rebuffed.  
2 There were no direct meetings between Alberta and  
3 Athabasca Chipewyan regarding this Project until  
4 sometime in 2012.

5 Correspondence from Alberta Justice to our  
6 firm has indicated an unfortunate tendency to take  
7 what Shell says regarding consultation with ACFN at  
8 face value.

9 And those would be Exhibits 006-013KK and  
10 006-013LL, at PDF pages 183 to 192.

11 And I note that we have provided a copy of  
12 our written submissions to Madam Court Reporter so  
13 that she has all of the specific evidence  
14 references that I'm not taking you through.

15 So, in fact, beyond delegating the procedural  
16 aspects of consultation to Shell in this case, it  
17 appears that Alberta has also allowed Shell to  
18 engage in the substantive aspects of consultation,  
19 such as leaving it to Shell to determine what the  
20 concerns are and what the appropriate level of  
21 consultation required is and what the appropriate  
22 mitigation and accommodations are for impacts to  
23 rights. There's no evidence that Alberta does  
24 anything more than meet quarterly with Shell to ask  
25 Shell how consultation is going. And while Shell



1 has assured ACFN on occasion that Alberta takes  
2 other steps, there's no evidence that in fact  
3 Alberta does any of the things that Shell says they  
4 do. Shell has not witnessed these activities, has  
5 no direct knowledge of them.

6 So on occasion, Shell has assured ACFN that  
7 Alberta takes other steps to review the  
8 consultation record besides just speaking with  
9 Shell and reviewing Shell's Consultation Logs. But  
10 in discussion with Jason Plamondon on October 31st,  
11 it became clear that Shell doesn't know this for  
12 certain, Shell has not witnessed those activities,  
13 Shell has no direct knowledge of what Alberta does,  
14 and Alberta is not here to speak to the issue.

15 What this Panel is left with is evidence that  
16 Shell has been left to implement Alberta's  
17 obligations under Treaty 8 and Alberta is not  
18 responding to ACFN's communications regarding the  
19 effectiveness of the process to achieve  
20 reconciliation.

21 In a similar vein, with Canada, consultation  
22 has ostensibly been ongoing for five years  
23 regarding No Net Loss Planning. But according to  
24 Mr. Makowecki and Mr. Janowitz, nobody at DFO  
25 has yet considered Treaty Rights in the process,

1 and DFO's witnesses exhibited considerable  
2 confusion as to when and how that might actually  
3 happen.

4 This Panel is required to consider the impact  
5 of the Project on Treaty Rights and Aboriginal  
6 Rights, yet none of the witnesses Canada put  
7 forward were able to speak to the impact of the  
8 Project on Treaty and Aboriginal Rights, especially  
9 with regards to the fishery, even though a Draft No  
10 Net Loss Plan is in place.

11 In any event, Shell Canada, and, you know,  
12 during questioning, Mr. Lambrecht raised the issue  
13 that the HADD authorization is in the future, we  
14 don't need to be looking at Treaty 8 yet. But what  
15 I would point to you is that Shell Canada has  
16 acknowledged that they don't actually even need to  
17 wait for the final DFO authorization from Canada to  
18 make final investment decisions about this Project.  
19 They get their level of comfort from their  
20 engagement with the on-the-ground staff, the same  
21 staff who could not speak to Treaty Rights or how  
22 those Treaty Rights had been considered in DFO's  
23 process around this HADD authorization.

24 And Mr. Lambrecht asked the Shell panel:

25

1                   "Would it be fair to say, and  
2                   would you agree with me, that  
3                   before Shell takes a final  
4                   investment decision for the  
5                   Jackpine Mine Expansion Project, it  
6                   will require ... the **Fisheries Act**  
7                   authorization?"

8

9                   And Shell responded:

10

11                   "...we may take a judgment  
12                   view on based on our engagement  
13                   with the Department of Fisheries  
14                   and Oceans and how comfortable we  
15                   are that ultimately we're going to  
16                   be able to satisfy the regulator  
17                   and seek and obtain an approval."

18

19                   Several of Canada's witnesses, when  
20                   questioned about who actually was responsible for  
21                   accounting for Treaty Rights, deferred to Canada's  
22                   consultation coordinator. However, the  
23                   uncontroverted evidence is that the consultation  
24                   coordinator's mandate is to coordinate, not to  
25                   actually engage in, consultation and accommodation.

1 We are left with the impression that Canada,  
2 although less explicitly than Alberta, is relying  
3 heavily upon Shell to do its consultation work for  
4 it. And again, Shell has no obligation to  
5 implement Treaty 8. And Shell has made clear its  
6 fiscal interests in moving this Project forward.

7 And one of the problems with leaving the  
8 consultation process to be largely done between  
9 ACFN and Shell was highlighted by Ms. Somers in her  
10 testimony on November 8th. And that is, that  
11 because Proponents have been told Shell's been  
12 told, they are a procedural delegate, the whole  
13 thing starts to become about the process. Rather  
14 than logging the issues and ways in which we might  
15 work to resolve these issues, it becomes about how  
16 many meetings there were, how many times did you  
17 call, how many e-mails did you send. There's a  
18 serious lack of substance. And dates and times are  
19 not sufficient to reconcile interests.

20 It's to the point that the procedure becomes  
21 the outcome. And many times the Proponent starts  
22 to rely on that. That's why it seems to us to be  
23 about counting calls and meetings, which is how the  
24 simplest matter turns into a long drawn-out  
25 process. The whole process becomes riddled with

1 procedure and is quite unmanageable when you're  
2 dealing with hundreds of applications per year.  
3 That is why the Crown cannot delegate the  
4 substantive aspects of consultation to industry.  
5 Industry looks at it from a procedural point of  
6 view and our interests get pushed aside because the  
7 Proponent is not responsible for accommodating or  
8 reconciling those interests. The Proponent becomes  
9 fixated on procedure and that is part of what is  
10 overwhelming ACFN.

11 Now I'll turn briefly to the third problem  
12 that's come up in the consultation process between  
13 Shell and ACFN. And that is that neither Shell nor  
14 the Crowns will ultimately be responsible for  
15 making decisions regarding this Project, have  
16 properly informed themselves of what's required to  
17 sustain ACFN's Treaty Rights now and into the  
18 future, despite ACFN's best efforts to move the  
19 TRUMP process forward.

20 ACFN's Treaty Rights culture and wellbeing  
21 are approaching a point where sustaining them may  
22 not be possible into the future. Yet planning  
23 assessment and decision-making processes such as  
24 these are proceeding without consideration of where  
25 that point is.

1           And in response to some of Shell's argument  
2           about the TRUMP yesterday, where he said it would  
3           take two years and there would be a lot of  
4           variables, in fact the testimony given by  
5           Ms. Nicholls was that ACFN would not need a long  
6           period of time to develop the TRUMP. She indicated  
7           in fact it could be completed more quickly than a  
8           two-year timeframe if it were appropriately  
9           resourced.

10           Further, I just note that each of Shell and  
11           Alberta were made aware of the TRUMP concept and  
12           made aware of ACFN's view that it needed to be  
13           implemented prior to approval of this Project as  
14           early as 2009. Yesterday, Shell said that it  
15           supports the TRUMP, but in 2009, Shell said the  
16           TRUMP was unnecessary and that Shell's TUS was good  
17           enough.

18           So it's not for lack of effort on ACFN's part  
19           that a TRUMP is not yet in place. And it is not  
20           unreasonable for ACFN to continue to request, as it  
21           has for three years, that a TRUMP be in place  
22           before this Project is approved.

23           Ms. Nicholls also provided evidence about the  
24           flaws in the system that are preventing parties  
25           from reaching reconciliation. And this is the

1 fourth problem that's really become apparent in the  
2 consultations with Shell.

3 The first systemic flaw is that the  
4 information and methodologies needed to properly  
5 assess impacts to Treaty Rights and culture are  
6 absent from this process. Shell asserts that their  
7 EIA will enable an assessment of impacts to  
8 Aboriginal and Treaty Rights, but the problem is  
9 that those assessments have not taken into account  
10 what the thresholds are that are necessary to  
11 sustain ACFN's rights. Filling the gap is critical  
12 to ensuring that impacts to rights can actually be  
13 accurately characterized and is critical to make  
14 sure that we can develop mitigation and  
15 accommodation measures that actually address those  
16 impacts.

17 Another flaw is that there appears to be a  
18 lack of will on the part of Shell and the Crowns to  
19 meaningfully address ACFN's concerns. And  
20 Ms. Nicholls provided several examples of this at  
21 her evidence on November 8th, which is transcript  
22 pages 2114 to 2120. And I direct your attention to  
23 that specifically because it's a really important  
24 point. ACFN's tried over and over again in good  
25 faith to have its concerns addressed in various

1 processes, and it's just not happening.

2 Today, I'm going to highlight ACFN's  
3 involvement with LARP simply because Mr. Denstedt  
4 suggested to you yesterday that some of the parks  
5 and protective measures in LARP should be  
6 considered to be protective of ACFN's rights. It's  
7 ACFN's submission that this Panel should refrain  
8 from relying upon the Lower Athabasca Regional Plan  
9 as any sort of mitigation for this Project and  
10 cumulative impacts on ACFN. You should be aware  
11 that LARP is not a framework that protects Treaty  
12 Rights, nor was it designed to do so.

13 And I further note that Alberta's not here to  
14 speak to LARP, so we can't actually test any  
15 evidence about the LARP process or how effective it  
16 will be when it will be implemented, et cetera.

17 Consultation on LARP was largely meaningless.  
18 There was no transparency on how ACFN's input was  
19 considered by Alberta. And at no point has ACFN's  
20 input been incorporated in a substantive way.  
21 There's no assurance that ACFN's concerns or input  
22 will be addressed or incorporated in the  
23 issue-specific plans or frameworks that will be  
24 developed pursuant to LARP.

25 Simply put, neither the draft LARP, final



1 LARP, nor the various frameworks under it are  
2 directed at ensuring that ACFN's ability to  
3 exercise their rights will be protected now or into  
4 the future.

5 So when ACFN raises concerns that are  
6 regional in nature, it's not sufficient for Shell  
7 or the Crowns to refer to LARP or associated  
8 frameworks and say, don't worry, your concerns have  
9 been addressed, or, they will be addressed there.  
10 Without credible measures in place to assess and  
11 accommodate the cumulative effects on development  
12 of ACFN's Treaty Rights, ACFN's concerns remain  
13 outstanding.

14 Now as I mentioned, Mr. Denstedt suggested  
15 that LARP would take care of cumulative impacts and  
16 given the amount of new parkland and the lack of  
17 timber and oil and gas tenures in the area around  
18 Fort Chipewyan and the Richardson Backcountry,  
19 ACFN's rights and uses would be safeguarded.

20 That view is flawed for the reasons I just  
21 discussed and for several more reasons.

22 First, parks don't necessarily protect Treaty  
23 Rights as we can see from the history of Wood  
24 Buffalo National Park.

25 Furthermore, parks under LARP would still

1 allow development. All existing oil sands,  
2 metallic, industrial or coal exploration or  
3 exploitation, commercial forestry, grazing leases,  
4 activity and multi-use corridors within parks, will  
5 all be permitted. In fact the LARP explicitly  
6 contemplates future mine development in the  
7 Richardson conservation area, which is the  
8 Richardson Backcountry.

9 LARP states at page 23:

10

11 "If approvals are granted in  
12 the future for a mining development  
13 in the new Richardson PLART..."

14

15 Or park:

16

17 "... the boundaries for this  
18 area will be re-examined, if deemed  
19 necessary and acceptable as a  
20 result of the regulatory review for  
21 the mining development."

22

23 And while my friend mentioned that there  
24 aren't oil and gas and forestry tenures in the  
25 Richardson Backcountry currently, what he neglected

1 to mention was that almost all of the areas  
2 identified for the Richardson Wildland Provincial  
3 Park have existing metallic and industrial mineral  
4 tenures in the form of permits.

5 The entire proposed Richardson public land  
6 area for recreation and tourism public use has  
7 existing metallic and industrial mineral tenures in  
8 the form of permits, while a number of permit and  
9 lease applications are pending. And the broad  
10 extent of those metallic and industrial mineral  
11 tenures within those new LARP areas can be seen at  
12 Figure 4-46 of Patt Larcombe's Encroachment Report,  
13 which is Exhibit 006-013-L.

14 I would next note that parks under LARP are  
15 explicitly meant to be used for all recreational  
16 and tourism opportunities. Those are precisely  
17 some of the impacts on ACFN use that ACFN has  
18 identified as problematic. Recreational use of the  
19 Richardson Backcountry has already interfered with  
20 ACFN exercise of rights in the area. The LARP  
21 designations may encourage further consumptive and  
22 non-consumptive sport and commercial hunters and  
23 fishers, as well as increasing numbers of  
24 recreational snowmobiles, all-terrain vehicles, and  
25 other backcountry transportation uses. They may

1           also support commercial tourism development. And  
2           if the proposed road and trail networks discussed  
3           under LARP come to fruition, access to the area for  
4           everybody will be greatly improved and with more  
5           access and more non-indigenous and recreational  
6           users, ACFN is often not able to hunt in areas due  
7           to safety concerns. There's a direct impact.

8                        Finally, the new Lake Athabasca and  
9           Richardson recreation tourism areas in LARP fall  
10          within homeland areas that have been identified by  
11          ACFN as places the members wish to protect as  
12          sanctuaries for their current use and for the use  
13          of future generations. By way of contrast, the  
14          Government of Alberta's LARP goal for those areas  
15          is:

16  
17                        "... to provide additional  
18                        recreation opportunities and  
19                        attract tourism investment."

20  
21                        And:

22  
23                        "... to address the growing  
24                        demand for recreational  
25                        opportunities and provide an

1 attractive land base for tourism  
2 investment."

3  
4 So there's a high potential that the LARP  
5 land-use designations referred to by Shell as some  
6 kind of mitigation for ACFN regional concerns will  
7 actually attract tourism-based investment and  
8 government-induced infrastructure which would  
9 proactively encourage incremental and new sport and  
10 recreational use in ACFN's homeland areas. And  
11 again, this would further restrict ACFN member's  
12 use of the area and, in particular, their use for  
13 hunting.

14 I'm going to turn now to speak to some of the  
15 mitigation and accommodation issues with the  
16 Jackpine Mine Expansion Application.

17 And at the outset, I think it's useful just  
18 to explain the relationship of mitigation and  
19 accommodation. So accommodation of impacts to  
20 Treaty Rights can include mitigative measures but  
21 where impacts cannot be addressed through  
22 mitigation, where mitigation is not possible,  
23 accommodation or other compensations may be  
24 required to address the residual impacts on Treaty  
25 Rights.

1                   So mitigation is a subset of accommodation,  
2                   as it were.

3                   So the primary mitigation tool that I want to  
4                   speak about this morning is the adaptive management  
5                   that Shell has proposed to be used to address some  
6                   of the ongoing environmental impacts of the  
7                   Project. There are several flaws with this  
8                   approach.

9                   And the first is that this Panel's Terms of  
10                  Reference requires that it:

11  
12                  "... consider measures that are  
13                  technically and economically  
14                  feasible to mitigate any adverse  
15                  environmental effects ... to the  
16                  project..."

17  
18                  And there's a real distinction between  
19                  measures that are known to be technically and  
20                  economically feasible now and a vague commitment to  
21                  do what we can at some point in the future.

22                  We note that Section 2.d. requires, of the  
23                  Panel's Terms of Reference, requires that the Panel  
24                  identify measures that would, not could or might,  
25                  mitigate the Project's effects.

1                   Section 1 of the Amended Agreement includes  
2                   the following definitions for follow-up and  
3                   mitigation:

4  
5                   "'Follow-up program' means a  
6                   program for

7                   a. verifying the accuracy of  
8                   the environmental assessment of the  
9                   project, and;

10                  b. determining the  
11                  effectiveness of any mitigation  
12                  measures."

13  
14                  And:

15  
16                  "'Mitigation' means, in respect of  
17                  the project, the elimination,  
18                  reduction or control of the adverse  
19                  environmental effects of the  
20                  project, and includes restitution  
21                  for any damage to the environment  
22                  caused by such effects through  
23                  replacement, restoration,  
24                  compensation or any other means."

25

1           Considering the need for and requirements of  
2           a follow-up program for a project, such a program  
3           is not a substitute for considering and identifying  
4           feasible mitigation measures. Rather, a follow-up  
5           program is meant to verify the accuracy of the  
6           environmental assessment and determine the  
7           effectiveness of the technically and economically  
8           feasible measures that were taken to mitigate the  
9           project's adverse environmental effects. Follow-up  
10          programs are not intended to design mitigation  
11          measures nor to determine their feasibility. And  
12          Section 53 of **CEAA (2012)** recognizes this  
13          distinction and lists mitigation measures as a  
14          class of condition that is separate from a  
15          follow-up program.

16                 The issue of reliance on adaptive management  
17                 in environmental assessment processes has been  
18                 considered by the Courts, and we've provided a  
19                 discussion of that case law in detail in our  
20                 written submissions. But today I'm just going to  
21                 take you through a couple of highlights.

22                         In **Canadian Wildlife Federation Incorporated**  
23                         **v. Canada:**

24  
25                                 "... Justice Muldoon reviewed



1 the decision the federal Minister  
2 of Environment to allow a project  
3 to proceed..."

4  
5 On the basis of adaptive management.

6  
7 "Justice Muldoon held that  
8 'vague hopes for future technology'  
9 cannot constitute mitigation.  
10 (Justice Tremblay-Lamer quoted this  
11 passage, with approval, in  
12 ***Pembina*** ...)

13  
14 A decision which was a judicial review of the  
15 Kearl Oil Sands Mine decisions.

16 And Justice Muldoon said:

17  
18 "... since the Minister did  
19 not identify any known  
20 technologies, but only vague hopes.  
21 For future technology, it is not  
22 possible to consider that the  
23 recited adverse water quality  
24 effects are mitigable..."

25 ...

1                   "Justice Muldoon also held  
2                   that monitoring plans for the  
3                   future cannot constitute  
4                   mitigation..."

5

6                   Stating:

7

8                   "'Monitoring plans for the  
9                   future are a far cry from  
10                  known technology whereby the  
11                  adverse water quality effects  
12                  can be mitigated.'"

13

14                  So:

15

16                  "As a matter of law, a  
17                  significant adverse effect can only  
18                  be rendered insignificant by  
19                  technically and economically  
20                  feasible measures - the Courts have  
21                  described 'feasible mitigation  
22                  measures' as 'practical means' ...  
23                  [and] as measures that are 'known  
24                  and proposed' and that 'can and  
25                  will' mitigate environmental

1 effects."

2 ...

3 "Neither vague hopes for  
4 future technology or monitoring  
5 plans for the future constitute  
6 feasible mitigation measures..."

7

8 The Federal Government has provided some  
9 guidance as well on adaptive management and its use  
10 in relation to Environmental Assessment. In 2009,  
11 it published an Operational Policy Statement on  
12 Adaptive Management Measures under the **Canadian**  
13 **Environmental Assessment Act**. The Adaptive  
14 Management Policy Statement is meant to provide  
15 best practice guidance on the use of adaptive  
16 management measures.

17 And it notes that adaptive management  
18 measures are specifically in relation to follow-up  
19 measures. They are not mentioned in relation to  
20 mitigation measures.

21 The Policy Statement has a helpful section  
22 that outlines when it might not be appropriate to  
23 incorporate adaptive management into an  
24 Environmental Assessment, and ACFN submits that  
25 these following factors are relevant to the present

1 assessment.

2 So under the heading "Mitigation is not  
3 Identified," the policy statement says:

4  
5 "... it is insufficient to  
6 assert that implementation of an  
7 unidentified future measure,  
8 developed as a result of adaptive  
9 management, constitutes mitigation  
10 of a predicted adverse  
11 environmental effect."

12 ...

13 "Commitment to adaptive  
14 management is not a  
15 substitute for committing to  
16 specific mitigation measures  
17 in the EA prior to the course  
18 of action decision."

19  
20 Under the heading "Uncertainty about  
21 Significant Adverse Environmental Effects," the  
22 policy says:

23  
24 "If ... there is uncertainty  
25 about whether the project is likely

1 to cause significant adverse  
2 environmental effects, a commitment  
3 to monitor project effects and to  
4 manage adaptively is not  
5 sufficient."

6  
7 The feasibility of several proposed  
8 mitigations is a key issue before this Joint Review  
9 Panel, and ACFN submits there must be enough  
10 information before the Panel, prior to the time  
11 that it closes its record, for the Panel to  
12 consider and determine whether mitigation measures  
13 are technically and economically feasible and  
14 whether residual project effects are significant.

15 Where mitigation is uncertain, and where the  
16 probability and magnitude of cultural and  
17 ecological impacts is high, ACFN submits that the  
18 Panel must exercise its power in a manner that  
19 protects the environment and human health and that  
20 applies the precautionary principle per  
21 Section 4(2) of **CEAA (2012)** by finding that the  
22 Project has significant environmental effects.

23 If the Proponent has failed to identify  
24 technologically and economically feasible  
25 mitigation measures to address major project

1 related effects, which we say is the case here, the  
2 Panel has nothing to rely on to address those  
3 effects.

4 The Federal Court considered the role of  
5 adaptive management as it relates to the  
6 precautionary principle in the ***Pembina Institute***  
7 case, and it still concluded that sufficient  
8 information regarding environmental impacts and  
9 mitigation measures must exist when applying  
10 adaptive management.

11 And Madam Justice Tremblay-Lamer said:

12  
13 "Thus, in my opinion,  
14 adaptive management permits  
15 projects with uncertain, yet  
16 potentially adverse environmental  
17 impacts to proceed based on  
18 flexible management  
19 strategies ... where sufficient  
20 information regarding those impacts  
21 and potential mitigation measures  
22 already exists."

23  
24 The Panel's determination of whether this  
25 Project has significant environmental effects will

1           inform its public-interest decision. It would also  
2           ensure that future discussion about whether the  
3           Project is justified in the circumstances under  
4           Section 52 of **CEAA (2012)**. That discussion should  
5           take place in the full awareness of the likely  
6           environmental effects of the Project as currently  
7           proposed. If mitigation measures are not yet  
8           feasible, this is key information that must be  
9           brought to the attention of First Nations, of the  
10          public, and of the government.

11                   And I'm going to turn now to a few other  
12          proposed mitigation measures in this process.

13                   So Shell has proposed that First Nations must  
14          negotiate mitigations with it in order to get their  
15          concerns addressed. It's ACFN's experience that  
16          the commitments and agreements with Shell in  
17          relation to previous oil sands mines, and which  
18          this Panel relied on as mitigation, haven't  
19          actually worked to mitigate the impacts. That's  
20          why ACFN has filed breach of contract litigation  
21          regarding their previous agreements with Shell.

22                   There are few, if any, mitigation measures  
23          that previous Panels have relied on to address  
24          First Nations concerns regarding impacts to land  
25          use rights and culture, because often those have

1           been hived off into agreements that are not before  
2           you and that you're not able to assess. Monitoring  
3           and follow-up is required to determine whether  
4           mitigation for traditional use actually works.

5                     In Dr. Candler's review of the EIA, the only  
6           other mitigations proposed by Shell that were  
7           specific to Aboriginal use and knowledge were:

8                     Compensation for directly affected trapline  
9           holders, which, again, demonstrates a certain  
10          amount of confusion between traditional use and the  
11          commercial rights associated with an RFMA;

12                    Continued consultation with key Aboriginal  
13          groups;

14                    Access to traplines;

15                    Employee contractor education;

16                    And reclamation.

17                    And in ACFN's submission, those aren't  
18          sufficient. That doesn't address the level of  
19          concerns or the nature of the concerns that ACFN  
20          has raised in this process.

21                    Shell has been unable to point this Panel to  
22          other mitigations it has proposed for the Project  
23          regarding its impacts on ACFN traditional use,  
24          knowledge and rights, besides the diversion of the  
25          Muskeg River through a channel rather than through



1 a pipe.

2 But as Mr. Bolton noted on November 6th, the  
3 Muskeg River Management Framework is still in  
4 place.

5 And as we heard from Ms. Gorrie, there's  
6 nothing else in place right now to guide  
7 decision-making in the Muskeg River watershed.

8 The Interim Management Framework included an  
9 objective that there be no diversion of the  
10 mainstem of the Muskeg River. And as this Panel is  
11 likely aware, that Interim Framework was put in  
12 place in response to past Joint Review Panel  
13 recommendations and strong calls for a backstop as  
14 an effort to manage cumulative environmental  
15 effects and to protect the integrity of the river.  
16 The aim of the Interim Framework was to reduce the  
17 impacts of resource development in the Muskeg River  
18 watershed to acceptable levels of change. That's  
19 what they were considering when they recommended no  
20 more diversions, no diversions of the mainstem of  
21 the Muskeg River. Planning and management  
22 decisions were to be evaluated within the context  
23 of the Muskeg River as a key component of the  
24 Athabasca River aquatic system.

25 And my point here is that a lot of thought

1 has already gone into determining that no  
2 diversions of the Muskeg River should take place.  
3 And that goal was set explicitly in view of current  
4 and future industrial development. The Interim  
5 Framework was already an explicit attempt to  
6 balance development with environmental needs.

7 So my point is that work has been done. In  
8 response to this Joint Review Panel's calls for  
9 efforts to manage cumulative impacts, Alberta  
10 determined that a goal for this watershed was no  
11 diversion of the mainstream of the Muskeg River.

12 But if this Panel does require further social  
13 and environmental reasons to impose a condition on  
14 the Project that the river not be diverted, or to  
15 sterilize the ore underneath the river, here are  
16 some reasons for your consideration:

17 The river has cultural and spiritual  
18 significance to the Athabasca Chipewyan who have  
19 used and occupied the Muskeg River Basin for  
20 millennia. ACFN members continue to use the  
21 river;

22 The Muskeg River provides fish habitat for  
23 migrant and resident populations;

24 Traditional knowledge says that the river  
25 keeps the surrounding muskeg system alive, it's the

1           lifeblood of the living breathing entity that is  
2           the muskeg, and that muskeg supports the animals  
3           that are relied on by ACFN for the exercise of its  
4           rights;

5                     The Muskeg River provides a regionally  
6           important wildlife corridor without which wildlife  
7           will not have a way to move through the Muskeg  
8           River watershed. It allows for genetic  
9           connectivity. And as noted by Mr. L'Hommecourt,  
10          migratory animals won't have the luxury of a mine  
11          escort to get through the pits to their habitat;

12                    The Muskeg River is, as acknowledged by the  
13          Interim Framework, a key component of the Athabasca  
14          River aquatic ecosystem. And ACFN has submitted  
15          extensive evidence regarding their use of the  
16          Athabasca River and how stresses on that system are  
17          already impeding their ability to exercise their  
18          rights.

19                    Again, ACFN opposes the Jackpine Mine  
20          Expansion Application, but should it be approved  
21          over ACFN's objection, ACFN strongly urges this  
22          Panel to approve it on condition that the Muskeg  
23          River be left in a natural state and not be  
24          diverted.

25                    As discussed earlier, I believe Mr. Murphy

1           discussed this last night, another of Shell's  
2           primary proposed mitigations is a compensation  
3           lake. But as has come out in the evidence, no net  
4           loss planning is not being done with the Treaty  
5           Rights of First Nations in mind. It's not being  
6           done with the Treaty Rights as a primary objective.  
7           And further, No Net Loss Planning does not have a  
8           track record as an effective mitigation across  
9           Canada, and, as Mr. Makowecki indicated, it's too  
10          early to say whether it's going to be effective in  
11          the oil sands.

12                    Another specific mitigation issue that I wish  
13          to raise is that of the effectiveness of Shell's  
14          mitigations for waterfowl and processed-water and  
15          tailings-pond interactions. Mr. Martindale was put  
16          forward as Shell's primary witness regarding  
17          Shell's mitigations for waterfowl, but he was  
18          unaware of a major incident involving the deaths of  
19          16 birds in May 2007. He did correct his testimony  
20          the day after being questioned but it's somewhat  
21          concerning that the person responsible for  
22          implementing the mitigation system would have been  
23          unaware of such a major incident.

24                    Mr. Martindale also testified that Shell  
25          participates in the Regional Bird Monitoring

1 Program, the RAPP, and that Shell conducts  
2 extensive mortality searches. Mr. Martindale told  
3 you that Shell spends in the order of thousands of  
4 person-hours per year. However, the 2011 RAPP  
5 report indicates that, in fact, Shell spends less  
6 than 200 hours per year on mortality searches, and  
7 when it does search, it recovers more dead birds  
8 per hour of searching than do any of the other  
9 participating operators in the program.

10 And you heard from ACFN avian expert, Sarah  
11 Hechtenthal, that her review of the data associated  
12 with the 2011 RAPP report showed that, in fact,  
13 Shell spent only 160.4 hours of dedicated mortality  
14 searches at six of their industrial waterbodies in  
15 2011.

16 Given the significant contradiction between  
17 Mr. Martindale's evidence and the RAPP report, it's  
18 our submission that the Panel should exercise great  
19 caution in relying on Mr. Martindale's testimony  
20 regarding the efficiency and effectiveness of  
21 Shell's programs to mitigate Project impacts on  
22 waterfowl.

23 And finally, I note that because in terms of  
24 mitigation, because there hasn't yet been an  
25 adequate identification of the impacts on ACFN,

1 culturally important wildlife species, and other  
2 resources, it's not possible yet to design  
3 appropriate mitigations or accommodations that  
4 fully address the extent of ACFN's concerns.

5 And it has to be remembered that this Project  
6 is being proposed, you know, in absence of specific  
7 targeted Crown efforts to manage and mitigate the  
8 impacts of industrial development on ACFN's Treaty  
9 Rights. And this kind of inaction does not  
10 actually absolve the Crown of its duties to ACFN.

11 As held by the Federal Court in **Adam v.**  
12 **Canada**, when ACFN took Canada to court to actually  
13 force the production of a woodland caribou recovery  
14 strategy, Crown conduct can involve decisions to  
15 simply not do anything.

16 So, in conclusion, ACFN has demonstrated  
17 through evidence, that if approved, the Jackpine  
18 Mine Expansion will have significant direct and  
19 adverse impacts on its traditional use, culture and  
20 rights.

21 ACFN has further demonstrated that there are  
22 significant cumulative impacts on its traditional  
23 use, culture and rights, and these impacts are not  
24 being managed.

25 ACFN opposes approval of the Project and

1 respectfully submits that the Project is not in the  
2 public interest and should not be approved.

3 In the alternative, should the Panel find  
4 over ACFN's objective that the Project is in the  
5 public interest, and finds that it will not result  
6 in significant adverse environmental effects, in  
7 light of ACFN's position that no further impacts to  
8 ACFN are acceptable at this juncture, ACFN requests  
9 that any approval or recommendation that the  
10 Project proceed be made conditional upon completion  
11 or implementation of the matters listed under the  
12 heading "disposition" in our October 1st  
13 submission. And I'm just going to highlight a few  
14 of those for you here today.

15 So, first, prior to the issuance of any  
16 further decisions on oil sands projects in ACFN's  
17 traditional lands by the ERCB, by this Joint Review  
18 Panel, or by a subsequent Joint Review Panel, ACFN  
19 strongly requests the completion and implementation  
20 of a Traditional Land and Resource Use Management  
21 plan, the TRUMP.

22 ACFN requests that any further permits issued  
23 adhere to the thresholds and limits identified in  
24 the TRUMP in subsequent regulatory processes.

25 ACFN requests adoption and implementation of

1 ACFN's recommendations, including the maintenance  
2 of an Aboriginal Base Flow in the Athabasca River,  
3 so those recommendations are contained in review of  
4 the Phase 2 Framework Committee Recommendations:  
5 Synthesis Report that is part of the evidence filed  
6 in this proceeding.

7 The Athabasca River must be protected for the  
8 continued exercise of Treaty Rights.

9 ACFN further seeks regulatory reform whereby  
10 First Nations in the region play a co-management  
11 role in decision making on proposed industrial  
12 development projects where regulatory and  
13 legislative mechanisms relating to land and water  
14 use have a rights-based focus, and consistent with  
15 Section 35 rights.

16 Regional planning regulations and related  
17 legislation must acknowledge that the ability of  
18 Aboriginal peoples to exercise traditional uses of  
19 the land may be linked to specific lands and  
20 territories and the resources thereon which require  
21 conservation to maintain the ability of Aboriginal  
22 peoples to exercise traditional uses.

23 ACFN submits that there must be immediate  
24 protection for the Ronald Lake bison herd from  
25 non-First Nations hunting and from any disturbance



1 of the herd's habitat throughout their range.

2 ACFN requests that this Panel recommend the  
3 establishment of an independent panel to evaluate  
4 consultation in the Oil Sands Region. Such a panel  
5 or commission should be comprised of experts that  
6 are independent of industry and government and that  
7 have expertise with and sensitivity to First  
8 Nations cultures and unique issues regarding health  
9 and wellness, socio-economics and culture.

10 First Nations in the region should be  
11 directly involved in the appointment process and  
12 drafting of the Terms of Reference and should have  
13 representation on the commission.

14 The commission should spend time and hold  
15 hearings in the communities of impacted First  
16 Nations and should have a wide-ranging mandate to  
17 make findings and recommendations.

18 Finally, participant funding should be  
19 allocated in this process to ensure First Nations  
20 have the capacity to participate meaningfully.

21 ACFN also has some following project-specific  
22 requirements, some requests for project-specific  
23 requirements.

24 And I would adopt the submissions of  
25 Ms. Gorrie that, to the extent that the Panel finds

1           itself able to do so, that any recommendations it's  
2           considering be made conditions, because as we've  
3           seen, often panel recommendations don't bear fruit.

4           So ACFN requests that permits,  
5           authorizations, construction and operations, be  
6           deferred on the Jackpine Mine Expansion until such  
7           time as a traditional land and resource use plan  
8           has been completed and binding thresholds and  
9           measures set that will allow regulators to  
10          condition permits and authorizations in a manner  
11          which protects and prioritizes Treaty Rights.

12          ACFN requests that the ore beneath the Muskeg  
13          River and in an appropriate setback be sterilized  
14          and that the Muskeg River be left to flow in its  
15          natural state and that full protection for this  
16          river be put in place.

17          ACFN requests that prior to the commencement  
18          of construction, the Applicant must post a  
19          reclamation bond of a size and character that will  
20          ensure Project lands will be progressively and  
21          effectively reclaimed to a standard and in a  
22          timeframe consistent with the exercise of ACFN's  
23          Treaty Rights.

24          And I understand that there's a Mine  
25          Liability Management Program in place right now,

1 but it's also my understanding that that program  
2 does not explicitly consider the need to reclaim to  
3 a standard consistent with the exercise of Treaty  
4 Rights. So that's the difference we're asking for  
5 here.

6 Another Project-specific requirement that  
7 ACFN requests is funding for and the conduct of  
8 community-based comprehensive baseline country-food  
9 harvesting and consumption study, including a  
10 dedicated study of risk perception and its impacts  
11 on country-food harvesting among ACFN members.

12 ACFN requests the funding for and completion  
13 of a sociocultural assessment as proposed by ACFN  
14 to Shell.

15 We further request the creation of a  
16 socio-economic monitoring program to assess the  
17 effectiveness of socio-economic effect mitigation  
18 measures implemented by any of Shell, the  
19 Government of Canada, and the Government of  
20 Alberta.

21 And that concludes my submissions. Thank  
22 you.

23 THE CHAIRMAN: Thank you. We have no  
24 questions. Thank you very much.

25 MS. BIEM: Thank you.

1 THE CHAIRMAN: I have 10:18. We'll take  
2 20 minutes.

3

4 **(The morning adjournment)**

5

6 THE CHAIRMAN: Mr. Murphy.

7 MR. MURPHY: Thank you, Mr. Chairman.

8 Over the break, Chief Adam requested if he could  
9 make a brief closing statement on behalf of ACFN.

10 I've spoken to my friend, Mr. Denstedt, and he said  
11 he has no objection so long as there's no new  
12 evidence that Chief Adam will say.

13 THE CHAIRMAN: So it's in the nature of  
14 argument?

15 MR. MURPHY: It is.

16 THE CHAIRMAN: Thank you.

17 MR. MURPHY: Thank you.

18

19 **FINAL ARGUMENT OF CHIEF ADAM OF THE ATHABASCA CHIPEWYAN**

20 **FIRST NATION:**

21 CHIEF ADAM: Good morning, Mr. Chairman.

22 You know, in the last three weeks, three and  
23 a half weeks, you've heard arguments in regards to  
24 ACFN's position in regards to the Jackpine Mine  
25 Expansion. You've heard testimony from our Elders,

1           you've heard testimony from our community members  
2           in regards to the concerns that ACFN has of further  
3           development. One thing that we mentioned in my  
4           statement was the fact that clearly note that the  
5           position that ACFN takes is the fact that we do not  
6           oppose development. I've stated it many times to  
7           Ministers, to industry, to the press. The one  
8           thing that we oppose is the fact about how the  
9           regulatory system is in breach of conducting  
10          findings in regards to moving forward.

11                 We hear new studies coming out constantly and  
12          it is very alarming for ACFN members. We have no  
13          recourse in regards to address these findings in  
14          any form. When we address them to government  
15          agencies, to industry, it seems like we go full  
16          circle and it comes right back to us with no  
17          conclusion.

18                 On health studies for the community, doctors  
19          have been silenced, you know, in regards to what's  
20          been going on in the community. We feel that when  
21          credible people who have concerns raise issues in  
22          regards to general public and ACFN, there's always  
23          a recourse that something happens to them. We know  
24          the instance in regards to what Dr. O'Connor went  
25          through a few years back. We hear the reports

1           constantly coming out in regards to the scientists  
2           of Canada that have been muzzled, you know. And we  
3           have very, very much concerns in regards to those  
4           issues.

5                     We need to find a way to balance the  
6           development that is going on in the region of Fort  
7           McMurray and north. And we feel that at this point  
8           in time, history will be made in regards to further  
9           development if strong recommendations were put  
10          before government agencies, and industry. We know  
11          for a fact that the concerns are real. I hear them  
12          constantly from the community level. I hear them  
13          constantly from general public in regards to where  
14          I go.

15                    We've echoed the fact that we need to put in  
16          place a co-management structure where First Nations  
17          will participate in regards to moving forward. Any  
18          objection in regards to that faith will have a  
19          continuous effect in regards to the First Nation  
20          coming before the Panel on any more new projects  
21          coming up.

22                    We take into consideration that both Canada  
23          and the Alberta Governments are not taking the  
24          issues at hand for both Canadians and Albertans and  
25          Aboriginal people alike. Where, in my mind and

1 others, is the Government of Canada on their  
2 position? Where has the Government of Alberta, in  
3 their mind, addressed the issues in regards to  
4 what's going on?

5 We speak on behalf of the Nation. And we  
6 have collective rights in regards to what we're  
7 doing based on Treaty and under the **Constitution** of  
8 Section 35. We argue our rights and we argue the  
9 fact that there's something wrong. And if the  
10 Canadian Government and the Provincial Government  
11 cannot argue for the citizens alike, well, then,  
12 ACFN takes that position to argue on their behalf  
13 as well, that there is something wrong in this  
14 system. We need to understand the complexity of  
15 the whole surrounding. You've heard in their  
16 submission, that, yeah, they go above the levels  
17 that are required within LARP. You've heard the  
18 submissions from Shell's lawyer in that regards.  
19 So I cautious, you know, caution you in regards to  
20 moving forward. And I just hope that one day that  
21 justice will be served on behalf of the First  
22 Nation and for the people that are affected by the  
23 development in this region.

24 I just clearly state the fact that ACFN was  
25 grateful enough to come before the Panel and that

1           you've taken the time to listen to our concerns.  
2           So on behalf of the Athabasca Chipewyan First  
3           Nation, the Elders, the members at large, and for  
4           the youth and for the children that are unborn for  
5           generations to come, that you take into  
6           consideration that our evidence of greatly concern  
7           of the fact about what is going on and the need to  
8           fix this whole problem, and then, only then, we  
9           will be satisfied in moving along in further  
10          development on our traditional territories.

11                           Thank you, Mr. Chairman.

12          THE CHAIRMAN:                    Thank you, Chief Adam.

13                           Mr. Mallon. Oh, Ms. Johnston, are you going  
14          ahead?

15          MS. ANNA JOHNSTON:            Good morning, Panel,  
16          Mr. Chair.

17          THE CHAIRMAN:                    Good morning.

18          MS. ANNA JOHNSTON:            Before I begin, I would also  
19          like to ask if Mr. Malcolm can give a few closing  
20          remarks at the end of my submissions. I've asked  
21          counsel for Shell and they've said that they are  
22          okay with that.

23          THE CHAIRMAN:                    That's fine.

24

25          **FINAL ARGUMENT OF JOHN MALCOLM, THE NON-STATUS FORT**



1                   **MCMURRAY/FORT MCKAY FIRST NATION AND THE CLEARWATER**  
2                   **RIVER PAUL CREE BAND #175 A, B, AND C, BY MS. ANNA**  
3                   **JOHNSTON:**

4           MS. ANNA JOHNSTON:                   The Non-Status Fort  
5                   McMurray/Fort McKay First Nation, which for the  
6                   sake of my tongue I will refer to as the  
7                   "Non-Status First Nation" and the Clearwater River  
8                   Band number 175 A, B, and C, which I will refer to  
9                   as the "Clearwater River Band," are Aboriginal  
10                  groups with rights recognized by and protected  
11                  under Section 35 of the **Constitution Act**. As such,  
12                  they are groups to which consultation and  
13                  accommodation are owed with respect to the  
14                  Application that is before the Board today.

15                         These groups' rights remain unrecognized by  
16                         Canada and Alberta. As a result, they have been  
17                         marginalized and disenfranchised under the  
18                         environmental assessment process established to  
19                         review commercial oil sands projects such as the  
20                         Application for the Jackpine Mine Expansion Project  
21                         under review in this hearing.

22                         As set out in the evidence, and as I will  
23                         discuss at greater length, members of both groups  
24                         trace their roots to the Project area and the  
25                         greater Athabasca Oil Sands Region.

1           As I will also discuss, commercial oil sands  
2 activities in their traditional territories have  
3 significantly interfered with the groups' ability  
4 to exercise their Section 35 rights. They have  
5 faced increasing difficulty in accessing their  
6 traditional lands throughout the region and in  
7 carrying on their traditional hunting, gathering,  
8 spiritual and cultural practices that are protected  
9 under Treaty 8.

10           Because of these concerns, the Non-Status  
11 First Nation and Clearwater River Band are asking  
12 this Panel to recommend that the Application not be  
13 approved until they are adequately consulted on  
14 their rights with respect to the Project and until  
15 their concerns regarding how the Project will  
16 impact them are fully addressed.

17           I will describe these concerns in more  
18 detail. But first, I would like to discuss the  
19 groups themselves. I will explain how both the  
20 Non-Status First Nation and the Clearwater River  
21 Band hold rights under Section 35 of the  
22 **Constitution Act** and, accordingly, how they are  
23 owed consultation by the Crown before it makes any  
24 decisions in relation to the Project.

25           I will briefly describe their concerns

1           regarding the social and environmental impacts of  
2           this Project. However, in the interests of time,  
3           and because the groups lacked capacity funding to  
4           submit expert evidence to the Panel on specific  
5           social and environmental concerns related to the  
6           Project, I will not set out their concerns  
7           regarding those impacts in detail. Instead, I  
8           would like to adopt the concerns raised by the Oil  
9           Sands Environmental Coalition with regards to  
10          environmental impacts in their submissions and  
11          argument.

12                 The Non-Status First Nation is a collective  
13          of approximately 600 unregistered Indians. Its  
14          members are the descendants of the original Cree  
15          and Chipewyan peoples who lived in and around the  
16          Athabasca Region, including the Project area, since  
17          time immemorial.

18                 While they trace their lineage to members of  
19          the Fort McMurray and Fort McKay First Nations,  
20          members of the Non-Status First Nation consider  
21          themselves to be a politically distinct Aboriginal  
22          group, holding meetings and governing themselves as  
23          members of a collective.

24                 They lost their status under the ***Indian Act***  
25          when a female ancestor married a non-Aboriginal

1 man. John Malcolm is that Nation's Interim Chief.

2 The Clearwater River Band is a band of  
3 registered Indians. Its members are the  
4 descendants of a Cree-speaking group that has also  
5 lived, hunted and travelled throughout the Wood  
6 Buffalo region since time immemorial.

7 Members of both groups have hunted, fished,  
8 gathered and conducted other traditional activities  
9 protected under Section 35 and Treaty 8 from prior  
10 to its execution through to the present-day.

11 Members of both groups are the descendants of  
12 signatories to Treaty 8 and of individuals whose  
13 names appeared on the Fort McMurray Fort McKay Band  
14 pay list for Treaty 8.

15 The Clearwater River Band was one of the five  
16 bands that appeared on the Fort McMurray Fort McKay  
17 band pay list, which was the pay list for this  
18 region. It originally consisted of five bands, one  
19 of which was the Clearwater River Band. They are  
20 the descendants of Paul Cree, for whom the  
21 Clearwater River Band Reserve No.175 was set aside.  
22 While the Clearwater River Band was assimilated  
23 into the Fort McMurray Band by Indian Affairs, it  
24 was done without the consultation or consent of  
25 Clearwater River Band members or leaders.

1                   Its members consider themselves to be  
2                   distinct from the Fort McMurray Band and they  
3                   function as a distinct band, holding meetings and  
4                   governing themselves as members of a collective.

5                   John Malcolm is its manager and its chief is  
6                   Mary Ann Powder.

7                   My colleagues have done an admirable job of  
8                   setting out the case law on Section 35 rights and  
9                   the duty to consult. Of particular relevance to  
10                  the Non-Status First Nation and Clearwater River  
11                  Band are the submissions made by Ms. Bishop  
12                  yesterday regarding the Crown's duty to consult  
13                  when it contemplates conduct that might adversely  
14                  impact potential Aboriginal or Treaty Rights.

15                  So rather than belabour these principles, I  
16                  will merely note them and focus my submissions on  
17                  the specific case law that applies to my clients.  
18                  But I would like to emphasize the Supreme Court of  
19                  Canada's recognition that the duty to consult stems  
20                  from the honour of the Crown, and due to its unique  
21                  relationship with Aboriginal peoples, the Crown  
22                  must respect potential unproven rights.

23                  As the Court held in **Taku River**, the Crown's  
24                  efforts to consult and accommodate Aboriginal  
25                  groups whose potential or established Aboriginal or

1 Treaty Rights may be adversely affected should be  
2 consistent with the overarching objectives of  
3 reconciliation.

4 Courts have also held that the interpretation  
5 of Treaty Rights "should be fair and liberal". The  
6 Government of Canada's Consultation Policy  
7 acknowledges these principles. It states that:

8  
9 "The duty to consult and,  
10 where appropriate, accommodate, is  
11 part of a process of fair dealing  
12 and reconciliation that begins with  
13 the assertion of sovereignty by the  
14 Crown and continues beyond formal  
15 claims resolution through to the  
16 application and implementation of  
17 treaties."

18  
19 As set out by the Supreme Court of Canada in  
20 ***Haida, Taku River, and Mikisew Cree***, three elements  
21 must be present for a duty to consult to exist.

22 They are:

- 23  
24 i. a Crown conduct,  
25 ii. a potential adverse impact, and

1           iii. potential or established Aboriginal or  
2           Treaty rights recognized and affirmed under  
3           section 35(1) that might be adversely  
4           affected.

5

6           In the case of the Non-Status First Nation and  
7           Clearwater River band, these three elements do  
8           exist.

9           The courts have already confirmed that both  
10          non-status Indians and non-status Bands may hold  
11          Treaty Rights. For this Panel to recognize the  
12          Non-Status First Nation and the Clearwater River  
13          Band as groups capable of holding Section 30 rights  
14          would not be precedent setting, it would only be  
15          following the jurisprudence.

16          Section 35 of the **Constitution Act** provides  
17          that:

18

19                       "(1) The existing aboriginal  
20                       and treaty rights of the aboriginal  
21                       peoples of Canada are hereby  
22                       recognized and affirmed."

23

24           And that:

25

1                               "(2) In this Act,  
2                               'aboriginal peoples of Canada'  
3                               includes the Indian, Inuit and  
4                               Métis peoples of Canada."

5  
6                               In applying a fair and liberal interpretation  
7                               to Treaty Rights, courts have interpreted  
8                               Aboriginal peoples of Canada as including  
9                               non-status Indians and accordingly have extended  
10                              Treaty-based rights to non-status Indians who could  
11                              prove their ancestral connection to the community  
12                              of Treaty signatories.

13                             In the *Queen v. Trotchi*, the Court held that  
14                             a Treaty Rights claimant need only establish:

15  
16                             "- a 'sufficient and  
17                             substantial' ancestral connection  
18                             to a historical community that  
19                             exercised the rights in question,  
20                             and  
21                             - a real relationship to a  
22                             presently recognized aboriginal  
23                             community that exercises treaty  
24                             rights."

25



1                   In the *Queen v. Chevrier*, the Ontario  
2                   District Court held that a man of mixed Aboriginal  
3                   and non-Aboriginal blood who is not registered  
4                   under the *Indian Act* but who traced his decent from  
5                   a member of a tribe that was a signatory to an  
6                   historical Treaty had inherited the right to hunt  
7                   granted to his ancestors under that Treaty.

8                   The Court held that it did not need to  
9                   determine whether the claimant was an Indian within  
10                  the meaning of the *Constitution* as he claimed a  
11                  birthright that was granted by the Crown. It also  
12                  held that the Province could not negate those  
13                  Treaty Rights even though the present holder of  
14                  that right may not be a Status Indian.

15                  Similarly, in the *Queen v. Fowler*, the New  
16                  Brunswick Court found that a claimant who could  
17                  prove a substantial connection with a signatory to  
18                  a Treaty could avail himself of the rights  
19                  enshrined in that Treaty without regard to his  
20                  status under the *Indian Act*. In that case, too, a  
21                  man who is not a registered Indian but who traced  
22                  his lineage back to a First Nations group that was  
23                  covered by the Treaty was recognized as holding  
24                  Section 35 rights.

25                  Now, the Alberta Provincial Court in the

1           **Queen v. Ferguson** set out a test for when  
2 non-status Indians can claim Section 35 rights.  
3 Under the **Ferguson** test, non-status Indians can  
4 claim Section 35 rights if they are a person of  
5 Indian blood who is reputed to belong to an  
6 irregular band or who follows the Indian mode of  
7 life. And "irregular band" is defined as:

8  
9           "... any tribe, band or body of  
10 persons of Indian blood who own no  
11 interest in any reserve or lands of  
12 which the legal title is vested in  
13 the Crown, who possess no common  
14 fund managed by the Government of  
15 Canada, and who have not had any  
16 treaty relations with the Crown."

17  
18           In the **Queen v. Marshall, Queen v. Bernard,**  
19 the Supreme Court held that to establish a right,  
20 claimants must establish a connection with a  
21 pre-sovereignty group upon whose practices they  
22 rely to assert a right.

23           Both the Non-Status First Nation and the  
24 Clearwater Band meet these requirements. Both are  
25 groups with distinct collective identities that are

1           comprised of descendants of people who have lived  
2           in and around the Project area and greater  
3           Athabasca region since time immemorial. Both are  
4           descendants of signatories of Treaty 8 with  
5           connections to the Fort McKay and Fort McMurray  
6           First Nations. Members of both groups continue to  
7           hunt, fish and otherwise carry on their traditional  
8           activities protected under Treaty 8 in Shell's  
9           lease site and the surrounding area. Neither  
10          currently possesses an interest in reserve lands.

11                   And both groups have a representative entity,  
12           a chief, and in the case of the Clearwater Band, a  
13           manager, who may serve as consultation partners.

14                   Thus members of both the Non-Status First  
15           Nation and the Clearwater River Band are Aboriginal  
16           peoples of Canada as contemplated by Section 35 and  
17           who's Aboriginal and Treaty Rights are thus  
18           confirmed under Section 35(1).

19                   Canada's Consultation Policy confirms this  
20           interpretation. Under that policy, an Aboriginal  
21           group is defined as including a community of First  
22           Nations people that holds or may hold Aboriginal  
23           and Treaty Rights under Section 35.

24                   And "First Nation" is defined in that policy  
25           as referring to the Indian peoples in Canada, both

1 status and non-status.

2 Now, in the Joint Review Panel report for the  
3 Kearl Oil Sands Project, the Joint Panel concluded  
4 that membership by individuals in the Clearwater  
5 Band and the Wood Buffalo First Nation and other  
6 bands precluded those groups from being recognized  
7 as distinct entities with Treaty or Aboriginal  
8 Rights. This conclusion, however, is contrary to  
9 the common law on the rights of non-status Indians  
10 and unregistered bands.

11 The courts have held that **Indian Act** bands  
12 are not the only collectives capable of claiming  
13 Section 35 rights. Rather, unregistered bands have  
14 also been recognized as capable of holding those  
15 rights. And the Courts have also recognized valid  
16 Aboriginal claims as belonging to unregistered  
17 bands whose members are also the members of  
18 registered bands.

19 In **Ontario v. Bear Island Foundation**, the  
20 Ontario High Court found that members of a  
21 registered band who also claim to belong to an  
22 unregistered band were entitled to Section 35  
23 rights through that unregistered band that were  
24 separate from those that were held by the  
25 registered band.

1           In the same way individuals belonging to the  
2           Clearwater River Band and the Non-Status First  
3           Nations, to the extent that those individuals  
4           belonged to other bands, that does not preclude  
5           those groups from recognition as distinct  
6           communities capable of claiming their rights under  
7           Treaty 8.

8           Now, regarding their rights under Treaty 8,  
9           the Non-Status First Nation and Clearwater River  
10          Bands' submissions on the interpretation and  
11          application of that Treaty is set out in  
12          submissions dated December 16th, 2011, which is on  
13          the record, and I will not repeat them here.

14          Instead, I will move on to how the Project  
15          will infringe the rights of the groups and then  
16          their recommendations with respect to this  
17          Application.

18          Many of the impacts that this Project will  
19          have on the Section 35 rights of the Non-Status  
20          First Nation & Clearwater River Band are also set  
21          out in that December 16th, 2011 submission. I  
22          would just like to discuss a few additional impacts  
23          before turning to the issue of consultation.

24          The failure to reach a resolution of the  
25          outstanding claims of the Non-Status First Nation &

1 Clearwater River Band has deprived their members of  
2 access to an adequate land base on which to sustain  
3 their traditional ways of life, to pass on their  
4 traditions to future generations, to meet their  
5 economic needs, and to live with dignity among  
6 their peers.

7           Hunting, fishing, trapping and harvesting are  
8 not only important economic and food-source  
9 activities, they are also culturally integral to  
10 both groups. Thus, the preservation of fish, birds  
11 and wildlife habitat is crucial to the  
12 sustainability and wellbeing of the bands.

13           As we heard from Ms. Cardinal, Ms. Malcolm,  
14 and Mr. Malcolm, members of the Non-Status First  
15 Nation and the Clearwater River Band are facing  
16 increasing difficulties in accessing their  
17 traditional lands and resources due to the increase  
18 in industrial activities in their traditional  
19 territories. Berries and other plant resources,  
20 which are eaten, help prevent disease, have become  
21 less plentiful and increasingly difficult to access  
22 due to industrial activities in the region. Where  
23 they may still be accessed, they are often altered  
24 in taste and form.

25           Animals that the groups' ancestors formerly

1           trapped such as mink, muskrats, weasels and foxes,  
2           have also become scarce. As we heard from  
3           Ms. Cardinal, some wildlife species have declined  
4           so significantly and become so difficult to trap  
5           that members of the group feel that there is no  
6           sense in even trying to live like that anymore.

7                       Caribou, which ancestors of members of the  
8           Non-Status First Nation & Clearwater River Band  
9           once relied, have become so affected by oil sands  
10          development in the region that it is now a listed  
11          species under the ***Species at Risk Act***.

12                      Even where members of the groups attempt to  
13          harvest these traditional resources, they are  
14          reluctant to do so because of interference by  
15          industrial activities that criss-cross their  
16          traditional lands, and because of concerns that  
17          those resources have become so contaminated by  
18          pollution, that to harvest and consume them is  
19          believed to be a serious health risk.

20                      Some hunters avoid areas where human activity  
21          has increased, such as around the Project area,  
22          also due to fears over altercations with industry  
23          staff and security.

24                      With its anticipated impacts on fish and  
25          wildlife species, aquatic and terrestrial habitat,

1 plant and diamond willow fungus harvesting sites  
2 and air and water quality, the Project threatens to  
3 cut them off even further from their lands and  
4 resources, from their ability to engage in  
5 traditional activities and to participate as equal  
6 and empowered members of society.

7 In brief, this Project will destroy caribou  
8 habitat and further reduce the numbers of that  
9 already at risk species. It will raze stands of  
10 diamond willow on which grows a fungus that the  
11 members of the group use for important cultural and  
12 medicinal purposes. It will destroy important food  
13 fish and the habitat of those fish without  
14 commitment to ensuring their recovery or  
15 replacement. It will further pollute an already  
16 compromised watershed. And it will prevent members  
17 of the Non-Status First Nation and the Clearwater  
18 River Band from freely accessing their lands, from  
19 practising their traditional activities, and from  
20 ensuring that the customs that are integral to  
21 their identity are passed on to their future  
22 generations.

23 What's more, the resource management  
24 practices and beliefs of the Non-Status First  
25 Nation and the Clearwater River Band prevent its



1 members from harvesting threatened species which  
2 further prevents them from exercising their rights  
3 to hunt, fish, trap and gather.

4 As many species have been caused to be  
5 threatened by oil sands development, members of the  
6 Non-Status First Nation & Clearwater River Band  
7 have been forced to bear the burden of the careless  
8 environmental management by industry and the Crown  
9 through the sacrifice of their ability to practice  
10 their traditional activities.

11 In addition to environmental impacts,  
12 important cultural practices of the Non-Status  
13 First Nation & Clearwater River Band have also been  
14 impeded by oil sands activities. Members of the  
15 group, as we've heard, have lost their traditional  
16 swimming waters due to pollution caused by  
17 industry, and, as a result, are unable to pass on  
18 important skills and customs to their children.

19 On the Jackpine Mine Expansion lease site,  
20 it's a site of significance to the Clearwater River  
21 Band called Creeburn Lake which is at risk of being  
22 destroyed if this Project proceeds.

23 There is also evidence that quarries of  
24 pipestone, a sacred stone for the Non-Status First  
25 Nation & Clearwater River Band, exist near the

1 Project area and which may be at risk from Project  
2 construction and operations.

3 As a result of these and other impacts, the  
4 Project will interfere with and result in a loss of  
5 the traditions and values that are integral to the  
6 distinctive culture of the Non-Status First Nation  
7 and the Clearwater River Band.

8 To add insult to injury, as members of the  
9 groups have watched their traditional lands and  
10 resources be taken by the government and handed to  
11 industrial giants, their claims to consultation,  
12 accommodation, and compensation for their losses go  
13 ignored.

14 They remain invisible and unheard, unable to  
15 either participate in or be compensated in any way  
16 from the activities that threaten to take their  
17 lands, their resources, their health, and their  
18 culture. As other Aboriginal groups in the region  
19 sign agreements with industrial actors, as they  
20 receive funding to undertake traditional land use  
21 and cultural studies, and as they are consulted  
22 with on projects that will impact their shared  
23 territories, the Non-Status First Nation &  
24 Clearwater River Band have been steadfastly  
25 rejected from the consultation process and from any

1 sharing in benefits following from use of their  
2 lands.

3 With each project approval, the groups have  
4 become more marginalized and more disenfranchised.

5 Because of the persistent refusal by the  
6 Crown or industry to recognize their rights,  
7 members of the Non-Status First Nation & Clearwater  
8 River Band have suffered disproportionately as a  
9 result of this development in their traditional  
10 territories.

11 As described in the Supplemental Social  
12 Economic and Cultural Effects Submission for Shell  
13 submitted by ACFN, the social determinants of  
14 health include, among other things, employment and  
15 working conditions, income and social status,  
16 social support networks, social environments,  
17 education, and gender.

18 We've heard much in this proceeding about the  
19 adverse, social, cultural, economic and  
20 environmental effects that are felt in Fort  
21 McMurray and in outlying communities, including a  
22 shortage of affordable housing, increasing  
23 homelessness, reduced access to medical care, an  
24 increase in illicit drug use, and salaries that are  
25 not commensurate with the high cost of living.

1                   This has certainly been the case for members  
2                   of the Non-Status First Nation & Clearwater River  
3                   Band who have largely been excluded from general  
4                   social benefits such as employment in oil sands  
5                   development.

6                   Members of the Non-Status First Nation &  
7                   Clearwater River Band have also observed their  
8                   health decline since the advent of industrial oil  
9                   activity in the Athabasca region.

10                  While there are many qualified trades people  
11                  among the groups who are actively seeking work,  
12                  they face a disproportionately high rate of  
13                  unemployment as compared to the non-Aboriginal  
14                  population.

15                  Housing prices have especially affected the  
16                  Aboriginal population and, in particular, the  
17                  elderly among that population who are unable to  
18                  afford rent or own in Fort McMurray or the  
19                  surrounding areas.

20                  The high cost of living has rendered many  
21                  Aboriginal people, including members of these  
22                  groups, homeless or at imminent risk of becoming  
23                  homeless. It's pushed many others out of Fort  
24                  McMurray and into smaller more remote communities.  
25                  Accordingly, their members are scattered, requiring

1           them to risk their safety and lose much time  
2           travelling on those dangerous roads to stay  
3           connected.

4                     In 1980, as we heard from Mr. Malcolm, Elders  
5           of the Non-Status First Nation were forcibly  
6           evicted from a settlement of the Snye in order to  
7           build housing for employees of Syncrude.

8                     And then in 2006, Mr. Malcolm was told he  
9           would not be able to set up a work camp to help the  
10          homeless because, due to his band's name, he did  
11          not have rights under Treaty 8.

12                    These groups are the marginalized of the  
13          marginalized, much like the caribou in the Jackpine  
14          Mine lease site, they remain unrecognized and  
15          invisible.

16                    Since the signing of Treaty 8, the Non-Status  
17          First Nation & Clearwater River Band have had their  
18          lands and resources systematically taken up. To  
19          date, however, they have not been engaged in an  
20          effective dialogue with respect of their rights by  
21          Crown or industry, or that taking up.

22                    As I have explained, both are groups that  
23          hold rights under Treaty 8 to which consultation is  
24          owed.

25                    However, neither group has had capacity to

1 effectively assert their rights and engage in  
2 consultation. The problem is cyclical. In order  
3 to participate effectively in environmental  
4 processes, and to have their concerns considered,  
5 members of the Non-Status First Nation & Clearwater  
6 River Band require capacity funding. But as  
7 neither group has had their rights recognized,  
8 neither has been provided with funding to undertake  
9 the necessary traditional use studies or studies of  
10 potential impacts of the Project on their rights  
11 and so their concerns remain unaddressed, and as  
12 their concerns remain unaddressed, they are denied  
13 consultation opportunities.

14 In oral argument, my friend Mr. Denstedt  
15 submitted that in 2008 Shell supplied funding to  
16 the Wood Buffalo Elders Society to undertake a  
17 study related to their traditional land use.

18 With respect, that funding has no bearing on  
19 the matter of consultation with the Non-Status  
20 First Nation or the Clearwater River Band. It has  
21 no bearing on Shell's efforts to engage in  
22 consultation or the discharge of the Crown's duty  
23 to consult.

24 The Wood Buffalo Elders Society is neither  
25 the Non-Status First Nation nor the Clearwater

1 River Band. It was at one time a registered  
2 society, but it no longer exists.

3 As the Courts have held, to be owed  
4 consultation obligations by the Crown, an  
5 Aboriginal group must have a representative entity  
6 that can serve as a consultation partner for the  
7 Crown. The Wood Buffalo Elders Society was not a  
8 representative entity recognizable as such by law.

9 In the Environmental Assessment proceeding of  
10 the Muskeg River Mine Expansion project, the Joint  
11 Panel for that project determined that the Wood  
12 Buffalo Elders Society did not qualify as an  
13 Aboriginal group capable of holding Aboriginal or  
14 Treaty Rights giving rise to a duty of  
15 consultation. The proponent in that application,  
16 Albian Sands Energy Incorporated, is a company  
17 created by the Athabasca Oil Sands Project of which  
18 Shell is a majority shareholder. In effect, what  
19 Shell is asking the Panel to find here is that,  
20 while in a previous application by it, the Elders  
21 Society could not constitute a representative  
22 entity able to serve as a consultation partner for  
23 the Crown, Shell could engage in consultation with  
24 it for the purposes of discharging consultation  
25 obligations with respect to this Application.

1           With respect, that finding would be an  
2           absurdity.

3           Thus, in our submission, any funding provided  
4           to the Wood Buffalo Elders Society does not  
5           constitute consultation with either the Non-Status  
6           First Nation or the Clearwater River Band, and  
7           accordingly, does not discharge the consultation  
8           obligation owed to either group.

9           In fact, while in January 2011, Mr. Malcolm  
10          submitted a formal request for consultation to  
11          Shell on behalf of the groups he represents, the  
12          extent of Shell's consultation has been to provide  
13          information to Mr. Malcolm regarding application  
14          materials. As this Panel has noted, Mr. Malcolm  
15          and his groups have been fighting to have their  
16          voices heard in environmental assessments of oil  
17          sands projects for over a decade. To date, they  
18          have not been successful.

19          While Shell alleges that Mr. Malcolm's  
20          frequent participation makes him an expert at such  
21          proceedings, his systematic failure to achieve  
22          recognition of the rights of his groups or the  
23          impacts to their lands and resources and  
24          traditional activities by oil sands activities  
25          tells a different story.



1           These groups have faced obstacles in their  
2           attempts to participate in the limited information  
3           sharing that has been provided by Shell. The  
4           technical language of environmental assessment can  
5           be difficult for even highly trained and  
6           experienced experts to understand, hence the three  
7           weeks of discussion we underwent in this proceeding  
8           to try and clarify a handful of issues.

9           While Shell's Aboriginal consultant may smirk  
10          at the notion, it is little wonder that Mr. Malcolm  
11          claims that the technical jargon of science and law  
12          has made it difficult to understand the regulatory  
13          processes of environmental assessment.

14          The conclusion that the groups have drawn  
15          from these years of being ignored by government and  
16          industry is that they are meaningless.

17          This situation is not unique to the  
18          Non-Status First Nation or the Clearwater River  
19          Band. As described in the Amnesty International  
20          report submitted by Ms. Anna Zalek, there are an  
21          estimated 526 claims concerning historic Treaties  
22          that are currently being assessed or under  
23          negotiation in Canada, and another 77 cases that  
24          are before the courts. Surely this is not in the  
25          public interest to ignore them.

1           As we heard from Ms. Celina Malcolm and  
2           Ms. Anna Zalik, the mechanisms used to negotiate  
3           and resolve land and resource disputes dramatically  
4           increase costs for Aboriginal participants. It  
5           erodes their rights and it fosters a race to the  
6           bottom as groups suspect that if they do not enter  
7           into agreements, they will be left with nothing.

8           Distinguishing between Aboriginal groups that  
9           share claims to the land and resources for the  
10          purposes of consultation, entering into agreements  
11          with select groups and refusing to disclose the  
12          terms of those agreements, has created divisions  
13          between groups who once shared these lands and  
14          resources. This, too, cannot be in the public  
15          interest.

16          As I mentioned, Shell has refused to  
17          adequately address the impacts that this Project  
18          will have on the resources, lands and rights of the  
19          Non-Status First Nation & Clearwater River Band.  
20          Furthermore, it has not adequately supported its  
21          conclusions with regard to potential impacts to  
22          such important factors as species at risk, air and  
23          water quality, and human and social health.

24          As became clear in the numerous competing  
25          expert reports and rounds of cross examination

1 challenging each other's subject matter experts,  
2 there's much uncertainty regarding the data,  
3 methodologies and conclusions that Shell relies on  
4 in its Application materials.

5 To name just one example. As described by  
6 various witnesses and admitted to in Shell's own  
7 wildlife studies, caribou have been seen in and  
8 around the Project area and are reported to have  
9 formerly occurred there more frequently. The  
10 residual net impact from the Project on caribou  
11 habitat in the LSA has been assessed as high, and  
12 impacts to caribou in the RSA during construction  
13 and operations is assessed as moderate.

14 Despite these findings, Shell has refused to  
15 offer adequate mitigation measures or offsets for  
16 harm to caribou.

17 In our submission, this is unacceptable.  
18 "Virtually absent" does not mean "absent."

19 Similarly, while Shell claims that it is  
20 committed to ensuring that end pit lakes will, with  
21 time, contain fish, it has not committed to  
22 ensuring that they will contain the same species of  
23 fish as originally appear there. In fact, as Shell  
24 attested to, these lakes will not contain the same  
25 species of fish. In the view of the Non-Status

1 First Nation and the Clearwater River Band, all  
2 species of fish are not the same. It is not  
3 adequate compensation or mitigation for Shell to  
4 replace their traditional food sources with  
5 alternative ones. Had they been consulted about  
6 this matter, they would have explained this to  
7 Shell.

8 In our submission, there is insufficient  
9 evidence to proceed with the Project that will  
10 likely impact species that are at risk and that are  
11 of significant importance to Aboriginal groups.  
12 And this Panel cannot conclude, in our submission,  
13 that the Project will be in the public interest  
14 when there are so many outstanding issues of  
15 concern and so many gaps in the data regarding  
16 issues of such importance to so many directly  
17 affected groups and individuals.

18 Regarding the degree of consultation that is  
19 owed to the groups, rather than setting them out  
20 here, again, I'll turn the Panel's attention to the  
21 submissions dated December 16th, 2011, that the  
22 group submitted in this proceeding.

23 And I will give my conclusions and  
24 recommendations.

25 First, it's worth noting again that this

1 Panel should look at the spirit of the duty to  
2 consult as set out by the courts.

3 In *Haida*, the Supreme Court of Canada held  
4 that the Crown acting honourably cannot cavalierly  
5 run roughshod over Aboriginal interests where  
6 claims affecting those interests are being  
7 seriously pursued in the process of Treaty  
8 negotiation and proof. It must respect these  
9 potential but yet unproven interests. To  
10 unilaterally exploit a claimed resource during the  
11 process of approving and resolving the Aboriginal  
12 claim to that resource may be to deprive the  
13 Aboriginal claimants of some or all of the benefit  
14 of the resource. This is not honourable.

15 In environmental assessments, consultation is  
16 intended to ensure the traditional activities and  
17 access to resources is not significantly impacted.  
18 And where such impact occurs, traditional users are  
19 compensated. This duty extends to non-status  
20 groups.

21 However, the Non-Status First Nation and  
22 Clearwater River Band members have fallen through  
23 the regulatory cracks. If, as Shell submits,  
24 environmental assessment is a planning tool, then  
25 its application constitutes bad planning. This

1 issue at its core is a matter of perspective. It's  
2 about values and competing interests. It's about  
3 the meaning of significance. And the meaning of  
4 public interest. And it's also about patience.  
5 This Panel has before it the daunting task of  
6 weighing the evidence and conclusions of Shell on  
7 the one hand against those of intervening parties  
8 on the other and ascertaining what exactly is in  
9 the public's interest with regards to Shell's  
10 Application.

11 Shell has provided no evidence that a delay  
12 in approving its Application would cause it harm  
13 beyond the ability to begin profiting from  
14 resources for which it holds property rights.  
15 Conversely, the Panel has received much evidence on  
16 the harm that allowing this Project to proceed will  
17 likely have on the many stakeholders whose rights  
18 and interests have been represented in this  
19 Application.

20 In our submission, it would be unjust,  
21 inequitable and contrary to the public interest to  
22 permit this Project to proceed when its adverse  
23 impacts will further marginalize and disenfranchise  
24 the already disadvantaged groups of the Non-Status  
25 First Nation and the Clearwater River Indian Band.

1           Taken from a national perspective that places  
2           the footprint of industrial development on the  
3           backdrop of Canada's vast land base, and which has  
4           as its ethos economic growth as the most important  
5           consideration in a public interest analysis, it's  
6           tempting to see the benefits of this Project as  
7           outweighing the relatively insignificant concerns  
8           regarding the rights, health and wellbeing of  
9           members of the Non-Status First Nation & Clearwater  
10          River Band. But taken from the perspective of  
11          members of those groups who have for generations  
12          seen their lands fragmented, polluted, and taken up  
13          by the Crown without their consent or control, and  
14          from the perspective of Canadians, who value  
15          democracy, rule of law, social justice, substantive  
16          equality, and public participation in regulatory  
17          matters that will have unmitigable and irreversible  
18          impacts on which they have a direct interest, the  
19          scales tip.

20                 This Project is more than just a road through  
21                 a forest. It's a freeway connected to a highway  
22                 grid that has so severely impacted the human and  
23                 physical environments around it as to make them  
24                 virtually unrecognizable to its original  
25                 inhabitants.

1           For these reasons, in our submissions, the  
2 Project should not proceed until the concerns of  
3 the Non-Status First Nation, the Clearwater River  
4 Band, and the public are addressed.

5           Therefore, the Non-Status First Nation and  
6 the Clearwater River Band would like to make the  
7 following requests:

8           First, that the Joint Review Panel recommend  
9 that the Crown recognize the Section 35 rights of  
10 the Non-Status First Nation and the Clearwater  
11 River Band and the potential infringement on those  
12 rights by the Project should it be approved.

13           Second, that the Joint Review Panel recommend  
14 that the Project is not in the public interest and  
15 cannot be authorized unless and until the Crown has  
16 fully discharged its duties to consult and  
17 accommodate the Non-Status First Nation and the  
18 Clearwater River Band with respect to potential  
19 effects on its Treaty and Aboriginal Rights.

20           Third, that the Joint Review Panel recommend  
21 that the consultation process owed to the  
22 Non-Status First Nation and the Clearwater River  
23 Band include, but not be limited to, consideration  
24 of the potential impacts of the Project on their  
25 Section 35 rights, to consultation prior to



1 finalizing any resources management frameworks or  
2 plans with regards to oil sands activities or to  
3 environmental management in the Project area or the  
4 greater Athabasca region in general.

5 The provision of resources to the Non-Status  
6 First Nation and the Clearwater River Band to  
7 document the nature and scope of their Aboriginal  
8 and Treaty Rights, including traditional land use  
9 studies, Traditional Ecological Knowledge studies,  
10 and cultural studies.

11 Provision of capacity funding to both groups  
12 in order to undertake studies that identify any  
13 potential additional adverse impacts that may be  
14 caused by the Project, including the cumulative  
15 impacts which have not yet been identified.

16 And capacity funding to partner with local  
17 organizations, governments and industry to address  
18 those impacts.

19 And in addition to the above, a request that  
20 this Panel recommend that no approvals or  
21 authorizations be issued in relation to this  
22 Project until Shell:

23 Engage in a cultural sensitivity workshop  
24 with the Non-Status First Nation and the Clearwater  
25 River Band;

1                   Until the Non-Status First Nation &  
2                   Clearwater River Band are satisfied that any sites  
3                   of historical or cultural significance to the  
4                   groups have been adequately identified and  
5                   protected;

6                   Until members of those groups be permitted to  
7                   harvest diamond-willow fungus that occurs in the  
8                   Project area before any activities occur there that  
9                   may disturb or harm that resource;

10                  And that any other resources of cultural  
11                  environmental health and social importance to the  
12                  Non-Status First Nation & Clearwater River Band be  
13                  adequately protected;

14                  And finally, that both groups receive  
15                  compensation for any losses or harm to those  
16                  resources that might occur.

17                  And finally, I would like to recommend that  
18                  the conditions requested by the Oil Sands  
19                  Environmental Coalition regarding the environmental  
20                  protections and measures that they have set out are  
21                  met.

22                  And with that, I would like to invite  
23                  Mr. Malcolm up here to make a few closing remarks  
24                  on behalf of the groups.

25                  THE CHAIRMAN:                   Thank you.

1 MS. ANNA JOHNSTON: And also to thank the Panel  
2 for hearing our submissions on this.

3

4 **FINAL ARGUMENT BY MR. MALCOLM:**

5 MR. MALCOLM: Good morning, Mr. Chairman  
6 and respected Panel. I'm here to thank you for  
7 allowing me to present my final argument and  
8 hopefully I'll be able to do that without any  
9 concerns from Shell.

10 I would like to start with, Mr. Broadhurst  
11 made a comment earlier in the proceedings at the  
12 start and he said that traditional knowledge and  
13 traditional users' words were basically solid and  
14 he would listen to them. I would like to believe  
15 that, but from what I've seen throughout this  
16 process, that contradicts what he says. In  
17 Exhibit No. 001-001E, Volume 5.740, there's a  
18 comment from a trapper in the region of McKay. He  
19 said that, 20 years ago, there was lots of wildlife  
20 here, which included the caribou. Now Shell says  
21 that they don't exist.

22 I would like to comment about the wildlife  
23 and migratory fly-ways. When I was young, clouds  
24 of, clouds of birds would, waterfowl and wildlife  
25 would fly over Fort McMurray, and now today there's

1           hardly any. And part of it is due to the war zone  
2           set up by the tailings ponds. It's constant  
3           explosions going off and it's really having  
4           detrimental effect on the wildlife, not only the  
5           migratory fowl, but the wildlife themselves. And  
6           more studies need to be done on the noise and how  
7           it affects the wildlife in the area. I feel like  
8           they are more concentrated on making more noise  
9           than they are effectively deterring the birds from  
10          landing.

11                        I would like to talk about the caribou that's  
12          been hammered thoroughly throughout this process.  
13          And the comments I heard was the Audet Lake caribou  
14          herd and the Steepbank caribou herd are amalgamated  
15          with the Richardson herd. They also failed to  
16          mention that there's a Caroline herd that's also  
17          part of the Richardson herd. And down south where  
18          I live in Anzac, there's three different other  
19          caribou herds: The Egg-Pony, the Algar, and the  
20          Leismer herds, all part of another branch. It's  
21          kind of like the Métis Nation with their  
22          communities and the Locals: I feel that the local  
23          communities are the local herds, the Steepbank herd  
24          and the Audet caribou herd are directly impacted by  
25          this process. And it should not only be the

1 requirements of the Federal Government to help  
2 restore the herds, it should also be the  
3 requirements of Shell.

4 I would recommend that they do studies on the  
5 freshwater clams in the Athabasca River. I've  
6 requested this several times throughout the  
7 hearings. I've yet to see that being done. If  
8 there's any clams left, maybe the next study will  
9 be, well, there's no clams left so we don't have to  
10 study them as well.

11 I would also like to see what is the critical  
12 water temperature for the fish habitat during  
13 different seasons. I did not get that through the  
14 EIA or through this process.

15 I would like to see the outcrops along the  
16 riverbanks on Shell's leases identified and provide  
17 that information to CEMA and include it in their  
18 EIAs.

19 I would also like to see the wildlife  
20 corridors being maintained, not only to sustain the  
21 wildlife but also sustain the natural resources  
22 that are there. From my understanding, in 100  
23 years from now there's going to be no oil left, so  
24 where does the word "sustain" in Alberta  
25 Sustainable Environment fulfill that?

1 Shell has billions of barrels in their  
2 leases, surely they can set aside some oil for the  
3 future.

4 And I'd like to talk about thresholds.  
5 Thresholds, according to the experts, is when a  
6 change in the population is affected. Well, our  
7 threshold for our groups have been severely  
8 impacted to where we're almost extirpated.

9 So in conclusion, we will continue to  
10 dialogue with Shell in hopes of what we feel is a  
11 meaningful process will come out. Until then, we  
12 object to this Project's approval.

13 And I'd like to thank you for your time.

14 Thank you.

15 THE CHAIRMAN: Thank you, Mr. Malcolm.

16 Mr. Mallon.

17

18 **FINAL ARGUMENT OF THE MIKISEW CREE FIRST NATION,**

19 **BY MR. MALLON:**

20 MR. MALLON: Good morning, Mr. Chairman,  
21 Members of the Panel. I have the pleasure again to  
22 appear before you on behalf of the Mikisew Cree  
23 First Nation.

24 The Mikisew Cree have participated to a  
25 greater or lesser degree in every oil sands open

1 mine regulatory review since 2002. They have done  
2 so in an attempt to elucidate to the tribunals and  
3 to the Provincial and Federal Governments what was  
4 at stake for the Mikisew and to attempt to convince  
5 tribunals and governments to regulate the  
6 development of the region in a careful and caring  
7 manner which respects the rights of First Nations  
8 and the laws of nature.

9 And so here we are again.

10 This time around, some things are different.  
11 The pressure on Mikisew's Treaty Rights and culture  
12 from cumulative effects of development in Mikisew's  
13 traditional lands have increased.

14 Some things are the same. The Mikisew is  
15 concerned that the Governments of Alberta and  
16 Canada are not meaningfully consulting Mikisew  
17 about the cumulative effects that are adversely  
18 impacting Mikisew's rights and culture and that  
19 this failure to meaningfully consult Mikisew means  
20 that government is not managing the cumulative  
21 effects on Treaty Rights in a credible or effective  
22 way.

23 The Mikisew have agreed to work with Shell  
24 directly on project-specific issues, therefore we  
25 do not object to this Project.

1           As stated in our submission, our concerns for  
2 your attention are the cumulative effects  
3 associated with the overall development of the  
4 region. We are concerned about the cumulative  
5 impacts of oil sands development on the environment  
6 and on our rights and culture.

7           Now, we've noted that you can make  
8 recommendations, that you have, Joint Review Panels  
9 have in the past, and we've also noted that both  
10 governments have stated that they listen to what  
11 you say. Canada has said in this hearing that it  
12 will inform itself for its consultation efforts  
13 from your decision. Alberta regrettably chooses to  
14 no longer participate in these hearings, but we can  
15 only hope that they, too, will perform their  
16 obligations in light of the information that is  
17 gleaned from this process.

18           I should tell you, I have been recently  
19 hunting for speakers for my stereo system. And it  
20 occurred to me last night when I was on Google  
21 looking at that, that these Joint Review Panels are  
22 much like loud speakers in that the recommendations  
23 that you make seem to be well heard by governments.  
24 And so we submit that that's a very important part  
25 of your decision-making process.



1           The Government of Canada shares Mikisew's  
2           concerns about cumulative effects of oil sands  
3           development on our traditional lands. They believe  
4           that through diligence on the part of operators,  
5           and through a number of regional initiatives, the  
6           cumulative effects can be successfully managed.  
7           We're not so sure. However, we do know that unless  
8           regulators and governments are fully informed as to  
9           the cumulative effect of oil sands developments on  
10          both the environment and First Nation's rights,  
11          such effects cannot be managed.

12           We also know that unless affected First  
13          Nations are involved in monitoring and management  
14          in a meaningful way, the odds of long-term success  
15          are not good.

16           The Aboriginals of the area have more at  
17          stake than anybody else. They have more knowledge  
18          about the area than anyone else. Yet they are  
19          frustrated by government's failure to heed their  
20          advice and to work with them constructively.

21           Lip service is paid to the "C" word, to  
22          consultation, but Mikisew see Canada and Alberta as  
23          working hard to avoid as opposed to observe their  
24          Treaty obligations.

25           The Mikisew wish to provide the Joint Review

1 Panel a number of recommendations that we hope the  
2 Panel sees fit to pass on. With one exception,  
3 these recommendations are contained in our original  
4 submission. Some are new to these hearings, but  
5 most will have a familiar ring. All of them are in  
6 respect of cumulative effects and regional  
7 concerns.

8 And I should say that having gone through  
9 them again over the last few days, we've noted that  
10 there appears to be some repetition among them.  
11 There's 19 original. We're going to add one more  
12 today. Probably could have pared them down to 13  
13 or 14, but I'm going to go through the original  
14 group in any event.

15 So the first recommendation is that Canada  
16 and Alberta jointly fund Mikisew to develop a  
17 Traditional Land and Resource Use Management Plan.  
18 From the development of the plan, that Alberta and  
19 Canada take the necessary steps to implement that  
20 plan, including adhering to the thresholds, limits  
21 and criteria identified in the plan in subsequent  
22 regulatory processes conducted by and decisions of  
23 the ERCB or future Joint Review Panels.

24 That's the joint resource use plan that was  
25 referred to in evidence as the TLRUMP. Frankly, I

1           prefer the ACFN's acronym. Nevertheless.

2           You'll recall in my discussions with DFO the  
3 following points were made:

4

5           (a) DFO measures impacts to the  
6 environment as does Environment  
7 Canada, and not impacts to Treaty  
8 Rights.

9           (b) The assessments of rights and  
10 impacts on those rights is a  
11 complicated matter.

12          (c) Having a tool which provides  
13 the knowledge of the rights and  
14 allows some measurement of impacts  
15 would be useful for those  
16 departments whose mandates it is to  
17 honour Treaty Rights; and

18          (d) A traditional land resource  
19 use and management plan as such a  
20 tool.

21

22           Now, somewhere in the bowels of government  
23 this initiative got stopped. We ask that the Joint  
24 Review Panel recommend to Canada and Alberta that  
25 it get restarted.

1           The second recommendation is that monitoring  
2           be conducted by the Federal Government through a  
3           program overseen by a committee of independent  
4           experts and Aboriginal representatives, including  
5           the Mikisew. This should include at a minimum:

6  
7           (a) That Canada and Alberta work  
8           with Mikisew to develop and fund a  
9           community-controlled health  
10          assessment of water and terrestrial  
11          resources, including wildlife and  
12          monitoring;

13          (b) Implementation of an  
14          independent and scientifically  
15          rigorous monitoring program for the  
16          delta in consultation with local  
17          First Nations to address the  
18          effects of current and reasonably  
19          foreseeable development on the  
20          Delta; and

21          (c) That Mikisew be meaningfully  
22          included in the development and  
23          implementation of the Joint  
24          Canada-Alberta Monitoring Program,  
25          and that no further projects after

1                   this one be approved until that  
2                   monitoring program is operational  
3                   and had at least five years to  
4                   gather and assess data, including  
5                   traditional knowledge.

6  
7                   The recent publication of findings by Kirk  
8                   and others is notice to all that the impacts of the  
9                   oil sands developments are more widespread than  
10                  have been previously predicted. In light of those  
11                  results, it's even more important that First  
12                  Nations who have traditional ties to this area be  
13                  intimately involved in the assessment and  
14                  monitoring. We've made it clear to Canada and  
15                  Alberta that the Mikisew and other First Nations  
16                  affected by cumulative effects must be included in  
17                  the development and implementation of this proposed  
18                  world-class monitoring program. But to date, we  
19                  have seen little indication that the program will  
20                  consider the conditions required to exercise our  
21                  Treaty Rights without a panel such as this one  
22                  recommending it.

23                  The third recommendation is that through  
24                  consultation, Aboriginal peoples, Canada and  
25                  Alberta take the necessary steps to regionalize the

1 regulation of certain aspects of oil sands such as  
2 reclamation, tailings reduction and water use,  
3 giving equal weight to traditional knowledge and  
4 western science, and having regard to the  
5 protection of Section 35 rights now and into the  
6 future.

7 This is obviously a very general  
8 recommendation. But we note that most of the  
9 regional programs are not geared to observance of  
10 Treaty Rights. For instance, Phase I of the IFN  
11 for the Athabasca did not consider the  
12 transportation needs of First Nations. And Mikisew  
13 is concerned that Phase II is similarly being  
14 developed without meaningful consultation and  
15 without appropriate consideration of Mikisew's  
16 rights and culture.

17 The fourth recommendation is that Alberta  
18 work with Aboriginal peoples to jointly develop and  
19 finalize a wetland policy and reclamation standards  
20 that includes compensation for destroyed or altered  
21 wetlands, particularly bogs and fens. You've heard  
22 that peatlands cannot be reclaimed. What will  
23 replace them will provide less biodiversity, the  
24 land will be poorer, and we submit the loss must be  
25 recognized in some way.

1                   Five, specifically with respect to  
2                   waterbodies and waterways:

3

4                   (a)     That the Athabasca and  
5                   Firebag Rivers be designated as  
6                   heritage rivers.

7                   (b)     That Alberta and Canada  
8                   establish a comprehensive and  
9                   transparent monitoring program for  
10                  water flows and water quality for  
11                  the Lower Athabasca River basin,  
12                  including monitoring of tailings  
13                  reclamation and tailings seepage,  
14                  that is overseen by a  
15                  government-funded committee of  
16                  independent experts and Aboriginal  
17                  representatives, including the  
18                  Mikisew.

19                  (c)     That Alberta and Canada  
20                  establish precautionary Aboriginal  
21                  Base Flow for the Athabasca River  
22                  at 1600 cubic metres per second and  
23                  a precautionary Aboriginal extreme  
24                  flow at a level of 400 cubic metres  
25                  per second during the months that

1 the river is used for travel.

2 (d) that Alberta and Canada  
3 immediately implement a  
4 precautionary Base Flow of the  
5 Athabasca River of 100 cubic metres  
6 per second below which no  
7 withdrawals would be allowed.

8 (e) That governments work with  
9 Aboriginal peoples to develop a  
10 process for altering water permits  
11 to existing mines so as to lower  
12 and cap the peak water withdrawal  
13 that will be needed by the oil  
14 sands industry from the Lower  
15 Athabasca River.

16 (f) That Canada and Alberta  
17 include tributaries in their  
18 calculations of in-stream flow  
19 needs as they finalize the Lower  
20 Athabasca Management Framework in  
21 Phase 2; and

22 (g) That Alberta and Canada adopt  
23 and implement all recommendations  
24 including those listed above as set  
25 out in the review of Phase 2



1 Framework Committee Recommendations  
2 Synthesis Report that was produced  
3 on behalf of the Mikisew and  
4 Athabasca Chipewyan First Nation.  
5 And that's appended in our  
6 exhibits.

7  
8 Water and waterbodies are absolutely critical  
9 to all aspects of Treaty Rights and our culture.  
10 When there are sufficient water levels, we can  
11 access harvesting locations and spiritual sites,  
12 but when water levels are low, we cannot access our  
13 harvesting areas and navigation becomes dangerous.

14 Clean water sustains our harvesters while out  
15 on the land, but when there are concerns about  
16 water quality, our harvesters must haul water with  
17 them, which increases the time, difficulty and  
18 expense of harvesting.

19 Joint Review Panels in the past have been  
20 instrumental in persuading Canada and Alberta to  
21 develop Base Flow guidelines. While we do not  
22 expect this Panel to dictate the specifics of those  
23 guidelines, we ask the Panel to remind Canada and  
24 Alberta of their obligations to First Nations in  
25 the development of those guidelines.

1           The sixth recommendation is that Canada  
2           actively assume a stronger federal role in  
3           protecting freshwater in the oil sands through  
4           monitoring the release of toxic substances and the  
5           impacts of such substances on fisheries through a  
6           stronger enforcement presence. And this needs no  
7           further explanation.

8           Seven. That Canada and Alberta expand the  
9           testing parameters of drinking water at Fort  
10          Chipewyan to include PAHs and toxic metals using  
11          methodology capable of measuring at thresholds  
12          relative to human health.

13          Mr. Chairman, the health concerns of Fort  
14          Chipewyan are a matter of public record. We know  
15          from recent studies that the impacts of the mines  
16          and upgraders is greater than previously thought.  
17          This recommendation is just the application of  
18          commonsense and good judgment.

19          Eight. That Wood Buffalo National Park be  
20          included in any impact study in respect of oil  
21          sands activity.

22          And in respect of this one, we would state  
23          that as development continues in the Oil Sands  
24          Region, downstream and other cumulative effects  
25          negatively impact the environment and traditional

1 resources of Wood Buffalo National Park. This  
2 development also negatively impacts our ability to  
3 exercise our Treaty Rights in the Wood Buffalo  
4 National Park.

5 Governments and Proponents must meaningfully  
6 consult with us about the full scale of the  
7 cumulative effects which include studying and  
8 understanding how the direct and indirect and  
9 cumulative effects of development are affecting the  
10 Wood Buffalo National Park.

11 The ninth recommendation is that Alberta work  
12 with Mikisew and Lower Athabasca First Nations to  
13 develop a Lower Athabasca Regional Plan, a LARP,  
14 that appropriately addresses First Nation concerns  
15 and that uses a rights-based approach to land-use  
16 planning, including:

17  
18 (a) The results of a Mikisew-led  
19 traditional land resource  
20 management plan be incorporated  
21 into the amended LARP.

22 (b) That Canada and Alberta  
23 acknowledge the First Nations'  
24 exercise of Treaty Rights as a  
25 priority in land use in their

1                   traditional territories and cause  
2                   that priority to be reflected in  
3                   land use and resource development  
4                   policies, such as LARP, and all  
5                   Crown decision making; and  
6                   (c)     The establishment of First  
7                   Nation specific land-use  
8                   conservation areas with viable  
9                   corridors that are managed jointly  
10                  with First Nations and Alberta.

11  
12                  Our view is that LARP in its current form  
13                  fails to protect Mikisew's traditional territories  
14                  and the sustained exercise of Mikisew's Treaty  
15                  Rights and culture.

16                  In our view, the Crown has not honoured its  
17                  obligations to the Mikisew by this initiative and  
18                  it must be revised. It should be revised following  
19                  meaningful consultation with Mikisew and other  
20                  First Nations and following a Traditional Land  
21                  Resource Use Management Plan.

22                  If there's to be a land use planning  
23                  mechanism in the Oil Sands Region, that's the only  
24                  way that you'll be able to have, we will be able to  
25                  have a land use planning mechanism in the oil sands

1           that can effectively and credibly manage cumulative  
2           effects.

3           Ten. That resources be provided to First  
4           Nations to conduct a regional cumulative effects  
5           assessment which includes comprehensive traditional  
6           land use and traditional ecological knowledge with  
7           the aim of developing a traditional resource use  
8           plan. That plan should be a key focus in other  
9           policies such as LARP. Again, this is a repeat of  
10          the first and ninth recommendations. Or a  
11          synthesis of them.

12          Eleven. That Canada and Alberta utilize a  
13          terrestrial No Net Loss standard when considering  
14          disturbance approvals, giving equal weight to  
15          traditional knowledge and western science.

16          The Mikisew have repeatedly requested that  
17          Alberta and Canada work with them to identify the  
18          qualitative and quantitative conditions required to  
19          sustain the exercise of Mikisew's Treaty rights as  
20          cumulative effects of development continue to  
21          dramatically increase.

22          Mikisew have also expressed concern at the  
23          continued and rapid loss of areas in their  
24          traditional lands that are or can be used for the  
25          exercise of those rights. The key here is that

1           when considering loss, the Crown must recognize  
2           loss not only to the environment, but to those  
3           Treaty Rights.

4           Twelve. That Canada and/or Alberta establish  
5           pre-disturbance baseline information, the range of  
6           natural variation for wildlife populations and the  
7           conditions required to support Mikisew's rights and  
8           culture before disturbance of any further  
9           industrial activity. In part, this would be  
10          accomplished through the Traditional Land and  
11          Resource Use Management Plan and meaningful  
12          consultation to incorporate this information into  
13          the development of effective cumulative effects  
14          management measures before regulators and or the  
15          Crown consider any future industrial activities  
16          beyond Shell's proposed Jackpine and Pierre River  
17          Projects.

18          Thirteen. That Canada and Alberta work with  
19          Mikisew to identify and protect key species  
20          affected by cumulative effects such as bison,  
21          caribou and moose. In this regard, Canada must  
22          revise the recovery plans for the wood bison and  
23          woodland buffalo identifying critical habitat which  
24          must be protected under the **Species at Risk Act**.  
25          We note that recent studies show that habitat loss

1 is much greater than predicted. This  
2 recommendation, we believe, is one that is  
3 critical.

4 Fourteen. That Canada conduct with Mikisew a  
5 traditional food study to examine the impact of oil  
6 sands contaminants on traditional foods such as  
7 fish, moose, caribou, small game, bird eggs and  
8 berries in the region. Special attention should be  
9 drawn to the location of traditional foods in  
10 relation to the oil sands mine development. Again,  
11 this could be incorporated into a TLRUMP.

12 Fifteen. That Alberta finalize the oil sands  
13 mine liabilities management program with input from  
14 Mikisew and other First Nations. We're certain the  
15 Panel is aware that the mine securities program is  
16 in need of reform.

17 Sixteen. That Alberta and Canada conduct a  
18 comprehensive baseline study for Fort Chipewyan  
19 residents as recommended in the 2003 EUB Decision  
20 Report. In addition, a study of contaminant intake  
21 and body burden of members of Fort Chipewyan should  
22 be undertaken. Had Canada put a representative  
23 from Health Canada on the Panel, we would have  
24 asked them why this recommendation still has not  
25 been carried out after 10 years.

1                   Seventeen. That Canada develop a  
2                   comprehensive sustainable employment strategy with  
3                   Mikisew to address employment and training issues  
4                   in the region. And we should say that while some  
5                   operators have undertaken initiatives such as  
6                   fly-in/fly-out transportation between shifts, more  
7                   must be done in order that the persons most  
8                   impacted by oil sands development be put in a  
9                   position to reap some benefit from the oil sands  
10                  development.

11                  Eighteen. That Canada and Alberta ensure the  
12                  Mikisew has adequate capacity for consultation on  
13                  all resource development activities that may impact  
14                  their traditional lands. The resources of First  
15                  Nations in the area are stretched to the limit  
16                  trying to deal with resource development activities  
17                  on their traditional lands. While all acknowledge  
18                  that consultation and accommodation are necessary,  
19                  these objectives cannot be achieved in the absence  
20                  of First Nation capacity. In the **Taku River** case,  
21                  one of the factors that the Supreme Court of Canada  
22                  considered when determining if consultation had  
23                  been meaningful was the provision of funding to the  
24                  First Nation to gather information and participate  
25                  in consultation. This is a principle that cannot



1 be overstated.

2 Nineteen. That Canada and Alberta resource  
3 additional First Nations directed analysis related  
4 to health, diet, practice of Treaty and Aboriginal  
5 Rights, and avoidance patterns related to  
6 contaminants.

7 Again, some of the previous recommendations  
8 incorporated, are incorporated into this one,  
9 however, we seek to examine the cumulative impacts  
10 of oil sands, again, so that this information can  
11 be used effectively and credibly to manage  
12 cumulative effects.

13 The 20th recommendation is a new one and it  
14 was the subject of some of my discussions in  
15 respect of CEMA with the Federal panel. And the  
16 recommendation is that CEMA's annual planned and  
17 budgeted programs recommended by its Management  
18 Board be fully funded. Previous tribunals have put  
19 great reliance on CEMA to deliver programs and  
20 recommendations to Canada and Alberta. Canada  
21 agrees that what is proposed by CEMA's Management  
22 Board are all important programs. Yet the evidence  
23 before you is that CEMA has been underfunded to the  
24 tune of two to three million dollars annually.  
25 Somebody is not stepping up to the plate.

1           With the money being generated by oil sands  
2           developments for the entire country, to say nothing  
3           of foreign shareholders, and with what is at stake  
4           for First Nations, this is inexcusable. If CEMA is  
5           to be relied upon, its programs must be fully  
6           funded. We ask this Joint Review Panel to put the  
7           heat on Canada and on Alberta and on industry to  
8           rectify this situation.

9           Mr. Chairman, Members of the Panel, we have  
10          no choice but to hope that Canada and Alberta  
11          manage the cumulative effects in a way that  
12          protects the environment and our rights. These  
13          recommendations that I've provided to you are our  
14          earnest attempt to provide a partial roadmap to the  
15          Crowns as to how to possibly meet their  
16          obligations. Simple delegation to oil sands  
17          operators will not suffice. We submit that it's in  
18          the public interest that Canada's and Alberta's  
19          Treaty 8 obligations be honoured.

20          To the extent that you can reinforce this  
21          message and be our loud speakers to Canada and  
22          Alberta, we thank you.

23          Those are my submissions. I should say I  
24          neglected to point out that we've previously  
25          provided to the court reporter the citations that I

1           did not bore you with in my discussions this  
2           morning, and we'd ask that those be incorporated  
3           into the record.

4   THE CHAIRMAN:                   Thanks, Mr. Mallon.

5   MR. MALLON:                    Thank you, sir. And if I  
6           don't get the opportunity, thank you again for  
7           allowing us to be here and participate. Thank you.

8   THE CHAIRMAN:                   You're welcome.

9           Mr. Murphy.

10   MR. MURPHY:                   Mr. Chairman, before we take  
11           a lunch break, I wonder if I could speak to one  
12           housekeeping matter.

13

14   **HOUSEKEEPING MATTER SPOKEN TO BY MR. MURPHY:**

15   MR. MURPHY:                   A short while ago I  
16           circulated by e-mail a copy of ACFN's written  
17           submissions and Mr. Perkins suggested I speak to  
18           the Panel about this. You might recall when I got  
19           up yesterday to start oral submissions I did say  
20           that we are intending on circulating a copy of our  
21           written submissions. What we did was, in our oral  
22           submissions, we truncated those somewhat in the  
23           sense that you might recall I said I was starting  
24           at paragraph 9 of the written submissions and you  
25           may recall Ms. Biem, this morning, saying that she

1           was skipping over a whole section on, you know,  
2           explaining the case law. And we tried to truncate  
3           the written submissions in the interests of time,  
4           but also because some of our colleagues, frankly,  
5           had already addressed some of the matters, for  
6           example Ms. Gorrie had addressed some of the  
7           Environmental Assessment case law.

8                        And so I don't think I explained that clearly  
9           enough. And I guess I'm requesting that our  
10          written submissions be considered as supplemental  
11          to our oral submissions and if there's any conflict  
12          between the two that the oral submissions be relied  
13          upon.

14        THE CHAIRMAN:                        Does any party have any  
15          comment about that? Mr. Denstedt?

16

17        **COMMENTS BY MR. DENSTEDT:**

18        MR. DENSTEDT:                        In fact, I do, sir. I  
19          haven't had a chance to look at the written  
20          submissions, obviously we've been here today  
21          working, but when we start by saying, putting  
22          context around this, last Friday, Mr. Chairman, the  
23          Panel --

24        THE CHAIRMAN:                        Sorry, sir, let's try again.

25        MR. DENSTEDT:                        Last Friday, the Panel

1           determined that argument for this proceeding would  
2           be oral argument. And pursuant to Section 46 of  
3           the *Rules of Practice*, the argument will be as  
4           directed, must be as directed by the Board. There  
5           are no exceptions. It's either written argument or  
6           it's oral argument.

7           It shouldn't come as a surprise to anyone.  
8           For the 23 years I've practised in front of this  
9           Panel, oral argument has in fact been oral  
10          argument. The only purpose that you provide your  
11          notes to the court reporter for is for ease of  
12          reference and citations. And quite frankly, I'm  
13          astounded that I'm hearing about this at this late  
14          date. Shell's rights would be severely prejudiced  
15          by allowing a written submission to go in at this  
16          late stage in the process without an opportunity to  
17          take the time that generally goes into written  
18          submission processes of sometimes days or weeks in  
19          between those submissions. And it should just not  
20          be allowed, sir. If my friend wants to include  
21          references to transcripts and evidence and  
22          citations, he can look at the transcript and do so.  
23          So we object to this in the most strenuous way.

24        THE CHAIRMAN:                    Anything in reply, sir?

25

1       **REPLY COMMENTS BY MR. MURPHY:**

2       MR. MURPHY:                               I should have said that there  
3               aren't any additional substantive matters in the  
4               written form of our submissions. Our oral  
5               submissions follow the written submissions. What's  
6               provided in our written submissions are the  
7               detailed references to the evidence, so, you know,  
8               where we've referred to the transcript evidence and  
9               exhibit numbers. And so it wasn't meant to  
10              surprise anybody or add any additional information  
11              or, I mean, you know, new submissions. I simply  
12              meant to give everybody a copy of what we've done  
13              and what we're relying upon. That's all.

14      THE CHAIRMAN:                           Thank you. So we'll consider  
15              this over the lunch break. And we'll resume at  
16              1:15. Thank you.

17

18   **(The Luncheon Adjournment)**

19   **(12:15 p.m. to 1:15 p.m.)**

20

21      THE CHAIRMAN:                           Could you take your places,  
22              please.

23              Mr. Purdy, I was just going to address the  
24              matter that Mr. Murphy raised before the lunch  
25              break and I just wondered if there'd been any

1           developments over the noon hour?

2       MR. MURPHY:                   Thank you, Mr. Chairman.

3           I've spoken with my friend, Mr. Denstedt, and I  
4           think we've figured out how to deal with it. What  
5           I proposed to him -- and my main concern is we have  
6           the evidentiary references matching what the oral  
7           submissions were and just the headings being  
8           inserted in the right areas. And so we can work  
9           with madam transcriber to ensure that happens.

10                  What I've suggested to my friend, and he  
11           seemed agreeable, is if it would help madam  
12           transcriber, she could e-mail at least the draft of  
13           the oral submission to me and copy my friend and at  
14           least I could point her to the references so that  
15           they are correct.

16       MR. DENSTEDT:               Thank you, sir. I always  
17           seem agreeable; in this case I actually am  
18           agreeable. So that's fine with us.

19       THE CHAIRMAN:               Mr. Perkins?

20       MR. PERKINS:                In that case, as I understand  
21           it, then, Mr. Chairman, we would not be filing  
22           additional information; that is, the exhibit list  
23           would not be taking in another exhibit for ACFN;  
24           rather, the material, however it ends up being,  
25           will be reflected in the transcript. I assume

1           that's the case.

2           MR. MURPHY:                           That would be my  
3           understanding.

4           THE CHAIRMAN:                       Thank you, counsel.  
5    Mr. Purdy?

6

7           **FINAL ARGUMENT OF THE REGIONAL MUNICIPALITY OF WOOD**

8           **BUFFALO, BY MR. PURDY:**

9           MR. PURDY:                           Good afternoon, Mr. Chairman  
10           and Panel. Thank you for allowing me to make  
11           submissions on behalf of the Regional Municipality.

12    The council of the Regional Municipality has  
13           a statutory responsibility pursuant to Section 3 of  
14           the ***Municipal Government Act*** to provide:

15

16    Number 1. Good government.

17    Number 2. Services, facilities and  
18           other things that, in the opinion  
19           of council are necessary or

20           desirable for the Municipality; and

21    Number 3. To develop and maintain  
22           safe and viable communities.

23

24    It is within the context of Section 3 of the  
25           ***Municipal Government Act*** that the Regional



1 Municipality has intervened in this hearing.

2 The Regional Municipality's council seeks to  
3 provide services and facilities that will create  
4 and maintain safe and viable communities within the  
5 Regional Municipality as a complement to oil sands  
6 development.

7 The Chief Administrative Officer,  
8 Mr. Laubenstein, who appeared at the hearing, said  
9 this:

10

11 "So we're committed to  
12 developing that community. We're  
13 capable of supporting it. We have  
14 the staff now in place that we  
15 believe can do the things  
16 necessary."

17

18 As stated in the Regional Municipality's  
19 brief, the vision for the Municipality is to be a  
20 world-class model of sustainable living in the  
21 North. In terms of the oil sands industry, this  
22 means that the Municipality strives to be a  
23 leading-edge community capable of supporting the  
24 development of a world-class resource. And as  
25 further stated in our brief, the Regional

1 Municipality does not oppose the Project.

2 The goal of the Regional Municipality in  
3 intervening is to report to the Joint Panel on  
4 progress made on socio-economic issues and to  
5 report on issues that remain challenging and  
6 troubling to the Regional Municipality's council  
7 and administration.

8 Clearly the Project will have socio-economic  
9 impacts for the Regional Municipality and its  
10 residents. On the positive side, the project will  
11 create wealth for the community by increasing the  
12 tax base and providing business and employment  
13 opportunities for local businesses and residents.  
14 The Project has broader positive benefits for both  
15 Alberta and Canada as enunciated by Shell in its  
16 evidence and presentation.

17 However, the Project will also place strains  
18 on the community with increased population growth,  
19 increased traffic, and increased reliance on social  
20 services.

21 Clearly, the Regional Municipality and its  
22 residents are directly impacted and each project  
23 adds to these impacts.

24 Shell has supported this proposition in its  
25 SEIA. Shell stated that oil sands expansion has

1           created pressures for the region.

2

3                       "- From the perspective of  
4                       the municipality and other service  
5                       providers, high economic and  
6                       population growth rates, giving  
7                       rise to stresses on road, municipal  
8                       and social infrastructure."

9

10                   Now, with regard to the significance of  
11                   cumulative impacts resulting from the Project and  
12                   from regional oil sands activities on  
13                   socio-economic conditions, there's anticipated to  
14                   be a significant growth in population because of  
15                   the Project. The Project will require  
16                   approximately 3,000 workers at its peak of  
17                   construction and 750 operational workers while the  
18                   mine is in operation.

19                   Cumulatively, this will lead to rapid  
20                   population growth. By 2030, the regional  
21                   population is expected to double to exceed 230,000  
22                   with Fort McMurray having a population of  
23                   approximately 200,000.

24                   However, the Project will not stretch the  
25                   community's resources beyond their capacities to

1 accommodate the Project and its workers. In fact,  
2 the Regional Municipality has entered into a  
3 Memorandum of Understanding with Shell that has as  
4 its goal the mitigation of impacts such that the  
5 Regional Municipality believes that it can  
6 accommodate the socio-economic impacts of the  
7 project.

8 Now, I indicated that, by 2030, it's  
9 anticipated that Fort McMurray will have a  
10 population of approximately 200,000 people. The  
11 question that I want to pose is: What will Fort  
12 McMurray in 2030 look like? Will it look like the  
13 model of sustainable living as presented by  
14 Mr. Laubenstein in his presentation? Or will it be  
15 a community that is flown over, with chronic  
16 housing shortages and high housing prices, with  
17 transportation issues, and that struggles to  
18 accommodate oil sands growth?

19 I believe the answer lies in the issues that  
20 I will now address.

21 With regard to specific socio-economic  
22 issues, the Regional Municipality believes that the  
23 key issues are:

24

25 - Land release;

- 1                   -       Transportation connectiveness;  
2                   -       Work camp permitting and operation; and  
3                   -       Fly-in/fly-out operations.

4  
5                   Firstly, with respect to land release, the  
6                   Regional Municipality needs the Provincial  
7                   Government to release Crown land on a timely and  
8                   appropriate basis. The Regional Municipality needs  
9                   the Province to put in place a coherent, effective  
10                  and sensible land release strategy that deals with  
11                  servicing, access, and valuation issues.

12                  As Mr. Laubenstein indicated in his evidence,  
13                  the Regional Municipality requires the Province to  
14                  implement an integrated transportation strategy,  
15                  without which, proper land release is not possible.

16                  Mr. Laubenstein spoke not only about the need  
17                  for the release of land, but also anticipated  
18                  impacts on the market. He expressed the view that,  
19                  with more land available, the market would correct  
20                  over time and there would not be a crash. Put  
21                  simply, an effective land release policy is at the  
22                  heart of a more sustainable housing picture in Fort  
23                  McMurray.

24                  On the issue of long-term supply, Mr. Gordon,  
25                  the Regional Municipality's housing expert, gave

1           this evidence. And I quote this:

2

3                        "So what's required is a  
4                        long-term supply of accessible land  
5                        with major infrastructure  
6                        installed, and by that I mean  
7                        mainly transportation, thereby  
8                        creating a functioning free  
9                        marketplace which will stabilize  
10                      land supply and prevent land  
11                      shortages and price escalation, in  
12                      brackets, speculation, in the  
13                      future.

14                     The Municipality is doing  
15                     what it can to prevent a shortage  
16                     of land, but continued support and  
17                     assistance is required from the  
18                     Government of Alberta to create a  
19                     balanced real estate market in Fort  
20                     McMurray."

21

22                     For the Regional Municipality to properly  
23                     grow and implement its Municipal Development Plan,  
24                     the Municipality requires a long-term supply of  
25                     land like almost all other cities have the luxury

1 of. Mr. Laubenstein explained it this way, and I  
2 quote him:

3  
4 "Virtually every city that  
5 I've ever managed, and it's a few  
6 of them, has a 5-to-20 year supply  
7 of land available in the hands of  
8 the private sector so they can  
9 manage their own destiny. The  
10 number here is zero."

11  
12 On the issue of land release, I think it's  
13 clear from the evidence that we presented that the  
14 Regional Municipality is frustrated with the  
15 Province's approach. While an MoU was signed that  
16 should have created a long-term supply, there  
17 hasn't been that anticipated move forward to get  
18 this accomplished. There has been a lack of  
19 co-ordination between AESRD and Alberta  
20 Transportation. When land is released, it needs to  
21 be accessible. I will say more about access later  
22 on in my presentation.

23 I now want to turn and talk briefly about  
24 land valuation.

25 The Regional Municipality's brief discloses

1           that the communities of Fort McMurray, Anzac, and  
2           Conklin are identified as the urban centres that  
3           require a supply of land. All of these communities  
4           are surrounded by tracts of Crown land. These  
5           centres are the hole in the doughnuts. The  
6           Province holds all the cards on when, how, and at  
7           what value the land will be released.

8                     The only progress so far in instituting a  
9           long-term land supply for Fort McMurray is the  
10          Memorandum of Understanding referred to by  
11          Mr. Evans in his evidence.

12                    Now, with respect to land valuation, I want  
13          to sum up the problem this way: Currently, there's  
14          a circular problem regarding the issue of land  
15          valuation. This is the problem. The expansion of  
16          the oil sands industry has put tremendous growth  
17          pressure on the Regional Municipality. The  
18          population increase has created a huge demand for  
19          housing. A key component of housing is land. When  
20          land is not released, it becomes scarce and,  
21          therefore, more expensive. The longer the land is  
22          not released, the more scarce it becomes and, in  
23          turn, the more valuable it becomes.

24                    The Province then values the land in a vacuum  
25          and will not sell or release land until current



1 appraisal values are met. In effect, the  
2 Province's lack of a coherent and functioning Land  
3 Release Strategy has caused or largely contributed  
4 to the largest component of housing costs; that  
5 being land.

6 Mr. Evans' description of recent events and  
7 the Province's position exemplifies the  
8 circumstance. To quote Mr. Evans:

9  
10 "If I may, it's also not just  
11 explaining the situation to them.  
12 The response that we have received  
13 from one department in particular,  
14 several times over the last year,  
15 is [as read]:

16  
17 'That's not our mandate. Our  
18 mandate is to maximize the  
19 return on a public resource,  
20 which in this case is Crown  
21 land, and if a market price  
22 or if an independent  
23 appraiser determines that  
24 this is a fair price for  
25 land...'

1                   ...

2

3                   "... 'then that's what the  
4                   price is.'"

5

6                   Mr. Evans went on to comment that this  
7                   creates an incredibly artificially deformed housing  
8                   market or land market.

9                   Mr. Evans then said, and I quote him:

10

11                   "More than once I've had an  
12                   ADM say to me:

13

14                   'We know this is high, but  
15                   that's our appraisal. You  
16                   have the right to refuse it  
17                   if you don't want to buy  
18                   it.'"

19

20                   And Mr. Laubenstein had this to say in his  
21                   analysis with respect to both land cost and  
22                   valuation:

23

24                   "The land is often put on the  
25                   market by the Province without the

1           infrastructure identified. It's  
2           put on as raw land and sold as  
3           developed land. And it spirals the  
4           cost up and does not give the very  
5           thing you're looking for which is  
6           the coordinated design and actually  
7           ends up increasing the costs for  
8           all of us because then those  
9           designs are put on after the land  
10          is sold instead of before."

11  
12           All of this, I submit, creates uncertainty  
13          for the development community, a chronic shortage  
14          of land, and escalating costs.

15           I now want to turn and speak for a moment  
16          about transportation and traffic.

17           On the issue of traffic volumes and driving  
18          conditions, the Regional Municipality wants to  
19          acknowledge the leadership shown by Premier Redford  
20          relating to twinning Highway 63 south of Fort  
21          McMurray. This is welcome news. And the project  
22          is certainly needed for safety and to accommodate  
23          the traffic flow supporting the oil sands industry.  
24          However, this simply gets the people and industry  
25          to Fort McMurray. What happens then?

1                   Clearly, from all accounts, the current  
2                   transportation network within the Regional  
3                   Municipality does not have capacity.  
4                   Notwithstanding CRISP and other programs, traffic  
5                   and transportation remains a major issue.  
6                   Mr. Laubenstein gave evidence that CRISP is  
7                   unfunded and no government department has taken the  
8                   lead on implementation. Mr. Laubenstein's evidence  
9                   can be summed up as follows:

10

11                   -        Highway 63 north of Fort  
12                   McMurray is at times beyond its  
13                   capacity.

14                   -        The heavy traffic creates  
15                   congestion and safety issues; and

16                   -        Highway 63 is the only route  
17                   through Fort McMurray and this  
18                   creates a bottleneck.

19

20                   On the issue of transportation, the Regional  
21                   Municipality is proposing an eastern bypass route.  
22                   The eastern bypass route is needed to take pressure  
23                   off Highway 63 through Fort McMurray. The bypass  
24                   would reduce the construction and oil sands  
25                   operations traffic on Highway 63 in the Fort

1 McMurray Urban Service Area and allow residents to  
2 move more freely around the Urban Service Area with  
3 respect to commutes and for other pursuits.

4 The proposed eastern bypass will essentially  
5 be a highway that will divert traffic around Fort  
6 McMurray to the east, with a bridge over the  
7 Clearwater River, and then connect to the west  
8 through the Parsons Creek interchange that needs to  
9 yet be completed. This was all described in  
10 Mr. Laubenstein's evidence to you.

11 This Project has been discussed but a plan  
12 has not been finalized and there's no funding for  
13 this critical piece of infrastructure.

14 The Regional Municipality has proposed to the  
15 Province that an alternative funding model should  
16 be discussed with industry so this highway can be  
17 built. But, currently, there is no initiative for  
18 this to take place.

19 With respect to both land release and  
20 transportation, the Regional Municipality asserts  
21 that there needs to be a more unified voice from  
22 the Province in its co-ordination of both land  
23 release and transportation issues.

24 Mr. Laubenstein is proposing for the Regional  
25 Municipality that some type of authority be put in

1 place that would have the Province, the Federal  
2 Government, the Regional Municipality, and industry  
3 at the table to deal with these issues.

4 Now, I want to return for a minute and talk  
5 about the relationship of land release and  
6 accessibility.

7 The Regional Municipality made it clear in  
8 its evidence that bringing land on the market  
9 without adequate road access does not and will not  
10 solve the housing issue. There needs to be a  
11 co-ordination by the Provincial Government on land  
12 release and land access. This was amplified by the  
13 Regional Municipality's housing expert, Mr. Gordon,  
14 and I quote him:

15  
16 "I want to talk briefly about  
17 residential land.

18 While some progress has been  
19 made in convincing the Alberta  
20 Government to release more land,  
21 there are still significant  
22 challenges in making the bulk of  
23 that land accessible to enable  
24 residential development. And the  
25 example I'll use is Parson's Creek.

1           While Parson's Creek, you know,  
2           provides an opportunity for a large  
3           development, to date, only 1,000  
4           units are available. And that's  
5           because the subdivision isn't  
6           accessible by road. So there's  
7           still a lot of challenges."

8  
9           I want to turn now and discuss work camps.  
10          Project accommodations or work camps have  
11          proliferated in an atmosphere where there is a huge  
12          demand for housing but little accommodation  
13          available. Developers have resorted to  
14          fly-in/fly-out operations to mitigate the scarcity  
15          of housing. The Regional Municipality asserts that  
16          this is only a short-term solution, and in the long  
17          run, fly-in/fly-out has a negative impact on the  
18          community. Generally, the Regional Municipality  
19          would prefer to have workers live within the  
20          community. And I now quote from the Regional  
21          Municipality's brief:

22  
23                        "The Municipality encourages  
24                        and supports the efforts of  
25                        companies that choose to not use a

1 fly-in/fly-out model for their  
2 operations workers. Encouraging  
3 operations staff to live within the  
4 community is key to the development  
5 of a thriving and sustainable  
6 region that will support the  
7 development of the oil sands  
8 industry. The Municipality accepts  
9 that temporary or construction  
10 labour may, under certain  
11 circumstances, be housed within  
12 project accommodations; however,  
13 the Municipality is eager to work  
14 with the Province and the oil sands  
15 industry to develop strategies to  
16 encourage permanent, operations  
17 staff to take permanent residency  
18 in the region."

19  
20 At this point, and at this time, the Regional  
21 Municipality accepts that Shell's construction  
22 workers may well need to live in work camps, but it  
23 encourages and supports operational workers living  
24 in the community close to the project.

25 While the overall short-term and long-term



1 impacts of fly-in/fly-out operations are not well  
2 understood, as indicated by the Regional  
3 Municipality's evidence, the Regional  
4 Municipality's housing and socio-economic experts  
5 who gave evidence at the hearing were both of the  
6 opinion that fly-in/fly-out models had negative  
7 impacts for the host community.

8 Firstly, Mr. Gordon gave this evidence  
9 regarding work camp growth:

10

11 "From 2002 to 2005, Fort  
12 McMurray captured 92 percent of the  
13 population growth and the work  
14 camps captured about 8 percent."

15

...

16

17 "From 2005 to 2012, Fort  
18 McMurray captured only 29 percent  
19 of the growth, 70 percent of the  
20 growth was in work camps."

21

22 His conclusions from these trends of workers  
23 not locating in the community and therefore not  
24 having their families relocate with them is that it  
25 creates the following:

25

1           -       a population imbalance in the  
2           community with an oversupply of  
3           single males;

4           -       it reduces potential  
5           population growth because  
6           population grows with a single  
7           worker versus a worker and his or  
8           her family; and

9           -       it reduces the availability  
10          of workers for other sectors of the  
11          economy, such as retail.

12                 Mr. Gordon indicated that, in his opinion,  
13          all of this will make it very difficult to build an  
14          inclusive and sustainable community in Fort  
15          McMurray.

16                 Mr. Howery, the Regional Municipality's  
17          socio-economic expert had this to say, and I quote  
18          him (as read):

19  
20                         "Firstly, it was estimated  
21                         that in 2001, the population of  
22                         work camps was 25 percent of the  
23                         total population. By 2012, the  
24                         work camp population comprised  
25                         40 percent of the population.

1                   Secondly, this increase is  
2                   significant, because with growth,  
3                   generally you expect the population  
4                   will grow through families and not  
5                   single workers. The effect is lost  
6                   to the community."

7

8                   Mr. Howery went on to say:

9

10                   "It's something that  
11                   typically you take for granted  
12                   that, as a population of a  
13                   community grows, that its residents  
14                   are comprised of families. And  
15                   those families provide a variety of  
16                   things to the community that, as I  
17                   say, often are taken for granted.  
18                   In particular, the family provides  
19                   a support base for the family and  
20                   for the workers in those families  
21                   within that family unit. And that  
22                   support base is comprised of a  
23                   whole bunch of things which enable  
24                   people to thrive and enjoy their  
25                   work and non-work life."

1

2

Mr. Howery was also of the opinion that the community is deprived of those family workers to provide a labour force for other local businesses and that the community was also deprived of non-paid work activities and volunteer activities. And this is what Mr. Howery had to say about that:

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"... there's another component to having the complete family available within a community is that oftentimes the family also supports non-paid work activities and volunteer activities which are also important to the social fabric of the community, including schools and other social support organizations which are available in the community to help the residents of that community."

He also indicated that having the family in the community enhances the economic retail base of the community.

Therefore, clearly there's evidence before

1 the Panel that there are significant negative  
2 impacts to a fly-in/fly-out model being used by  
3 developers of the oil sands.

4 Now, Shell actually supports the Regional  
5 Municipality's view of operational workers living  
6 in the community, and you probably will recall the  
7 evidence that Mr. Broadhurst gave. And there was  
8 just one exchange that I wanted to point out to  
9 you, and that comes from a question that  
10 Mr. Perkins asked and that Mr. Broadhurst responded  
11 to in this way:

12  
13 "Our focus has always been  
14 and, in fact, it is with all of our  
15 operations in Canada, to look to  
16 have our operating workforce reside  
17 close to the operating location.  
18 That, we think, is the best for the  
19 community."

20  
21 I now want to turn and talk about the  
22 operational and permitting challenges of work  
23 camps.

24 The Regional Municipality illustrated the  
25 following challenge with respect to work camps.

1           While there is a municipal requirement that work  
2           camps be permitted by the Regional Municipality,  
3           many developers do not seek to comply with  
4           municipal regulations for work camps. In 2012  
5           alone, the Regional Municipality found 28 existing  
6           camps that were not permitted.

7           Mr. Evans of the Regional Municipality's  
8           witness panel believed that part of the problem  
9           stems from a lack of cooperation with AESRD. And  
10          he had this to say:

11  
12                         "The leases are issued. It's  
13                         a miscellaneous land lease is  
14                         issued by formerly SRD, now AESRD.  
15                         And one of the provisions in the  
16                         leasing process says, more or less,  
17                         meeting the requirements of this  
18                         lease should not be construed as  
19                         meeting any other requirement such  
20                         as municipal, DFO, what have you.  
21                         But when the lease is issued,  
22                         nobody at the Province follows up  
23                         to make sure that the proponent has  
24                         gone to any other agencies. And if  
25                         the Province doesn't share the

1 leases with us, we don't know that  
2 anybody's established a camp. So  
3 there have been instances where  
4 operators have received a lease  
5 from the Province and they've  
6 assumed, deliberately or  
7 accidentally, that that was  
8 sufficient and gone on to build  
9 their operation without obtaining a  
10 development permit from the  
11 Municipality."

12  
13 Again, from the evidence, this has resulted  
14 in 2012 finding out that there was 28 unpermitted  
15 camps.

16 Basically on this issue, the Regional  
17 Municipality is concerned with the lack of  
18 communication from AESRD to the Regional  
19 Municipality that a lease has been issued and that  
20 AESRD does not require the developer to show proof  
21 that it has obtained a municipal development permit  
22 to construct and operate the camp. Clearly this  
23 creates safety issues because the Regional  
24 Municipality needs to know where populations are  
25 located for such things as fire suppression and

1 emergency response.

2 Mr. Laubenstein had this to say when he  
3 reported on the issue, and I quote him:

4  
5 "And you may not recall, but  
6 I think I mentioned earlier on,  
7 this is all, once again, part of  
8 the transportation network. These  
9 camps are approved in isolation,  
10 without input from us originally,  
11 they are all over the place, they  
12 are not coordinated, the  
13 transportation to and from them  
14 isn't there, the quality of life  
15 issues that could be made available  
16 to the camp, people that live in  
17 the camps, aren't there because  
18 they are not clustered.

19 So those are some of the things that are  
20 addressed in CRISP as a need to  
21 deal with these things, but there's  
22 really nobody doing it."

23  
24 In conclusion, regarding the permitting and  
25 operation of camps, the Regional Municipality is



1           concerned about safety, emergency access, and  
2           unnecessary impacts on the environment.

3                       With regard to permitting, the issue could be  
4           better managed by AESRD alerting the Municipality  
5           to any applications for camp accommodations, AESRD  
6           requiring a condition that the applicant obtain a  
7           development permit from the Regional Municipality  
8           and provide proof of that, and that AESRD require  
9           monitoring and reporting of camps with yearly  
10          reporting on worker spaces that are available in  
11          the camp, and for the reporting period, the number  
12          of workers per month that resided in the camp.

13                      The Regional Municipality supports the  
14          recommendations of CRISP and the goal of its own  
15          MDP, both of which support a centralized camp  
16          approach through the development of multicamp  
17          nodes. This will lessen safety, transportation,  
18          and environmental impacts.

19                      On the issue of fly-in/fly-out operations,  
20          the Regional Municipality presented evidence in its  
21          brief and through Mr. Laubenstein's evidence at the  
22          hearing that operational expenditures will soon  
23          outpace construction expenditures. The Regional  
24          Municipality asserts that now is the time for  
25          regulators and industry to promote, encourage and

1 support workers living in the community where they  
2 work.

3 Now, I want to turn and speak briefly about  
4 the SEIA process. Since approximately 2000, the  
5 Regional Municipality has undergone transformative  
6 changes largely because of oil sands development.  
7 However, in the Regional Municipality's opinion,  
8 research concerning project-specific and cumulative  
9 socio-economic impacts is lacking. AESRD has  
10 indicated that it is not adequately resourced to  
11 review the information provided. In the Regional  
12 Municipality's view, this creates an ineffective  
13 and inefficient assessment of socio-economic issues  
14 facing the region. The Regional Municipality would  
15 like to see a more coordinated approach, which  
16 includes both senior levels of government, the  
17 Regional Municipality, and industry so that  
18 socio-economic impacts can be identified, mitigated  
19 and monitored.

20 Prior Review Panels have indicated that they  
21 understood the challenges facing the Regional  
22 Municipality. The Regional Municipality believes  
23 that it is once again the time for the Joint Review  
24 Panel to take the lead and provide further comment  
25 on this issue.

1           Now, in conclusion, I just want to go through  
2           some summarizing points with respect to my  
3           presentation and also with respect to  
4           recommendations that the Regional Municipality  
5           would like the Joint Review Panel to make.

6           Firstly, the Regional Municipality and its  
7           residents are directly impacted by the Project  
8           specifically and by oil sands development generally  
9           on a cumulative basis.

10           Number 2. The Regional Municipality does not  
11           oppose Shell's application of Expansion of its  
12           Jackpine Mine as it relates to socio-economic  
13           issues that impact the Regional Municipality and  
14           its residents.

15           Number 3. The Regional Municipality leaves  
16           issues of air quality, water quality, land use, and  
17           Aboriginal and Treaty Rights to those parties that  
18           are statutorily and otherwise responsible for these  
19           issues.

20           Number 4. The Regional Municipality remains  
21           concerned about the manner in which socio-economic  
22           reviews are conducted and recommends that the Joint  
23           Review Panel recommend to the Provincial Government  
24           that the Regional Municipality be consulted earlier  
25           in the process so that, number one, there is more

1 collaboration amongst the Province, the Regional  
2 Municipality and industry on project-specific and  
3 cumulative impacts, and number two, there is more  
4 clarity on the socio-economic assessment mandate of  
5 the Joint Review Panel. Clearly, further work  
6 needs to be done having regard to the unprecedented  
7 impacts on the region and what is yet to come.

8           Number 5. The Regional Municipality is  
9 concerned and frustrated with the lack of a  
10 coordinated provincial approach to land release in  
11 the region. The Regional Municipality requests  
12 that the Joint Review Panel strongly urge the  
13 Government of Alberta to implement and execute a  
14 coherent land release policy having regard to the  
15 unique issues in the Wood Buffalo region. This  
16 policy should include servicing, access, and  
17 valuation of land that reflects these unique  
18 issues.

19           Number 6. The Regional Municipality is  
20 concerned about the dramatic increase and  
21 proliferation of work camp population and the  
22 process of fly-in/fly-out operations and requests  
23 that the Joint Review Panel recommend to the  
24 Province of Alberta that its Ministries work more  
25 closely with the Regional Municipality to report

1 work camp applications, require proof of municipal  
2 permitting, and recommend to Alberta and Canada to  
3 identify, assess, and monitor the impacts of  
4 fly-in/fly-out workforce models on host  
5 communities.

6 The Regional Municipality specifically  
7 requests that the Joint Review Panel find on the  
8 evidence presented in this hearing that  
9 fly-in/fly-out operations have a negative impact on  
10 the region.

11 Number 7. The Joint Review Panel recommend  
12 to Canada that it participate in funding of  
13 transportation projects of regional significance,  
14 prioritized by the Alberta Oil Sands Area  
15 Transportation Coordination Committee. There are  
16 tremendous benefits that flow to Canada from the  
17 development of the oil sands and there's very  
18 little evidence of funding for infrastructure back  
19 from the Federal Government.

20 Number 8. The Regional Municipality requests  
21 that the Joint Review Panel recommend to the  
22 Government of Alberta that it fund CRISP so that  
23 critical infrastructure can be built on a timely  
24 basis.

25 And finally, number 9, the Regional

1           Municipality asks the Joint Review Panel to make it  
2           a condition of its approval that Shell comply with  
3           all municipal regulations that are not inconsistent  
4           with the Joint Review Panel's approval of the  
5           Project.

6                     Thank you very much.

7   THE CHAIRMAN:                     Thank you, sir.

8                     Mr. Lambrecht?

9   MR. LAMBRECHT:                    Sir, I have a number of  
10            submissions that I intend to make. Having regard  
11            to the suggestion from the Panel earlier that we  
12            should perhaps take more frequent breaks, what I  
13            would propose to do is to deal with two of the  
14            issues that I need to deal with and then suggest  
15            that we take a break at that point. That's a  
16            natural point in the submissions. And I will then  
17            turn to the third issue which takes up the bulk of  
18            the time in my submissions here.

19   THE CHAIRMAN:                    Sir, how long do you think  
20            you'd be in total?

21   MR. LAMBRECHT:                    About an hour I now think.  
22            It was a little more than what I'd initially  
23            estimated, but I need to be responsive to some of  
24            the things that were said here.

25   THE CHAIRMAN:                    What we could do is take a

1 break now for about 15 minutes and then you  
2 wouldn't have to break up your flow.

3 MR. LAMBRECHT: That will work for me  
4 perfectly. And what I would suggest in that period  
5 of time is that I intend to make reference to one  
6 exhibit. I will refer to other exhibits in the  
7 course of my submissions, but it might be helpful  
8 if the Panel staff and other counsel had 005-021  
9 available when we return. These are the  
10 submissions of the Attorney General in response to  
11 the Notices of Constitutional Question filed with  
12 the Joint Review Panel. I'll be making some  
13 reference to some of the factual materials there  
14 during the course of my submissions.

15 THE CHAIRMAN: Thanks, sir.

16 So I have 1:50 p.m. We'll take 15 minutes.

17 MR. LAMBRECHT: Thank you, sir.

18

19 **(The Afternoon Adjournment)**

20

21 THE CHAIRMAN: Mr. Lambrecht, would you like  
22 to proceed?

23 MR. LAMBRECHT: Thank you, sir.

24

25 **FINAL ARGUMENT OF THE ATTORNEY GENERAL OF CANADA, BY**

1                   **MR. LAMBRECHT:**

2           MR. LAMBRECHT:                   My name is Kirk Lambrecht. I  
3           represent the Attorney General of Canada in this  
4           proceeding. The Attorney General has two functions  
5           in this respect: First, we represent Transport  
6           Canada, Natural Resources Canada, the Department of  
7           Fisheries, and Environment Canada, who had  
8           presented scientific or expert information or  
9           knowledge which may assist the Panel both in their  
10          report on October 1st in the evidence which their  
11          panel gave and in the various aspects in which they  
12          have participated in the **EPEA** process leading to  
13          the appointment of this Panel; in particular, in  
14          the SIRs in that process.

15                   I have submissions on three issues that are  
16          set out in the final argument issues list provided  
17          by counsel for the Panel: 4.d., Air Emissions,  
18          which is very brief; 5.c., Wildlife, which is very  
19          brief; and 7, Aboriginal Groups and Issues, which  
20          is the most extensive of the submissions that I  
21          will be making to the Panel this afternoon.

22                   Time is limited and it is not possible to  
23          address all the recommendations outlined in the  
24          evidence of Transport Canada, Natural Resources  
25          Canada, Environment Canada, and the Department of



1 Fisheries and Oceans filed on October 1st. So I  
2 would like to thank the Panel and the staff for  
3 their consideration of those and the consideration  
4 of the evidence that the Federal Government  
5 witnesses gave during cross-examination and through  
6 undertakings.

7 At this point, I would note that there are  
8 seven undertakings outstanding. I have advised my  
9 clients of the importance of providing undertakings  
10 before the close of argument and I continue to  
11 advise them of the importance of providing  
12 undertakings as soon as possible.

13 So with respect to issue of 4.d., Asphaltenes  
14 in Co-Generation, Environment Canada would like to  
15 note that evidence within the departmental  
16 submission dated on October 1st did not contain  
17 specific concerns related to the use of asphaltene  
18 for co-generation. This was a direct result of  
19 communications between Environment Canada and the  
20 JRP in a letter dated December 6th, 2011, and  
21 Shell's response dated January 18th, 2012,  
22 indicating that Shell was not currently seeking  
23 approval of Asphaltene Energy Recovery, or AER, as  
24 a part of the Jackpine Mine Expansion Project.

25 Should the Project proceed and should Shell

1 reconsider that position, and the proposed use of  
2 asphaltene for co-generation in future, Environment  
3 Canada would like to note that there has not been  
4 an adequate assessment of the impact of the burning  
5 of asphaltenes for co-generation and, therefore,  
6 that it would like to participate in the additional  
7 information-gathering and assessment that should be  
8 required in that respect.

9 With respect to issue 5.c., Wildlife,  
10 Environment Canada's operational framework for the  
11 use of conservation allowances provides guidance on  
12 important design elements that may be used when  
13 allowances are considered. An important  
14 consideration that allowances are in addition to  
15 existing legislation regulations, programs, land  
16 use plans and funding, and are intended to provide  
17 an overall net benefit following land disturbance,  
18 ultimately, how conservation allowances and  
19 conservation areas may be viewed by Alberta under  
20 LARP or integrated into LARP is unknown as the  
21 biodiversity framework and landscape management  
22 plan of LARP have not yet been developed and will  
23 not be completed until the end of 2013.

24 Although the final intent of the Province of  
25 Alberta is not known, page 45 of LARP does

1 recognize the potential role of conservation  
2 offsets in landscape planning. This is referenced  
3 outside the consideration of conservation areas as  
4 defined within LARP.

5 Now, with respect to issue number 7,  
6 Aboriginal Groups and Individuals, I would like to  
7 spend some time on what I understand to be the  
8 functions of the Panel regarding Aboriginal Rights  
9 and Interests.

10 The theme of this submission, I think, is  
11 going to be that the Panel has a potential role as  
12 a catalyst in policy development via its  
13 recommendations. And so the functions of the Panel  
14 in this regard are set out in clause 6.2 of the  
15 Joint Review Panel Agreement. And these require  
16 the Panel to make findings of effects of the  
17 Project on Aboriginal and Treaty Rights, and I  
18 would assume in this that "effects" includes  
19 environmental effects as now defined in  
20 Section 5(1)(c) of **CEAA, 2012**, and also requires  
21 the Panel to make recommendations respecting the  
22 manner in which the Project may adversely affect  
23 the Aboriginal and Treaty Rights asserted by the  
24 participants.

25 I note, to begin, that many of the Aboriginal

1 parties and the other parties involved have been  
2 very supportive of the Panel process. Ms. Bishop,  
3 in her submissions, described it as a very  
4 rewarding process. Chief Adam thanked the Panel,  
5 as I understood him, or as I heard him, for taking  
6 the time to listen to the ACFN concerns. And  
7 Mr. Mallon indicated that governments listen to  
8 Panel recommendations, or at least have done so in  
9 the past.

10 So in the larger picture of the function of  
11 this Tribunal within the Project development  
12 process, it may be helpful to look at the chart at  
13 page 86 of the submissions that I filed in response  
14 to the Notices of Question of Constitutional Law  
15 that are at Exhibit 005-021. This, in effect,  
16 summarizes in a satellite-level picture how a  
17 project development for major projects like the  
18 Shell Jackpine Mine Expansion go through stages of  
19 development and that there are different procedural  
20 requirements appropriate to different problems at  
21 different stages of the project development  
22 process.

23 So in general, in general terms, in my  
24 submission, the jurisprudence establishes that  
25 Treaty and Aboriginal Rights fall within the

1 existing frameworks of Canadian law. And that  
2 framework in Canadian law has long recognized that  
3 the legislative branch of government may create  
4 specialist tribunals, and, indeed, the Energy  
5 Resources Conservation Board is a good example of  
6 one of the long-standing tribunals in Canadian  
7 history, dating back to a very early time in the  
8 history of Alberta and the management of resources  
9 under Alberta's jurisdiction.

10 For controversial projects, it is, indeed,  
11 reasonable for the Crown to integrate its  
12 Aboriginal consultation with existing tribunal  
13 process. In other words, it is reasonable for the  
14 Crown to rely on quasi-judicial tribunals  
15 recognized as operating independently of the  
16 executive branch of government to fulfill the  
17 functions described in Section 6.2 of the Terms of  
18 Reference of this Panel; that is, to make findings  
19 of effects of the Project on Treaty and Aboriginal  
20 Rights and to make recommendations respecting the  
21 manner in which the Project may adversely affect  
22 Aboriginal and Treaty Rights asserted by the  
23 participants.

24 This is consistent with the decision of the  
25 Supreme Court of Canada in *Haida*, where, at

1 paragraph 51, the Court said that:

2

3 "It is open to governments to  
4 set up regulatory schemes to  
5 address the procedural requirements  
6 appropriate to different problems  
7 at different stages..."

8

9 Of the project development process. So the  
10 key here is to recognize that major projects like  
11 the Shell Jackpine Mine Expansion move through  
12 stages. I have attempted to present these in  
13 paragraph 86 of the exhibit that I've referred you  
14 to as Planning, Approval and Development. And if  
15 you accept that overarching analysis, then where we  
16 are now is in the planning stage of the Project,  
17 asking the tribunal to determine what are the  
18 effects of the Project on Aboriginal and Treaty  
19 Rights. This is the findings aspect of the Panel's  
20 jurisdiction. And then the question arises: "What  
21 should be done about such effects?"

22 Now, here, I am going to focus my submissions  
23 on the Project-specific effects, briefly, but also  
24 some of the cumulative effects.

25 You will see in both the Terms of Reference

1 issued by Alberta Environment for the Environmental  
2 Impact Assessment, which is prepared under **EPEA**,  
3 and in the Terms of Reference for this Panel, so  
4 both of these Terms of Reference, the one for the  
5 Environmental Impact Assessment and the one for the  
6 Panel, that a Cumulative Effects Environmental  
7 Assessment is done. And this is where the  
8 Aboriginal concerns intersect with the functions of  
9 the Panel.

10 In my submission, the responsibility for  
11 answering the question "What should be done about  
12 such effects?" is distributed. It does not rest  
13 solely upon the Crown. First, and you heard  
14 Mr. Denstedt make some submissions to you about  
15 this earlier on, it falls to Shell to discharge the  
16 consultation obligations that fall upon it under  
17 the EIA Terms of Reference and to do what it can do  
18 to address Aboriginal concerns. Mr. Denstedt  
19 outlined some of these things, but they are, for  
20 example, since we are at the planning stage of the  
21 Project, it is possible to make relatively  
22 cost-effective changes in the design of the Project  
23 to address or attempt to address Aboriginal  
24 concerns. The illustration of this that Shell  
25 advances is the position it has taken with respect

1 to the diversion of the Muskeg River.

2 Shell is also in a position to attempt to  
3 structure the economic benefits of the Project in  
4 such a way that it can engage in the process of  
5 give-and-take with Aboriginal groups who can,  
6 therefore, benefit from the economic activity  
7 around them without in any way limiting their  
8 desire to pursue traditional lifestyles pursuant to  
9 Treaty or asserted Aboriginal Rights.

10 So Shell has some capacity to address  
11 Project-specific concerns and it also has some  
12 capacity to address cumulative concerns. And you  
13 heard the vice-president of heavy oil operations  
14 testify that Shell's willing to do its part in  
15 participating with stakeholder groups of different  
16 kinds and regional initiatives of different kinds  
17 to address cumulative effects.

18 After Shell comes this Panel. This Panel has  
19 the ability to make conditions of its approval.  
20 And the capacity of these to address Aboriginal  
21 concerns is outlined in some evidence which I have  
22 set out at paragraph number 89 of the exhibit that  
23 I've taken you to. And this is a document dated  
24 September 30th, 2011 where this JRP clarified the  
25 Panel's mandate respecting Aboriginal rights and



1 interests and Aboriginal consultation obligations.

2 It indicates here, and I'm going to refer you  
3 to the indented passage in paragraph 89 and read  
4 sentences from it, beginning with this one:

5  
6 "The Panel's mandate in  
7 relation to aboriginal rights and  
8 interests is set out in Article 6  
9 of the Joint Review Panel  
10 agreement. The Panel has a clear  
11 mandate to receive information  
12 about perceived impacts on  
13 aboriginal rights, including treaty  
14 rights, and the effects the project  
15 may have on those rights. The  
16 Panel is also required to document  
17 in its final report all such  
18 information provided by  
19 participants. This clearly  
20 indicates that the Panel has a  
21 mandate to hear and report on the  
22 concerns described by the ACFN and  
23 MCFN in your letter, to the extent  
24 those relate to the project and the  
25 environmental assessment to be

1                   undertaken by the panel."

2

3                   And then going on at the passage at the  
4                   bottom of page 34 of the submissions and the top of  
5                   page 35:

6

7                   "The Panel is not the Crown  
8                   and does not have a consultation  
9                   obligation arising out of the duty  
10                  of the Crown, as described in the  
11                  **Haida** and **Mikisew** decisions. The  
12                  common law has established that the  
13                  regulatory process is well-suited  
14                  to address issues that are site or  
15                  project-specific..."

16

17                  And that is the passage that I want to  
18                  emphasize here in underscoring the role of the  
19                  Panel in addressing some Aboriginal concerns.

20                  So I go on in the quotation:

21

22                  "... but it is not intended  
23                  or designed to address larger  
24                  issues of the overall impact of  
25                  development, on a regional basis,

1 on rights exercised throughout the  
2 region. Such regional concerns may  
3 be raised by parties in the course  
4 of the proceeding and the  
5 information so provided reported by  
6 the Panel, but the Panel cannot  
7 give any advance assurance that it  
8 will make decisions based on what  
9 it hears about those concerns. The  
10 Panel's hearing process may,  
11 however, assist the Crown to meet  
12 its consultation obligations to  
13 First Nations."

14  
15 Now, the evidence that has been placed before  
16 you in terms of what at least is the intent of the  
17 Crown after the Panel makes its report with its  
18 findings and recommendations is set out on the  
19 Federal side in Appendix 3 of these written  
20 submissions, and on the Provincial side, at  
21 paragraph 80 of the written submissions.

22 Let me restate this.

23 The Crown has a capacity to consult and  
24 accommodate after the Joint Review Panel report and  
25 before making any additional decisions which are

1 essential preconditions to the final investment  
2 decisions by Shell and its joint venture partners.  
3 How that capacity may be exercised should be  
4 informed by the Panel report and its  
5 recommendations. And here, I restate the theme  
6 that there is a potential here for the Panel to act  
7 as a catalyst for policy evolution via its  
8 recommendations.

9 Now, I would like to take a moment to address  
10 a submission made by Ms. Biem on behalf of the ACFN  
11 during her submissions when she indicated with  
12 respect to the evidence of the Department of  
13 Fisheries and Oceans particularly that nobody  
14 considered the Treaty Rights. With the greatest of  
15 respect, this is honestly mistaken. The transcript  
16 at page 3558, line 20, to 3559, line 10, which is a  
17 question from Mr. Perkins to Mr. Makowecki,  
18 indicates that Mr. Makowecki did, indeed, consider  
19 Treaty Rights. Similar, the same effect is  
20 transcript passage 3658, line 4, to 3659, line 17,  
21 which was a question from Panel Member Cooke to  
22 Mr. Makowecki.

23 The ACFN in the course of their evidence have  
24 filed an entire binder containing the complete  
25 record of correspondence between various

1 departmental officials and the ACFN on the issues  
2 of Aboriginal consultation. That's Exhibit 006-013  
3 and its appendices. And an examination of that  
4 will indicate that Mr. Makowecki and DFO -- that  
5 DFO officials participated in that. The DFO  
6 written evidence of October 1st also makes this  
7 clear.

8 So I'm merely going to refer here to certain  
9 parts of the DFO evidence that is filed on the  
10 record. The bottom of page 8 of that document,  
11 under the heading "Traditional Use of Lands and  
12 Resources", it shows on the face of it that the  
13 Department of Fisheries and Oceans considered  
14 Treaty Rights and Métis rights in the course of the  
15 preparation of their evidence.

16 Recommendations 2 and 3 include  
17 recommendations respecting the incorporation of  
18 components of cultural significance and traditional  
19 uses of land and resources. So does recommendation  
20 number 9.

21 And with respect to fish, Aboriginal  
22 fisheries particularly, paragraph 22 contains the  
23 following statement:

24

25

"Assessing the influence of

1 oil sands development on the status  
2 of commercial, recreational and  
3 Aboriginal fisheries and the fish  
4 and fish habitat that support them  
5 is challenging. The review of the  
6 monitoring information to date  
7 indicates that there is limited  
8 spatial coverage within the fish  
9 population dataset, a lack of  
10 reference areas and sites, a  
11 limited number of years of  
12 information gathered and the  
13 complication of alterations to the  
14 sampling design between years.  
15 These factors make it difficult to  
16 establish the level of natural  
17 variability of fish populations at  
18 the regional level."

19  
20 So I turn to the main theme of my submissions  
21 here. Far from it being the case that no one is  
22 considering Aboriginal or Treaty Rights. The truth  
23 of the matter is is that everybody here is  
24 considering Treaty and asserted Aboriginal Rights.  
25 The submissions of Mr. Denstedt outline what Shell

1 did in that respect. And I heard him to say that,  
2 at least with respect to Métis rights, that they  
3 assumed that such rights existed; a point that I  
4 will come to later when I indicate that the Panel  
5 process is not a process of proof of rights but one  
6 of avoidance of impacts on actual or asserted  
7 rights.

8 The Panel's Terms of Reference require it to  
9 consider Aboriginal and Treaty Rights, and that is  
10 the case with respect to both the Terms of  
11 Reference for the EIA and the Terms of Reference  
12 for this Panel.

13 And the evidentiary submissions of Canada  
14 show that they considered Aboriginal Rights. I  
15 have taken you to some of the evidence with respect  
16 to the Department of Fisheries and Oceans. I would  
17 like to take you to the conclusion of the evidence  
18 of Transport Canada at page 15 of its submissions  
19 where it says -- oh, I'm sorry, I'm going to come  
20 to that in due course. What I wanted to take you  
21 to is the submissions of Transport Canada filed on  
22 October 1st at page 7 of the document itself,  
23 quoting, under the heading "Potential Cumulative  
24 Effects on Navigation:

25

1                                   "Transport Canada  
2                                   acknowledges that navigability of  
3                                   the Athabasca River is important to  
4                                   traditional use activities and  
5                                   general recreational use.  
6                                   Transport Canada understands that  
7                                   Aboriginal groups are concerned  
8                                   with water withdrawals from the  
9                                   Athabasca River and the potential  
10                                  impacts on navigation, including  
11                                  during low flow open water periods  
12                                  in the lower Athabasca River and  
13                                  the Peace Athabasca Delta. Taking  
14                                  into consideration concerns  
15                                  expressed, and based upon a review  
16                                  of the information provided by  
17                                  Shell in the environmental  
18                                  assessment review process including  
19                                  the updated cumulative effects  
20                                  assessment, Transport Canada is of  
21                                  the opinion that impacts to  
22                                  navigation on the Athabasca River  
23                                  would be negligible."  
24  
25                                  So all of the parties, without exception,



1           have taken care to try to bring the best science  
2           that they could to this Panel, and this Panel has  
3           heard that, with respect to all of parties,  
4           recognizing that the positions of the parties and,  
5           in some cases, the positions of the scientists do  
6           not necessarily correspond with one another. This  
7           is normal in the course of panel proceedings of  
8           this type. And in that sense, what I mean is that  
9           it is natural in our tribunal process and in the  
10          presentation of scientific opinion that opinions  
11          may vary. And that is why the legislative branches  
12          of government have conferred upon this Panel a  
13          fact-finding and advisory function.

14                 And so I am not here to make submissions to  
15          you about what recommendations you should make or  
16          how you should exercise the difficult job that  
17          falls to you of making findings and making  
18          recommendations. But I am here to observe that  
19          many of the submissions -- I wish to direct some  
20          submissions to what I see as a rather challenging  
21          issue that has arisen in this proceeding. And it  
22          is this: That many of the Aboriginal submissions  
23          seek recommendations, which are often broad, and  
24          which may be said, at least in some cases, to be  
25          only remotely related to Project-specific effects.

1           In a more plain-language way, I think it is  
2           fair to say that at this stage in the development  
3           of oil sands in this region of Alberta, everyone  
4           recognizes that concerns have the capacity to  
5           transcend project-specific planning process. The  
6           Aboriginal recommendations that I have heard have  
7           root in two different sources: One is cumulative  
8           effects, of what is often described as the  
9           development case scenario, or just generally  
10          cumulative effects of what exists today and what  
11          may exist in future, together with issues  
12          respecting Crown Consultation and accommodation  
13          issues generally.

14                 And so, for example, to illustrate some of  
15          this, the ACFN and the MCFN, if I may refer to them  
16          by those acronyms because those acronyms appear  
17          frequently in the filed evidence, request a TRUMP,  
18          Treaty Resource Use Management Plan, an acronym  
19          which clearly has a double entendre; firstly, it is  
20          not only proposed as a valuable planning document  
21          for a panel like this and other decision-makers,  
22          but it is also intended as a pre-condition to any  
23          development within the traditional lands of those  
24          First Nations.

25                 The Métis, as I understand their submission,

1 seek inclusion of Métis in Alberta's Aboriginal  
2 Consultation Policy.

3 The Fort McKay filed Exhibit 009-011, which  
4 included a number of recommendations, and there's  
5 two that I'd like to refer to; I just need a moment  
6 to locate that document. Yes, the first of these  
7 is the third bullet under paragraph 22 (a), and it  
8 asks that the Panel recommend to Alberta and  
9 Canada:

10

11 "A commitment and process by  
12 Alberta and Canada to consult and  
13 accommodate Fort McKay with respect  
14 to the impacts of regional  
15 development on its aboriginal and  
16 treaty rights."

17

18 And the opening words of paragraph 23 are  
19 similar:

20

21 "Fort McKay also requests  
22 that the Panel recommend to Canada  
23 and Alberta that they appoint  
24 negotiators with the necessary  
25 mandate to negotiate accommodation

1                   measures with Fort McKay..."

2

3                   Mr. Mallon, on behalf of the MCFN, made it  
4 clear that the MCFN concerns were cumulative  
5 effects with respect to overall development in the  
6 region and that the MCFN did not oppose the  
7 development of this particular project.

8                   Mr. Malcolm, for his part, sought recognition  
9 of rights and Section 35 rights, including a  
10 consultation process with capacity funding.

11                   So if we go back to some of the basic  
12 questions: "What are the effects of the Project  
13 and what can be done about these effects?"

14                   The effects are clearly, some of them,  
15 Project-specific, and I'm going to leave those to  
16 the jurisdiction of the Panel and its staff.  
17 There's tremendous expertise here to deal with  
18 Project-specific effects. The Panel has a mandate  
19 with respect to hearing Aboriginal concerns and  
20 reporting on these. And through this mandate have  
21 come a flood of recommendations, some of which I  
22 just listed for you. And the question is, well,  
23 what to do with these? Clearly, the ability of  
24 Shell to address some of these issues has been  
25 exhausted or it's simply beyond Shell's capacity.

1           In addition, this Panel is limited by the  
2           mandate conferred upon it by the legislative branch  
3           of government. And that mandate does not extend to  
4           some -- except in the respect of making the  
5           recommendations and the reporting of what it has  
6           heard -- does not extend to compelling the Crowns  
7           to take these steps that are requested.

8           So what should we do with these?

9           My submission to you is that the Panel should  
10          report these matters and, in that respect, what I  
11          have found from participating in this Panel process  
12          over the last month, but especially in the last  
13          three weeks when the parties bring evidence and  
14          that evidence is tested by way of  
15          cross-examination, that you, Panel Members, are in  
16          an absolutely unique place because of your role in  
17          the Project development process at this early time  
18          and because of the mandate that has been conferred  
19          upon you.

20          No one in this country is better placed than  
21          you, at this time, to articulate and to some extent  
22          to prioritize according to the views that you see  
23          fit what may need to be done to reconcile the  
24          intrusion of industrial development into a boreal  
25          landscape that, prior to that time, had supported

1           Aboriginal use from time immemorial.

2                   And in addition to the reporting that you're  
3           obliged to do by the Terms of Reference, I  
4           encourage you to have the courage to do what the  
5           Regional Municipality urged you to do in its  
6           submissions: Which is to take the lead. Or which  
7           the Mikisew Cree urged upon you in its submissions:  
8           Which is to put the heat on the governments.

9                   I prefer the Regional Municipality expression  
10          of that, but I recognize that there are many  
11          challenges that governments face. So, for example,  
12          to go back to the point about the growing maturity  
13          of oil sands development and our appreciation of  
14          that in this region, no one really disputes that  
15          oil sands development will have cumulative effects  
16          within this region. I heard Shell acknowledge that  
17          in its evidence and in its submissions of counsel.  
18          I'm hearing that from the Regional Municipality. I  
19          doubt that any of the Aboriginal groups would  
20          disagree with that observation. And you will find  
21          that expression in the evidence of the Government  
22          of Canada.

23                   So, for example, at page 15 of the submission  
24          filed on October 1st by Environment Canada, you  
25          will find the following paragraph:

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"EC shares concerns with the Aboriginal groups regarding the potential cumulative environmental effects on air quality, greenhouse gases, water quality, and wildlife, including biodiversity, resulting from oil sands development in northern Alberta. Individual project reviews may not fully account for the broad range of cumulative regional impacts given their project-scale focus. The need to address cumulative effects on a regional scale requires the cooperation and collaboration of all orders of government, proponents, stakeholders and Aboriginal groups to coordinate actions to minimize and mitigate risks, monitor effects, and to manage consequences related to development."

And so you can see that there has been

1 progress here. Many of the counsel before you are  
2 outstanding counsel. Well, I think they are all  
3 outstanding, but I've been struck by the fact that,  
4 really, you have before you some of the counsel  
5 that have been here almost from -- that have  
6 participated in so many regulatory hearings  
7 involving oil sands mines, that there's a  
8 tremendous richness of depth.

9 Mr. Perkins, I heard him say he has done nine  
10 of these. I'm not sure if that relates to oil  
11 sands specifically. Ms. Buss has been here from  
12 the beginning. The Mikisew Cree have been here  
13 from the beginning and I think represented by  
14 Mr. Mallon for many, many years. And we go on down  
15 the line. Mr. Denstedt saying he's had 23 years of  
16 experience of practice in front of this Panel. And  
17 I know, Mr. Dilay, that you have been involved in  
18 some of the other panels involving oil sands  
19 particularly.

20 So we all know that the tools that are used  
21 to manage cumulative effects have certainly  
22 evolved. As I see it, one of the primary catalysts  
23 to policy evolution were prior recommendations from  
24 this Panel; noting that each case, in the absence  
25 of some broader framework of thresholds, against



1           which the Panel could measure individual project  
2           contributions within a regional framework, the  
3           absence of such a thing weighed more heavily in the  
4           public interest with each passing case. I'm sorry  
5           that I did not take the time to find the exact  
6           articulation of that language, but the "weighs more  
7           heavily" phrase is found in a number of the reports  
8           from the early reports of this century, of these  
9           Joint Review Panels, from prior oil sands mines in  
10          the early part of the century.

11                 Now, the response, as I understand it, is  
12          that the Government of Alberta introduced the  
13          ***Alberta Land Stewardship Act*** and made the Lower  
14          Athabasca Regional Plan, or LARP, the highest  
15          priority under that Act. And LARP is now beginning  
16          to be rolled out.

17                 In addition, the Government of Canada is  
18          trying to work jointly with Alberta in the joint  
19          Canada-Alberta Monitoring Plan. That found  
20          expression -- that found support in the report of  
21          the Auditor General of Canada in October 2011,  
22          Chapter 2 at paragraph 2.4.2, where the Auditor  
23          General said:

24

25

"We are encouraged by the

1                   government's commitments in  
2                   response to the work of the Oil  
3                   Sands Advisory Panel. We will  
4                   monitor the government's progress  
5                   in putting into effect monitoring  
6                   systems in keeping with the  
7                   principles set out by the Panel."

8  
9                   So everyone recognizes that there is a need  
10                  to better manage cumulative effects in this region.  
11                  This Panel has recognized that in the past. And,  
12                  indeed, you've heard from some of the participants  
13                  about some of the frustrations in that regard; the  
14                  interim nature of the Muskeg River Water Management  
15                  Framework, the lack of apparent completion of the  
16                  Phase 2 Water Management Framework for the  
17                  Athabasca River, et cetera.

18                  What I'm here to submit to you is that,  
19                  having regard to the many challenges that the Crown  
20                  faces, the report that you will prepare will not  
21                  only be informative but may have an actual  
22                  catalytic effect on policy development. And I  
23                  encourage you to consider the potential of your  
24                  capacity in this regard.

25                  I was intrigued in listening to the evidence

1 of the Regional Municipality which described how  
2 challenging it was in working with the Province on  
3 such a simple matter as finding out whether a  
4 miscellaneous lease was issued. So the  
5 Municipality has to come here to ask you to  
6 recommend to the Alberta Government that it please  
7 tell the Municipality that it has issued a work  
8 camp lease or general lease on which there'll be a  
9 work camp.

10 I don't mean this to be critical. I mean  
11 this to be a sober observation that what some  
12 describe as the unlimited capacity of the Crown is  
13 really not unlimited. The Crown has capacity to  
14 attempt to address Aboriginal concerns and to  
15 accommodate them where necessary, but there are  
16 many, many challenges in meeting that.

17 Amongst these, I would point out, that we are  
18 now operating in a period of fiscal restraint  
19 arising from the economic crash in 2008. And while  
20 we were sitting, both the governments of Alberta  
21 and Canada noted that international conditions are  
22 such that the fiscal restraint period will carry on  
23 for a longer period of time than had been budgeted  
24 for just even last year.

25 Now, this has implications for many of the

1 requests that the First Nations put in front of the  
2 Panel, or indeed that the Regional Municipality  
3 puts in front of the Panel. But amongst them,  
4 amongst the issues that I heard today were capacity  
5 funding, the funding for what is described as the  
6 TRUMP, and the funding for various accommodations  
7 requested of the government.

8 To this I would add human resource  
9 constraint. It is often said as an almost  
10 automatic response that the government has  
11 unlimited resources, but the government acts  
12 through personnel and those personnel or human  
13 resources are precious and limited and,  
14 particularly, under stress in periods of time of  
15 fiscal restraint.

16 So if you are so inclined to take the lead on  
17 prioritizing some of what you see that governments  
18 can do to accommodate and address Aboriginal  
19 concerns before they make further decisions in the  
20 Project development process, or, if you prefer, if  
21 you are inclined to put the heat on governments in  
22 this respect, I invite you to do so. Because, as  
23 I've said at the beginning, the Crown has the  
24 capacity after the Panel report, and before it  
25 takes any further decisions in respect of this

1 Project, to do some consultation and accommodation,  
2 but there are many challenges in that respect. And  
3 how the Crown may exercise that capacity should be  
4 informed by this Panel report.

5 And so if you should choose to prioritize  
6 some of the recommendations that you're obliged to  
7 report, and add the commentary that is within your  
8 privilege because of the unique position that the  
9 Panel has not only in respect of this Project but  
10 in prior projects, sitting at the middle of the oil  
11 sands development and being the primary tribunal in  
12 the planning process for oil sands development, I  
13 would invite you to do so.

14 Whether you do so is up to you. How the  
15 Crown responds is beyond my capacity to predict.  
16 But I think we have here an important institution  
17 of democratic government that Aboriginal groups  
18 have described as very rewarding and which they  
19 hope the government will listen to.

20 So, sir, Panel Members, subject to any  
21 questions you have, those are my submissions.

22 THE CHAIRMAN: We have no questions, sir.

23 Thank you very much.

24 MR. LAMBRECHT: Thank you very much.

25 THE CHAIRMAN: We'll take about 15 minutes

1           and turn to your reply, Mr. Denstedt.

2       MR. DENSTEDT:                   Fifteen minutes is fine, sir.

3       THE CHAIRMAN:                  Thank you.

4

5

**(BRIEF BREAK)**

6

7       THE CHAIRMAN:                  Mr. Denstedt, Shell's reply?

8       MR. DENSTEDT:                  Mr. Chairman, Panel, thank  
9           you.

10

11       **REPLY SUBMISSIONS OF SHELL CANADA, BY MR. DENSTEDT:**

12       MR. DENSTEDT:                  Reply is always a little  
13           ragged based on putting things together, so don't  
14           expect much flow from this. We're just trying to  
15           hit the issues we want to remark on. Where we  
16           haven't responded to somebody, we believe it's  
17           clear on the record what the issues are and what  
18           our position and their position are, so I'm going  
19           to try and resist the temptation to go back to my  
20           very, very lengthy final argument and stick with  
21           what's new.

22

23           So let me start with the Métis Nation and,  
24           first of all, deal with some of the legal issues  
25           that my friend, Ms. Bishop, raised. And quite  
frankly, I wasn't sure what her point was in

1           respect of *R. v. Powley*. That is a case that is  
2           used to determine whether in fact or not the Métis  
3           group has rights. As we've said all along, Shell  
4           has assumed that the Métis have the rights that  
5           they assert, and they consulted on that basis.

6                        Which brings me to Ms. Bishop's references to  
7           **Haida** where she indicated that in that case there  
8           were asserted rights which created the obligation  
9           to consult. And, again, Shell agrees with that.  
10          It does have that obligation and it did fulfill  
11          that obligation in respect of the procedural  
12          aspects of consultation.

13                      Where we disagree is where Ms. Bishop says  
14          Shell did not consult. And I would simply refer to  
15          Panel to the record and, in particular, the  
16          Traditional Land Use Studies that Shell provided  
17          funding for for the Métis Locals 125, 1935, and 63.

18                      My friend also said that the *Mark of the*  
19          *Métis* book which was filed as part of the evidence  
20          here shows in those maps that are in that book that  
21          traditional uses were being exercised in the LSA.  
22          I'd urge the Panel to take a close look at those  
23          maps and take a close look at Mr. Fortna's  
24          testimony. And I'd suggest to you that, first of  
25          all, the Métis Nation doesn't seem to know where

1 the Project footprint is. And those maps do not  
2 demonstrate uses in the Local Study Area.

3 And she also said yesterday, "Remember Johnny  
4 Grant and that Shell didn't speak to him." And,  
5 again, we find ourselves in agreement with  
6 Ms. Bishop: "Remember Mr. Grant." And take a look  
7 at his will-say statement. His trapline is located  
8 30 miles north of the Project on the Margeurite  
9 River. And that would not qualify him for  
10 consultation under Directive 56 even, let alone  
11 under this process. So I'd say take a look at  
12 that.

13 So Shell consulted with the Métis Locals and  
14 the Métis Nation and the Region 1. They provided  
15 material funding. And they also provided funding  
16 for what the Locals wanted. My friend seemed to  
17 suggest that Shell was only interested in funding  
18 things like golf tournaments and Christmas parties.  
19 But Shell provided funding based on what those  
20 Métis Locals wanted. We've only heard what the  
21 Métis Locals wanted in respect of traditional land  
22 use and other issues from Mr. Fortna and  
23 Ms. Bishop. When the Métis Locals asked for  
24 funding for those studies, they got that funding.

25 So let me turn now to Fort McMurray 468. And



1 first of all, my friend suggested to you: Well,  
2 this is a multi-billion dollar project, there's  
3 lots of money to go around here. And the funding  
4 that Fort McMurray needs to participate in this  
5 process is lost in the rounding.

6 And he seemed to indicate, what I heard, was  
7 that it really doesn't matter whether a group  
8 asserts rights; if the project is big enough, it  
9 doesn't matter whether the rights are affected, you  
10 should provide them some funding and some money and  
11 have them participate in the process and not look  
12 at what those potential impacts are. And he went  
13 on to say that that's the low watermark of  
14 consultation.

15 Well, quite frankly, Mr. Chairman, I'd  
16 suggest that you can determine what is the low  
17 watermark of this process based on some of those  
18 comments. Consultation has nothing to do with a  
19 capital cost of a project. Whether it's  
20 \$50 billion or \$500,000, consultation relates to  
21 potential impact on a right being asserted.

22 And one thing my friend did get right; Shell  
23 is a blue chip company. They are also a blue chip  
24 company that takes a very principled approach to  
25 consultation. They take it seriously. They

1 provided opportunities to Fort McMurray 468 to  
2 participate in the process. They've been meeting  
3 with them since 2007. They've been working with  
4 them to understand what their traditional land uses  
5 are since that time. 468 has been provided with  
6 numerous opportunities to participate in this  
7 process and demonstrate how their rights might be  
8 impacted in order to work more closely with Shell.

9 The facts of the matter are, is that they  
10 showed minimal use in the Project area. And they  
11 did receive project information. And Shell did  
12 cooperate and work with them. And it was on that  
13 basis that Shell and 468 proceeded with their  
14 relationship.

15 And he also indicated that Shell has a  
16 problem on the record. And I, with great respect,  
17 disagree with that. Shell has no problem on the  
18 record. Its consultation record with 468 is deep  
19 and complete and comprehensive based on the  
20 potential impacts on the rights that that group has  
21 asserted.

22 I might also add that, when I listened to  
23 Mr. Jeerakathil speak, there seemed to be, and I'm  
24 not saying I'm intimately familiar with the record,  
25 but there seemed to me to be a fair bit of

1 information that was not evidence before the Panel.  
2 I don't think anything turns on it, but I think the  
3 Panel should be cautious in looking at those  
4 submissions and make sure that the information that  
5 he provided is in fact evidence.

6 His clients could have attended the  
7 proceeding. It was in Fort McMurray for three  
8 weeks. It didn't seem to take a lot of capacity to  
9 participate in the process for a day and bring  
10 their concerns before the Panel. They did receive  
11 \$77,000 in funding from the CEAA Agency. I'm not  
12 sure why they didn't at least show up and provide  
13 that evidence. Nonetheless, it's not  
14 Mr. Jeerakathil's job to provide the evidence to  
15 the Panel.

16 He also criticized the definitions of the  
17 RSA, the LSA, ecological content, and the  
18 significance determinations, but he didn't explain  
19 or provide any evidence why Shell's position was  
20 incorrect.

21 And finally, he dealt with three Joint Review  
22 Panel reports, and I'm just going to touch on them  
23 briefly because, quite frankly, again, the facts of  
24 those reports bear no relationship to what's before  
25 the Panel.

1           In respect of the Kemess Mine, that was a  
2           gold mining project that had a very short life,  
3           predicted for 11 years, and there was some doubt  
4           whether, in fact, that mine would last that long.  
5           On the other side of the ledger, the tailings  
6           clean-up from that project was going to last  
7           thousands of years. Thousands. It bears no  
8           relationship to this Project.

9           And the Whites Point Quarry, that involved a  
10          basal quarry in Nova Scotia which was to be sited  
11          adjacent to an existing fishing village that had  
12          received UNESCO and UN Heritage awards for its  
13          sustainability and it was found to be incompatible  
14          with that village. Again, no relationship to the  
15          facts before you.

16          In respect of Prosperity Mine, that involved  
17          the decimation of an entire lake that that panel  
18          found to be critical to the Aboriginal users in the  
19          area, without compensation. Again, no relationship  
20          to the facts before you.

21          So let me move on to OSEC. And let me start  
22          with this morning's presentation by Ms. Gorrie.  
23          And just a few things in her comments which I'd  
24          like to take the time to fix up.

25          First of all, she indicated that there would

1 be tailings in the end pit lakes. As we know,  
2 that's not correct.

3 She said that the consultants for Shell  
4 assumed that all mine fleets would be TIER-IV  
5 compliant in the modelling. Again, that's  
6 incorrect. The consultants assumed that every  
7 other mine operator would have TIER-II compliant  
8 mine fleets, not TIER-IV. Only Shell was assumed  
9 to be TIER-IV in the far future.

10 And, finally, again I don't think this was on  
11 the record anywhere, but she indicated that someone  
12 had said that the RAMP consultants were the same as  
13 Shell's consultants. That's just flat wrong. They  
14 are not.

15 And I won't again go into any more details in  
16 respect of our comments with Dr. Schindler, other  
17 than to say that the Summary by the editors of the  
18 *Journal of Limnology*, Aherne and Shaw, I think  
19 provides a useful summary to the Panel in pulling  
20 together what the basis or what the conclusions of  
21 those six reports were. It's not put forward as a  
22 scientific study, but it's put forward for what it  
23 is, which is a summary of the six scientific  
24 studies that were in that journal. And I think  
25 it's useful and I think the Board should have a

1 look at it.

2 And in respect of some of the other comments  
3 that were put forward by my friend in contradiction  
4 to what Shell's position was by Dr. Schindler, I  
5 would simply recommend the Board take a look at the  
6 submissions he filed on Monday and satisfy  
7 themselves.

8 And in respect of the air emissions, my  
9 friend suggested that the Millennium Station shows  
10 that we are at or near the limit of NO<sub>x</sub> emissions.  
11 What she didn't tell you, and you can go check the  
12 WBEA document on the record, is that at that  
13 station, the emissions level has actually been  
14 declining for the last three years; that in the  
15 face of increasing production. And that was  
16 reported without explanation.

17 And in respect of the emissions from the mine  
18 fleet, my friend said, well, the issues of mercury  
19 and PAHs and the transport of those into the  
20 ecosystem are relevant to Shell even without an  
21 upgrader. And, again, I refer you to the  
22 cross-examination or the questioning that we had  
23 with Environment Canada where they agreed that, in  
24 fact, the emissions from the mine fleet would fall  
25 very close to the source and the Shell evidence was

1 indicated that those emissions would likely be  
2 within the fenceline of the Project.

3 And while we continue to hear the comments  
4 and the assertions in respect of mercury emissions  
5 and acid deposition and PAHs in relation to this  
6 Project, I just remind the Panel -- I'm not going  
7 to quote a scientist here, but I will quote a  
8 higher authority, my mother, who said, "Saying  
9 something is so doesn't make it so."

10 And, finally, I'd simply say that in respect  
11 of the greenhouse gas emissions and climate change,  
12 my friend said that Shell's position was that it  
13 should be taken in the global context and that's  
14 wrong because that diminishes the impact. Well,  
15 Shell never said that at all. What we said:  
16 There's a context you should look at, because this  
17 is a global issue. But in respect of this Project,  
18 Shell's position was they will comply with what the  
19 Federal and Provincial governments require on  
20 greenhouse gas emissions, because it is a global  
21 issue that must be addressed through regulation at  
22 the Provincial and Federal level. And, finally, we  
23 provided a list to you of the Project-specific  
24 things that Shell is doing in respect of climate  
25 change.

1           And my friend also raised the issue of the  
2           selection of the RSA and LSA, and others did as  
3           well, so I'll try and deal with it all at once  
4           here.

5           In respect of the LSA, this is the same  
6           approach that has been taken at four Joint Review  
7           Panels before this: For the Jackpine Mine, for  
8           CNRL's Horizon Project, for Suncor's Voyager  
9           Project, and for the Muskeg River Mine Expansion.  
10          This is not a new approach to addressing  
11          environmental effects and it's quite appropriate in  
12          the circumstances. And we said this before; it  
13          doesn't make any sense to me, as a kid growing up  
14          on the farm, to suggest that you'd look at the  
15          footprint and decide the significance of an impact  
16          based on the footprint of a project. The potential  
17          impacts of that project should be considered in a  
18          much larger context and determine whether, in fact,  
19          the environment is being impacted.

20          But don't believe it when they say Shell  
21          didn't look at the impacts in the Local Study Area.  
22          Just take a look at the documents. Don't believe  
23          me either. Go back and read the EIA, sir. Have a  
24          look at the EIA. The information's all there.

25          And that brings me to the selection of the



1 RSA. And, again, I'd recommend the Panel go back  
2 to the evidence and have a look at Volume 5,  
3 Section 7.2.4. And, there, it's described pretty  
4 clearly that the Regional Study Area is based on  
5 the ecological factors that are needed to encompass  
6 existing effects and understand what the real  
7 effects of the Project are. Again, it's the same  
8 RSA that's been used and determined as part of the  
9 approval process for the four projects I noted  
10 before. Environment Canada agreed that the RSA was  
11 appropriate in these circumstances. And, by the  
12 way, this RSA has been in the Application and in  
13 the public domain since 2007; for five years.

14 My friend also talked about thresholds and  
15 she suggested that what Shell is telling you,  
16 Panel, is that, as a matter of thresholds, Shell's  
17 relying on an ecological threshold, and their  
18 assessment depends on the threshold that says if it  
19 befalls below that, it's catastrophic. Well,  
20 that's not what Shell is saying. Shell put that  
21 information in front of the Panel to provide  
22 context in respect of the speed limit that was  
23 being suggested by Mr. Dyer. That's the only  
24 purpose that was used for. Shell has not used that  
25 as the test for whether there's a significant

1 impact. What Shell has said is what you should do  
2 is look at the facts and look at the analysis in  
3 determining effects and not just simply look at a  
4 number that is chosen arbitrarily.

5 My friend also raised the issue of **SARA** and  
6 that Shell's proposal is not compliant with **SARA**.  
7 Again, we would submit that that's incorrect.  
8 Section 79 of the **Species at Risk Act** provides that  
9 proponents in an environmental assessment process  
10 must identify adverse effects on species and their  
11 critical habitat and the proponent must provide  
12 measures on ways to avoid or lessen the effects and  
13 then monitoring proposals for those effects.  
14 That's exactly what Shell has done in these  
15 circumstances. And the information provided is  
16 compliant with the **Species at Risk Act**.

17 My friend also suggested, I think she  
18 suggested that my position was ludicrous, but I may  
19 have heard it wrong, but I'll take it as that, in  
20 respect of cumulative effects. And I simply refer  
21 the Panel on this issue when I suggested cumulative  
22 effects assessment of the PDC in particular, that's  
23 for use for providing recommendations to  
24 governments and regulators on how to manage these  
25 cumulative effects. That's what the purpose of

1           that was for. And the OPS on cumulative effects,  
2           which is the operating policy statement for CEAA,  
3           agrees with that. And here's what they say, and I  
4           quote:

5  
6                                "Information concerning the  
7                                cumulative environmental effects of  
8                                the project under assessment  
9                                combined with hypothetical projects  
10                              may contribute to future  
11                              environmental planning; however, it  
12                              should not be the determining  
13                              factor in the environmental  
14                              assessment decision under the Act."

15  
16           Again, I suggest to you that the PDC case  
17           fits those circumstances perfectly and the PDC case  
18           should not be used as a determining factor in this  
19           case.

20           And, finally, my friend raised a case, or a  
21           decision before this Panel, Decision 94-8, which  
22           was the Whaleback decision. And she may have not  
23           known this, but on a snowy winter night back in  
24           1993, Mr. O'Farrell, from my former firm, and I  
25           drove up to the Whaleback. We were the first

1           counsel contacted by that group of interveners to  
2           assist them in opposing Amoco's project. We were  
3           subsequently conflicted out, but I can tell you the  
4           basis of their concerns and the primary issues were  
5           twofold: One was the lack of consultation around  
6           the Emergency Response Plan and the need for that  
7           in respect of the critical sour gas well that was  
8           being proposed; and, secondly, that the Whaleback  
9           itself at that moment was a candidate for the  
10          Special Places 2000 program by Alberta Environment.  
11          Neither of those situations fit the facts in this  
12          case, sir.

13                 So that brings me to the ACFN. And I've got  
14          a few comments on there, but not too many, so we  
15          should be done in a reasonably expeditious time.

16                 So first, let me respond to my friend's  
17          question or confusion about why I put in front of  
18          the Panel some information around the consultation  
19          process. And let me put everyone's mind at ease.  
20          I'm not suggesting that the Panel should provide a  
21          decision on the adequacy of consultation. That  
22          ship has sailed and the decisions have been made.  
23          But I did think it would be useful for the Panel to  
24          have that information in front of them to  
25          understand the types of information and the

1 relative importance of the information that they  
2 might collect up and summarize and put in front of  
3 the governments as part of their panel report  
4 pursuant to the terms of the agreement. And I  
5 thought that would be a useful discussion.

6 So my friend also suggested that the **Taku**  
7 case did not stand for the proposition that these  
8 processes and these panels can be used to fulfill  
9 or part of the consultation and in furtherance of  
10 the consultation process. I disagree with that.  
11 But, again, don't believe me; have a look at the  
12 case and decide for yourselves. I'm content with  
13 that approach. What she didn't mention, though, is  
14 that the **Brokenhead Ojibway** case was a case that  
15 related to the National Energy Board's role in  
16 fulfilling the consultation process, which is a  
17 process very similar to the process that we're in  
18 today.

19 And she also raised a case out of British  
20 Columbia where she talked about the length of the  
21 consultation record and the details around the  
22 information and that doesn't necessarily mean that  
23 the consultation was meaningful. And in response  
24 to that, I say that there's a case out of  
25 Newfoundland called the **NunatuKavuu Community**

1           **Council**, which is a Métis group, which challenged  
2           the Nalcore Energy proposal for the Lower Churchill  
3           Falls Project where the logs that were provided  
4           there demonstrated the sufficiency of consultation  
5           and the Court found that in that process,  
6           consultation was fulsome and generous. I don't  
7           think anything turns on that case or on Ms. Biem's  
8           case. I think it's fact specific. And the  
9           information that the Panel should summarize is  
10          what's in front of it in this proceeding and not  
11          worry about either of those cases.

12                        So just a few things again and in no  
13          particular order. My friend made some comments  
14          about hydrology and the lack of reliance that the  
15          Panel should place on Shell's assessment of water  
16          quantity and quality in their climate change  
17          conclusions as being unscientific and having  
18          implied bias. Well, I'd again invite the Panel to  
19          have a look at the evidence. It's not unscientific  
20          at all. There is no implied bias. The model has  
21          been verified by real life data from the Muskeg  
22          River. And we've provided that information to the  
23          Panel on October 15th.

24                        In respect of consultation, my friend says  
25          Shell never responded to the concerns of their

1 client. And with great respect, I disagree. Shell  
2 did respond to their client. Shell's been in  
3 consultation with their client for 15 years. They  
4 understand their issues well. They understand  
5 their concerns well. They responded to the issues  
6 that were being provided to them and the concerns  
7 that were being raised with them. And they would  
8 suggest in their responses, and there are more than  
9 300 of them that were on the record, with here's  
10 how we've designed the project to address that  
11 concern, or here's the mitigation that we're using  
12 to address that issue, or we're participating in a  
13 regional initiative and that takes care of your  
14 concern in that place. The fact you don't agree  
15 with the response or you don't like a response does  
16 not mean that the Proponent has not made an attempt  
17 to respond. And in this case, I'd suggest, again,  
18 have a look at the record and make your own  
19 determination on that.

20 People can disagree. And a good example of  
21 that is the Phase 2 Framework. The Athabasca  
22 Chipewyan First Nation has clearly demonstrated in  
23 this proceeding and previously that they have a  
24 concern with water levels and water quantity.  
25 Shell's response was that it was going to be

1 participating in the initiative around the Phase 2  
2 Framework and that it was going to work through  
3 that process to address that concern. That is in  
4 fact a response. The ACFN may not be happy with  
5 that response, but that is an appropriate response.  
6 And it's up to the Panel, then, to sort out this on  
7 the record and determine what that potential impact  
8 might be.

9 My friend also suggested that Shell has  
10 usurped the role of the Provincial and Federal  
11 Government in deciding who to consult with. Again,  
12 I would suggest that is not correct. Shell filed  
13 its Consultation Plan with the Provincial  
14 Government in 2007. It was approved by the  
15 government and they provided additional Aboriginal  
16 groups that Shell was required to consult with.  
17 That was updated and approved again by the  
18 Provincial Government in 2010. And the Federal  
19 Government has also reviewed those plans and found  
20 that they were appropriate.

21 And, finally, on respect of consultation, my  
22 friend said that Shell seems to indicate that an  
23 agreement is required with them in order to arrive  
24 at any mitigation. Shell has never said that  
25 anywhere in the record and does not require an



1 agreement. It takes two parties to get an  
2 agreement. We all know that. And Shell has never  
3 said it needs an agreement in order to provide  
4 mitigation.

5 She also raised the issue about a breach of  
6 contract, that a lawsuit has been filed by the  
7 Athabasca Chipewyan First Nation against Shell.  
8 Again, I can tell you this, that Shell has filed a  
9 Statement of Defence in response to that breach of  
10 contract claim and they are going to defend it  
11 vigorously. So I think in that response, the Panel  
12 can take away that there's a dispute as to whether,  
13 in fact, Shell has lived up to its commitments or  
14 not.

15 If I could turn to some of my friend's  
16 comments on the LARP and she used that in relation  
17 to some of the evidence that Ms. Larcombe had  
18 provided. Again, in respect of the LARP, it has  
19 identified a number of conservation areas. And  
20 that can be found at Exhibit 001-070S. And I'd  
21 specifically refer the Panel to Adobe page 88 which  
22 lists the various conservation areas that have been  
23 identified. And it includes Richardson Wildland  
24 Park. And we heard the ACFN witnesses say in  
25 response to a question I believe it was from the

1 Panel about what would be useful to them. And one  
2 of the witnesses said, "Well, some land in the  
3 Richardson Backcountry would be good." Well, the  
4 Richardson Wildland Park is 265,000 hectares in  
5 size. And according to the LARP, oil sands and  
6 petroleum and natural gas and surface minerals are  
7 not permitted there. And I'm not sure whether  
8 Dr. Larcombe had this or not, but in August of this  
9 year, the Department of Energy issued Information  
10 Letter 2012-30 which said that the government is  
11 going to be cancelling the oil sands and PNG leases  
12 in those conservation areas, which is not what was  
13 suggested by my friend.

14 And, finally, on some of the basic issues I'm  
15 running through here is, in respect of mitigation,  
16 my friend characterized Shell's mitigation as being  
17 a vague hope of success. With respect, again, I  
18 disagree. And I think I can refer the Panel to the  
19 evidence on this; that Shell has a concrete and  
20 comprehensive package of evidence in front of this  
21 Panel on the potential effects of the Project, on  
22 the mitigation that they proposed, and how that  
23 mitigation will be implemented. There's a high  
24 level of certainty in respect of those predictions.  
25 And it's based on analysis and review and modelling

1 and verification of modelling.

2 The follow-up monitoring and the adaptive  
3 management programs that are planned by Shell are  
4 to demonstrate that those predictions are accurate,  
5 and to the extent they are not accurate, then to  
6 implement the adaptive management program. So I  
7 find myself in agreement with my friend that the  
8 Pembina case is useful in this situation because it  
9 said where there is sufficient information to  
10 proceed, adaptive management is a perfectly  
11 acceptable condition.

12 In respect of co-management, we heard that a  
13 couple times in the recommendations and also from  
14 Chief Adam. I simply have this to say: I think a  
15 recommendation to suggest that there be  
16 comanagement of the resources in the province of  
17 Alberta goes far beyond the mandate of the Panel  
18 because it would result in a fundamental change in  
19 the legal structure of how resources are managed in  
20 this province and I suggest that it is not a  
21 recommendation that would be available to the Panel  
22 within the framework of the Joint Agreement.

23 In respect of wildlife corridors, we heard  
24 from a number of parties that the corridors will  
25 not be available. And with respect, again, the

1 record is clear on this, that this Project will not  
2 bisect or dead-end any wildlife corridors along the  
3 Muskeg River. Wildlife will be able to continue to  
4 use those corridors into the future and the  
5 monitoring has shown that wildlife are using those  
6 corridors currently. Further, there's ongoing  
7 monitoring of those corridors under CONRAD through  
8 the Wildlife Habitat Effectiveness and Corridor  
9 Monitoring Program. So there's a high level of  
10 confidence that these corridors not only are being  
11 used but will be used.

12 We also heard that access was an issue. And  
13 Fort McKay provided information on trails and  
14 access that Shell reviewed as part of that Fort  
15 McKay specific assessment and integrated that into  
16 their EIA and they incorporated that into their  
17 update. The complaint that access was cut off is  
18 not accurate. There will be continued and ongoing  
19 access, first of all, around both the eastern and  
20 northern sides of the Project. And as we heard  
21 from the Shell witnesses, there's additional access  
22 provided through contact with the company to get  
23 access across the mine site as well; an activity  
24 and action that Ms. Tourangeau is well used to  
25 exercising and participating in. So I would

1 suggest that access is not the issue that my  
2 friends would suggest it is.

3 My last kind of environmental issue I wanted  
4 to deal with is in respect of bison. And we heard  
5 that bison are important. And Shell understands  
6 that and respects that. But the facts are, and I'd  
7 refer you to Exhibit 001-116, that where the  
8 compensation lake is proposed is not an area of  
9 rare habitat type. Extensive winter range exists  
10 for bison, for the Ronald Lake bison herd. And as  
11 we heard from a number of parties, that bison in  
12 north-eastern Alberta are not habitat limited, so  
13 it's not an issue of habitat of why there's a  
14 dwindling bison population. And also we heard that  
15 bison are only available to ACFN members from the  
16 Ronald Lake bison herd. Again, look at  
17 Exhibit 001-116, which demonstrates in the evidence  
18 that the bison herd at Wood Buffalo National Park,  
19 which has increased by two or threefold in the last  
20 10 years, are now starting to migrate outside of  
21 that park as well. So you should consider that in  
22 your deliberations.

23 Finally, I come to the conclusion of my  
24 remarks, and I'd turn to my friend, Mr. Murphy's  
25 comments yesterday when he talked about the **Badger**

1 case and the Indian Claims Commission consideration  
2 of Bennet Dam. And I think his words were, from  
3 the ICC report, that a project can't destroy or  
4 fundamentally alter the ability of an Aboriginal  
5 group's right to exercise their Treaty Rights. And  
6 I think that focuses the Panel on their task ahead.  
7 And, first of all, I'd say, "Is this Project going  
8 to destroy or fundamentally alter the exercise of  
9 ACFN's rights?" And the answer to that is no. But  
10 that means that the Panel's obligation here is to  
11 understand, assess what the real impact is of this  
12 Project on the exercise of the ACFN's rights. So  
13 that's the real issue in front of the Panel. And  
14 so I'd say that focuses kind of the context of what  
15 you need to consider.

16 And when I say that, in the deliberations,  
17 what the Panel should look at, they need to put  
18 that into context. And the context in front of the  
19 Panel at this proceeding is that the ACFN have a  
20 vast territory. That's one of the things that is  
21 germane to your deliberations. They need to  
22 understand what is the use that the ACFN exercise  
23 in the Local Study Area and how extensive is that  
24 use. That's a consideration. What are the  
25 mitigation plans that Shell's providing? What are

1 the opportunities for exercise of those rights  
2 elsewhere? What are the impacts and benefits to  
3 all parties in the process, and not in the process,  
4 the Province of Alberta, and the people of Alberta  
5 and the people of Canada? You have to look at all  
6 those things and put this in context.

7 And my friend, Ms. Biem, seemed to indicate  
8 that Shell said if you impact individuals, that  
9 does not affect the ACFN. Well, I don't think that  
10 reflects what Shell said. And if she took that  
11 from my comments, then it's my fault. Because what  
12 Shell did say was that the Panel needs to look at  
13 the impact on the collective rights. And that  
14 assuming that has a significant impact on an  
15 individual does not necessarily translate to a  
16 significant impact on the collective rights. And  
17 for that I'd refer the Panel, again, to the  
18 Mackenzie Gas Project's determinations. And that  
19 panel was a member of seven panels. They spent two  
20 years travelling around the North trying to  
21 understand the impacts of the Mackenzie Gas Project  
22 on a multitude of Aboriginal groups. Four of the  
23 seven members of that panel were Aboriginal  
24 members.

25 And in their report, and I'm just going to

1 provide the quote that I provided to you in final  
2 argument, just to focus this. And here's what they  
3 said:

4  
5 "There may well be impacts on  
6 regions or communities that would  
7 be significant. To those regions  
8 or communities but which the Panel,  
9 in its collective judgment, has  
10 concluded are not significant in  
11 the context of its overall Mandate.  
12 There may well be impacts on  
13 individuals that, from an  
14 individual perspective, would be  
15 significant but which, again, the  
16 Panel might conclude would not be  
17 significant in the broader  
18 context."

19  
20 And I'll leave that with you, Panel, to make  
21 sure that, when you're conducting your  
22 deliberations, that you put the issues in front of  
23 you in the broader context to understand what, in  
24 fact, is the significance of a particular impact.

25 Mr. Chairman, that concludes my submissions.



1 I'd urge the Panel to find that the Project is in  
2 the public interest.

3 In closing, I would like to thank the counsel  
4 and parties who participated in this process for  
5 their civil and collegial approach to the process.  
6 I thank the Panel staff, and Mr. Perkins will pass  
7 it on to those who have left, and to Mr. Gill, and  
8 my sincere apologies and thanks to Ms. Nielsen who  
9 is ever the star of the show. Thank you very much.

10 THE CHAIRMAN: Thank you, sir.

11 Mr. Perkins, is there anything left to hear?

12

13 **HOUSEKEEPING MATTERS SPOKEN TO:**

14 MR. PERKINS: There's two matters that I  
15 would like to address, sir, just before we wind  
16 things up.

17 With respect to a discussion yesterday with  
18 respect to a request by the Fort McMurray First  
19 Nation, Mr. Jeerakathil, and I had asked you if you  
20 would take under advisement his request to redact  
21 from the web the internet version of the Registry  
22 two maps, so to follow that up, sir, I can advise  
23 you that Mr. Jeerakathil has had discussions with  
24 Mr. Birchall, and I understand from Mr. Birchall  
25 that Mr. Jeerakathil is going to pursue the matter

1 outside of the Panel, the Panel's authority for the  
2 time being, so I ask that you let that work through  
3 between Mr. Jeerakathil and Mr. Birchall and  
4 whatever other organization he's suggested this go  
5 through. If that's acceptable to you, sir?

6 THE CHAIRMAN: That's fine. Thank you.

7 MR. PERKINS: And finally, sir, I thought I  
8 just might reiterate that, as Mr. Lambrecht has  
9 indicated, there are some outstanding undertaking  
10 responses, and we assume those will be coming in  
11 soon, but given that there are rights that start to  
12 run against the clock when this proceeding is  
13 closed, I would offer up to you, sir, that when the  
14 Panel indicates that the record is closed, the  
15 Secretariat will send a letter out to parties  
16 indicating when that happened or that that has  
17 happened and what date that occurred on so that  
18 that might assist the participants in whatever they  
19 think is important in relation to that date.

20 THE CHAIRMAN: That's helpful, sir. Thank  
21 you.

22 MR. PERKINS: And that is all I had, sir.  
23 Thank you.

24 THE CHAIRMAN: Thank you very much.

25

1       **CLOSING COMMENTS BY THE CHAIRMAN:**

2       THE CHAIRMAN:                   Ladies and Gentlemen, I won't  
3           keep you.  People need to travel and some places  
4           are feeling the brunt of winter, so you'll need to  
5           check the roads and check your flights.

6                   I, too, would like to thank all of the  
7           participants for their very professional approach  
8           in the proceeding.  We had mishaps along the way,  
9           but there were very few of them and we found a way  
10          to work through them with your cooperation.

11                   I want to thank my colleagues on the Panel,  
12          the Members of the Panel Secretariat, and the  
13          people behind the scenes for all of their hard work  
14          so far.

15                   I, too, would like to thank Ms. Nielsen and  
16          her colleagues, our reporter, and Mr. Van Mechelen  
17          who supplies the sound system and operates it so  
18          capably.

19                   The record is very extensive, in the tens of  
20          thousands of pages, and the transcript is thousands  
21          of pages.  Clearly, the effort required to deal  
22          with such an extensive file will be significant.  
23          We'll do our best to make our decisions and  
24          recommendations in a reasonable time.

25                   As Mr. Perkins has pointed out, there are

1           some undertakings that remain and we'll look  
2           forward to having those completed in due course.

3                    Have a safe trip home and happy holidays that  
4           are just around the corner.

5                    The hearing is closed.

6

7                            **(The Hearing Closed at 3:40 p.m.)**

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**REPORTER'S CERTIFICATION**

I, Nancy Nielsen, RCR, RPR, CSR(A), Official  
Realtime Reporter in the Provinces of British Columbia  
and Alberta, Canada, do hereby certify:

That the proceedings were taken down by me in  
shorthand at the time and place herein set forth and  
thereafter transcribed, and the same is a true and  
correct and complete transcript of said proceedings to  
the best of my skill and ability.

IN WITNESS WHEREOF, I have hereunto subscribed  
my name this 23rd day of November, 2012.

---

**Nancy Nielsen, RCR, RPR, CSR(A)**  
**Official Realtime Reporter**

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