

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

VOLUME 17

PAGES 4255 TO 4565  
(With Footnotes)

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

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2 See, e.g., Mikisew's submission on the draft Lower Athabasca Regional Plan at MCFN Submission, JRP Registry document #456, Appendix D, Tab 94; see also, Appendix D, Tabs 113 and 117 regarding Mikisew's exclusion from the World Class Monitoring Program 4444

3 Jackpine Mine Expansion Project JPR Hearing Transcript ["JPME Hearing Transcript"], Vol. 14, November 14, 2012, p. 3450, lines 18-25 p. 345, lines 1-18 4446

4 JPME Hearing Transcript, Vol. 14, November 14, 2012, p. 3458-59 4446

5 See, e.g., The Traditional Land and Resource Use Management Plan is described at MCFN Submission, JRP document #456, Appendix D, Tabs 110 and 111 4446

6 JPME Hearing Transcript, Vol. 14, November 14, 2012, p. 3463, lines 17-25- p. 3464, lines 1-6 4446

7 See, e.g. Correspondence from Alberta re: TRLUMP dated June 22, 2012, MCFN Submission, JRP document #456, Appendix D, Tab 116 4447

8 MCFN Submission, JRP document #456, Appendix D, Tab 117 4449

9 Perhaps the clearest example of this is Alberta's Lower Athabasca Regional Plan: See, e.g., MCFN Submission, JRP Document #456, Appendix D, Tabs 92-94 4449

10 JPME Hearing Transcript, Vol. 14, November 14, 2012, pp. 3450-51 and pp. 3457-59 4449

11 MCFN's concerns with Phase 1 of the IFN are set out at MCFN Submission, JRP document #456 Appendix D, Tabs 3, 19 and 28; Mikisew's concerns with Phase 2 of the IFN, including the lack of consultation, are set out in MCFN Submission, document #456, Appendix D, Tabs 66, 68, 83 and 106	4450
12 MCFN Submission, JRP document #456, Appendix D, Tab 68, As Long As The Rivers Flow: Athabasca River Use, Knowledge and Change	4453
13 MCFN Submission, JRP document #456, Appendix D, Tab 80, Patterns of Mikisew Cree land and resource use, at pages 44, 51	4454
14 See, e.g., MCFN Submission, JRP document #456, Appendix D, Tabs 92-94	4456
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17 See, e.g., the report by Petr Komers at MCFN Submission, JRP document #456, Appendix D, Tab 94	4457
18 See, e.g., Mikisew's LARP submissions at MCFN Submission, JRP document #456, Appendix D, Tab 80, Patterns of Mikisew Cree land and resource use, and Appendix D, Tabs 92-94	4457
19 JPME Hearing Transcript, Vol. 11, November 8, 2012 pp. 2451-2452	4458
20 See, e.g., MCFN Submission, JRP document #456, Appendix C, Tab 1, Mikisew Cree First Nation Indigenous Knowledge and Use Report and Assessment; Mikisew's concerns regarding caribou are also set out at MCFN Submission, JRP document #456, Appendix D, Tabs 97, 104, 112	4459
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**PAGE NO.**

There were no exhibits marked.

INDEX OF UNDERTAKINGS

DESCRIPTION

PAGE NO.

There were no undertakings given.

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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

#### 14       **Air Emissions**

15                   So I'd now like to turn to speak about air.

16          NO<sub>x</sub> emissions have been steadily rising in the  
17          region. This is confirmed by Wood Buffalo  
18          Environmental Association's monitoring stations and  
19          satellite images. <sup>61 Exhibit 017-016I; App GGG: MacLinden (2012)</sup>

20          Shell predicts annual NO<sub>x</sub> emissions at their fence  
21          line will be above the Alberta Ambient Air Quality  
22          Objectives. <sup>62 App 3.2, s. 5.3, pdf p. 50 [Ex. 001-0511]</sup>

23                   The annual maximum emissions at the  
24          Millennium monitoring station were 30 micrograms  
25          per metre cubed in 2011. <sup>63 Exhibit 017-035 OSEC [Hout]</sup>



1           PowerPoint    That measurement must be put in context,  
2                            as that data is based on production levels of  
3                            500,000 to 1.5 million per day or less over the  
4                            last 10 years, which is approximately half of what  
5                            has since been approved.   64 Transcript Volume 5, p. 816

6                            It's also important to note that this Project  
7                            will add 5.8 tons per day of NO<sub>x</sub>.   65 App 3.2, Table 2.1-2,  
8                            pdf p. 8

9                            Modelling of NO<sub>x</sub> emissions were based on the  
10                            assumption that the entire mine fleet would be  
11                            replaced by equipment meeting TIER-IV standards by  
12                            the end of 2024 at the latest.   66 App 3.2s. Pdf p. 12

13                            This assumption was made not just for this Project,  
14                            but for all mines. Yet Shell testified it could  
15                            not commit to ensuring their fleet met TIER-IV  
16                            standards by 2025.   67 Transcript Volume 5, p. 829 per Broadhurst

17                            Therefore, Shell's predictions of future ambient  
18                            air concentrations of NO<sub>x</sub> is not conservative; a  
19                            view shared by Environment Canada.   68 Transcript  
20                            Volume 13, p. 3273 per Fox

21                            It is very likely that this additional  
22                            Project will not meet the regional standards of  
23                            annual average of 45 micrograms per metre cubed.

24                            Shell testified it was going to experiment  
25                            with alternative fuel for its mine fleet and did

1 not plan on any retrofits to reduce emissions.

2 Shell, however, did not provide any  
3 information regarding what measures it could take  
4 to reduce emissions if monitored air quality  
5 exceeds thresholds.

6 Without any evidence of mitigation being  
7 undertaken, approving this Project will contravene  
8 the LARP Air Quality Management Framework.

9 69 Exhibit 017-016S; app. PP LARP Air Quality Framework

10 Now, Shell states that that framework will  
11 only apply if monitored ambient air levels exceed  
12 the guidelines. However, LARP was intended to  
13 guide decision-makers, including the ERCB,  
14 according to the **Land Stewardship Act**.<sup>70 SA, 2009 A-26.8</sup>  
15 The purpose of the threshold set by the plan is not  
16 to manage existing developments, but also to guide  
17 decisions about what activities will occur on the  
18 landscape.<sup>71 Exhibit 017-016T; app. QQ LARP pg. 27-28</sup> This is  
19 recognized in ERCB Bulletin 2012-22.

20 This bulletin requires applicants to submit  
21 sufficient information to enable an assessment of  
22 compliance with LARP thresholds.<sup>72 ERCB Bulletin 2012-22</sup>  
23 dated October 17, 2012

#### 24 **PAI and Metals**

25 The NO<sub>x</sub> emissions are also important because

1 they are acidifying emissions. They also emit  
2 particulate matter, trace metals and PACs.

3 <sup>73 Transcript Volume 5, p. 814, l. 12-14, p. 826, l. 4-5</sup> Mine fleet  
4 emissions, however, are not measured, so we have no  
5 hard data on what they actually emit.

6 The provincially appointed expert Water Data  
7 Review Committee released a report in 2011. These  
8 experts agreed that the Kelly et al. research  
9 indicates that considerably more particulate matter  
10 and trace metals are being released from oil sands  
11 facilities than are being reported to the National  
12 Pollution Release Inventory, or NPRI. <sup>74 Transcript</sup>

13 <sup>Volume 5, p. 804; p. 813-814</sup> It is important context that  
14 the NPRI excludes fleet emissions from the  
15 reporting requirements. <sup>75 Canadian Environmental Protection</sup>  
16 <sup>Act, 1999; Notice with respect to substances in the National Pollutant</sup>  
17 <sup>Release Inventory for 2011 Canada Gazette, December 24, 2011</sup>

18 The recent research from Environment Canada  
19 confirmed the Kelly et al. findings of  
20 concentrations of PAH and metals close to the mine  
21 sites.

22 The lake sediment studied by Muir et al.  
23 shows the highest concentrations were deposited in  
24 2009 to 2010, which corresponds with increasing  
25 bitumen production during this time.

1           The effects of this pollution is starting to  
2           become apparent. Muir states that industrial  
3           pollution and climate change (as read):

4  
5                        "Have forced freshwaters  
6           towards new ecological states,  
7           largely distinct from those of  
8           previous centuries of lake  
9           ecosystem history."   76 Exhibit 005-026

10           Excerpts from SETAC abstract book

11  
12           The Water Monitoring Data Review Committee  
13           notes in their report that (as read):

14  
15                        "Recent studies show that  
16           levels of PAHs in sediments of the  
17           Athabasca delta and mercury in the  
18           eggs of birds nesting there have  
19           been increasing, as have arsenic  
20           concentrations in the sediments of  
21           Lake Athabasca."   77 Exhibit 017-022 p. ii

22  
23           Now, Kelly et al. on the subsequent  
24           Environment Canada studies have found significantly  
25           elevated mercury levels near oil sands facilities

1 in the snowpack. <sup>78 Exhibit 017-022, p. 16</sup>

2 The Water Monitoring Data Review Committee  
3 believes that fugitive sources were likely an  
4 important source of local deposition of mercury.

5 <sup>79 Exhibit 017-022, p. 16</sup> Even RAMP reports that a general  
6 increase in frequency of measurable concentration  
7 of mercury among all baseline and test stations  
8 monitored by RAMP occurred. <sup>80 Exhibit 107-022, p. 25</sup>

9 Mercury and metal depositions are relevant to  
10 this Project because fugitive emissions in mine  
11 fleets are a source of these contaminants.

12 According to Dr. Schindler, the 2010 Kelly study  
13 implicated combustion sources for metal and PAHs

14 out of the stacks. <sup>81 Transcript Volume 11, p. 2518-2519</sup> They

15 are relevant because the compensation lake will be  
16 subject to the pollutants from the upgraders and  
17 mine fleets. Most importantly, mercury levels are  
18 already high from various sources and methylmercury  
19 rapidly accumulates in the food chain. <sup>82 Transcript</sup>

20 Volume 11, p. 2516

21 The precautionary approach as set out in **CEAA**  
22 **(2012)** and other legislative instruments is  
23 practical.

24 We have heard at many oil sands hearings that  
25 RAMP's monitoring improves the absence of impacts,

1 but the absence of evidence of impacts is not  
2 evidence of their absence. Several important  
3 Scientific Reviews have recently established that  
4 RAMP is incapable of detecting changes in the  
5 environment caused by oil sands development.

6 <sup>83 Exhibit 017-037; Exhibit 017-049, p. 33-34, p. 33-34; Exhibit 017-022</sup>

7 Alberta's Acid Deposition Management  
8 Framework is designed to prevent acidification  
9 problems from developing. <sup>84 Exhibit 017-035, pdf, p. 20</sup>

10 However, Shell's EIA shows that the Base Case will  
11 already exceed target and critical levels for 2  
12 grid cells and 21 lakes and these emissions will  
13 increase under the Planned Development Case.

14 A paper tendered by Shell indicates  
15 significant exceedances of critical loads of  
16 acidity in forest soils in the region. <sup>85 Exhibit</sup>

17 <sup>Aherne and Shaw (2010)</sup>

18 While RAMP has been unable to detect changes  
19 in acidification of lakes, Dr. Schindler notes that  
20 RAMP's monitoring design was based on a  
21 misunderstanding of the deposition process. The  
22 provincially appointed Water Monitoring Review  
23 Panel also noted that RAMP's monitoring was based  
24 on faulty assumptions about lake chemistry.

25 <sup>86 Exhibit 017-022, p. 25-26</sup>

1           The framework says new emission sources  
2           should only be approved in a manner that will not  
3           increase depositions in the grid cell and meet  
4           reduction targets.

5           Shell has not identified how the Project will  
6           avoid increasing acid deposition.

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

9  
10                       "The JME air emissions will  
11                       increase incremental acid  
12                       deposition in the region. This is  
13                       despite the proposed mitigation  
14                       measures outlined in the EIA."

15                               87 Exhibit 001-015B, App 1 SIR 8s, 2.2.3, pdf p. 38

16  
17           Shell supported this framework and it was  
18           approved by CEMA <sup>88 Transcript Volume 5, p. 831</sup> and therefore  
19           it should be prepared to accept its requirements.

20

21           **Summary**

22                       In summary, this Project will cause  
23                       exceedances of the LARP maximum limit for NO<sub>x</sub> and  
24                       the Acid Deposition Management Framework and is  
25                       therefore not in the public interest.

1                   At minimum, Shell should be required to  
2                   measure end-of-pipe emissions from their mine fleet  
3                   and report these annually.

4                   Further, prior to any approvals, mitigation  
5                   measures to reduce emissions should be required.

6                   I'd now like to turn to discussing end pit  
7                   lakes.

8

9                   **End Pit Lake**

10                   The proposed pit lakes will cover an area of  
11                   about 40 square kilometres, the largest ever  
12                   proposed. <sup>89 Transcript Volume 5, p. 753-754</sup> During the life  
13                   of the mine, tailings will be stored in the four  
14                   pit lakes. Over a 15-year period, the Northeast  
15                   Pit Lake will receive consolidation flux of about  
16                   2 million cubic metres a year, tailings seepage of  
17                   1.5 million cubic metres per year, and process  
18                   water from the centrifugation of MFT, or mature  
19                   fine tailings, of about 1 million per year.

20                   <sup>90 Transcript Volume 5, p. 755-756, p. 758-759 per Martindale</sup>

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

23                   <sup>91 Transcript Volume 7, p. 1321-1322</sup>

24                   Throughout its life, water from the Kearl  
25                   project's pit lake will also flow into Shell's,



1 with Kearn's pit lakes having been approved to  
2 store MFT. <sup>92 Transcript Volume 5, p. 759-760; see also</sup>  
3 Exhibit 001-002, Part 1, Table 2.6-13, pdf p. 55; Exhibit 001-051M;  
4 Table 4.2-1 No active treatment of contaminated water  
5 has been proposed for Shell's pit lakes.

6 Shell's modelling indicates that the pit  
7 lake's water quality will exceed Alberta's Water  
8 Quality Guidelines and several Chronic Effects  
9 Benchmarks. <sup>93 Exhibit 005-020, pdf p. 79</sup>

10 Dr. Miller testified that metals are a  
11 concern as well as the high salt load. Shell also  
12 predicts high salinity. <sup>94 Exhibit 001-002B, Appendix 1;</sup>

13 s. 3.2.6, pdf p. 24 While salts can be diluted, they  
14 will remain in the pit-receiving environment. The  
15 success of pit lakes depends very much on their  
16 chemistry and the few successful pit lakes that  
17 have been cited, like gravel pits, have contained  
18 clean water, which will not be the case for these  
19 EPLs. <sup>95 Transcript Volume 8, p. 194-203</sup>

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

1           Further, Shell states that Dr. Miller's  
2 evidence should be disregarded because he is not an  
3 oil sands pit expert. We note that Shell's  
4 consultants are not experts either. No one is.  
5 This is because no oil sands pit lake has been  
6 completed.

7           Shell's witnesses professed a high degree of  
8 certainty that the pit lakes will be ecologically  
9 self-sustainable, especially after 100 years.  
10 <sup>96 Transcript Volume 5, p. 775, l. 19-25</sup> They describe the  
11 predicted condition of the pit lake a few decades  
12 after closure as a "best guess." <sup>97 Transcript Volume 5,</sup>  
13 <sup>p. 775, l. 11-12</sup> Mr. Denstedt stated that EPLs are a  
14 matter of when, not if. We completely disagree.  
15 It is very much a question of if.

16           Both Dr. Miller and Environment Canada  
17 described multiple sources of uncertainty,  
18 including the reliance of multiple models and  
19 assumptions, errors in climate change modelling,  
20 and lack of a demonstration lake. <sup>98 Exhibit 005-020,</sup>  
21 <sup>pdf p. 77; Exhibit 017-016</sup>

22           Shell's definition of ecologically  
23 self-sustaining pit lakes is that they will  
24 eventually contain fish, but not necessarily the  
25 same fish as currently exist in the area. This

1 does not equate with Environment Canada's  
2 definition of ecological integrity. <sup>99</sup> Transcript  
3 Volume 5, p. 837

4 Accordingly, even if the pit lakes meet  
5 Shell's criteria, there will be a permanent loss of  
6 ecological integrity.

7 Dr. Schindler emphatically disagrees with  
8 Shell's prediction in part because few pit lakes  
9 have been successful to date. He also notes that  
10 the pit lakes will likely never provide a fishery  
11 comparable to what will be lost or the similar  
12 biodiversity.

13 No water quality standards have been  
14 developed yet for pit lakes despite CEMA  
15 undertaking this work in 2003. <sup>100</sup> Transcript Volume 5,

16 p. 762 Shell has also stated that it will not  
17 undertake a demonstration lake. <sup>101</sup> Transcript Volume 5,

18 p. 764 Rather, it is relying on Syncrude's Base Mine  
19 Lake to demonstrate the viability of the pit lake.  
20 That research is not publicly available and was not  
21 made available to the Panel. <sup>102</sup> Transcript Volume 5, p. 764

22 On that note, during final argument, counsel  
23 for Syncrude made several claims regarding  
24 Syncrude's activities and the alleged science of  
25 pit lakes that are not in evidence. As such, those

1 final arguments should be disregarded by the Panel.

2 Dr. Miller described the proposed pit lake as

3 a "grand experiment." The CEMA guidance document

4 also refers to it as a "large-scale experiment."

5 103 Transcript Volume 5, p. 776, l. 25; p. 777, l. 1-2; Exhibit 001-070K,

6 p. 350 Shell says it will use adaptive management,

7 which appears to mean that Shell hopes that it will

8 be able to figure out a solution in the future.

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

10

11 "Worldwide, adaptive

12 management has a poor track record

13 of performance." 104 Transcript Volume 5,

14 p. 786; Exhibit 001-070K, p. 28

15

16 Therefore, the CEMA guide stressed the need

17 for a concrete plan for the various failures that

18 may occur.

19 The Oil Sands Advisory Panel to the Federal

20 Minister of Environment also found that a clearly

21 focused set of objectives and a statistically sound

22 decision-making process that can allow for adaptive

23 management in a rapidly changing oil sands

24 environment does not exist. 105 Exhibit 017-049, pg. 33

25 Canada also recommended contingency plans be

1 developed because it was concerned about Shell's  
2 ability to predict and control effluent quality  
3 from the end pit lakes. <sup>106 Exhibit 005-018, pdf p. 14-15</sup>

4 Despite this, Shell has no concrete  
5 mitigation plan and provided no data to enable the  
6 Panel to assess whether any mitigation measures are  
7 technically or economically feasible. <sup>107 Transcript</sup>  
8 Volume 5, p. 789, l. 16-25, p. 790, l. 1

9 As such, the Panel is unable to discharge its  
10 obligations under CEAA and should not recommend  
11 approval of this mine.

12 And this is important, as that contingency  
13 plan can cost billions of dollars, posing a  
14 significant risk to the future taxpayers of this  
15 province. <sup>108 Transcript Volume 5, p. 790</sup>

16 Alternatively, we note that the 2004 CNRL  
17 Decision Report, and the Total Joslyn Mine Report,  
18 that previous Panels gave conditional approval to  
19 the end pit lake concept, subject to full-scale  
20 demonstration of its success in 15 years, which  
21 would be 2019 for CNRL. Shell testified that the  
22 information regarding the viability of Base Mine  
23 Lake to enact as a water treatment system will not  
24 be available for 10 years; that takes us to 2022.  
25 Therefore, the ERCB's condition of 2019 will not be

1 met. Shell does not plan to begin construction  
2 until 2015 and there is no commitment from Shell to  
3 make an investment decision by 2015.

4 The pit lakes are integral to the Mine Plan.  
5 We therefore request that before any approval be  
6 given, there be a proviso that Shell propose a Mine  
7 Plan with an alternative to the pit lakes. If  
8 Shell can demonstrate pit lakes are viable by the  
9 date of its investment decision, or has a fully  
10 developed contingency plan, then it can be granted  
11 leave to apply for a review in variance.

12 If Shell can take three years or more to  
13 ensure this Project meets the interest of its  
14 investors, then this Panel can surely take the time  
15 necessary to ensure the public interest is  
16 protected.

17 I'd like to move on and talk about water  
18 issues.

19

20 **EBF**

21 The Athabasca Management Framework is another  
22 example of how Alberta and Canada have failed to  
23 manage the cumulative effects of oil sands  
24 development in a responsible manner. This means  
25 that it falls to this Panel to ensure projects do

1 not contribute to the regional cumulative effects.

2 In 2003, at the first Jackpine hearing, DFO  
3 said it would make every effort to get an in-stream  
4 flow needs in place by 2005. <sup>109</sup> Transcript Volume 13, p.

5 <sup>3219</sup> An Interim Framework was put in place in  
6 2006. And a Base Flow was deferred to further  
7 study.

8 Work on the Phase 2 Framework started in  
9 2007. The Joint Review Panel for the Kearl Project  
10 recommended Phase 2 be implemented by January 2011.  
11 <sup>110</sup> Transcript Volume 9, p. 1766-1767 And DFO undertook to do  
12 so that year.

13 Both Scientific Reviews conducted by DFO in  
14 2006 and 2010 determined there is a need to  
15 establish an Ecological Base Flow, or EBF, to  
16 protect the river. <sup>111</sup> Transcript Volume 13, p. 3225 We are  
17 now in November 2012 and this has still not been  
18 done.

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

22 Water will be reduced below the 87  
23 centimetres because Syncrude and Suncor's  
24 allocation of 2 centimetres each have been  
25 grandfathered under the **Water Act**. Shell and CNRL

1 each are entitled to withdraw 0.2 centimetres, so  
2 the 87 centimetres may be reduced during critical  
3 low flows. 112 Transcript Volume 9, p. 1889 to 1892

4 Shell has committed to restricting water  
5 withdrawals from the Athabasca River to  
6 0.2 centimetres during low-flow conditions. Even  
7 so, negative effects on fish habitat may occur.  
8 113 Transcript Volume 13, p. 3211 Flow levels are important  
9 not just for fish habitat but also because the  
10 river is being used to dilute contaminants released  
11 from the mine. 114 Transcript Volume 13, p. 3219 to 3231; Exhibit  
12 017-1046

13 Most importantly, Shell has not provided the  
14 details of how it will cut withdrawals. It  
15 referred to using freeboard from its tailings  
16 facility or aquifers. 115 Transcript Volume 7, p. 1309-1310  
17 OSEC is concerned that Shell and other operators  
18 may effectively withdraw more than 0.2 centimetres  
19 by purchasing unused allocations from Syncrude or  
20 Suncor. 116 Transcript Volume 9, p. 1891

21 The Oil Sands Developer Group agreed for the  
22 winter of 2011 to 2012 that it indicates that  
23 operators will indeed allocate unused licence  
24 allocations between themselves. 117 Exhibit 002-038

25 The effect of this agreement is to enable



1           withdrawals greater than would be permitted by an  
2           87-centimetre Base Flow.

3                       We therefore believe the Panel has an  
4           important role to play in protecting the river:

5                       First, by affirming the need for an EBF  
6           forthwith;

7                       Second, by conditioning any approvals on  
8           Shell's limiting its water withdrawal to 0.2  
9           centimetres for both Shell Phase I and the  
10          Expansion Project, and doing so without purchasing  
11          additional withdrawals from other operators;

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

15

16          **Muskeg River**

17                      I'd like to speak briefly about the Muskeg  
18          River.

19                      The Muskeg River watershed is approximately  
20          1400 square kilometres. <sup>118 Transcript Volume 5, p. 839</sup>

21                      This Project will be the first project to mine a  
22          large area of the mainstem of the Muskeg River,  
23          21 kilometres. <sup>119 Transcript Volume 5, p. 840</sup>       If the  
24          Project is approved, 45 percent of the watershed  
25          will be mined.

1           According to Dr. Schindler, there is evidence  
2 of existing adverse impacts to the watershed and it  
3 is ridiculous to assume no permanent biological  
4 damage from 10 mines operating in the watershed.

5           120 Exhibit 017-016C; App A, Dr. Schindler

6           Shell has assessed components of the impacts  
7 to this watershed in discrete components  
8           121 Transcript Volume 5, p. 840; EIA - but there is no  
9 integrated assessment of the aquatic and  
10 terrestrial components of the impacts. In other  
11 words, it was not specifically chosen as a spatial  
12 area to assess.     122 Transcript Volume 5, p. 842     As such,  
13 there is no assessment of whether the Project will  
14 significantly impair the watershed and its ability  
15 to provide resources for current and future  
16 generations, which is required under **CEAA (2012)**.

17           There is also no direct assessment by Shell  
18 of the impacts to the watershed as a unit and  
19 therefore no information for the Panel to conclude  
20 that the policy goal of maintaining the ecological  
21 integrity of the basin will be met.     123 Transcript

22           Volume 5, p. 837 for definition of ecological integrity

23           In 2003, Shell was part of CEMA's Muskeg  
24 River Integrity Working Group. This group was  
25 charged with developing a plan for maintaining the

1 ecological integrity of the Muskeg River Watershed.  
2 124 Exhibit 017-016C; App A, Dr. Schindler After repeated  
3 delays, the task was abandoned. The Government of  
4 Alberta produced an Interim Framework in 2008.  
5 Alberta adopted the recommendations of past Panels  
6 to manage the cumulative effects on a watershed  
7 basis. 125 Exhibit 017-023 Muskeg River Interim Management Framework  
8 (2008)

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

11

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

13

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

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

18 THE CHAIRMAN: Nothing to do with you.

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

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

1           one year until a comprehensive framework could be  
2           developed. That is, one that includes the  
3           important terrestrial and land use components of  
4           the ecology of the basin, as well as aquatic  
5           health, and one that includes pollutants of concern  
6           like naphthenic acids and PAHs. <sup>126 Transcript Volume 5,</sup>  
7           p. 848-851       It also said that social, cultural and  
8           economic considerations would be addressed in the  
9           final plan. <sup>127 Transcript Volume 5, p. 845-847; 855</sup>

10                   This comprehensive plan was never developed  
11           and the Interim Framework was extended  
12           indefinitely. <sup>128 Exhibit 017-023 - covering letter; Transcript</sup>  
13           Volume 5, p. 847

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

22                   Although the ERCB and past Joint Review  
23           Panels asked Alberta Environment to come up with a  
24           management plan, the Interim Framework only deals  
25           with water quantity in the lowest reaches of the

1 river and specifies some water quality parameters.  
2 It also states as an objective to ensure that no  
3 physical diversion or rerouting of the mainstem of  
4 the Muskeg River. <sup>129 Transcript Volume 5, p. 952-953;</sup>  
5 Exhibit 017-023, s. 5.1.2

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

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

20 While past decisions of Joint Review Panels  
21 were instrumental in at least getting an Interim  
22 Management Framework in place, Alberta Environment  
23 has again dropped the ball. Without a management  
24 plan, permanent loss of ecological integrity will  
25 occur. This includes loss of rare patterned fen

1           130 Exhibit 005-020, p. 63 pdf and the creation of  
2           40 kilometres squared of pit lakes, which do not  
3           resemble the pre-existing ecology of the area.

4           Now I'd like to turn to speaking about  
5           greenhouse gas emissions and climate change, which  
6           is my final topic.

7

8           **GHG Emissions**

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

19          Taking such an approach will mean that  
20          effects are virtually never found to be  
21          significant. And I suppose that is why Shell's  
22          advocating for such an approach, despite the fact  
23          that it is not supported in law.

24          The fact that climate change is a global  
25          issue that affects us all does not provide an

1           excuse to ignore the impacts caused at a local and  
2           regional scale. If anything, it provides even more  
3           reason for action to be taken at those levels. On  
4           that basis, the Provincial and Federal Governments  
5           have developed greenhouse gas emission reduction  
6           targets.

7                         However, the Government of Canada and Alberta  
8           are currently not on track to achieve their 2020  
9           reduction targets. <sup>131 Exhibit 017-016</sup> As stated by  
10          the National Roundtable on the Environment and the  
11          Economy:

12  
13                                 "Canada will not achieve its  
14                                 2020 GHG emission reduction target  
15                                 unless significant new, additional  
16                                 measures are taken. More will have  
17                                 to be done. No other conclusion is  
18                                 possible." <sup>132 Exhibit 017-016, p. 56</sup>

19  
20                                 Now, at the same time, the Federal Government  
21          has continually delayed enacting regulations to  
22          limit greenhouse gas emissions for the oil sands  
23          industry. <sup>133 Exhibit 017-016, p. 56</sup> Environment Canada  
24          has stated that oil sands regulations will be  
25          drafted next year, but it was not able to speak to

1           whether they will actually include emission limits  
2           134 Transcript Volume 13, p. 3166, l. 12, and p. 3167, l. 8, or when  
3           any such regulations will be implemented.

4           We submit that approval of this Project will  
5           clearly undermine the ability of the Provincial and  
6           Federal Governments to meet their reduction  
7           targets. The Project will produce a total volume  
8           of greenhouse gases amounting to 1.18 megatons of  
9           CO<sub>2</sub> each year over the Project life.

10           135 Exhibit 001-001B, p. 3-106

11           However, Shell has failed to show how it will  
12           be able to mitigate these emissions.     136 Transcript  
13           Volume 13, p. 3168, l. 24; p. 3169, l. 3; p. 3654, l. 19; p. 3655, l. 13

14           Given Shell's failure to provide sufficient  
15           information to demonstrate that the impacts of the  
16           Project will be fully mitigated, the Panel cannot  
17           recommend that the Project proceed. The Project  
18           will further undermine the ability of the  
19           Provincial and Federal Governments to meet its  
20           greenhouse emission goals and therefore it is not  
21           in the public interest.

22           I also wanted to respond to a few points  
23           Shell made in its Opening Statement.

24           There Mr. Broadhurst stated that Shell's goal  
25           is to:



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"... become the world's most competitive and innovative energy company..." 137 Transcript Volume 3, p. 213, 1. 4-7

However, Shell is failing to increase its emission intensity targets from what they were eight years ago, which is far from innovative. 138 Exhibit 017-016, p. 52

Mr. Broadhurst also stated that Shell has a long and proven track record of delivering on its commitments. 139 Transcript Volume 3, p. 306, 1. 23 However, Shell is currently failing to meet its last two greenhouse gas emission reduction commitments, both for Muskeg River Mine and Shell Phase I. During cross-examination, Shell tried to explain the failure to meet its commitments by again trying to take the focus off of the Project-specific impacts by referring to the efforts of Shell, the company, through all of its projects and activities.

Shell stated that it aspires to meet the targets that it committed to for the last two projects but has not offered sufficient means by which it will be able to do so. 140 Transcript Volume 13,

1 p. 949, l. 11 and p. 953, l. 13 They have stated that they  
2 currently have no plans to undertake carbon capture  
3 and storage to mitigate the specific impacts of  
4 this Project. 141 Exhibit 001-070, p. 35 They rely on  
5 the Quest project, but that is not a  
6 Project-specific mitigation, and no evidence has  
7 been proffered to suggest that the Quest project is  
8 intended specifically to mitigate the effects of  
9 this Project as opposed to the numerous other  
10 operations Shell has undertaken.

11 In fact, the Quest project would have to be  
12 dedicated just to addressing emissions from this  
13 Project if it were going to be able to mitigate  
14 those emissions. 142 Transcript Volume 3, p. 264, l. 16-23;  
15 143 Exhibit 005-020, p. 39; 144 Transcript Volume 13, p. 3123, l. 23;  
16 p 3124, l. 4; 145 Transcript Volume 13, p. 3171, l. 17-23

17

## 18 **Conditions**

19 So in the event that the Panel finds this  
20 Project to be in the public interest, approvals for  
21 the Project should not be granted until Shell  
22 provides a detailed plan demonstrating the  
23 following:

24 1. How it will mitigate all of the  
25 greenhouse gas emissions caused by the Project.

1                   2. How it will meet greenhouse gas emission  
2 reduction targets for the Project equal to the  
3 emissions of a conventional oil and gas operation  
4 of similar size at start-up, which is the same  
5 condition that was included for the past two Shell  
6 mines.

7                   And 3. An operational carbon capture and  
8 storage system in place by 2020 that will  
9 specifically offset emissions from this Project.

10  
11                   **Not in the Public Interest**

12                   So given the foregoing, OSEC submits that  
13 this Project is clearly not in the public interest.

14                   If the Project were to proceed, it would  
15 contravene numerous legislative obligations and  
16 government policy objectives. The list of  
17 legislative and policy objectives that will be  
18 breached is long, and includes the following:

19                   - Approval would be contrary to  
20 the vision and objectives set out  
21 in LARP and the Integrated Resource  
22 Plan to protect biodiversity and  
23 ecosystem health and to avoid and  
24 minimize impacts.

25                   - It is also contrary to the

1                   purpose of the **EPEA**, which is to  
2                   protect the environment and to  
3                   avoid and minimize impacts.

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

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

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

21                 -       The reductions in biodiversity  
22                  resulting from the Project are  
23                  contrary to both the UN Convention  
24                  on Biological Diversity, to which  
25                  Canada is a signatory, and **SARA**.

1           - The significant loss of habitat for  
2           species at risk is also contrary to  
3           **SARA.**

4           It's also important to note that Shell's own  
5           assessment shows that projects that have already  
6           received approval, never mind the development that  
7           is planned, including this Project, will have  
8           impacts that exceed the region's environmental  
9           protection limits. Approving further projects to  
10          be added to such a landscape is clearly not in the  
11          public interest.

12          Now, the decision of the EUB in Whaleback  
13          <sup>146 ERCB Decision D94-8</sup> is instructive for determining  
14          whether the Project is in the public interest. In  
15          that case, the Board turned down a licence for an  
16          application to drill a well on the basis of public  
17          interest issues. It refused it on a number of  
18          reasons that are applicable to the current  
19          Application:

20                 First, they denied the application because  
21                 there was not a sufficiently robust mitigation plan  
22                 in place for the anticipated impacts, which for the  
23                 reasons discussed, OSEC submits is the case here.

24                 A second reason was that the well would be  
25                 inconsistent with the Provincial Government's land

1 management goals for the region, as expressed in  
2 the Integrate Resource Plan for the area. This  
3 Project would also be inconsistent with provincial  
4 management goals, including the Integrated Resource  
5 Plan.

6 Thirdly, the Board in Whaleback was also  
7 concerned that the region could be significantly  
8 negatively affected before the Province's then  
9 Special Places 2000 initiative could evaluate its  
10 importance in the overall provincial context.

11 This demonstrates that the Board was prepared  
12 to hold off approving drilling pending Provincial  
13 Government policy determinations.

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

1 roadmap. And so it is in the public's interest  
2 that the roadmap be available before any decisions  
3 are made with respect to this Project.

4 Now, in Polaris Resources Limited, the ERCB  
5 stated that:

6  
7 "As all projects may have  
8 some element of risk, a great deal  
9 of the Board's attention must be  
10 focused upon the level of risk and  
11 the ability and willingness of the  
12 applicant to mitigate or eliminate  
13 such risks. <sup>147 ERCB Decision 2003-101,</sup>  
14 page 3

15 An applicant's ability to  
16 take the appropriate measures to  
17 deal with risk is therefore  
18 critical to the Board's final  
19 determination as to whether the  
20 project can be found to be in the  
21 public interest."

22  
23 In the present case, Shell is clearly  
24 unwilling to take the necessary measures to  
25 mitigate the risk, particularly with respect to

1 conservation offsets.

2 Failing to provide adequate mitigation  
3 measures is also contrary to CEAA and the Panel's  
4 Terms of Reference and the requirements therein to  
5 provide an opportunity for public participation in  
6 the assessment process. If mitigation measures are  
7 not available for review during the assessment, it  
8 is impossible for the public to participate in a  
9 meaningful way.

10 When considering whether the Project is in  
11 the public interest of Alberta, it is important to  
12 note that the bitumen that will be produced will be  
13 predominantly for export <sup>148 Transcript Volume 5, p. 745</sup> -  
14 it's not going to be to meet Albertan or Canadian  
15 needs. Shell also acknowledged that only 3 percent  
16 of the money it will spend on construction will be  
17 spent locally, including labour. <sup>149 Exhibit 001-006</sup>  
18 (December 2009 update), s. 6.2; p. 6-9

19 It is also important to note that Shell has  
20 failed to provide a contingency or mitigation plan  
21 for the end pit lakes, even though such plans could  
22 cost the taxpayers billions of dollars. It is not  
23 in the public interest for Albertans to be kept in  
24 the dark about potentially significant costs that  
25 they may be liable for in the future.



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**Failure of Government to Follow Up on Recommendations**

One further note is with respect to the failure of governments to follow-up on past recommendations from Panels. And we respectfully request that if the Panel finds this Project to be in the public interest, that where possible, it provide for binding conditions instead of recommendations, as the failure to follow through on past Panel recommendations or to do so in a timely manner has been demonstrated time and time again.

Now, I've already talked about the EBF issue, Ecological Base Flow, but in 2007 the Joint Review Panel in Kearl recommended that one be established. 150 Transcript Volume 13, p. 3224, l. 4-7 And it's now 2013, almost, and we still don't have an EBF flow or a Phase 2 Management Framework.

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

There's also been a failure by Shell to

1 complete a technical review of wildlife corridors  
2 and their effectiveness in facilitating wildlife  
3 movement as recommended by the Panel in Shell  
4 Jackpine Phase I. <sup>151</sup> Transcript Volume 5, p. 947, l. 4; p. 969,  
5 l. 10

6 The 2006 Panel for Albian Sands recommended  
7 that Environment Canada and the Government of  
8 Alberta collaborate to determine mitigation options  
9 to minimize the impacts on yellow rail. Such  
10 mitigation measures have yet to be developed.  
11 Environment Canada has confirmed that it will be  
12 2013 or later before they are produced. <sup>152</sup> Transcript  
13 Volume 13, p. 2154, l. 15; p. 3157, l. 15

14 The Panel for Total also recommended that  
15 specific water quality objectives be developed for  
16 naphthenic acids, but Environment Canada has  
17 admitted that they are a ways away and could not  
18 give a specific timeframe for completion of those  
19 objectives. <sup>153</sup> Transcript Volume 13, p. 3154, l. 11-15; p. 3162,  
20 l. 2-3

21 These examples demonstrate that  
22 recommendations to take action after the fact  
23 cannot be relied upon by the Panel to mitigate  
24 project impacts.

25

1       **Conclusion**

2                   So, in conclusion, the information provided  
3                   by Shell is insufficient in order for the Panel to  
4                   discharge its duty to assess the Project. Shell  
5                   has failed to consider important impacts caused by  
6                   the Project as outlined throughout this submission.  
7                   What is clear from the information provided is that  
8                   the impacts will be significant.

9                   Virtually the entire LSA will be destroyed  
10                  during the mine life resulting in extreme habitat  
11                  loss to wildlife, including species at risk, and  
12                  loss of important vegetation, particularly wetlands  
13                  and old-growth forests.

14                  The ecological integrity of the Muskeg River  
15                  basin will potentially be lost, and unproven and  
16                  untested pit lakes, for which no contingency plan  
17                  exists, will become a permanent fixture on the  
18                  landscape.

19                  The Panel should disregard Shell's attempt to  
20                  define significance solely in relation to the RSA.  
21                  Further, determinations made by Shell with respect  
22                  to significance should be dismissed as they are  
23                  based on Shell's own subjective analysis, which is  
24                  not supported by the evidence that has been  
25                  provided or CEAA and its guidance documents.

1                   Despite the significant adverse effects,  
2                   Shell has failed to provide adequate mitigation  
3                   that it is technically and economically feasible.  
4                   The Federal Government has even clearly stated that  
5                   the mitigation measures provided are not  
6                   sufficient. Where mitigation measures are  
7                   available, Shell has even refused to provide them.

8                   Shell also relies on adaptive management,  
9                   particularly as it relates to pit lakes. But as  
10                  confirmed by CEAA, adaptive management cannot be  
11                  relied upon. If this is Shell's answer to the many  
12                  unknowns and uncertainties surrounding this  
13                  Project, given that adaptive management has proven  
14                  to be a failure, we urge the Panel that they cannot  
15                  rely on it as a cure for this Project's many  
16                  ailments.

17                  Further, Shell's position is that if there is  
18                  a potential significant adverse effect, the answer  
19                  should be monitoring and adaptive management.  
20                  Taking that approach would mean that all projects  
21                  would be allowed to proceed, even where there will  
22                  be significant adverse effects. Such an approach  
23                  is unacceptable and contrary to the governing  
24                  legislation.

25                  Mr. Broadhurst testified that production will

1 not begin until 2018. <sup>154</sup> Transcript Volume 8, p. 1485, l. 7-9  
2 During the next five years, the available  
3 technology and mitigation options will very likely  
4 change. More monitoring data and research will  
5 advance our understanding of the potential impacts  
6 and best practices. The regulatory landscape is  
7 also quickly evolving and many management  
8 frameworks are not in place or are only  
9 preliminary.

10 Approving the Project now, as proposed, will  
11 effectively grandfather in old technology and  
12 mitigation measures. Shell recognizes the value of  
13 regional planning as it relies on it to address  
14 many of the concerns raised during this process.  
15 As such, Shell should agree with the proposition  
16 that regional frameworks and policies that are  
17 forthcoming in the next few years should be in  
18 place before decisions regarding this Project are  
19 made.

20 OSEC requests that the Panel conclude that  
21 the Project will have significant adverse effects  
22 that cannot be mitigated and that it is not in the  
23 public interest.

24 However, if the Panel determines that this  
25 Project is in the public interest, we request that

1           it recommend that the ERCB only give provisional  
2           approval to this Application. That is, it be  
3           subject to the right of anyone potentially affected  
4           by the Project, and the Board itself, to review the  
5           ERCB's decision. We also request that any  
6           approvals be conditional upon compliance with the  
7           requirements that we've requested in this  
8           submission.

9                           Thank you.

10

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

12                           **CHAIRMAN:**

13           THE CHAIRMAN:                           Ms. Gorrie, I do have one  
14                           question. At the end of your argument, you  
15                           requested that the Panel recommend that the ERCB  
16                           only give provisional approval to the Application  
17                           and that it be subject to the right of anyone  
18                           potentially affected by the Project, and the Board  
19                           itself, to review the ERCB's decision.

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

23           MS. GORRIE:                           With reference to a review, I  
24                           was thinking of the review in variance provision in  
25                           the ERCB legislation. And, you're right, already

1           there is an ability to seek a review in variance.

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

14       THE CHAIRMAN:                   Thank you, Ms. Gorrie.

15       MS. GORRIE:                     You're welcome.

16       THE CHAIRMAN:                   I have 8:55. We'll take  
17           10 minutes.

18                                       **(Brief Break)**

19  
20       THE CHAIRMAN:                   Ms. Biem, would you like to  
21           continue for ACFN?

22       MS. BIEM:                        Yes, thank you.

23

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

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

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

8

9 **D. Shell's EIA**

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

20 I'll discuss several fundamental problems  
21 with the Environmental Impact Assessment, beginning  
22 with Shell's apparent confusion over the use and  
23 application of the concept of significance,  
24 especially as it applies to ACFN's traditional use  
25 and Treaty Rights.



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**i. Significance of the Impacts**

And I'd first like to note that impacts to Treaty Rights need not be significant in order for Crowns to do something to avoid, minimize and mitigate or accommodate those effects. However, once a significance determination is embarked on, it should involve local communities in developing significance to criteria. (Lawrence, 2007) MSES slide 6 of Exhibit 006-022, MSES text page 2, pdf page 7

Shell has taken contradictory positions about how significance of impacts on traditional uses and Treaty Rights should be assessed. On one hand, Shell says that the environmental consequences to a particular Aboriginal Right or interest will be closely tied and in most cases directly related to the environmental consequences to the supporting environmental or biological Key Indicator Resource. September 7 SIR Response, Exhibit 001-063 at page 71

However, Mr. Kovach told this Panel on October 30th that when considering significance in relation to the effects on a First Nation or Aboriginal group, what has to be taken into consideration is the effects as they apply and what that means to the communities. October 30, Page 394, at

1 lines 9, to page 395, line 1

2 Shell has been in possession of ACFN's  
3 assessment of impacts of the Jackpine Mine  
4 assessment on Athabasca Chipewyan's traditional  
5 knowledge and use since the spring of 2011. That  
6 assessment included a significance evaluation that  
7 was based upon what the effects of the Project mean  
8 to the community. <sup>Dr. Candler, Integrated Knowledge and Use Report,</sup>

9 <sup>Exhibit 006-013I at 46</sup> And that assessment concluded that  
10 the Jackpine Mine Expansion Project alone was  
11 likely to have significant adverse residual effects  
12 on ACFN knowledge and use. <sup>Dr. Candler, Integrated Knowledge</sup>

13 <sup>and Use Report, Exhibit 006-013I at 81</sup> However, as  
14 acknowledged by Mr. Kovach, Shell's review of  
15 ACFN's assessment of impacts to traditional use and  
16 knowledge did not change Shell's assessment of the  
17 impacts of its Project upon ACFN. <sup>Bill Kovach, Transcript</sup>

18 <sup>October 30, pages 433, lines 14-25</sup>

19  
20 **ii. Assessing Impacts to Traditional Use and Culture -**  
21 **Other Issues**

22 Besides being problematic, because it does  
23 not take into account what the effects of this  
24 Project mean to ACFN, Shell's own assessment  
25 underestimates the likely residual Project effects

1 and cumulative effects on ACFN traditional  
2 knowledge and land use in part because:

3 The Local Study Area was not based on Project  
4 effect or footprint;

5 The EIA exhibits considerable confusion  
6 between trapline rights and Aboriginal or Treaty  
7 Rights;

8 The EIA also contains several inappropriately  
9 vague or unsupported conclusions regarding impacts  
10 to traditional use. For example, Shell concluded  
11 that with regard to fishing, the Project will not  
12 have a direct effect on traditional fishing, <sup>Volume 5</sup>  
13 EIA, Exhibit 001-001E at page 8-53, and SIR 1, response 20B, Exhibit 001-006  
14 and further concluded that the Jackpine Mine  
15 Expansion will not change the ability of Aboriginal  
16 groups to use the fish and fish habitat resources  
17 in the Lower Athabasca River.

18 It's unclear what kind of data this strong  
19 conclusion is based upon, and, in fact, that  
20 conclusion contradicts the evidence that ACFN has  
21 placed before this Panel.

22 Further, there's an inappropriate reliance in  
23 this Environmental Impact Assessment on optimistic  
24 and distant future reclamation objectives as  
25 mitigation for Project impacts on traditional use

1 and rights. Even if the assumptions that  
2 reclamation will be successful and provide  
3 opportunities for ACFN knowledge and use that are  
4 equivalent to what naturally exists, and those are  
5 two highly questionable assumptions, the removal of  
6 lands from Aboriginal use for periods of time that  
7 exceed one generation is considered permanent.

8 And that's because of the interruption of  
9 knowledge transmission regarding the disturbed  
10 areas. Dr. Candler, ACFN Integrated Knowledge and Use Report,  
11 Exhibit 006-013I at text pages 20-21

12 The other major piece of work that Shell  
13 offered this Panel as a means for understanding  
14 Jackpine Mine Expansion impacts on ACFN was its  
15 cultural assessment in response to the Panel's  
16 January 2012 Supplemental Information Request 30.

17 And we've heard extensive submissions on why  
18 the cultural assessment did nothing to remedy the  
19 problems with Shell's earlier assessment of impacts  
20 of the Project on traditional use and Treaty  
21 Rights. Once again, Shell was willing to proceed  
22 with developing information for this Panel that was  
23 not based on adequate information from ACFN and  
24 that misinterpreted what information it did  
25 include.

1           Ms. Havers, the lead author responsible for  
2           the conclusions of the study, is clearly not an  
3           expert in Dene culture, yet decided she had enough  
4           information to proceed with her assessment in the  
5           face of clear indications from Athabasca Chipewyan  
6           First Nation themselves that more was required.

7           Linda Havers, October 31 Transcript at page 577, line 16, to page 578,  
8           line 13

9           And ACFN has provided critiques by  
10          Dr. McCormack whose academic background involves  
11          45-years worth of study, research, fieldwork and  
12          publishing about Fort Chipewyan and other northern  
13          histories and cultures that indicate just how  
14          deeply flawed this cultural assessment was.

15          Dr. McCormack, Critique of Golder Study slide deck, Exhibit 006-022 starting  
16          at page 196; Dr. McCormack Critique, Exhibit 008-010 at pdf page 80;  
17          Dr. McCormack, November 8 Transcript at page 2288, line 16, page 2289,  
18          line 19; Dr. Candler, November 8 Transcript at page 2272, line 21, to  
19          page 2273, line 13

20                 In ACFN's submission, this Panel should  
21                 exercise extreme caution in considering or relying  
22                 upon any of the traditional use rights or cultural  
23                 information or assessments that have been put forth  
24                 by Golder and Shell in relation to this Project.

25

1       **iii. Other Issues and Gaps**

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

19                  And the issues go beyond simple disagreements  
20                  about methodology as suggested by Shell.

21                  Some of the specific examples of problems  
22                  with Shell's EIA include a failure to provide  
23                  information regarding where wildlife will go during  
24                  the Project lifespan or where animals will  
25                  originate from to recolonize the disturbed

1 landscape after closure and reclamation should  
2 reclamation be successful.

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

18 An overarching problem with the EIA is  
19 Shell's position that an EIA is about assessment  
20 alone rather than about also including scientific  
21 research. And its ACFN's submission that where  
22 development is of an unprecedented scale, and given  
23 that this Project would be contiguous with others  
24 across the landscape, it may be necessary to  
25 generate new scientific knowledge in order to

1           actually conduct a meaningful assessment. And the  
2           failure of oil sands EIAs to generate new  
3           scientific understandings has been highlighted by a  
4           number of independent Review Panels, including the  
5           Royal Society of Canada and the Water Monitoring  
6           Data Review Committee that was set up by Alberta.

7                     Another problem I wish to highlight in the  
8           EIA is that Shell's disturbance analysis  
9           underestimates the amount of linear disturbance  
10          currently present in the RSA. Mr. Jalkotzy  
11          testified that Shell used the most current dataset  
12          available in order to complete the disturbance  
13          layer of its mapping, for example the disturbance  
14          mapping that can be seen at Figure 2, Appendix 4,  
15          of Shell's May 2012 SIR Response. However, that  
16          map does not show existing linear disturbances in  
17          the southeast and eastern sections of the mapped  
18          area. Those disturbances can clearly be seen on  
19          both Google Earth maps and on the mapping completed  
20          by MSES on behalf of ACFN using less refined  
21          datasets than the data that Shell's disturbance  
22          mapping is ostensibly based upon. And this failure  
23          to accurately represent linear disturbance in the  
24          terrestrial RSA remains unexplained and it should  
25          act as a caution to this Panel in relying upon the



1 cumulative impact data presented by Shell. Exhibit  
2 001- 0510, Figure 2 of Appendix 4 of Shell's May response to the JRP  
3 Information Requests; Martin Jalkotzy, Transcript November 2, page 1050,  
4 lines 5-8, Exhibit 001-086; Petr Komers, Transcript November 9, pages 2452,  
5 line 13, to page 2453, line 15, referring to Exhibit 066-022, MSES slide 22;  
6 see also MSES report Effects on the Traditional Resources of the Athabasca  
7 Chipewyan First Nation, Exhibit 006-0130 at text page 10  
8

9 **iv. Hydrological Assessment and Climate Change**

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

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

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

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

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

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

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

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

25                  There are further deficiencies in relation to

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

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

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

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

1 in the face of climate change and increasing water  
2 withdrawals.

3 These gaps and scientific errors build on  
4 each other to reach erroneous conclusions of  
5 negligible effects, including a disregarded  
6 potential for key cumulative impacts. As a result,  
7 the EIA conclusions end up contradicting the  
8 regulator's own science as demonstrated in the  
9 Phase 2 Framework Committee science, and therefore  
10 should not be relied upon. The detail of the problems with  
11 Shell's hydrological and climate change assessments can be found in  
12 Dr. Carver's evidence, November 8 Transcript at pages 2299-2371

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

20

21 **E. Consultation**

22 So ACFN has provided an extensive record on  
23 the subject of its consultation with Shell and the  
24 Panel has heard a lot of oral testimony regarding  
25 consultation on the Project. From ACFN's

1 perspective, the problems can be summarized as  
2 follows:

3 First, despite ACFN's good-faith efforts to  
4 work with Shell to manage impacts on its rights,  
5 nothing changed in the Project plan.

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

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

22 The third major problem is that neither the  
23 Crowns nor Shell have properly informed themselves  
24 of what is required to sustain ACFN's Treaty Rights  
25 now and into the future despite ACFN's best efforts

1 to move the TRUMP process forward. This Panel is  
2 being asked to determine whether the Project is in  
3 the public interest and whether it will have  
4 significant impacts upon ACFN's traditional lands,  
5 traditional use and resources, but you're being  
6 asked to make that decision without the information  
7 required to do so.

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

20 Yesterday, my friend provided a summary of  
21 consultation law. And it's somewhat unclear to me  
22 why he would have done so when Shell clearly  
23 opposed this Panel considering the adequacy of  
24 Crown Consultation. As will be discussed below,  
25 Shell's clearly acting for the Alberta Crown as a

1 procedural delegate and, in fact, the evidence is  
2 that they are engaging in conduct which goes far  
3 beyond the procedural aspects of the duty to  
4 consult, such as assessing rights claims, assessing  
5 impacts to rights, and determining the appropriate  
6 level of engagement with various Aboriginal groups.

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

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

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

1           In that case, Justice McLaughlin noted that  
2           when Crown decision-makers contemplate conduct that  
3           may adversely impact an Aboriginal Right, they must  
4           engage in consultation with the affected Nation.  
5           And the controlling question governing the level of  
6           engagement and the steps that must be taken is what  
7           is required to maintain the honour of the Crown and  
8           to effect reconciliation between the Crown and  
9           Aboriginal peoples with respect to the interests at  
10          stake.

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

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



1 in the regulatory approval system in the Oil Sands  
2 Region. *Haida Nation v. British Columbia (Minister of Forests)*, 2004  
3 SCC 73 at para. 45

4 I would next direct your attention to the  
5 leading Treaty 8 consultation case of **Mikisew Cree**  
6 **First Nation v. Canada**. And in that case, the  
7 Supreme Court of Canada made it clear that  
8 consultation is not intended to simply be an  
9 opportunity for First Nations to blow off steam.  
10 It's not intended to be limited to an opportunity  
11 to comment, particularly in cases where the level  
12 of engagement should be deep. *Mikisew Cree First Nation v.*  
13 *Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 54

14 And certainly the consultation process  
15 between ACFN and Shell has been characterized, you  
16 know, as it's been an opportunity to comment and  
17 not much more.

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

1                   Turning to another point raised by my friend  
2                   Mr. Denstedt yesterday, Shell takes the position  
3                   that removing the ability of individuals to  
4                   exercise rights in the footprint does not affect  
5                   the community as a whole. And this shows that they  
6                   just simply have not been listening to ACFN over  
7                   the course of their 15-year engagement.

8                   Traditional resources are shared by hunters and  
9                   distributed among members of the community and when  
10                  one hunter is pushed off the land, this affects  
11                  many community members. And this Panel heard  
12                  evidence about that sharing tradition from  
13                  Mr. L'Hommecourt on November 8th. Marvin L'Hommecourt

14                  Trancript November 8, at page 2248, lines 19-25

15                  Next I would turn to Mr. Denstedt's  
16                  submission that **Taku River Tlingit** stands for the  
17                  proposition that, in this case, the EIA process is  
18                  an appropriate vehicle to meet any obligation for  
19                  deep consultation. The **Taku River** case simply does  
20                  not support that proposition in this context. In  
21                  **Taku River**, the EIA process was quite different  
22                  than the one in which we find ourselves today. The  
23                  Supreme Court of Canada said it could be relied  
24                  upon, because in that case the First Nation had  
25                  been a full participant on something called a

1 "Project Committee." And the Project Committee was  
2 the primary driver, it was the primary engine that  
3 drove the assessment process. As part of the  
4 Project Committee, the First Nation had the  
5 opportunity to provide to the decision-maker and  
6 the ministers, expertise, advice, analysis, and  
7 recommendations, including advice about the  
8 potential effects of the project and measures for  
9 the prevention or mitigation of adverse effects.

10 *Taku River Tlingit First Nation v. British Columbia (Project Assessment*  
11 *Director)*, 2004 SCC 74 at paras 6, 8

12 This is a far cry from the situation before  
13 you where ACFN has been provided with some capacity  
14 to comment, but has no legislated role in the  
15 assessment process. ACFN does not have the type of  
16 influence or level of participation in this process  
17 that the ***Taku River Tlingit*** had as members of the  
18 Project Committee under the ***B.C. Environmental***  
19 ***Assessment Act***.

20 And I'll just note that even subsequent case  
21 law from B.C. has distinguished the ***Taku River*** case  
22 on the grounds that project committees no longer  
23 exist in that environmental assessment project --  
24 or sorry, in that environmental assessment process.  
25 So without the project committees, which provided a

1 legislated role for First Nations, **Taku River**  
2 doesn't really apply. *Halalt First Nation v. British Columbia*  
3 *(Environment)*, 2011 BCSC 945 at paras. 642-654

4 I would also like to direct the Panel's  
5 attention to the finding of the B.C. Supreme Court  
6 in **Halalt First Nation v. British Columbia**. And in  
7 that case, a proponent, and I'm directing it to you  
8 because my friend invited the Panel to review  
9 Shell's Consultation Logs as testament to the  
10 amount of effort that Shell has invested in  
11 consultation with ACFN. And in the **Halalt**  
12 decision, the proponent did something similar. And  
13 Justice Wedge remarked:

14  
15 "[655] The District  
16 argued that the length of the  
17 record itself illustrated the depth  
18 of the consultation in which the  
19 EAO engaged. Counsel for the  
20 District pointed to Mr. Finkel's  
21 affidavit, which included 639  
22 exhibits and was over 5,000 pages  
23 in length, and reminded the Court  
24 that the affidavit of Mr. Finkel  
25 was only one of many filed in this

1 case.

2 [656] One cannot quarrel  
3 about the length of the record in  
4 this case. It is a testament to  
5 the length of the environmental  
6 assessment itself, which exceeded  
7 the statutory timeline by more than  
8 five years. That in turn speaks to  
9 the complexity of the environmental  
10 issues raised by the Project and  
11 its several iterations. However,  
12 the length of the record does not  
13 establish that the Province  
14 discharged its constitutional  
15 duty." *Halalt First Nation v. British Columbia*  
16 *(Environment)*, 2011 BCSC 945 at paras. 655-656

17  
18 And I would submit that that applies to this  
19 case, the length of the record and the volume of  
20 Consultation Logs submitted by Shell detailing  
21 phone calls and meetings does not mean that  
22 consultation, that meaningful consultation has  
23 occurred.

24 And this takes us back to the first problem I  
25 mentioned in the consultation process between ACFN

1 and Shell, which is that despite ACFN's good faith  
2 and efforts to engage and achieve reconciliation,  
3 nothing changes, nothing substantive anyways.

4 And there's clear evidence before you that  
5 that's the case in relation to the Jackpine Mine  
6 Expansion.

7 On October 30th, Mr. Kovach candidly admitted  
8 that, despite the extensive concerns raised and  
9 issues presented by ACFN in relation to the  
10 Application, no changes were made to Shell's plans.  
11 In response to the question:

12  
13 "But Shell hasn't actually  
14 changed any of its plans in  
15 response to ACFN's technical  
16 reviews or in response to its  
17 traditional use information, have  
18 you?"

19  
20 Mr. Kovach replied:

21  
22 "I think that's fair to say  
23 that as far as the plans we're  
24 proposing for this Project, we  
25 haven't made any changes." <sup>Bill Kovach,</sup>

1                   October 30, page 462, lines 22-24; cross-examination  
2                   of Shell panel, October 30, pages 465 and 466; Linda  
3                   Jefferson, October 31 at pages 535-538; Linda  
4                   Jefferson, October 31, at page 534, lines 4-5

5  
6                   Shell has leaned quite heavily on a few minor  
7                   adjustments that they say respond to ACFN's  
8                   concerns. And I'm going to take you through those.

9                   First, you've heard repeatedly about their  
10                  decision to switch from diverting the Muskeg River  
11                  through a pipe to diverting it through a channel.  
12                  And as you've heard from Athabasca Chipewyan First  
13                  Nation, they were not consulted about that option  
14                  and they do not support that approach. It does not  
15                  address their concerns.

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

19  
20                  "... Albian Sands will  
21                  support implementation of seed  
22                  collection for traditional use  
23                  plants and ACFN members will  
24                  collect seeds and help replant them  
25                  on the reclamation sites. And we

1 support that commitment."

2

3 However, as explained by Ms. King on  
4 November 8th, that was an existing commitment  
5 negotiated under a prior agreement in relation to  
6 one of Shell's other mines; it has nothing to do  
7 with the Jackpine Mine Expansion Project.

8 Yesterday, my friend suggested that Shell has  
9 mitigated concerns about the loss of fish habitat  
10 in the compensation lake by planning to stock the  
11 compensation lake with fish species preferred by  
12 local Aboriginal peoples. ACFN has not asked for  
13 this. Rather, it opposes the destruction of the  
14 natural fish habitat and the replacement of the  
15 same with an unproven mitigation in the form of a  
16 compensation lake.

17 And again, those minor changes don't  
18 represent a substantive response to the various  
19 concerns that ACFN has raised.

20 And certainly the Alberta Court of Queen's  
21 Bench is alive to this type of issue. In the  
22 recent ***Cold Lake First Nation v. Alberta*** decision,  
23 the Court held that consultation had been  
24 inadequate even though, in that case, a number of  
25 substantive modifications and commitments had been



1 made to a proposed development in order to  
2 accommodate Cold Lake First Nation's Treaty Rights  
3 and protect Aboriginal interests. The Court found  
4 that, despite the substantive modifications, more  
5 work remained to be done to properly effect  
6 reconciliation. *Cold Lake First Nations v. Alberta*, 2012 ABQB 579 at  
7 paras. 23-24

8 In the context of ACFN's good-faith efforts  
9 over the past five years to engage with Shell on  
10 this Project to raise concerns, and Shell's failure  
11 to substantively respond or to change its plans,  
12 Ms. Jefferson's mantra that "consultation is  
13 ongoing" is highly inappropriate. Based on  
14 engagement to date, ACFN has little faith that  
15 continued consultation with Shell will actually  
16 move the parties towards reconciliation or towards  
17 a reconciliation of Crown/ACFN interests. And  
18 that's the ultimate objective of the process.  
19 That's why Shell engages.

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

22 Which leads to the second problem that I  
23 mentioned with the process. Shell does not respond  
24 substantively to ACFN's concerns because they don't  
25 have to. Nobody requires it of them. Consultation

1 is occurring in a flawed regulatory system that  
2 does not protect Treaty Rights, and where  
3 applications that, in ACFN's view, result in  
4 significant impacts to ACFN are approved as a  
5 matter of course. Chief Adam, November 7 Transcript at page 1964,  
6 line 9, to page 1965, line 3; Nicole Nicholls, November 8 Transcript at  
7 page 2123, lines 3-6

8 The testimony of Ms. Jefferson and  
9 Mr. Plamondon on October 31st between transcript  
10 pages 499 and 538, and again at page 559, is  
11 instructive regarding the structure of consultation  
12 in Alberta. In short, the evidence is that Shell  
13 summarizes Shell's view of consultation events and  
14 in a manner that is administratively convenient for  
15 Shell and Alberta, and that's the standard form  
16 Consultation Log. Presumably Alberta reviews those  
17 logs, but they are not here to give evidence on  
18 this matter, so we can't be sure.

19 Then Shell meets with Alberta behind closed  
20 doors, without ACFN, without taking minutes that  
21 can be reviewed by ACFN, and in those meetings,  
22 they discuss any questions that Alberta has about  
23 ACFN's issues, about the Consultation Logs, and  
24 about ACFN's concerns.

25 And although ACFN has raised concerns with

1 each of Shell and Alberta on several occasions  
2 regarding the effectiveness and accuracy of the  
3 Consultation Logs, Alberta has not followed up with  
4 ACFN at all. Alberta has not inquired further as  
5 to the nature of the concerns not being recorded on  
6 the logs, or the nature of the concerns with the  
7 logs themselves, or how the logs could be improved  
8 to actually reflect the substantive issues that are  
9 being raised in the process between ACFN and Shell.

10 Neither has Alberta followed up with Shell or  
11 required that Shell respond to ACFN's concerns or  
12 change its logs in a manner that reflects the  
13 actual issues of concern.

14 And while Alberta has been willing to meet  
15 quarterly with Shell to discuss its consultation  
16 activities, ACFN's requests to meet with Alberta  
17 directly about this Project, which have been  
18 ongoing since about 2009, have been rebuffed.  
19 There were no direct meetings between Alberta and  
20 Athabasca Chipewyan regarding this Project until  
21 sometime in 2012. For example, see August 7, 2009 letter, Nicole  
22 Nicholls to Alberta and Canada, requesting direct consultation;  
23 Exhibit 006-013CC, starting at pdf page 89; and Alberta's August 24, 2009  
24 response, Exhibit 006-013CC, starting at pdf page 220

25 Correspondence from Alberta Justice to our

1 firm has indicated an unfortunate tendency to take  
2 what Shell says regarding consultation with ACFN at  
3 face value. R. Zanin to J. Nelson, letter dated October 11, 2011,  
4 Exhibit 006-013KK starting at page 4; J. Nelson to T. Rothwell, letter dated  
5 February 2012 Exhibit 006-013LL at pdf 183-192

6 And those would be Exhibits 006-013KK and  
7 006-013LL, at PDF pages 183 to 192.

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

12 So, in fact, beyond delegating the procedural  
13 aspects of consultation to Shell in this case, it  
14 appears that Alberta has also allowed Shell to  
15 engage in the substantive aspects of consultation,  
16 such as leaving it to Shell to determine what the  
17 concerns are and what the appropriate level of  
18 consultation required is and what the appropriate  
19 mitigation and accommodations are for impacts to  
20 rights. Linda Jefferson and Jason Plamondon, October 31 Transcript at

21 pages 531-534 There's no evidence that Alberta does  
22 anything more than meet quarterly with Shell to ask  
23 Shell how consultation is going. And while Shell  
24 has assured ACFN on occasion that Alberta takes  
25 other steps, there's no evidence that in fact

1 Alberta does any of the things that Shell says they  
2 do. Shell has not witnessed these activities, has  
3 no direct knowledge of them.

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

13 Jason Plamondon, October 31 Transcript at page 521-522

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

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

1           confusion as to when and how that might actually  
2           happen.    Brian Makowecki and Marek Janowitz, Transcript November 15,  
3           page 3388, line 25, to page 3396

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

November 2, page 1120, at lines 8-23, question by

19

Mr. Lambrecht

20

21                   Several of Canada's witnesses, when  
22                   questioned about who actually was responsible for  
23                   accounting for Treaty Rights, deferred to Canada's  
24                   consultation coordinator. However, the  
25                   uncontroverted evidence is that the consultation

1 coordinator's mandate is to coordinate, not to  
2 actually engage in, consultation and accommodation.  
3 We are left with the impression that Canada,  
4 although less explicitly than Alberta, is relying  
5 heavily upon Shell to do its consultation work for  
6 it. And again, Shell has no obligation to  
7 implement Treaty 8. And Shell has made clear its  
8 fiscal interests in moving this Project forward.

9 Exhibit 006-013-GG, at page 47

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

23 It's to the point that the procedure becomes  
24 the outcome. And many times the Proponent starts  
25 to rely on that. That's why it seems to us to be



1           about counting calls and meetings, which is how the  
2           simplest matter turns into a long drawn-out  
3           process. The whole process becomes riddled with  
4           procedure and is quite unmanageable when you're  
5           dealing with hundreds of applications per year.  
6           That is why the Crown cannot delegate the  
7           substantive aspects of consultation to industry.  
8           Industry looks at it from a procedural point of  
9           view and our interests get pushed aside because the  
10          Proponent is not responsible for accommodating or  
11          reconciling those interests. The Proponent becomes  
12          fixated on procedure and that is part of what is  
13          overwhelming ACFN. Doreen Somers, November 8 Transcript starting at  
14          page 2133, line 16

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

24                   ACFN's Treaty Rights culture and wellbeing  
25                   are approaching a point where sustaining them may

1 not be possible into the future. Yet planning  
2 assessment and decision-making processes such as  
3 these are proceeding without consideration of where  
4 that point is.

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

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

22 So it's not for lack of effort on ACFN's part  
23 that a TRUMP is not yet in place. And it is not  
24 unreasonable for ACFN to continue to request, as it  
25 has for three years, that a TRUMP be in place

1 before this Project is approved. Nicole Nicholls, November 8

2 Transcript at pages 2211, lines 3-8; page 2234, lines 5-11

3 Ms. Nicholls also provided evidence about the  
4 flaws in the system that are preventing parties  
5 from reaching reconciliation. And this is the  
6 fourth problem that's really become apparent in the  
7 consultations with Shell.

8 The first systemic flaw is that the  
9 information and methodologies needed to properly  
10 assess impacts to Treaty Rights and culture are  
11 absent from this process. Shell asserts that their  
12 EIA will enable an assessment of impacts to  
13 Aboriginal and Treaty Rights. See for example

14 Exhibit 006-013NN at pdf page 81 But the problem is that  
15 those assessments have not taken into account what  
16 the thresholds are that are necessary to sustain  
17 ACFN's rights. Filling the gap is critical to  
18 ensuring that impacts to rights can actually be  
19 accurately characterized and is critical to make  
20 sure that we can develop mitigation and  
21 accommodation measures that actually address those  
22 impacts.

23 Another flaw is that there appears to be a  
24 lack of will on the part of Shell and the Crowns to  
25 meaningfully address ACFN's concerns. And

1 Ms. Nicholls provided several examples of this at  
2 her evidence on November 8th, which is transcript  
3 pages 2114 to 2120. November 8 Transcript pages 2114-2120

4 And I direct your attention to that  
5 specifically because it's a really important point.  
6 ACFN's tried over and over again in good faith to  
7 have its concerns addressed in various processes,  
8 and it's just not happening.

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

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

24 Consultation on LARP was largely meaningless.  
25 There was no transparency on how ACFN's input was

1           considered by Alberta. And at no point has ACFN's  
2           input been incorporated in a substantive way.  
3           There's no assurance that ACFN's concerns or input  
4           will be addressed or incorporated in the  
5           issue-specific plans or frameworks that will be  
6           developed pursuant to LARP.

7                         Simply put, neither the draft LARP, final  
8           LARP, nor the various frameworks under it are  
9           directed at ensuring that ACFN's ability to  
10          exercise their rights will be protected now or into  
11          the future.

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

21                        Now as I mentioned, Mr. Denstedt suggested  
22          that LARP would take care of cumulative impacts and  
23          given the amount of new parkland and the lack of  
24          timber and oil and gas tenures in the area around  
25          Fort Chipewyan and the Richardson Backcountry,

1 ACFN's rights and uses would be safeguarded.

2 That view is flawed for the reasons I just  
3 discussed and for several more reasons.

4 First, parks don't necessarily protect Treaty  
5 Rights as we can see from the history of Wood  
6 Buffalo National Park.

7 Furthermore, parks under LARP would still  
8 allow development. All existing oil sands,  
9 metallic, industrial or coal exploration or  
10 exploitation, commercial forestry, grazing leases,  
11 activity and multi-use corridors within parks, will  
12 all be permitted. In fact the LARP explicitly  
13 contemplates future mine development in the  
14 Richardson conservation area, which is the  
15 Richardson Backcountry.

16 LARP states at page 23:

17

18 "If approvals are granted in  
19 the future for a mining development  
20 in the new Richardson PLART..."

21

22 Or park:

23

24 "... the boundaries for this  
25 area will be re-examined, if deemed

1                   necessary and acceptable as a  
2                   result of the regulatory review for  
3                   the mining development." Exhibit

4                   006-013QQ at text page 23

5  
6                   And while my friend mentioned that there  
7                   aren't oil and gas and forestry tenures in the  
8                   Richardson Backcountry currently, what he neglected  
9                   to mention was that almost all of the areas  
10                  identified for the Richardson Wildland Provincial  
11                  Park have existing metallic and industrial mineral  
12                  tenures in the form of permits.

13                 The entire proposed Richardson public land  
14                 area for recreation and tourism public use has  
15                 existing metallic and industrial mineral tenures in  
16                 the form of permits, while a number of permit and  
17                 lease applications are pending. And the broad  
18                 extent of those metallic and industrial mineral  
19                 tenures within those new LARP areas can be seen at  
20                 Figure 4-46 of Patt Larcombe's Encroachment Report,  
21                 which is Exhibit 006-013-L.

22                 I would next note that parks under LARP are  
23                 explicitly meant to be used for all recreational  
24                 and tourism opportunities. Those are precisely  
25                 some of the impacts on ACFN use that ACFN has

1 identified as problematic. Recreational use of the  
2 Richardson Backcountry has already interfered with  
3 ACFN exercise of rights in the area. The LARP  
4 designations may encourage further consumptive and  
5 non-consumptive sport and commercial hunters and  
6 fishers, as well as increasing numbers of  
7 recreational snowmobiles, all-terrain vehicles, and  
8 other backcountry transportation uses. They may  
9 also support commercial tourism development. And  
10 if the proposed road and trail networks discussed  
11 under LARP come to fruition, access to the area for  
12 everybody will be greatly improved and with more  
13 access and more non-indigenous and recreational  
14 users, ACFN is often not able to hunt in areas due  
15 to safety concerns. There's a direct impact.

16 Finally, the new Lake Athabasca and  
17 Richardson recreation tourism areas in LARP fall  
18 within homeland areas that have been identified by  
19 ACFN as places the members wish to protect as  
20 sanctuaries for their current use and for the use  
21 of future generations. By way of contrast, the  
22 Government of Alberta's LARP goal for those areas  
23 is:

24

25

"... to provide additional



1 recreation opportunities and  
2 attract tourism investment."

3

4 And:

5

6 "... to address the growing  
7 demand for recreational  
8 opportunities and provide an  
9 attractive land base for tourism  
10 investment."

11

12 So there's a high potential that the LARP  
13 land-use designations referred to by Shell as some  
14 kind of mitigation for ACFN regional concerns will  
15 actually attract tourism-based investment and  
16 government-induced infrastructure which would  
17 proactively encourage incremental and new sport and  
18 recreational use in ACFN's homeland areas. And  
19 again, this would further restrict ACFN member's  
20 use of the area and, in particular, their use for  
21 hunting. Larcombe, Exhibit 006-013L at 4-67 to 4-69 and 5-22, 5-23

22 I'm going to turn now to speak to some of the  
23 mitigation and accommodation issues with the  
24 Jackpine Mine Expansion Application.

25

1 **F. MITIGATION AND ACCOMMODATION INADEQUATE**

2 **i. Mitigation, follow-up and adaptive management**

3 And at the outset, I think it's useful just  
4 to explain the relationship of mitigation and  
5 accommodation. So accommodation of impacts to  
6 Treaty Rights can include mitigative measures but  
7 where impacts cannot be addressed through  
8 mitigation, where mitigation is not possible,  
9 accommodation or other compensations may be  
10 required to address the residual impacts on Treaty  
11 Rights.

12 So mitigation is a subset of accommodation,  
13 as it were.

14 So the primary mitigation tool that I want to  
15 speak about this morning is the adaptive management  
16 that Shell has proposed to be used to address some  
17 of the ongoing environmental impacts of the  
18 Project. There are several flaws with this  
19 approach.

20 And the first is that this Panel's Terms of  
21 Reference requires that it:

22  
23 "... consider measures that are  
24 technically and economically  
25 feasible to mitigate any adverse

1 environmental effects ... to the  
2 project..."

3  
4 And there's a real distinction between  
5 measures that are known to be technically and  
6 economically feasible now and a vague commitment to  
7 do what we can at some point in the future.

8 We note that Section 2.d. requires, of the  
9 Panel's Terms of Reference, requires that the Panel  
10 identify measures that would, not could or might,  
11 mitigate the Project's effects.

12 Section 1 of the Amended Agreement includes  
13 the following definitions for follow-up and  
14 mitigation:

15  
16 "'Follow-up program' means a  
17 program for

18 a. verifying the accuracy of  
19 the environmental assessment of the  
20 project, and;

21 b. determining the  
22 effectiveness of any mitigation  
23 measures."

24

25 And:

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"'Mitigation' means, in respect of the project, the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means."

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

1 follow-up program.

2

3 **ii. Discussion of relevant case law**

4 The issue of reliance on adaptive management  
5 in environmental assessment processes has been  
6 considered by the Courts, and we've provided a  
7 discussion of that case law in detail in our  
8 written submissions. But today I'm just going to  
9 take you through a couple of highlights.

10 In **Canadian Wildlife Federation Incorporated**  
11 **v. Canada:**

12

13 "... Justice Muldoon reviewed  
14 the decision the federal Minister  
15 of Environment to allow a project  
16 to proceed..."

17

18 On the basis of adaptive management.

19

20 "Justice Muldoon held that  
21 'vague hopes for future technology'  
22 cannot constitute mitigation.  
23 (Justice Tremblay-Lamer quoted this  
24 passage, with approval, in  
25 **Pembina ...)**

1

2

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

3

4

And Justice Muldoon said:

5

6

"... since the Minister did

7

not identify any known

8

technologies, but only vague hopes.

9

For future technology, it is not

10

possible to consider that the

11

recited adverse water quality

12

effects are mitigable...".

13

...

14

"Justice Muldoon also held

15

that monitoring plans for the

16

future cannot constitute

17

mitigation..."

18

19

Stating:

20

21

"'Monitoring plans for the

22

future are a far cry from

23

known technology whereby the

24

adverse water quality effects

25

can be mitigated.'"

1

2

So:

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"As a matter of law, a significant adverse effect can only be rendered insignificant by technically and economically feasible measures - the Courts have described 'feasible mitigation measures' as 'practical means' ... [and] as measures that are 'known and proposed' and that 'can and will' mitigate environmental effects."

"Neither vague hopes for future technology or monitoring plans for the future constitute feasible mitigation measures..."  
*Canadian Wildlife Federation Inc. v. Canada*  
*(Minister of the Environment)* 31 F.T.R. 1 [1989]  
F.C.J. No. 1144 9QL) (F.C.T.D.) at pages 14-15;  
*Pembina Institute for Appropriate Development v.*  
*Canada* 2008 FC 302 at para. 25

1           The Federal Government has provided some  
2           guidance as well on adaptive management and its use  
3           in relation to Environmental Assessment. In 2009,  
4           it published an Operational Policy Statement on  
5           Adaptive Management Measures under the **Canadian**  
6           **Environmental Assessment Act**. The Adaptive  
7           Management Policy Statement is meant to provide  
8           best practice guidance on the use of adaptive  
9           management measures. *Alberta Wilderness Association v. Cardinal*  
10           *River Coals Ltd.* [1999] 3 F.C. 425 (Cheviot) at paras 55-56; *Alberta*  
11           *Wilderness Association v. Express Pipelines Ltd.* (1996), 137 D.L.R. (4th)  
12           177 (F.C.A) at para. 13; *Canadian Wildlife and Pembina*, *ibid.*

13  
14       **iii. Federal Policy Statement on Adaptive Management**

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

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

25           So under the heading "Mitigation is not



1 Identified," the policy statement says:

2

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

10 ...

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

17

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

21

22 "If ... there is uncertainty  
23 about whether the project is likely  
24 to cause significant adverse  
25 environmental effects, a commitment

1                   to monitor project effects and to  
2                   manage adaptively is not  
3                   sufficient." Operational Policy Statement on  
4                   Adaptive Management Measures under the Canadian  
5                   Environmental Assessment Act, Government of Canada  
6                   2009 available on the CEA Agency webpage listing  
7                   "Guidance Materials" for federal environmental  
8                   assessments under CEAA

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

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

1           If the Proponent has failed to identify  
2           technologically and economically feasible  
3           mitigation measures to address major project  
4           related effects, which we say is the case here, the  
5           Panel has nothing to rely on to address those  
6           effects.

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

14          And Madam Justice Tremblay-Lamer said:

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

1                   *Appropriate Development v. Canada* 2008 FC 302 at

2                   para. 32

3

4                   The Panel's determination of whether this

5                   Project has significant environmental effects will

6                   inform its public-interest decision. It would also

7                   ensure that future discussion about whether the

8                   Project is justified in the circumstances under

9                   Section 52 of **CEAA (2012)**. That discussion should

10                  take place in the full awareness of the likely

11                  environmental effects of the Project as currently

12                  proposed. If mitigation measures are not yet

13                  feasible, this is key information that must be

14                  brought to the attention of First Nations, of the

15                  public, and of the government.

16

17                  **iv. Shell's Approach to Mitigation**

18                  And I'm going to turn now to a few other

19                  proposed mitigation measures in this process.

20                  So Shell has proposed that First Nations must

21                  negotiate mitigations with it in order to get their

22                  concerns addressed. Linda Jefferson and John Broadhurst,

23                  October 4 30, transcript pages 469-476 It's ACFN's experience

24                  that the commitments and agreements with Shell in

25                  relation to previous oil sands mines, and which

1 this Panel relied on as mitigation, haven't  
2 actually worked to mitigate the impacts. That's  
3 why ACFN has filed breach of contract litigation  
4 regarding their previous agreements with Shell.

5 There are few, if any, mitigation measures  
6 that previous Panels have relied on to address  
7 First Nations concerns regarding impacts to land  
8 use rights and culture, because often those have  
9 been hived off into agreements that are not before  
10 you and that you're not able to assess. Monitoring  
11 and follow-up is required to determine whether  
12 mitigation for traditional use actually works.

13 *Linda Jefferson and John Broadhurst, October 30, transcript pages 469-476*

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

17 Compensation for directly affected trapline  
18 holders, which, again, demonstrates a certain  
19 amount of confusion between traditional use and the  
20 commercial rights associated with an RFMA;

21 Continued consultation with key Aboriginal  
22 groups;

23 Access to traplines;

24 Employee contractor education;

25 And reclamation. *Dr. Candler, ACFN Traditional Knowledge*

1 and Use Report, Exhibit 006-013I at page 22

2  
3 And in ACFN's submission, those aren't  
4 sufficient. That doesn't address the level of  
5 concerns or the nature of the concerns that ACFN  
6 has raised in this process.

7 Shell has been unable to point this Panel to  
8 other mitigations it has proposed for the Project  
9 regarding its impacts on ACFN traditional use,  
10 knowledge and rights, besides the diversion of the  
11 Muskeg River through a channel rather than through  
12 a pipe.

13 But as Mr. Bolton noted on November 6th, the  
14 Muskeg River Management Framework is still in  
15 place.

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

19 The Interim Management Framework included an  
20 objective that there be no diversion of the  
21 mainstem of the Muskeg River. And as this Panel is  
22 likely aware, that Interim Framework was put in  
23 place in response to past Joint Review Panel  
24 recommendations and strong calls for a backstop as  
25 an effort to manage cumulative environmental

1 effects and to protect the integrity of the river.  
2 The aim of the Interim Framework was to reduce the  
3 impacts of resource development in the Muskeg River  
4 watershed to acceptable levels of change. That's  
5 what they were considering when they recommended no  
6 more diversions, no diversions of the mainstem of  
7 the Muskeg River. Planning and management  
8 decisions were to be evaluated within the context  
9 of the Muskeg River as a key component of the  
10 Athabasca River aquatic system.

11 And my point here is that a lot of thought  
12 has already gone into determining that no  
13 diversions of the Muskeg River should take place.  
14 And that goal was set explicitly in view of current  
15 and future industrial development. The Interim  
16 Framework was already an explicit attempt to  
17 balance development with environmental needs.

18 So my point is that work has been done. In  
19 response to this Joint Review Panel's calls for  
20 efforts to manage cumulative impacts, Alberta  
21 determined that a goal for this watershed was no  
22 diversion of the mainstream of the Muskeg River.

23 But if this Panel does require further social  
24 and environmental reasons to impose a condition on  
25 the Project that the river not be diverted, or to

1 sterilize the ore underneath the river, here are  
2 some reasons for your consideration:

3 The river has cultural and spiritual  
4 significance to the Athabasca Chipewyan who have  
5 used and occupied the Muskeg River Basin for  
6 millennia. ACFN members continue to use the  
7 river;

8 The Muskeg River provides fish habitat for  
9 migrant and resident populations; Dr. Schindler, November 9  
10 Transcript at page 2520-2521, Interim Management Framework at text page 6

11 Traditional knowledge says that the river  
12 keeps the surrounding muskeg system alive, it's the  
13 lifeblood of the living breathing entity that is  
14 the muskeg, and that muskeg supports the animals  
15 that are relied on by ACFN for the exercise of its  
16 rights;

17 The Muskeg River provides a regionally  
18 important wildlife corridor without which wildlife  
19 will not have a way to move through the Muskeg  
20 River watershed. It allows for genetic  
21 connectivity. And as noted by Mr. L'Hommecourt,  
22 migratory animals won't have the luxury of a mine  
23 escort to get through the pits to their habitat;

24 The Muskeg River is, as acknowledged by the  
25 Interim Framework, a key component of the Athabasca



1 River aquatic ecosystem. And ACFN has submitted  
2 extensive evidence regarding their use of the  
3 Athabasca River and how stresses on that system are  
4 already impeding their ability to exercise their  
5 rights.

6 Again, ACFN opposes the Jackpine Mine  
7 Expansion Application, but should it be approved  
8 over ACFN's objection, ACFN strongly urges this  
9 Panel to approve it on condition that the Muskeg  
10 River be left in a natural state and not be  
11 diverted.

12 As discussed earlier, I believe Mr. Murphy  
13 discussed this last night, another of Shell's  
14 primary proposed mitigations is a compensation  
15 lake. But as has come out in the evidence, no net  
16 loss planning is not being done with the Treaty  
17 Rights of First Nations in mind. It's not being  
18 done with the Treaty Rights as a primary objective.  
19 And further, No Net Loss Planning does not have a  
20 track record as an effective mitigation across  
21 Canada, and, as Mr. Makowecki indicated, it's too  
22 early to say whether it's going to be effective in  
23 the oil sands.

24 Another specific mitigation issue that I wish  
25 to raise is that of the effectiveness of Shell's

1 mitigation for waterfowl and processed-water and  
2 tailings-pond interactions. Mr. Martindale was put  
3 forward as Shell's primary witness regarding  
4 Shell's mitigations for waterfowl, but he was  
5 unaware of a major incident involving the deaths of  
6 16 birds in May 2007. He did correct his testimony  
7 the day after being questioned but it's somewhat  
8 concerning that the person responsible for  
9 implementing the mitigation system would have been  
10 unaware of such a major incident.

11 Mr. Martindale also testified that Shell  
12 participates in the Regional Bird Monitoring  
13 Program, the RAPP, and that Shell conducts  
14 extensive mortality searches. Mr. Martindale told  
15 you that Shell spends in the order of thousands of  
16 person-hours per year. However, the 2011 RAPP  
17 report indicates that, in fact, Shell spends less  
18 than 200 hours per year on mortality searches, and  
19 when it does search, it recovers more dead birds  
20 per hour of searching than do any of the other  
21 participating operators in the program.

22 And you heard from ACFN avian expert, Sarah  
23 Hechtenthal, that her review of the data associated  
24 with the 2011 RAPP report showed that, in fact,  
25 Shell spent only 160.4 hours of dedicated mortality

1 searches at six of their industrial waterbodies in  
2 2011.

3 Given the significant contradiction between  
4 Mr. Martindale's evidence and the RAPP report, it's  
5 our submission that the Panel should exercise great  
6 caution in relying on Mr. Martindale's testimony  
7 regarding the efficiency and effectiveness of  
8 Shell's programs to mitigate Project impacts on  
9 waterfowl. Mr. Martindale, Transcript October 31, at 595-596.

10 Exhibit 006-013W; Sarah Hectenthal, Transcript November 9 at page 2467

11 And, finally, I note that because in  
12 terms of mitigation, because there hasn't yet been  
13 an adequate identification of the impacts on ACFN,  
14 culturally important wildlife species, and other  
15 resources, it's not possible yet to design  
16 appropriate mitigations or accommodations that  
17 fully address the extent of ACFN's concerns.

18 And it has to be remembered that this Project  
19 is being proposed, you know, in absence of specific  
20 targeted Crown efforts to manage and mitigate the  
21 impacts of industrial development on ACFN's Treaty  
22 Rights. And this kind of inaction does not  
23 actually absolve the Crown of its duties to ACFN.

24 As held by the Federal Court in **Adam v.**  
25 **Canada**, when ACFN took Canada to court to actually

1 force the production of a woodland caribou recovery  
2 strategy, Crown conduct can involve decisions to  
3 simply not do anything.

4

5 **G. Disposition of the Proceeding Advocated by ACFN**

6 So, in conclusion, ACFN has demonstrated  
7 through evidence, that if approved, the Jackpine  
8 Mine Expansion will have significant direct and  
9 adverse impacts on its traditional use, culture and  
10 rights.

11 ACFN has further demonstrated that there are  
12 significant cumulative impacts on its traditional  
13 use, culture and rights, and these impacts are not  
14 being managed.

15 ACFN opposes approval of the Project and  
16 respectfully submits that the Project is not in the  
17 public interest and should not be approved.

18 In the alternative, should the Panel find  
19 over ACFN's objective that the Project is in the  
20 public interest, and finds that it will not result  
21 in significant adverse environmental effects, in  
22 light of ACFN's position that no further impacts to  
23 ACFN are acceptable at this juncture, ACFN requests  
24 that any approval or recommendation that the  
25 Project proceed be made conditional upon completion

1 or implementation of the matters listed under the  
2 heading "disposition" in our October 1st  
3 submission. And I'm just going to highlight a few  
4 of those for you here today.

5 So, first, prior to the issuance of any  
6 further decisions on oil sands projects in ACFN's  
7 traditional lands by the ERCB, by this Joint Review  
8 Panel, or by a subsequent Joint Review Panel, ACFN  
9 strongly requests the completion and implementation  
10 of a Traditional Land and Resource Use Management  
11 plan, the TRUMP.

12 ACFN requests that any further permits issued  
13 adhere to the thresholds and limits identified in  
14 the TRUMP in subsequent regulatory processes.

15 ACFN requests adoption and implementation of  
16 ACFN's recommendations, including the maintenance  
17 of an Aboriginal Base Flow in the Athabasca River,  
18 so those recommendations are contained in review of  
19 the Phase 2 Framework Committee Recommendations:  
20 Synthesis Report that is part of the evidence filed  
21 in this proceeding.

22 The Athabasca River must be protected for the  
23 continued exercise of Treaty Rights.

24 ACFN further seeks regulatory reform whereby  
25 First Nations in the region play a co-management

1           role in decision making on proposed industrial  
2           development projects where regulatory and  
3           legislative mechanisms relating to land and water  
4           use have a rights-based focus, and consistent with  
5           Section 35 rights.

6                     Regional planning regulations and related  
7           legislation must acknowledge that the ability of  
8           Aboriginal peoples to exercise traditional uses of  
9           the land may be linked to specific lands and  
10          territories and the resources thereon which require  
11          conservation to maintain the ability of Aboriginal  
12          peoples to exercise traditional uses.

13                    ACFN submits that there must be immediate  
14          protection for the Ronald Lake bison herd from  
15          non-First Nations hunting and from any disturbance  
16          of the herd's habitat throughout their range.

17                    ACFN requests that this Panel recommend the  
18          establishment of an independent panel to evaluate  
19          consultation in the Oil Sands Region. Such a panel  
20          or commission should be comprised of experts that  
21          are independent of industry and government and that  
22          have expertise with and sensitivity to First  
23          Nations cultures and unique issues regarding health  
24          and wellness, socio-economics and culture.

25                    First Nations in the region should be

1 directly involved in the appointment process and  
2 drafting of the Terms of Reference and should have  
3 representation on the commission.

4 The commission should spend time and hold  
5 hearings in the communities of impacted First  
6 Nations and should have a wide-ranging mandate to  
7 make findings and recommendations.

8 Finally, participant funding should be  
9 allocated in this process to ensure First Nations  
10 have the capacity to participate meaningfully.

11 ACFN also has some following project-specific  
12 requirements, some requests for project-specific  
13 requirements.

14 And I would adopt the submissions of  
15 Ms. Gorrie that, to the extent that the Panel finds  
16 itself able to do so, that any recommendations it's  
17 considering be made conditions, because as we've  
18 seen, often panel recommendations don't bear fruit.

19 So ACFN requests that permits,  
20 authorizations, construction and operations, be  
21 deferred on the Jackpine Mine Expansion until such  
22 time as a traditional land and resource use plan  
23 has been completed and binding thresholds and  
24 measures set that will allow regulators to  
25 condition permits and authorizations in a manner

1 which protects and prioritizes Treaty Rights.

2 ACFN requests that the ore beneath the Muskeg  
3 River and in an appropriate setback be sterilized  
4 and that the Muskeg River be left to flow in its  
5 natural state and that full protection for this  
6 river be put in place.

7 ACFN requests that prior to the commencement  
8 of construction, the Applicant must post a  
9 reclamation bond of a size and character that will  
10 ensure Project lands will be progressively and  
11 effectively reclaimed to a standard and in a  
12 timeframe consistent with the exercise of ACFN's  
13 Treaty Rights.

14 And I understand that there's a Mine  
15 Liability Management Program in place right now,  
16 but it's also my understanding that that program  
17 does not explicitly consider the need to reclaim to  
18 a standard consistent with the exercise of Treaty  
19 Rights. So that's the difference we're asking for  
20 here.

21 Another Project-specific requirement that  
22 ACFN requests is funding for and the conduct of  
23 community-based comprehensive baseline country-food  
24 harvesting and consumption study, including a  
25 dedicated study of risk perception and its impacts



1 on country-food harvesting among ACFN members.

2 ACFN requests the funding for and completion  
3 of a sociocultural assessment as proposed by ACFN  
4 to Shell.

5 We further request the creation of a  
6 socio-economic monitoring program to assess the  
7 effectiveness of socio-economic effect mitigation  
8 measures implemented by any of Shell, the  
9 Government of Canada, and the Government of  
10 Alberta.

11 And that concludes my submissions. Thank  
12 you.

13 THE CHAIRMAN: Thank you. We have no  
14 questions. Thank you very much.

15 MS. BIEM: Thank you.

16 THE CHAIRMAN: I have 10:18. We'll take  
17 20 minutes.

18

19 **(The morning adjournment)**

20

21 THE CHAIRMAN: Mr. Murphy.

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

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

25 I've spoken to my friend, Mr. Denstedt, and he said

1           he has no objection so long as there's no new  
2           evidence that Chief Adam will say.

3       THE CHAIRMAN:                    So it's in the nature of  
4           argument?

5       MR. MURPHY:                    It is.

6       THE CHAIRMAN:                    Thank you.

7       MR. MURPHY:                    Thank you.

8

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

10       **FIRST NATION:**

11       CHIEF ADAM:                    Good morning, Mr. Chairman.

12            You know, in the last three weeks, three and  
13            a half weeks, you've heard arguments in regards to  
14            ACFN's position in regards to the Jackpine Mine  
15            Expansion. You've heard testimony from our Elders,  
16            you've heard testimony from our community members  
17            in regards to the concerns that ACFN has of further  
18            development. One thing that we mentioned in my  
19            statement was the fact that clearly note that the  
20            position that ACFN takes is the fact that we do not  
21            oppose development. I've stated it many times to  
22            Ministers, to industry, to the press. The one  
23            thing that we oppose is the fact about how the  
24            regulatory system is in breach of conducting  
25            findings in regards to moving forward.

1                   We hear new studies coming out constantly and  
2                   it is very alarming for ACFN members. We have no  
3                   recourse in regards to address these findings in  
4                   any form. When we address them to government  
5                   agencies, to industry, it seems like we go full  
6                   circle and it comes right back to us with no  
7                   conclusion.

8                   On health studies for the community, doctors  
9                   have been silenced, you know, in regards to what's  
10                  been going on in the community. We feel that when  
11                  credible people who have concerns raise issues in  
12                  regards to general public and ACFN, there's always  
13                  a recourse that something happens to them. We know  
14                  the instance in regards to what Dr. O'Connor went  
15                  through a few years back. We hear the reports  
16                  constantly coming out in regards to the scientists  
17                  of Canada that have been muzzled, you know. And we  
18                  have very, very much concerns in regards to those  
19                  issues.

20                  We need to find a way to balance the  
21                  development that is going on in the region of Fort  
22                  McMurray and north. And we feel that at this point  
23                  in time, history will be made in regards to further  
24                  development if strong recommendations were put  
25                  before government agencies, and industry. We know

1 for a fact that the concerns are real. I hear them  
2 constantly from the community level. I hear them  
3 constantly from general public in regards to where  
4 I go.

5 We've echoed the fact that we need to put in  
6 place a co-management structure where First Nations  
7 will participate in regards to moving forward. Any  
8 objection in regards to that faith will have a  
9 continuous effect in regards to the First Nation  
10 coming before the Panel on any more new projects  
11 coming up.

12 We take into consideration that both Canada  
13 and the Alberta Governments are not taking the  
14 issues at hand for both Canadians and Albertans and  
15 Aboriginal people alike. Where, in my mind and  
16 others, is the Government of Canada on their  
17 position? Where has the Government of Alberta, in  
18 their mind, addressed the issues in regards to  
19 what's going on?

20 We speak on behalf of the Nation. And we  
21 have collective rights in regards to what we're  
22 doing based on Treaty and under the **Constitution** of  
23 Section 35. We argue our rights and we argue the  
24 fact that there's something wrong. And if the  
25 Canadian Government and the Provincial Government

1 cannot argue for the citizens alike, well, then,  
2 ACFN takes that position to argue on their behalf  
3 as well, that there is something wrong in this  
4 system. We need to understand the complexity of  
5 the whole surrounding. You've heard in their  
6 submission, that, yeah, they go above the levels  
7 that are required within LARP. You've heard the  
8 submissions from Shell's lawyer in that regards.  
9 So I cautious, you know, caution you in regards to  
10 moving forward. And I just hope that one day that  
11 justice will be served on behalf of the First  
12 Nation and for the people that are affected by the  
13 development in this region.

14 I just clearly state the fact that ACFN was  
15 grateful enough to come before the Panel and that  
16 you've taken the time to listen to our concerns.  
17 So on behalf of the Athabasca Chipewyan First  
18 Nation, the Elders, the members at large, and for  
19 the youth and for the children that are unborn for  
20 generations to come, that you take into  
21 consideration that our evidence of greatly concern  
22 of the fact about what is going on and the need to  
23 fix this whole problem, and then, only then, we  
24 will be satisfied in moving along in further  
25 development on our traditional territories.

1 Thank you, Mr. Chairman.

2 THE CHAIRMAN: Thank you, Chief Adam.

3 Mr. Mallon. Oh, Ms. Johnston, are you going  
4 ahead?

5 MS. ANNA JOHNSTON: Good morning, Panel,  
6 Mr. Chair.

7 THE CHAIRMAN: Good morning.

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

13 THE CHAIRMAN: That's fine.

14

15 **FINAL ARGUMENT OF JOHN MALCOLM, THE NON-STATUS FORT**  
16 **MCMURRAY/FORT MCKAY FIRST NATION AND THE CLEARWATER**  
17 **RIVER PAUL CREE BAND #175 A, B, AND C, BY MS. ANNA**  
18 **JOHNSTON:**

19

20 **I. Overview**

21 **A. Submission of the Non-Status Fort McMurray/Fort**  
22 **MacKay First Nation**

23 MS. ANNA JOHNSTON: The Non-Status Fort  
24 McMurray/Fort McKay First Nation, which for the  
25 sake of my tongue I will refer to as the

1 "Non-Status First Nation" and the Clearwater River  
2 Band number 175 A, B, and C, which I will refer to  
3 as the "Clearwater River Band," are Aboriginal  
4 groups with rights recognized by and protected  
5 under Section 35 of the **Constitution Act**. As such,  
6 they are groups to which consultation and  
7 accommodation are owed with respect to the  
8 Application that is before the Board today.

9 These groups' rights remain unrecognized by  
10 Canada and Alberta. As a result, they have been  
11 marginalized and disenfranchised under the  
12 environmental assessment process established to  
13 review commercial oil sands projects such as the  
14 Application for the Jackpine Mine Expansion Project  
15 under review in this hearing.

16 As set out in the evidence, and as I will  
17 discuss at greater length, members of both groups  
18 trace their roots to the Project area and the  
19 greater Athabasca Oil Sands Region.

20 As I will also discuss, commercial oil sands  
21 activities in their traditional territories have  
22 significantly interfered with the groups' ability  
23 to exercise their Section 35 rights. They have  
24 faced increasing difficulty in accessing their  
25 traditional lands throughout the region and in

1 carrying on their traditional hunting, gathering,  
2 spiritual and cultural practices that are protected  
3 under Treaty 8.

4 Because of these concerns, the Non-Status  
5 First Nation and Clearwater River Band are asking  
6 this Panel to recommend that the Application not be  
7 approved until they are adequately consulted on  
8 their rights with respect to the Project and until  
9 their concerns regarding how the Project will  
10 impact them are fully addressed.

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

19 I will briefly describe their concerns  
20 regarding the social and environmental impacts of  
21 this Project. However, in the interests of time,  
22 and because the groups lacked capacity funding to  
23 submit expert evidence to the Panel on specific  
24 social and environmental concerns related to the  
25 Project, I will not set out their concerns



1            regarding those impacts in detail.  Instead, I  
2            would like to adopt the concerns raised by the Oil  
3            Sands Environmental Coalition with regards to  
4            environmental impacts in their submissions and  
5            argument.

6

7            **II.    The Non-Status Fort McMurray/Fort McKay First Nation**  
8            **and Clearwater Band Have Not Been Adequately**  
9            **Consulted or Accommodated**

10          **A.    The Non-Status First Nation and Clearwater River Band**

11          **1.    NSFMEFN**

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.  <sup>1</sup> Exhibit TRAN-012, Oral evidence of Interim Chief  
18                            John Malcolm, November 13, 2012, Joint Review Panel Session in Fort  
19                            McMurray, Alberta - Hearing Transcript - Volume 12 - November 13, 2012  
20                            [Exhibit TRAN-012], John Malcolm, at 2785, lines 22-23 and 2840, lines 5-8;  
21                            Exhibit TRAN-012, Oral evidence of Ms. Celina Malcolm, November 13, 2012,  
22                            Joint Review Panel Session in Fort McMurray, Alberta - Hearing Transcript -  
23                            Volume 12 - November 13, 2012 [Exhibit TRAN-012], Celina Malcolm, at 2799,  
24                            lines 2-25; Exhibit TRAN-012, John Malcolm at 2840, lines 13-17

25                            While they trace their lineage to members of

1 the Fort McMurray and Fort McKay First Nations,  
2 members of the Non-Status First Nation consider  
3 themselves to be a politically distinct Aboriginal  
4 group, holding meetings and governing themselves as  
5 members of a collective. <sup>2</sup> Exhibit TRAN-012, John Malcolm

6 They lost their status under the **Indian Act**  
7 when a female ancestor married a non-Aboriginal  
8 man. <sup>3</sup> Exhibit TRAN-012, John Malcolm at 2788, lines 4-6 and 2792, lines  
9 6-15; Celina Malcolm, Exhibit TRAN-012 at 2799-80 John Malcolm is  
10 that Nation's Interim Chief. <sup>4</sup> Exhibit TRAN-012, John Malcolm  
11 at 2785, lines 18-19

## 12 **2. Clearwater River Band**

13 The Clearwater River Band is a band of  
14 registered Indians. <sup>5</sup> Exhibit TRAN-012, John Malcolm at 2785,  
15 lines 22-23 and 2820, lines 17-25 Its members are the  
16 descendants of a Cree-speaking group that has also  
17 lived, hunted and travelled throughout the Wood  
18 Buffalo region since time immemorial. <sup>6</sup> Exhibit TRAN-012,  
19 Celina Malcolm at 2799, lines 20-25; Exhibit TRAN-012, John Malcolm at 2788  
20 at lines 7-10

21 Members of both groups have hunted, fished,  
22 gathered and conducted other traditional activities  
23 protected under Section 35 and Treaty 8 from prior  
24 to its execution through to the present-day. <sup>7</sup> Exhibit  
25 TRAN-012, Celina Malcolm at 2842, lines 1-4 Members of both

1 groups are the descendants of signatories to  
2 Treaty 8 and of individuals whose names appeared on  
3 the Fort McMurray Fort McKay Band pay list for  
4 Treaty 8. <sup>8</sup> Exhibit TRAN-012, John Malcolm at 2786, lines 6-7, 11-14  
5 and 2787, lines 20-21

6 The Clearwater River Band was one of the five  
7 bands that appeared on the Fort McMurray Fort McKay  
8 band pay list, which was the pay list for this  
9 region. <sup>9</sup> Exhibit TRAN-012, John Malcolm at 2786, lines 13-19 It  
10 originally consisted of five bands, one of which  
11 was the Clearwater River Band. <sup>10</sup> Exhibit TRAN-012, John  
12 Malcolm at 2786, lines 14-19

13 They are the descendants of Paul Cree <sup>11</sup> Exhibit  
14 TRAN-012, John Malcolm at 2788, lines 17-18, for whom the  
15 Clearwater River Band Reserve No.175 was set aside.  
16 <sup>12</sup> Exhibit TRAN-012, John Malcolm at 2787, lines 7-13 and 2788, lines 2-3  
17 While the Clearwater River Band was assimilated  
18 into the Fort McMurray Band by Indian Affairs, it  
19 was done without the consultation or consent of  
20 Clearwater River Band members or leaders. <sup>13</sup> Exhibit  
21 TRAN-012, John Malcolm at 2823-24; Exhibit 015-001, Submission on the  
22 Adequacy of the Environmental Impact Statement (From Devlin Gailus  
23 Barristers and Solicitors on behalf of the Non-status Fort McMurray/Fort  
24 McKay First Nation and Clearwater River Paul Cree Indian Band #175 to Joint  
25 Review Panel [Exhibit 015-001, Devlin Gailus Submission] at 3

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                   <sup>14</sup> Exhibit TRAN-012, John Malcolm

6                   John Malcolm is its Manager <sup>15</sup> Exhibit TRAN-012, John  
7                   Malcolm at 2785, lines 19-21 and its Chief is Mary Ann  
8                   Powder. <sup>16</sup> Exhibit TRAN-012, John Malcolm at 2820, lines 19-21

9  
10                   **B. Crown Duty to Consult NSFMEFN and Clearwater River**  
11                   **Band**

12                   **1. The Duty to Consult**

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

21                   So rather than belabour these principles, I  
22                   will merely note them and focus my submissions on  
23                   the specific case law that applies to my clients.

24                   But I would like to emphasize the Supreme  
25                   Court of Canada's recognition that the duty to

1 consult stems from the honour of the Crown, and due  
2 to its unique relationship with Aboriginal peoples,  
3 the Crown must respect potential, unproven, rights.

4 <sup>17</sup> *Haida Nation* at para 27

5 As the Court held in ***Taku River***, the Crown's  
6 efforts to consult and accommodate Aboriginal  
7 groups whose potential or established Aboriginal or  
8 Treaty Rights may be adversely affected should be  
9 consistent with the overarching objectives of  
10 reconciliation. <sup>18</sup> Canada Consultation Policy at 6

11 Courts have also held that the interpretation  
12 of Treaty Rights "should be fair and liberal".

13 <sup>19</sup> *R. v. Fowler* [1993] 3 C.N.L.R. 178, 134 NBR (2d) 361 at 3

14 The Government of Canada's Consultation  
15 Policy <sup>20</sup> Government of Canada, "Aboriginal Consultation and  
16 Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty  
17 to Consult, March 2011" (Minister of the Department of Aboriginal Affairs  
18 and Northern Development Canada, 2011) acknowledges these  
19 principles. It states that:

20  
21 "The duty to consult and,  
22 where appropriate, accommodate, is  
23 part of a process of fair dealing  
24 and reconciliation that begins with  
25 the assertion of sovereignty by the

1 Crown and continues beyond formal  
2 claims resolution through to the  
3 application and implementation of  
4 treaties." <sup>21</sup> Canada Consultation Policy at 6

5

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

9 They are:

10

- 11 i. a Crown conduct,  
12 ii. a potential adverse impact, and  
13 iii. potential or established Aboriginal or  
14 Treaty rights recognized and affirmed under  
15 section 35(1) that might be adversely  
16 affected. <sup>22</sup> Canada Consultation Policy

17

## 18 **2. Rights of the Non-Status First Nation and Clearwater**

### 19 **Band**

#### 20 **(i) Rights as Non-Status Indians**

21 In the case of the Non-Status First Nation  
22 and Clearwater River band, these three elements do  
23 exist.

24 The courts have already confirmed that both  
25 non-status Indians and non-status Bands may hold

1 Treaty Rights. For this Panel to recognize the  
2 Non-Status First Nation and the Clearwater River  
3 Band as groups capable of holding Section 30 rights  
4 would not be precedent setting, it would only be  
5 following the jurisprudence.

6 Section 35 of the **Constitution Act** provides  
7 that:

8  
9 "(1) The existing aboriginal  
10 and treaty rights of the aboriginal  
11 peoples of Canada are hereby  
12 recognized and affirmed."

13  
14 And that:

15  
16 "(2) In this Act,  
17 'aboriginal peoples of Canada'  
18 includes the Indian, Inuit and  
19 Métis peoples of Canada."

20  
21 In applying a fair and liberal interpretation  
22 to Treaty Rights, courts have interpreted  
23 Aboriginal peoples of Canada as including  
24 non-status Indians and accordingly have extended  
25 Treaty-based rights to non-status Indians who could

1 prove their ancestral connection to the community  
2 of Treaty signatories.

3 In the *Queen v. Trotchi*,<sup>23</sup> Exhibit 015-001, Devlin  
4 Gailus Submission at 4-5; see also Exhibit TRAN-012, Celina Malcolm at 2800,  
5 lines 14-24, and Exhibit TRAN-012, John Malcolm at 2841, lines 16-20 the  
6 Court held that a Treaty Rights claimant need only  
7 establish:

8  
9 "- a 'sufficient and  
10 substantial' ancestral connection  
11 to a historical community that  
12 exercised the rights in question,  
13 and  
14 - a real relationship to a  
15 presently recognized aboriginal  
16 community that exercises treaty  
17 rights."<sup>24</sup> Exhibit 015-001, Devlin Gailus  
18 Submission at 6; R v. Trotchie, 2002 SKPC 99,  
19 para 22

20  
21 In the *Queen v. Chevrier*,<sup>25</sup> R v. Chevrier, [1989] 1  
22 CNLR 128 the Ontario District Court held that a man of  
23 mixed Aboriginal and non-Aboriginal blood who is  
24 not registered under the *Indian Act* but who traced  
25 his decent from a member of a tribe that was a



1 signatory to an historical Treaty had inherited the  
2 right to hunt granted to his ancestors under that  
3 Treaty. <sup>26</sup> *R v. Chevrier*, *ibid*, paras 20-12

4 The Court held that it did not need to  
5 determine whether the claimant was an Indian within  
6 the meaning of the **Constitution**, as he claimed a  
7 birthright that was granted by the Crown. It also  
8 held that the Province could not negate those  
9 Treaty Rights even though the present holder of  
10 that right may not be a Status Indian. <sup>27</sup> *R v. Chevalier*,  
11 *ibid*, paras 22-23

12 Similarly, in the **Queen v. Fowler**, the New  
13 Brunswick Court found that a claimant who could  
14 prove a substantial connection with a signatory to  
15 a Treaty could avail himself of the rights  
16 enshrined in that Treaty without regard to his  
17 status under the **Indian Act**. <sup>28</sup> *R v. Fowler*, *supra* at 4

18 In that case, too, a man who is not a  
19 registered Indian but who traced his lineage back  
20 to a First Nations group that was covered by the  
21 Treaty was recognized as holding Section 35 rights.

22 Now, the Alberta Provincial Court in the  
23 **Queen v. Ferguson** <sup>29</sup> *R v. Ferguson*, [1993] 2 CNLR 148 (Alta Prov  
24 Ct), affirmed *R v. Ferguson*, [1994] 1 CNLR 117 (AB QB), set out a  
25 test for when non-status Indians can claim

1 Section 35 rights.

2 Under the **Ferguson** test, non-status Indians  
3 can claim Section 35 rights if they are a person of  
4 Indian blood who is reputed to belong to an  
5 irregular band or who follows the Indian mode of  
6 life. <sup>30</sup> Exhibit -15-001, Devlin Gailus Submission at 4-5

7 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 <sup>31</sup> Exhibit 015-001, Devlin Gailus Submission at 5-6

18  
19 In the **Queen v. Marshall, Queen v. Bernard**,  
20 the Supreme Court held that to establish a right,  
21 claimants must establish a connection with a  
22 pre-sovereignty group upon whose practices they  
23 rely to assert a right. <sup>32</sup> [2005] 2 SCR 22 at para 67

24 Both the Non-Status First Nation and the  
25 Clearwater Band meet these requirements. Both are

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

12 <sup>33</sup> Exhibit TRAN-012, John Malcolm at 2823

13 And both groups have a representative entity  
14 - a Chief, and in the case of the Clearwater Band,  
15 a manager -- who may serve as consultation  
16 partners.

17 Thus, members of both the Non-Status First  
18 Nation and the Clearwater River Band are Aboriginal  
19 peoples of Canada as contemplated by Section 35 and  
20 who's Aboriginal and Treaty Rights are thus  
21 confirmed under Section 35(1). <sup>34</sup> Exhibit 015-001, Devlin

22 Gailus submission at 4-5; see also Exhibit TRAN-012, Celina Malcolm at 2800,  
23 lines 14-24 and Exhibit TRAN-012, John Malcolm at 2841, lines 16-20

24 Canada's Consultation Policy confirms this  
25 interpretation. Under that policy, an Aboriginal

1 group is defined as including a community of First  
2 Nations people that holds or may hold Aboriginal  
3 and Treaty Rights under Section 35. <sup>35</sup> Canada

4 Consultation Policy, supra at 61, Annex A - Definitions

5 And "First Nation" is defined in that policy  
6 as referring to the Indian peoples in Canada, both  
7 status and non-status. <sup>36</sup> Canada Consultation Policy, supra at  
8 61, Annex A - Definitions

9  
10 **(ii) Membership by Individuals in Other Bands Does Not**  
11 **Preclude the Non-Status First Nation or Clearwater**  
12 **Band from Recognition as Distinct Entities**

13 Now, in the Joint Review Panel report for the  
14 Kearl Oil Sands Project, the Joint Panel concluded  
15 that membership by individuals in the Clearwater  
16 Band and the Wood Buffalo First Nation and other  
17 bands precluded those groups from being recognized  
18 as distinct entities with Treaty or Aboriginal  
19 Rights. <sup>37</sup> Report of the Joint Review Panel Established by the Alberta

20 Energy and Utilities Board and the Government of Canada, EUB Decision

21 2007-013: Imperial Oil Resources Ventures Limited, Application for an Oil  
22 Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) in the  
23 Fort McMurray Area (February 27, 2007) at 13

24 This conclusion, however, is contrary to the  
25 common law on the rights of non-status Indians and

1 unregistered bands.

2 The courts have held that **Indian Act** bands  
3 are not the only collectives capable of claiming  
4 Section 35 rights. Rather, unregistered bands have  
5 also been recognized as capable of holding those  
6 rights. And the Courts have also recognized valid  
7 Aboriginal claims as belonging to unregistered  
8 bands whose members are also the members of  
9 registered bands. <sup>38</sup> Exhibit 015-001, Devlin Gailus Submission at  
10 6; *Ontario (Attorney General) v. Bear Island Foundation*, 1984 CarswellOnt  
11 1320, paras 20-24

12 In ***Ontario v. Bear Island Foundation***, the  
13 Ontario High Court found that members of a  
14 registered band who also claim to belong to an  
15 unregistered band were entitled to Section 35  
16 rights through that unregistered band that were  
17 separate from those that were held by the  
18 registered band. <sup>39</sup> *Ontario (Attorney General) v. Bear Island*  
19 *Foundation*, 1984 CarswellOnt 1320, paras 20-24

20 In the same way individuals belonging to the  
21 Clearwater River Band and the Non-Status First  
22 Nations, to the extent that those individuals  
23 belonged to other bands, that does not preclude  
24 those groups from recognition as distinct  
25 communities capable of claiming their rights under

1 Treaty 8.

2

3 **(iii) Non-Status First Nation and Clearwater Band's**  
4 **Rights Under Treaty 8**

5 Now, regarding their rights under Treaty 8,  
6 the Non-Status First Nation and Clearwater River  
7 Bands' submissions on the interpretation and  
8 application of that Treaty is set out in  
9 submissions dated December 16th, 2011, <sup>40</sup> Exhibit  
10 015-001, Devlin Gailus Submission at 10-12, which is on the  
11 record, and I will not repeat them here.

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

16

17 **III. Impacts**

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.

22 <sup>41</sup> Exhibit 015-001, Devlin Gailus Submission at 12-14 I would just  
23 like to discuss a few additional impacts before  
24 turning to the issue of consultation.

25 The failure to reach a resolution of the

1 outstanding claims of the Non-Status First Nation &  
2 Clearwater River Band has deprived their members of  
3 access to an adequate land base on which to sustain  
4 their traditional ways of life, to pass on their  
5 traditions to future generations, to meet their  
6 economic needs, and to live with dignity among  
7 their peers. <sup>42</sup> Exhibit TRAN-012, John Malcolm at 2813, lines 7-10

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

14 As we heard from Ms. Cardinal, Ms. Malcolm,  
15 and Mr. Malcolm, members of the Non-Status First  
16 Nation and the Clearwater River Band are facing  
17 increasing difficulties in accessing their  
18 traditional lands and resources due to the increase  
19 in industrial activities in their traditional  
20 territories. <sup>43</sup> Exhibit TRAN-012, Oral evidence of Ms. Maureen

21 Cardinal, November 13, 2012, Joint Review Panel Session in Fort McMurray,  
22 Alberta - Hearing Transcript - Volume 12 - November 13, 2012 [ Exhibit  
23 TRAN-012, Maureen Cardinal] at 2794-95 and 2797, lines 3-13

24 Berries and other plant resources, which are  
25 eaten, help prevent disease, have become less

1 plentiful and increasingly difficult to access due  
2 to industrial activities in the region. <sup>44 Exhibit</sup>

3 TRAN-012, Celina Malcolm at 2800-01 Where they may still be  
4 accessed, they are often altered in taste and form.

5 Animals that the groups' ancestors formerly  
6 trapped such as mink, muskrats, weasels and foxes,  
7 have also become scarce. As we heard from  
8 Ms. Cardinal, some wildlife species have declined  
9 so significantly and become so difficult to trap  
10 that members of the group feel that there is no  
11 sense in even trying to live like that anymore.

12 <sup>45 Exhibit TRAN-012, Maureen Cardinal at 2797, lines 19-24</sup>

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

18 Even where members of the groups attempt to  
19 harvest these traditional resources, they are  
20 reluctant to do so because of interference by  
21 industrial activities that criss-cross their  
22 traditional lands, and because of concerns that  
23 those resources have become so contaminated by  
24 pollution, that to harvest and consume them is  
25 believed to be a serious health risk. <sup>46 Exhibit</sup>



1 TRAN-012, John Malcolm at 2840-41; Exhibit 006-013M, ACFN Socio-Econ  
2 Submission at 48, 52, 54-57

3 Some hunters avoid areas where human activity  
4 has increased, such as around the Project area,  
5 also due to fears over altercations with industry  
6 staff and security. <sup>47</sup> Exhibit TRAN-012, John Malcolm at 2840-41

7 With its anticipated impacts on fish and  
8 wildlife species, aquatic and terrestrial habitat,  
9 plant and diamond willow fungus harvesting sites  
10 and air and water quality, the Project threatens to  
11 cut them off even further from their lands and  
12 resources, from their ability to engage in  
13 traditional activities and to participate as equal  
14 and empowered members of society.

15 In brief, this Project will:

16 - Destroy caribou habitat and  
17 further reduce the numbers of that  
18 already at risk species.

19 - It will raze stands of  
20 diamond willow on which grows a  
21 fungus that the members of the  
22 group use for important cultural  
23 and medicinal purposes.

24 - It will destroy important  
25 food fish and the habitat of those

1 fish without commitment to ensuring  
2 their recovery or replacement.

3 - It will further pollute an  
4 already compromised watershed.

5 - And it will prevent members  
6 of the Non-Status First Nation and  
7 the Clearwater River Band from  
8 freely accessing their lands, from  
9 practising their traditional  
10 activities, and from ensuring that  
11 the customs that are integral to  
12 their identity are passed on to  
13 their future generations.

14 What's more, the resource management  
15 practices and beliefs of the Non-Status First  
16 Nation and the Clearwater River Band prevent its  
17 members from harvesting threatened species which  
18 further prevents them from exercising their rights  
19 to hunt, fish, trap and gather. <sup>48</sup> Exhibit TRAN-012, John  
20 Malcolm at 2841, lines 6-13

21 As many species have been caused to be  
22 threatened by oil sands development, members of the  
23 Non-Status First Nation & Clearwater River Band  
24 have been forced to bear the burden of the careless  
25 environmental management by industry and the Crown

1 through the sacrifice of their ability to practice  
2 their traditional activities.

3

4 **(i) Impacts on Culture**

5 In addition to environmental impacts,  
6 important cultural practices of the Non-Status  
7 First Nation & Clearwater River Band have also been  
8 impeded by oil sands activities.

9 Members of the group, as we've heard, have  
10 lost their traditional swimming waters due to  
11 pollution caused by industry, and, as a result, are  
12 unable to pass on important skills and customs to  
13 their children. <sup>49</sup> Exhibit TRAN-012, Celina Malcolm at 2803, lines  
14 14-24

15 On the Jackpine Mine Expansion lease site,  
16 it's a site of significance to the Clearwater River  
17 Band called Creeburn Lake which is at risk of being  
18 destroyed if this Project proceeds. <sup>50</sup> Exhibit TRAN-012,  
19 Celina Malcolm at 2800, lines 2-6

20 There is also evidence that quarries of  
21 pipestone, a sacred stone for the Non-Status First  
22 Nation & Clearwater River Band, exist near the  
23 Project area and which may be at risk from Project  
24 construction and operations.

25 As a result of these and other impacts, the

1 Project will interfere with and result in a loss of  
2 the traditions and values that are integral to the  
3 distinctive culture of the Non-Status First Nation  
4 and the Clearwater River Band. <sup>51 Exhibit TRAN-012, Celina</sup>  
5 Malcolm at 2801, lines 5-7

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

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

1                   With each project approval, the groups have  
2                   become more marginalized and more disenfranchised.

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

9

10           **(ii) Socio-Economic Impacts**

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. <sup>52</sup> Exhibit 006-013M, Supplemental Social,  
18                   Economic and Cultural Effects Submission for Shell Canada's Proposed  
19                   Jackpine Mine Expansion, Athabasca Chipewyan First Nations Written  
20                   Submission to Participate in the Hearings and Notice of Question of  
21                   Constitutional Law, Appendix D, Part 5 [Exhibit 006-013M, ACFN Socio-Econ  
22                   Submission] at 16

23                   We've heard much in this proceeding about the  
24                   adverse, social, cultural, economic and  
25                   environmental effects that are felt in Fort

1 McMurray and in outlying communities, including a  
2 shortage of affordable housing, increasing  
3 homelessness, reduced access to medical care, an  
4 increase in illicit drug use, and salaries that are  
5 not commensurate with the high cost of living.

6 <sup>53 Exhibit 006-013M, ACFN Socio-Econ Submission at 31</sup>

7 This has certainly been the case for members  
8 of the Non-Status First Nation & Clearwater River  
9 Band who have largely been excluded from general  
10 social benefits such as employment in oil sands  
11 development. <sup>54 Exhibit 006-013M, ACFN Socio-Econ Submission at 30</sup>

12 Members of the Non-Status First Nation and  
13 Clearwater River Band have also observed their  
14 health decline since the advent of industrial oil  
15 activity in the Athabasca region. <sup>55 Exhibit TRAN-012,</sup>  
16 <sup>Celina Malcolm at 2800-01</sup>

17 While there are many qualified trades people  
18 among the groups who are actively seeking work,  
19 they face a disproportionately high rate of  
20 unemployment as compared to the non-Aboriginal  
21 population. <sup>56 Exhibit TRAN-012, Celina Malcolm at 2802, lines 3-11</sup>

22 Housing prices have especially affected the  
23 Aboriginal population and, in particular, the  
24 elderly among that population who are unable to  
25 afford rent or own in Fort McMurray or the

1 surrounding areas. <sup>57</sup> Exhibit TRAN-012, Celina Malcolm at 2800,  
2 lines 16-21

3 The high cost of living has rendered many  
4 Aboriginal people, including members of these  
5 groups, homeless or at imminent risk of becoming  
6 homeless. <sup>58</sup> Exhibit TRAN-012, Celina Malcolm at 2802

7 It's pushed many others out of Fort McMurray  
8 and into smaller more remote communities.  
9 Accordingly, their members are scattered, requiring  
10 them to risk their safety and lose much time  
11 travelling on those dangerous roads to stay  
12 connected. <sup>59</sup> Exhibit 001-051S, Shell Socio-Economic Assessment at 9-10

13

14 **(iii) Discrimination**

15 In 1980, as we heard from Mr. Malcolm, Elders  
16 of the Non-Status First Nation were forcibly  
17 evicted from a settlement of the Snye in order to  
18 build housing for employees of Syncrude. <sup>60</sup> Exhibit  
19 TRAN-012, John Malcolm at 2790, lines 10-19

20 And then in 2006, Mr. Malcolm was told he  
21 would not be able to set up a work camp to help the  
22 homeless because, due to his band's name, he did  
23 not have rights under Treaty 8. <sup>61</sup> Exhibit TRAN-012, John  
24 Malcolm at 2791, lines 4-13

25 These groups are the marginalized of the

1           marginalized, much like the caribou in the Jackpine  
2           Mine lease site, they remain unrecognized and  
3           invisible.

4

5           **2. Consultation and Accommodation**

6                         Since the signing of Treaty 8, the Non-Status  
7           First Nation & Clearwater River Band have had their  
8           lands and resources systematically taken up. To  
9           date, however, they have not been engaged in an  
10          effective dialogue with respect of their rights by  
11          Crown or industry, or that taking up. <sup>62 Exhibit 015-011,</sup>  
12          Letter from Canadian Environmental Assessment Agency to John Malcolm  
13          Regarding consultation on the Jackpine Mine Expansion Project and the Pierre  
14          River Mine Project; Exhibit TRAN-012, John Malcolm at 2811-2813

15                        As I have explained, both are groups that  
16          hold rights under Treaty 8 to which consultation is  
17          owed.

18                        However, neither group has had capacity to  
19          effectively assert their rights and engage in  
20          consultation. The problem is cyclical. In order  
21          to participate effectively in environmental  
22          processes, and to have their concerns considered,  
23          members of the Non-Status First Nation & Clearwater  
24          River Band require capacity funding. <sup>63 Exhibit TRAN-012,</sup>  
25          Celina Malcolm at 2803, lines 10-14



1                   But as neither group has had their rights  
2                   recognized, neither has been provided with funding  
3                   to undertake the necessary traditional use studies  
4                   or studies of potential impacts of the Project on  
5                   their rights and so their concerns remain  
6                   unaddressed, and as their concerns remain  
7                   unaddressed, they are denied consultation  
8                   opportunities.

9                   In oral argument, my friend Mr. Denstedt  
10                  submitted that in 2008 Shell supplied funding to  
11                  the Wood Buffalo Elders Society to undertake a  
12                  study related to their traditional land use.

13                 With respect, that funding has no bearing on  
14                 the matter of consultation with the Non-Status  
15                 First Nation or the Clearwater River Band. It has  
16                 no bearing on Shell's efforts to engage in  
17                 consultation or the discharge of the Crown's duty  
18                 to consult.

19                 The Wood Buffalo Elders Society is neither  
20                 the Non-Status First Nation nor the Clearwater  
21                 River Band. It was at one time a registered  
22                 society, but it no longer exists.

23                 As the Courts have held, to be owed  
24                 consultation obligations by the Crown, an  
25                 Aboriginal group must have a representative entity

1           that can serve as a consultation partner for the  
2           Crown. The Wood Buffalo Elders Society was not a  
3           representative entity recognizable as such by law.

4           In the Environmental Assessment proceeding of  
5           the Muskeg River Mine Expansion project, the Joint  
6           Panel for that project determined that the Wood  
7           Buffalo Elders Society did not qualify as an  
8           Aboriginal group capable of holding Aboriginal or  
9           Treaty Rights giving rise to a duty of  
10          consultation. <sup>64</sup> Report of the Joint Review Panel Established by the

11          Alberta Energy and Utilities Board and the Government of Canada, EUB  
12          Decision 2006-128: Albian Sands Energy Inc., Application to Expand the Oil  
13          Sands Mining and Processing Plant Facilities at the Muskeg River Mine  
14          (December 17, 2006), Appendix 4 - Joint Panel Ruling on the Application by  
15          the Clearwater Band and Society at 114

16          The proponent in that  
17          application, Albian Sands Energy Incorporated, is a  
18          company created by the Athabasca Oil Sands Project  
19          of which Shell is a majority shareholder. <sup>65</sup> Exhibit

20          001-001A, Environmental Impact Assessment, Appendices and Environmental  
21          Setting Report, Volume 1 Jackpine Mine Expansion Project Description

22          In effect, what Shell is asking the Panel to  
23          find here is that, while in a previous application  
24          by it, the Elders Society could not constitute a  
25          representative entity able to serve as a  
            consultation partner for the Crown, Shell could

1 engage in consultation with it for the purposes of  
2 discharging consultation obligations with respect  
3 to this Application.

4 With respect, that finding would be an  
5 absurdity.

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

12 In fact, while in January 2011, Mr. Malcolm  
13 submitted a formal request for consultation to  
14 Shell on behalf of the groups he represents,  
15 66 Exhibit 001-057, Shell Canada Record of Stakeholder Consultation  
16 Activities as it Relates to the Jackpine Mine Expansion and the Pierre River  
17 Mine Projects Dating Back to October 2009 at pdf page 52 the extent  
18 of Shell's consultation has been to provide  
19 information to Mr. Malcolm regarding application  
20 materials.

21 As this Panel has noted, 67 Mr. Jim Dilay, Letter re  
22 Jackpine Mine Expansion Project (the "Project") CEAR Reference Number  
23 10-05059540 (October 19, 2012), CEAR Doc 1209 at 5 Mr. Malcolm and  
24 his groups have been fighting to have their voices  
25 heard in environmental assessments of oil sands

1 projects for over a decade. To date, they have not  
2 been successful.

3 While Shell alleges that Mr. Malcolm's  
4 frequent participation makes him an expert at such  
5 proceedings, his systematic failure to achieve  
6 recognition of the rights of his groups or the  
7 impacts to their lands and resources and  
8 traditional activities by oil sands activities  
9 tells a different story.

10 These groups have faced obstacles in their  
11 attempts to participate in the limited information  
12 sharing that has been provided by Shell. The  
13 technical language of environmental assessment can  
14 be difficult for even highly trained and  
15 experienced experts to understand, hence the three  
16 weeks of discussion we underwent in this proceeding  
17 to try and clarify a handful of issues.

18 While Shell's Aboriginal consultant may smirk  
19 at the notion, it is little wonder that Mr. Malcolm  
20 claims that the technical jargon of science and law  
21 has made it difficult to understand the regulatory  
22 processes of environmental assessment. <sup>68 Exhibit</sup>

23 TRAN-012, John Malcolm at 2791, lines 11-22

24 The conclusion that the groups have drawn  
25 from these years of being ignored by government and

1 industry is that they are meaningless. <sup>69</sup> Exhibit

2 TRAN-012, John Malcolm at 2791, lines 21-24

3 This situation is not unique to the  
4 Non-Status First Nation or the Clearwater River  
5 Band. As described in the Amnesty International  
6 report submitted by Ms. Anna Zalik, there are an  
7 estimated 526 claims concerning historic Treaties  
8 that are currently being assessed or under  
9 negotiation in Canada, and another 77 cases that  
10 are before the courts. <sup>70</sup> Exhibit 016-003, Anna Zalik - Written

11 Submission to Participate in the Hearings, Amnesty International "Canada:

12 Briefing to the UN Committee on the Elimination of Racial Discrimination"

13 (80th sess, February 2012) at 11 (pdf page 277)

14 Surely this is not in the public interest to  
15 ignore them. <sup>71</sup> Exhibit TRAN-003, Joint Review Panel Session in Fort

16 McMurray, Alberta - Hearing Transcript Volume 3 - October 30, 2012 at

17 279-80; Celina Malcolm, Exhibit TRAN-012 at 2805-06

18 As we heard from Ms. Celina Malcolm and  
19 Ms. Anna Zalik, the mechanisms used to negotiate  
20 and resolve land and resource disputes dramatically  
21 increase costs for Aboriginal participants. It  
22 erodes their rights and it fosters a race to the  
23 bottom as groups suspect that if they do not enter  
24 into agreements, they will be left with nothing.

25 <sup>72</sup> Exhibit 016-003, Anna Zalik - Written Submission to Participate in the

1 Hearings, Amnesty International "Canada: Briefing to the UN Committee on the  
2 Elimination of Racial Discrimination" (80th sess, February 2012) at 11 (pdf  
3 page 277); Celina Malcolm, Exhibit TRAN-012 at 2806, lines 14-19

4 Distinguishing between Aboriginal groups that  
5 share claims to the land and resources for the  
6 purposes of consultation, entering into agreements  
7 with select groups and refusing to disclose the  
8 terms of those agreements, has created divisions  
9 between groups who once shared these lands and  
10 resources. <sup>73</sup> Exhibit TRAN-012, Celina Malcolm at 2806, lines 14-16;  
11 John Malcolm, Exhibit TRAN-012 at 2807, lines 10-17 This, too,  
12 cannot be in the public interest.

### 14 **3. Mitigation Inadequate**

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

23 As became clear in the numerous competing  
24 expert reports and rounds of cross examination  
25 challenging each other's subject matter experts,

1           there's much uncertainty regarding the data,  
2           methodologies and conclusions that Shell relies on  
3           in its Application materials.

4           To name just one example, as described by  
5           various witnesses and admitted to in Shell's own  
6           wildlife studies, caribou have been seen in and  
7           around the Project area and are reported to have  
8           formerly occurred there more frequently. <sup>74 Exhibit</sup>  
9           TRAN-012, Maureen Cardinal at 5-15; Exhibit 001-001E, Environmental Impact  
10          Assessment, Volume 5 - EIA - Terrestrial Resources and Human Environment at  
11          7-37

12          The residual net impact from the Project on  
13          caribou habitat in the LSA has been assessed as  
14          high, and impacts to caribou in the RSA during  
15          construction and operations is assessed as  
16          moderate.

17          Despite these findings, Shell has refused to  
18          offer adequate mitigation measures or offsets for  
19          harm to caribou.

20          In our submission, this is unacceptable.  
21          "Virtually absent" does not mean "absent."

22          Similarly, while Shell claims that it is  
23          committed to ensuring that end pit lakes will, with  
24          time, contain fish, it has not committed to  
25          ensuring that they will contain the same species of

1 fish as originally appear there. In fact, as Shell  
2 attested to, these lakes will not contain the same  
3 species of fish. <sup>75 Exhibit TRAN-005 at 769, lines 7-13</sup>

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

11 In our submission, there is insufficient  
12 evidence to proceed with the Project that will  
13 likely impact species that are at risk and that are  
14 of significant importance to Aboriginal groups.

15 And this Panel cannot conclude, in our  
16 submission, that the Project will be in the public  
17 interest when there are so many outstanding issues  
18 of concern and so many gaps in the data regarding  
19 issues of such importance to so many directly  
20 affected groups and individuals.

21

#### 22 **IV. Conclusion**

23 Regarding the degree of consultation that is  
24 owed to the groups, rather than setting them out  
25 here, again, I'll turn the Panel's attention to the



1           submissions dated December 16th, 2011, that the  
2           group submitted in this proceeding.

3                   And I will give my conclusions and  
4           recommendations.

5                   First, it's worth noting again that this  
6           Panel should look at the spirit of the duty to  
7           consult as set out by the courts.

8                   In ***Haida***, the Supreme Court of Canada held  
9           <sup>76 *Haida Nation*, Para 27</sup> that the Crown acting honourably  
10          cannot cavalierly run roughshod over Aboriginal  
11          interests where claims affecting those interests  
12          are being seriously pursued in the process of  
13          Treaty negotiation and proof. It must respect  
14          these potential but yet unproven interests. To  
15          unilaterally exploit a claimed resource during the  
16          process of approving and resolving the Aboriginal  
17          claim to that resource may be to deprive the  
18          Aboriginal claimants of some or all of the benefit  
19          of the resource. This is not honourable.

20                   In environmental assessments, consultation is  
21          intended to ensure the traditional activities and  
22          access to resources is not significantly impacted.  
23          And where such impact occurs, traditional users are  
24          compensated. This duty extends to non-status  
25          groups.

1                   However, the Non-Status First Nation and  
2 Clearwater River Band members have fallen through  
3 the regulatory cracks.

4                   If, as Shell submits, environmental  
5 assessment is a planning tool, then its application  
6 constitutes bad planning.

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

17                   Shell has provided no evidence that a delay  
18 in approving its Application would cause it harm  
19 beyond the ability to begin profiting from  
20 resources for which it holds property rights.

21                   Conversely, the Panel has received much  
22 evidence on the harm that allowing this Project to  
23 proceed will likely have on the many stakeholders  
24 whose rights and interests have been represented in  
25 this Application. <sup>77 Exhibit TRAN-012, John Malcolm at 2807-08</sup>

1           In our submission, it would be unjust,  
2           inequitable and contrary to the public interest to  
3           permit this Project to proceed when its adverse  
4           impacts will further marginalize and disenfranchise  
5           the already disadvantaged groups of the Non-Status  
6           First Nation and the Clearwater River Indian Band.

7           Taken from a national perspective that places  
8           the footprint of industrial development on the  
9           backdrop of Canada's vast land base, and which has  
10          as its ethos economic growth as the most important  
11          consideration in a public interest analysis, it's  
12          tempting to see the benefits of this Project as  
13          outweighing the relatively insignificant concerns  
14          regarding the rights, health and wellbeing of  
15          members of the Non-Status First Nation and  
16          Clearwater River Band.

17          But taken from the perspective of members of  
18          those groups who have for generations seen their  
19          lands fragmented, polluted, and taken up by the  
20          Crown without their consent or control, and from  
21          the perspective of Canadians, who value democracy,  
22          rule of law, social justice, substantive equality,  
23          and public participation in regulatory matters that  
24          will have unmitigable and irreversible impacts on  
25          which they have a direct interest, the scales tip.

1                   This Project is more than just a road through  
2                   a forest. It's a freeway connected to a highway  
3                   grid that has so severely impacted the human and  
4                   physical environments around it as to make them  
5                   virtually unrecognizable to its original  
6                   inhabitants.

7                   For these reasons, in our submissions, the  
8                   Project should not proceed until the concerns of  
9                   the Non-Status First Nation, the Clearwater River  
10                  Band, and the public are addressed.

11

12       **A. Consultation Owed** - 78 Exhibit 015-001, Devlin Gailus Submission

13

14       **V. Recommendations**

15                   Therefore, the Non-Status First Nation and  
16                   the Clearwater River Band would like to make the  
17                   following requests:

18                   First, that the Joint Review Panel recommend  
19                   that the Crown recognize the Section 35 rights of  
20                   the Non-Status First Nation and the Clearwater  
21                   River Band and the potential infringement on those  
22                   rights by the Project should it be approved.

23                   Second, that the Joint Review Panel recommend  
24                   that the Project is not in the public interest and  
25                   cannot be authorized unless and until the Crown has

1 fully discharged its duties to consult and  
2 accommodate the Non-Status First Nation and the  
3 Clearwater River Band with respect to potential  
4 effects on its Treaty and Aboriginal Rights.

5 Third, that the Joint Review Panel recommend  
6 that the consultation process owed to the  
7 Non-Status First Nation and the Clearwater River  
8 Band include, but not be limited to, consideration  
9 of the potential impacts of the Project on their  
10 Section 35 rights, to consultation prior to  
11 finalizing any resources management frameworks or  
12 plans with regards to oil sands activities or to  
13 environmental management in the Project area or the  
14 greater Athabasca region in general.

15 The provision of resources to the Non-Status  
16 First Nation and the Clearwater River Band to  
17 document the nature and scope of their Aboriginal  
18 and Treaty Rights, including traditional land use  
19 studies, Traditional Ecological Knowledge studies,  
20 and cultural studies.

21 Provision of capacity funding to both groups  
22 in order to undertake studies that identify any  
23 potential additional adverse impacts that may be  
24 caused by the Project, including the cumulative  
25 impacts which have not yet been identified.

1                   And capacity funding to partner with local  
2 organizations, governments and industry to address  
3 those impacts.

4                   And in addition to the above, a request that  
5 this Panel recommend that no approvals or  
6 authorizations be issued in relation to this  
7 Project until Shell:

8                   Engage in a cultural sensitivity workshop  
9 with the Non-Status First Nation and the Clearwater  
10 River Band;

11                   Until the Non-Status First Nation &  
12 Clearwater River Band are satisfied that any sites  
13 of historical or cultural significance to the  
14 groups have been adequately identified and  
15 protected;

16                   Until members of those groups be permitted to  
17 harvest diamond-willow fungus that occurs in the  
18 Project area before any activities occur there that  
19 may disturb or harm that resource;

20                   And that any other resources of cultural  
21 environmental health and social importance to the  
22 Non-Status First Nation & Clearwater River Band be  
23 adequately protected;

24                   And finally, that both groups receive  
25 compensation for any losses or harm to those

1 resources that might occur.

2 And finally, I would like to recommend that  
3 the conditions requested by the Oil Sands  
4 Environmental Coalition regarding the environmental  
5 protections and measures that they have set out are  
6 met.

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

10 THE CHAIRMAN: Thank you.

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

13

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

15 MR. MALCOLM: Good morning, Mr. Chairman  
16 and respected Panel. I'm here to thank you for  
17 allowing me to present my final argument and  
18 hopefully I'll be able to do that without any  
19 concerns from Shell.

20 I would like to start with, Mr. Broadhurst  
21 made a comment earlier in the proceedings at the  
22 start and he said that traditional knowledge and  
23 traditional users' words were basically solid and  
24 he would listen to them. I would like to believe  
25 that, but from what I've seen throughout this

1 process, that contradicts what he says. In  
2 Exhibit No. 001-001E, Volume 5.740, there's a  
3 comment from a trapper in the region of McKay. He  
4 said that, 20 years ago, there was lots of wildlife  
5 here, which included the caribou. Now Shell says  
6 that they don't exist.

7 I would like to comment about the wildlife  
8 and migratory fly-ways. When I was young, clouds  
9 of, clouds of birds would, waterfowl and wildlife  
10 would fly over Fort McMurray, and now today there's  
11 hardly any. And part of it is due to the war zone  
12 set up by the tailings ponds. It's constant  
13 explosions going off and it's really having  
14 detrimental effect on the wildlife, not only the  
15 migratory fowl, but the wildlife themselves. And  
16 more studies need to be done on the noise and how  
17 it affects the wildlife in the area. I feel like  
18 they are more concentrated on making more noise  
19 than they are effectively deterring the birds from  
20 landing.

21 I would like to talk about the caribou that's  
22 been hammered thoroughly throughout this process.  
23 And the comments I heard was the Audet Lake caribou  
24 herd and the Steepbank caribou herd are amalgamated  
25 with the Richardson herd. They also failed to



1            mention that there's a Caroline herd that's also  
2            part of the Richardson herd. And down south where  
3            I live in Anzac, there's three different other  
4            caribou herds: The Egg-Pony, the Algar, and the  
5            Leismer herds, all part of another branch. It's  
6            kind of like the Métis Nation with their  
7            communities and the Locals: I feel that the local  
8            communities are the local herds, the Steepbank herd  
9            and the Audet caribou herd are directly impacted by  
10           this process. And it should not only be the  
11           requirements of the Federal Government to help  
12           restore the herds, it should also be the  
13           requirements of Shell.

14                    I would recommend that they do studies on the  
15                    freshwater clams in the Athabasca River. I've  
16                    requested this several times throughout the  
17                    hearings. I've yet to see that being done. If  
18                    there's any clams left, maybe the next study will  
19                    be, well, there's no clams left so we don't have to  
20                    study them as well.

21                    I would also like to see what is the critical  
22                    water temperature for the fish habitat during  
23                    different seasons. I did not get that through the  
24                    EIA or through this process.

25                    I would like to see the outcrops along the

1 riverbanks on Shell's leases identified and provide  
2 that information to CEMA and include it in their  
3 EIAs.

4 I would also like to see the wildlife  
5 corridors being maintained, not only to sustain the  
6 wildlife but also sustain the natural resources  
7 that are there. From my understanding, in 100  
8 years from now there's going to be no oil left, so  
9 where does the word "sustain" in Alberta  
10 Sustainable Environment fulfill that?

11 Shell has billions of barrels in their  
12 leases, surely they can set aside some oil for the  
13 future.

14 And I'd like to talk about thresholds.  
15 Thresholds, according to the experts, is when a  
16 change in the population is affected. Well, our  
17 threshold for our groups have been severely  
18 impacted to where we're almost extirpated.

19 So in conclusion, we will continue to  
20 dialogue with Shell in hopes of what we feel is a  
21 meaningful process will come out. Until then, we  
22 object to this Project's approval.

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

24 Thank you.

25 THE CHAIRMAN: Thank you, Mr. Malcolm.

1 Mr. Mallon.

2

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

4 **BY MR. MALLON:**

5 MR. MALLON: Good morning, Mr. Chairman,  
6 Members of the Panel. I have the pleasure again to  
7 appear before you on behalf of the Mikisew Cree  
8 First Nation.

9 The Mikisew Cree have participated to a  
10 greater or lesser degree in every oil sands open  
11 mine regulatory review since 2002. They have done  
12 so in an attempt to elucidate to the tribunals and  
13 to the Provincial and Federal Governments what was  
14 at stake for the Mikisew and to attempt to convince  
15 tribunals and governments to regulate the  
16 development of the region in a careful and caring  
17 manner which respects the rights of First Nations  
18 and the laws of nature.

19 And so here we are again.

20 This time around, some things are different.  
21 The pressure on Mikisew's Treaty Rights and culture  
22 from cumulative effects of development in Mikisew's  
23 traditional lands have increased.

24 Some things are the same. The Mikisew is  
25 concerned that the Governments of Alberta and

1 Canada are not meaningfully consulting Mikisew  
2 about the cumulative effects that are adversely  
3 impacting Mikisew's rights and culture and that  
4 this failure to meaningfully consult Mikisew means  
5 that government is not managing the cumulative  
6 effects on Treaty Rights in a credible or effective  
7 way.

8 The Mikisew have agreed to work with Shell  
9 directly on project-specific issues, therefore we  
10 do not object to this Project.

11 As stated in our submission, our concerns for  
12 your attention are the cumulative effects  
13 associated with the overall development of the  
14 region. We are concerned about the cumulative  
15 impacts of oil sands development on the environment  
16 and on our rights and culture.

17 Now, we've noted that you can make  
18 recommendations, that you have, Joint Review Panels  
19 have in the past, and we've also noted that both  
20 governments have stated that they listen to what  
21 you say. Canada has said in this hearing that it  
22 will inform itself for its consultation efforts  
23 from your decision. Alberta regrettably chooses to  
24 no longer participate in these hearings, but we can  
25 only hope that they, too, will perform their

1 obligations in light of the information that is  
2 gleaned from this process.

3 I should tell you, I have been recently  
4 hunting for speakers for my stereo system. And it  
5 occurred to me last night when I was on Google  
6 looking at that, that these Joint Review Panels are  
7 much like loud speakers in that the recommendations  
8 that you make seem to be well heard by governments.  
9 And so we submit that that's a very important part  
10 of your decision-making process.

11 The Government of Canada shares Mikisew's  
12 concerns about cumulative effects of oil sands  
13 development on our traditional lands. They believe  
14 that through diligence on the part of operators,  
15 and through a number of regional initiatives, the  
16 cumulative effects can be successfully managed.  
17 We're not so sure. However, we do know that unless  
18 regulators and governments are fully informed as to  
19 the cumulative effect of oil sands developments on  
20 both the environment and First Nation's rights,  
21 such effects cannot be managed.

22 We also know that unless affected First  
23 Nations are involved in monitoring and management  
24 in a meaningful way, the odds of long-term success  
25 are not good.

1                   The Aboriginals of the area have more at  
2 stake than anybody else. <sup>1</sup> See, e.g., Mikisew Cree First Nation  
3 Submission, JRP Registry document #890 (supporting documents located at JRP  
4 Registry document #456) [*"MCFN Submission"*], Appendix C, Tab 1, Mikisew Cree  
5 First Nation Indigenous Knowledge and Use Report and Assessment; Appendix D,  
6 Tab 68, *As Long As The Rivers Flow: Athabasca River Use, Knowledge and*  
7 *Change*; Appendix D, Tab 80, *Patterns of Mikisew Cree land and resource use*

8                   They have more knowledge about the area than  
9 anyone else. Yet they are frustrated by  
10 government's failure to heed their advice and to  
11 work with them constructively. <sup>2</sup> See, e.g., Mikisew's  
12 submission on the draft Lower Athabasca Regional Plan at *MCFN Submission*,  
13 JRP Registry document #456, Appendix D, Tab 94; see also, Appendix D, Tabs  
14 113 and 117 regarding Mikisew's exclusion from the World Class Monitoring  
15 Program

16                   Lip service is paid to the "C" word, to  
17 consultation, but Mikisew see Canada and Alberta as  
18 working hard to avoid as opposed to observe their  
19 Treaty obligations.

20                   The Mikisew wish to provide the Joint Review  
21 Panel a number of recommendations that we hope the  
22 Panel sees fit to pass on. With one exception,  
23 these recommendations are contained in our original  
24 submission. Some are new to these hearings, but  
25 most will have a familiar ring. All of them are in

1           respect of cumulative effects and regional  
2           concerns.

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

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

20                    That's the joint resource use plan that was  
21           referred to in evidence as the TLRUMP. Frankly, I  
22           prefer the ACFN's acronym. Nevertheless.

23                    You'll recall in my discussions with DFO the  
24           following points were made:

25

1 (a) DFO measures impacts to the  
2 environment, as does Environment  
3 Canada, and not impacts to Treaty  
4 Rights. <sup>3</sup> Jackpine Mine Expansion Project JPR

5 Hearing Transcript [*"JPME Hearing Transcript"*],  
6 Vol. 14, November 14, 2012, p. 3450, lines 18-25  
7 p. 345, lines 1-18

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

11 (c) Having a tool which provides  
12 the knowledge of the rights and  
13 allows some measurement of impacts  
14 would be useful for those  
15 departments whose mandates it is to  
16 honour Treaty Rights; and <sup>4</sup> *JPME*

17 *Hearing Transcript*, Vol. 14, November 14, 2012, p.  
18 3458-59

19 (d) A traditional land resource  
20 use and management plan as such a  
21 tool. <sup>5</sup> See, e.g., The Traditional Land and

22 Resource Use Management Plan is described at *MCFN*  
23 *Submission*, JRP document #456, Appendix D, Tabs 110  
24 and 111

25 <sup>6</sup> *JPME Hearing Transcript*, Vol. 14, November 14,



1 2012, p. 3463, lines 17-25- p. 3464, lines 1-6

2  
3 Now, somewhere in the bowels of government  
4 this initiative got stopped. <sup>7</sup> See, e.g. Correspondence from  
5 Alberta re: TRLUMP dated June 22, 2012, MCFN Submission, JRP document #456,  
6 Appendix D, Tab 116 We ask that the Joint Review Panel  
7 recommend to Canada and Alberta that it get  
8 restarted.

9 2. The second recommendation is that  
10 monitoring be conducted by the Federal Government  
11 through a program overseen by a committee of  
12 independent experts and Aboriginal representatives,  
13 including the Mikisew. This should include at a  
14 minimum:

15  
16 (a) That Canada and Alberta work  
17 with Mikisew to develop and fund a  
18 community-controlled health  
19 assessment of water and terrestrial  
20 resources, including wildlife and  
21 monitoring;

22 (b) Implementation of an  
23 independent and scientifically  
24 rigorous monitoring program for the  
25 delta in consultation with local

1 First Nations to address the  
2 effects of current and reasonably  
3 foreseeable development on the  
4 Delta; and  
5 (c) That Mikisew be meaningfully  
6 included in the development and  
7 implementation of the Joint  
8 Canada-Alberta Monitoring Program,  
9 and that no further projects after  
10 this one be approved until that  
11 monitoring program is operational  
12 and had at least five years to  
13 gather and assess data, including  
14 traditional knowledge.

15  
16 The recent publication of findings by Kirk  
17 and others is notice to all that the impacts of the  
18 oil sands developments are more widespread than  
19 have been previously predicted. In light of those  
20 results, it's even more important that First  
21 Nations who have traditional ties to this area be  
22 intimately involved in the assessment and  
23 monitoring. We've made it clear to Canada and  
24 Alberta that the Mikisew and other First Nations  
25 affected by cumulative effects must be included in

1 the development and implementation of this proposed  
2 world-class monitoring program. But to date, we  
3 have seen little indication that the program will  
4 consider the conditions required to exercise our  
5 Treaty Rights without a panel such as this one  
6 recommending it. <sup>8</sup> *MCFN Submission, JPR document #456, Appendix D,*

7 *Tab 117*

8 3. The third recommendation is that through  
9 consultation, Aboriginal peoples, Canada and  
10 Alberta take the necessary steps to regionalize the  
11 regulation of certain aspects of oil sands such as  
12 reclamation, tailings reduction and water use,  
13 giving equal weight to traditional knowledge and  
14 western science, and having regard to the  
15 protection of Section 35 rights now and into the  
16 future.

17 This is obviously a very general  
18 recommendation. But we note that most of the  
19 regional programs are not geared to observance of  
20 Treaty Rights. <sup>9</sup> Perhaps the clearest example of this is Alberta's

21 *Lower Athabasca Regional Plan: See, e.g., MCFN Submission, JPR Document*

22 *#456, Appendix D, Tabs 92-94* For instance, Phase I of the  
23 IFN for the Athabasca did not consider the  
24 transportation needs of First Nations <sup>10</sup> *JPME Hearing*

25 *Transcript, Vol. 14, November 14, 2012, pp. 3450-51 and pp. 3457-59* and

1 Mikisew is concerned that Phase II is similarly  
2 being developed without meaningful consultation and  
3 without appropriate consideration of Mikisew's  
4 rights and culture. <sup>11</sup> MCFN's concerns with Phase 1 of the IFN are  
5 set out at *MCFN Submission*, JRP document #456 Appendix D, Tabs 3, 19 and 28;  
6 Mikisew's concerns with Phase 2 of the IFN, including the lack of  
7 consultation, are set out in *MCFN Submission*, document #456, Appendix D,  
8 Tabs 66, 68, 83 and 106

9 4. The fourth recommendation is that Alberta  
10 work with Aboriginal peoples to jointly develop and  
11 finalize a wetland policy and reclamation standards  
12 that includes compensation for destroyed or altered  
13 wetlands, particularly bogs and fens.

14 You've heard that peatlands cannot be  
15 reclaimed. What will replace them will provide  
16 less biodiversity, the land will be poorer, and we  
17 submit the loss must be recognized in some way.

18 5. Specifically with respect to waterbodies  
19 and waterways:

20  
21 (a) That the Athabasca and  
22 Firebag Rivers be designated as  
23 heritage rivers.

24 (b) That Alberta and Canada  
25 establish a comprehensive and

1 transparent monitoring program for  
2 water flows and water quality for  
3 the Lower Athabasca River basin,  
4 including monitoring of tailings  
5 reclamation and tailings seepage,  
6 that is overseen by a  
7 government-funded committee of  
8 independent experts and Aboriginal  
9 representatives, including the  
10 Mikisew.

11 (c) That Alberta and Canada  
12 establish precautionary Aboriginal  
13 Base Flow for the Athabasca River  
14 at 1600 cubic metres per second and  
15 a precautionary Aboriginal extreme  
16 flow at a level of 400 cubic metres  
17 per second during the months that  
18 the river is used for travel.

19 (d) that Alberta and Canada  
20 immediately implement a  
21 precautionary Base Flow of the  
22 Athabasca River of 100 cubic metres  
23 per second below which no  
24 withdrawals would be allowed.

25 (e) That governments work with

1           Aboriginal peoples to develop a  
2           process for altering water permits  
3           to existing mines so as to lower  
4           and cap the peak water withdrawal  
5           that will be needed by the oil  
6           sands industry from the Lower  
7           Athabasca River.

8           (f)     That Canada and Alberta  
9           include tributaries in their  
10          calculations of in-stream flow  
11          needs as they finalize the Lower  
12          Athabasca Management Framework in  
13          Phase 2; and

14          (g)     That Alberta and Canada adopt  
15          and implement all recommendations  
16          including those listed above as set  
17          out in the review of Phase 2  
18          Framework Committee Recommendations  
19          Synthesis Report that was produced  
20          on behalf of the Mikisew and  
21          Athabasca Chipewyan First Nation.

22          And that's appended in our  
23          exhibits.

24

25          Water and waterbodies are absolutely critical

1 to all aspects of Treaty Rights and our culture.  
2 When there are sufficient water levels, we can  
3 access harvesting locations and spiritual sites,  
4 but when water levels are low, we cannot access our  
5 harvesting areas and navigation becomes dangerous.

6 Clean water sustains our harvesters while out  
7 on the land, but when there are concerns about  
8 water quality, our harvesters must haul water with  
9 them, which increases the time, difficulty and  
10 expense of harvesting. <sup>12 MCFN Submission, JRP document #456,</sup>

11 Appendix D, Tab 68, As Long As The Rivers Flow: Athabasca River Use,

12 Knowledge and Change Joint Review Panels in the past  
13 have been instrumental in persuading Canada and  
14 Alberta to develop Base Flow guidelines. While we  
15 do not expect this Panel to dictate the specifics  
16 of those guidelines, we ask the Panel to remind  
17 Canada and Alberta of their obligations to First  
18 Nations in the development of those guidelines.

19 6. The sixth recommendation is that Canada  
20 actively assume a stronger federal role in  
21 protecting freshwater in the oil sands through  
22 monitoring the release of toxic substances and the  
23 impacts of such substances on fisheries through a  
24 stronger enforcement presence. And this needs no  
25 further explanation.

1                   7. That Canada and Alberta expand the  
2 testing parameters of drinking water at Fort  
3 Chipewyan to include PAHs and toxic metals using  
4 methodology capable of measuring at thresholds  
5 relative to human health.

6                   Mr. Chairman, the health concerns of Fort  
7 Chipewyan are a matter of public record. We know  
8 from recent studies that the impacts of the mines  
9 and upgraders is greater than previously thought.  
10 This recommendation is just the application of  
11 commonsense and good judgment.

12                   8. That Wood Buffalo National Park be  
13 included in any impact study in respect of oil  
14 sands activity.

15                   And in respect of this one, we would state  
16 that as development continues in the Oil Sands  
17 Region, downstream and other cumulative effects  
18 negatively impact the environment and traditional  
19 resources of Wood Buffalo National Park. This  
20 development also negatively impacts our ability to  
21 exercise our Treaty Rights in the Wood Buffalo  
22 National Park. <sup>13</sup> *MCFN Submission, JRP document #456, Appendix D, Tab*  
23 *80, Patterns of Mikisew Cree land and resource use, at pages 44, 51*

24                   Governments and Proponents must meaningfully  
25 consult with us about the full scale of the



1 cumulative effects which include studying and  
2 understanding how the direct and indirect and  
3 cumulative effects of development are affecting the  
4 Wood Buffalo National Park.

5 9. The ninth recommendation is that Alberta  
6 work with Mikisew and Lower Athabasca First Nations  
7 to develop a Lower Athabasca Regional Plan, a LARP,  
8 that appropriately addresses First Nation concerns  
9 and that uses a rights-based approach to land-use  
10 planning, including:

11  
12 (a) The results of a Mikisew-led  
13 traditional land resource  
14 management plan be incorporated  
15 into the amended LARP;

16 (b) That Canada and Alberta  
17 acknowledge the First Nations'  
18 exercise of Treaty Rights as a  
19 priority in land use in their  
20 traditional territories and cause  
21 that priority to be reflected in  
22 land use and resource development  
23 policies, such as LARP, and all  
24 Crown decision making; and

25 (c) The establishment of First

1 Nation specific land-use  
2 conservation areas with viable  
3 corridors that are managed jointly  
4 with First Nations and Alberta.

5  
6 Our view is that LARP in its current form  
7 fails to protect Mikisew's traditional territories  
8 and the sustained exercise of Mikisew's Treaty  
9 Rights and culture. <sup>14</sup> See, e.g., *MCFN Submission*, JRP document  
10 #456, Appendix D, Tabs 92-94 In our view, the Crown has not  
11 honoured its obligations to the Mikisew by this  
12 initiative <sup>15</sup> See, e.g., *MCFN Submission*, JRP document #456, Appendix  
13 F, Tab 80, letter to Mr. Dave Bartesko dated November 11, 2010 and it  
14 must be revised. It should be revised following  
15 meaningful consultation with Mikisew and other  
16 First Nations and following a Traditional Land  
17 Resource Use Management Plan. If there's to be a  
18 land use planning mechanism in the Oil Sands  
19 Region, that's the only way that you'll be able to  
20 have, we will be able to have a land use planning  
21 mechanism in the oil sands that can effectively and  
22 credibly manage cumulative effects. <sup>16</sup> *MCFN Submission*,  
23 JRP document #456, Appendix D, Tabs 110-111

24 10. That resources be provided to First  
25 Nations to conduct a regional cumulative effects

1 assessment which includes comprehensive traditional  
2 land use and traditional ecological knowledge with  
3 the aim of developing a traditional resource use  
4 plan. That plan should be a key focus in other  
5 policies such as LARP.

6 Again, this is a repeat of the first and  
7 ninth recommendations. Or a synthesis of them.

8 11. That Canada and Alberta utilize a  
9 terrestrial No Net Loss standard when considering  
10 disturbance approvals, giving equal weight to  
11 traditional knowledge and western science.

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

18 Mikisew have also expressed concern at the  
19 continued and rapid loss of areas in their  
20 traditional lands that are or can be used for the  
21 exercise of those rights. <sup>17</sup> See, e.g., the report by Petr

22 Komers at *MCFN Submission*, JRP document #456, Appendix D, Tab 94 The  
23 key here is that when considering loss, the Crown  
24 must recognize loss not only to the environment,  
25 but to those Treaty Rights. <sup>18</sup> See, e.g., Mikisew's LARP

1                   submissions at *MCFN Submission*, JRP document #456, Appendix D, Tab 80,  
2                   Patterns of Mikisew Cree land and resource use, and Appendix D, Tabs 92-94

3                   12. That Canada and/or Alberta establish  
4                   pre-disturbance baseline information, the range of  
5                   natural variation for wildlife populations and the  
6                   conditions required to support Mikisew's rights and  
7                   culture before disturbance of any further  
8                   industrial activity.

9                   In part, this would be accomplished through  
10                  the Traditional Land and Resource Use Management  
11                  Plan and meaningful consultation to incorporate  
12                  this information into the development of effective  
13                  cumulative effects management measures before  
14                  regulators and or the Crown consider any future  
15                  industrial activities beyond Shell's proposed  
16                  Jackpine and Pierre River Projects.

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

24                  We note that recent studies show that habitat  
25                  loss is much greater than predicted. <sup>19</sup> *JPME Hearing*

1                    *Transcript*, Vol. 11, November 8, 2012 pp. 2451-2452                    This  
2                    recommendation, we believe, is one that is  
3                    critical.                    <sup>20</sup> See, e.g., *MCFN Submission*, JRP document #456,  
4                    Appendix C, Tab 1, Mikisew Cree First Nation Indigenous Knowledge and Use  
5                    Report and Assessment; Mikisew's concerns regarding caribou are also set out  
6                    at *MCFN Submission*, JRP document #456, Appendix D, Tabs 97, 104, 112

7                    14. That Canada conduct with Mikisew a  
8                    traditional food study to examine the impact of oil  
9                    sands contaminants on traditional foods such as  
10                    fish, moose, caribou, small game, bird eggs and  
11                    berries in the region. Special attention should be  
12                    drawn to the location of traditional foods in  
13                    relation to the oil sands mine development.

14                    Again, this could be incorporated into a  
15                    TLRUMP.

16                    15. That Alberta finalize the oil sands mine  
17                    liabilities management program with input from  
18                    Mikisew and other First Nations.

19                    We're certain the Panel is aware that the  
20                    mine securities program is in need of reform.

21                    16. That Alberta and Canada conduct a  
22                    comprehensive baseline study for Fort Chipewyan  
23                    residents as recommended in the 2003 EUB Decision  
24                    Report. In addition, a study of contaminant intake  
25                    and body burden of members of Fort Chipewyan should

1 be undertaken.

2 Had Canada put a representative from Health  
3 Canada on the Panel, we would have asked them why  
4 this recommendation still has not been carried out  
5 after 10 years.

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

16 18. That Canada and Alberta ensure the  
17 Mikisew has adequate capacity for consultation on  
18 all resource development activities that may impact  
19 their traditional lands. The resources of First  
20 Nations in the area are stretched to the limit  
21 trying to deal with resource development activities  
22 on their traditional lands. While all acknowledge  
23 that consultation and accommodation are necessary,  
24 these objectives cannot be achieved in the absence  
25 of First Nation capacity. In the **Taku River** case,

1 one of the factors that the Supreme Court of Canada  
2 considered when determining if consultation had  
3 been meaningful was the provision of funding to the  
4 First Nation to gather information and participate  
5 in consultation. <sup>21</sup> *Taku River Tlingit First Nation v. British*  
6 *Columbia (Project Assessment Director)*, 2004 SCC 74, para 37

7 This is a principle that cannot be  
8 overstated.

9 19. That Canada and Alberta resource  
10 additional First Nations directed analysis related  
11 to health, diet, practice of Treaty and Aboriginal  
12 Rights, and avoidance patterns related to  
13 contaminants.

14 Again, some of the previous recommendations  
15 incorporated, are incorporated into this one,  
16 however, we seek to examine the cumulative impacts  
17 of oil sands, again, so that this information can  
18 be used effectively and credibly to manage  
19 cumulative effects.

20 20. The 20th recommendation is a new one and  
21 it was the subject of some of my discussions in  
22 respect of CEMA with the Federal panel. And the  
23 recommendation is that CEMA's annual planned and  
24 budgeted programs recommended by its Management  
25 Board be fully funded.

1           Previous tribunals have put great reliance on  
2           CEMA to deliver programs and recommendations to  
3           Canada and Alberta. Canada agrees that what is  
4           proposed by CEMA's Management Board are all  
5           important programs. Yet the evidence before you is  
6           that CEMA has been underfunded to the tune of two  
7           to three million dollars annually. Somebody is not  
8           stepping up to the plate.

9           With the money being generated by oil sands  
10          developments for the entire country, to say nothing  
11          of foreign shareholders, and with what is at stake  
12          for First Nations, this is inexcusable. If CEMA is  
13          to be relied upon, its programs must be fully  
14          funded. We ask this Joint Review Panel to put the  
15          heat on Canada and on Alberta and on industry to  
16          rectify this situation.

17

18       **CONCLUSION**

19               Mr. Chairman, Members of the Panel, we have  
20               no choice but to hope that Canada and Alberta  
21               manage the cumulative effects in a way that  
22               protects the environment and our rights. These  
23               recommendations that I've provided to you are our  
24               earnest attempt to provide a partial roadmap to the  
25               Crowns as to how to possibly meet their



1 obligations. Simple delegation to oil sands  
2 operators will not suffice.

3 We submit that it's in the public interest  
4 that Canada's and Alberta's Treaty 8 obligations be  
5 honoured.

6 To the extent that you can reinforce this  
7 message and be our loud speakers to Canada and  
8 Alberta, we thank you.

9 Those are my submissions. I should say I  
10 neglected to point out that we've previously  
11 provided to the court reporter the citations that I  
12 did not bore you with in my discussions this  
13 morning, and we'd ask that those be incorporated  
14 into the record.

15 THE CHAIRMAN: Thanks, Mr. Mallon.

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

19 THE CHAIRMAN: You're welcome.

20 Mr. Murphy.

21 MR. MURPHY: Mr. Chairman, before we take  
22 a lunch break, I wonder if I could speak to one  
23 housekeeping matter.

24

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

1 MR. MURPHY: A short while ago I  
2 circulated by e-mail a copy of ACFN's written  
3 submissions and Mr. Perkins suggested I speak to  
4 the Panel about this. You might recall when I got  
5 up yesterday to start oral submissions I did say  
6 that we are intending on circulating a copy of our  
7 written submissions. What we did was, in our oral  
8 submissions, we truncated those somewhat in the  
9 sense that you might recall I said I was starting  
10 at paragraph 9 of the written submissions and you  
11 may recall Ms. Biem, this morning, saying that she  
12 was skipping over a whole section on, you know,  
13 explaining the case law. And we tried to truncate  
14 the written submissions in the interests of time,  
15 but also because some of our colleagues, frankly,  
16 had already addressed some of the matters, for  
17 example Ms. Gorrie had addressed some of the  
18 Environmental Assessment case law.

19 And so I don't think I explained that clearly  
20 enough. And I guess I'm requesting that our  
21 written submissions be considered as supplemental  
22 to our oral submissions and if there's any conflict  
23 between the two that the oral submissions be relied  
24 upon.

25 THE CHAIRMAN: Does any party have any

1 comment about that? Mr. Denstedt?

2

3 **COMMENTS BY MR. DENSTEDT:**

4 MR. DENSTEDT: In fact, I do, sir. I  
5 haven't had a chance to look at the written  
6 submissions, obviously we've been here today  
7 working, but when we start by saying, putting  
8 context around this, last Friday, Mr. Chairman, the  
9 Panel --

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

11 MR. DENSTEDT: Last Friday, the Panel  
12 determined that argument for this proceeding would  
13 be oral argument. And pursuant to Section 46 of  
14 the *Rules of Practice*, the argument will be as  
15 directed, must be as directed by the Board. There  
16 are no exceptions. It's either written argument or  
17 it's oral argument.

18 It shouldn't come as a surprise to anyone.  
19 For the 23 years I've practised in front of this  
20 Panel, oral argument has in fact been oral  
21 argument. The only purpose that you provide your  
22 notes to the court reporter for is for ease of  
23 reference and citations. And quite frankly, I'm  
24 astounded that I'm hearing about this at this late  
25 date. Shell's rights would be severely prejudiced

1 by allowing a written submission to go in at this  
2 late stage in the process without an opportunity to  
3 take the time that generally goes into written  
4 submission processes of sometimes days or weeks in  
5 between those submissions. And it should just not  
6 be allowed, sir. If my friend wants to include  
7 references to transcripts and evidence and  
8 citations, he can look at the transcript and do so.  
9 So we object to this in the most strenuous way.

10 THE CHAIRMAN: Anything in reply, sir?

11

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

13 MR. MURPHY: I should have said that there  
14 aren't any additional substantive matters in the  
15 written form of our submissions. Our oral  
16 submissions follow the written submissions. What's  
17 provided in our written submissions are the  
18 detailed references to the evidence, so, you know,  
19 where we've referred to the transcript evidence and  
20 exhibit numbers. And so it wasn't meant to  
21 surprise anybody or add any additional information  
22 or, I mean, you know, new submissions. I simply  
23 meant to give everybody a copy of what we've done  
24 and what we're relying upon. That's all.

25 THE CHAIRMAN: Thank you. So we'll consider

1           this over the lunch break. And we'll resume at  
2           1:15. Thank you.

3

4

**(The Luncheon Adjournment)**

5

**(12:15 p.m. to 1:15 p.m.)**

6

7       THE CHAIRMAN:                    Could you take your places,  
8           please.

9

          Mr. Purdy, I was just going to address the  
10         matter that Mr. Murphy raised before the lunch  
11         break and I just wondered if there'd been any  
12         developments over the noon hour?

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

14

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

21

          What I've suggested to my friend, and he  
22         seemed agreeable, is if it would help madam  
23         transcriber, she could e-mail at least the draft of  
24         the oral submission to me and copy my friend and at  
25         least I could point her to the references so that

1           they are correct.

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

5       THE CHAIRMAN:                   Mr. Perkins?

6       MR. PERKINS:                    In that case, as I understand  
7           it, then, Mr. Chairman, we would not be filing  
8           additional information; that is, the exhibit list  
9           would not be taking in another exhibit for ACFN;  
10          rather, the material, however it ends up being,  
11          will be reflected in the transcript. I assume  
12          that's the case.

13      MR. MURPHY:                    That would be my  
14          understanding.

15      THE CHAIRMAN:                   Thank you, counsel.  
16                                       Mr. Purdy?

17

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

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

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

23

24       **Introduction**

25                   The council of the Regional Municipality has

1 a statutory responsibility pursuant to Section 3 of  
2 the **Municipal Government Act** to provide:

3

4 Number 1. Good government.

5 Number 2. Services, facilities and

6 other things that, in the opinion

7 of council are necessary or

8 desirable for the Municipality; and

9 Number 3. To develop and maintain

10 safe and viable communities.

11 Section 3, MGA

12

13 It is within the context of Section 3 of the

14 **Municipal Government Act** that the Regional

15 Municipality has intervened in this hearing. The

16 Regional Municipality's council seeks to provide

17 services and facilities that will create and

18 maintain safe and viable communities within the

19 Regional Municipality as a complement to oil sands

20 development.

21 The Chief Administrative Officer,

22 Mr. Laubenstein, who appeared at the hearing, said

23 this:

24

25 "So we're committed to

1           developing that community. We're  
2           capable of supporting it. We have  
3           the staff now in place that we  
4           believe can do the things  
5           necessary." Proceedings at Hearing Transcript,  
6           November 13, 2012, page 2670, lines 8-10

7

8           As stated in the Regional Municipality's  
9           Brief:

10

11                       "The vision for the  
12           Municipality is to be a world-class  
13           model of sustainable living in the  
14           north. In terms of the oil sands  
15           industry, this means that the  
16           Municipality strives to be a  
17           leading-edge community capable of  
18           supporting the development of a  
19           world-class resource." Page 17, Section 4

20

21           And as further stated in our Brief, the  
22           Regional Municipality does not oppose the Project.  
23           Page 4, Section 1, Second Paragraph, Line 4, Intervention Brief

24

25           The goal of the Regional Municipality in  
          intervening is to report to the Joint Panel on



1 progress made on socio-economic issues and to  
2 report on issues that remain challenging and  
3 troubling to the Regional Municipality's Council  
4 and Administration.

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

14 However, the Project will also place strains  
15 on the community with increased population growth,  
16 increased traffic, and increased reliance on social  
17 services.

18 Clearly, the Regional Municipality and its  
19 residents are directly impacted and each project  
20 adds to these impacts.

21 Shell has supported this proposition in its  
22 SEIA. Shell stated that:

23  
24 "Oil sands expansion has  
25 created pressures for the region.

1                   From the perspective of the  
2                   Municipality and other service  
3                   providers, high economic and  
4                   population growth rates, giving  
5                   rise to stresses on road, municipal  
6                   and social infrastructure." Shell SEIA  
7                   2007, Vol 5, Part 8.7; 8.7.15, p. 8, 272

8  
9                   Now, with regard to the significance of  
10                  cumulative impacts resulting from the Project and  
11                  from regional oil sands activities on  
12                  socio-economic conditions, there's anticipated to  
13                  be:

14                   -    Significant growth in population  
15                   because of the Project.

16                   -    The Project will require  
17                   approximately 3,000 workers at its peak of  
18                   construction and 750 operational workers while  
19                   the mine is in operation. Shell's SEIA

20                   -    Cumulatively, this will lead to  
21                   rapid population growth. By 2030, the  
22                   regional population is expected to double to  
23                   exceed 230,000 with Fort McMurray having a  
24                   population of approximately 200,000. Page 7,  
25                   Section 2, 4th paragraph, Line 1-4

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However, the Project will not stretch the community's resources beyond their capacities to accommodate the Project and its workers. In fact, the Regional Municipality has entered into a Memorandum of Understanding with Shell that has as its goal the mitigation of impacts such that the Regional Municipality believes that it can accommodate the socio-economic impacts of the Project.

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

22

23

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

24

25

With regard to specific socio-economic issues, the Regional Municipality believes that the

1 key issues are:

2

- 3 - Land release;
- 4 - Transportation connectiveness;
- 5 - Work camp permitting and operation; and
- 6 - Fly-in/fly-out operations.

7

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

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

19 Transcript, page 274, Lines 12-21

20 Mr. Laubenstein spoke not only about the need  
21 for the release of land, but also anticipated  
22 impacts on the market. He expressed the view that,  
23 with more land available, the market would correct  
24 over time and there would not be a crash. Transcript,

25 page 2671, lines 20-25

1                   Put simply, an effective land release policy  
2                   is at the heart of a more sustainable housing  
3                   picture in Fort McMurray.

4                   On the issue of long-term supply, Mr. Gordon,  
5                   the Regional Municipality's housing expert, gave  
6                   this evidence. And I quote this:

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

19                  The Municipality is doing  
20                  what it can to prevent a shortage  
21                  of land, but continued support and  
22                  assistance is required from the  
23                  Government of Alberta to create a  
24                  balanced real estate market in Fort  
25                  McMurray." Proceedings at Hearing Transcript,

November 13, 2012, Page 2681, Lines 6-17

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For the Regional Municipality to properly grow and implement its Municipal Development Plan, the Municipality requires a long-term supply of land like almost all other cities have the luxury of. Mr. Laubenstein explained it this way, and I quote him:

"Virtually every city that I've ever managed, and it's a few of them, has a 5-to-20 year supply of land available in the hands of the private sector so they can manage their own destiny. The number here is zero." Proceedings at Hearing Transcript, November 13, 2012, page 2762, lines 4-8

On the issue of land release, I think it's clear from the evidence that we presented that the Regional Municipality is frustrated with the Province's approach. While an MoU was signed that should have created a long-term supply, there hasn't been that anticipated move forward to get

1 this accomplished. There has been a lack of  
2 co-ordination between AESRD and Alberta  
3 Transportation. When land is released, it needs to  
4 be accessible. Transcript of Hearing, page 2752, lines 6-15;  
5 page 2754, lines 2-3

6 I will say more about access later on in my  
7 presentation.

8 I now want to turn and talk briefly about  
9 land valuation.

10

#### 11 **Land Valuation**

12 The Regional Municipality's Brief discloses  
13 that the communities of Fort McMurray, Anzac, and  
14 Conklin are identified as the urban centres that  
15 require a supply of land. All of these communities  
16 are surrounded by tracts of Crown land. These  
17 centres are the hole in the doughnuts. The  
18 Province holds all the cards on when, how, and at  
19 what value the land will be released.

20 The only progress so far in instituting a  
21 long-term land supply for Fort McMurray is the  
22 Memorandum of Understanding referred to by  
23 Mr. Evans in his evidence.

24 Now, with respect to land valuation, I want  
25 to sum up the problem this way: Currently, there's

1 a circular problem regarding the issue of land  
2 valuation. This is the problem. The expansion of  
3 the oil sands industry has put tremendous growth  
4 pressure on the Regional Municipality. The  
5 population increase has created a huge demand for  
6 housing. A key component of housing is land. When  
7 land is not released, it becomes scarce and,  
8 therefore, more expensive. The longer the land is  
9 not released, the more scarce it becomes and, in  
10 turn, the more valuable it becomes.

11 The Province then values the land in a vacuum  
12 and will not sell or release land until current  
13 appraisal values are met. In effect, the  
14 Province's lack of a coherent and functioning Land  
15 Release Strategy has caused or largely contributed  
16 to the largest component of housing costs; that  
17 being land.

18 Mr. Evans' description of recent events and  
19 the Province's position exemplifies the  
20 circumstance. To quote Mr. Evans:

21  
22 "If I may, it's also not just  
23 explaining the situation to them.

24 The response that we have received  
25 from one department in particular,



1                   several times over the last year,  
2                   is [as read]:

3  
4                   'That's not our mandate. Our  
5                   mandate is to maximize the  
6                   return on a public resource,  
7                   which in this case is Crown  
8                   land, and if a market price  
9                   or if an independent  
10                  appraiser determines that  
11                  this is a fair price for  
12                  land...'"

13                  ...

14  
15                  "... 'then that's what the  
16                  price is.'"

17  
18                  Mr. Evans went on to comment that this  
19                  creates an incredibly artificially deformed housing  
20                  market or land market.

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

22  
23                  "More than once I've had an  
24                  ADM say to me:

25

1                    'We know this is high, but  
2                    that's our appraisal. You  
3                    have the right to refuse it  
4                    if you don't want to buy  
5                    it.'" Proceedings at Hearing Transcript,

6                    November 13, 2012, page 2762, lines 18-25; page

7                    2763, lines 1-18

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9

                  And Mr. Laubenstein had this to say in his  
10                    analysis with respect to both land cost and  
11                    valuation:

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                  "The land is often put on the  
                  market by the Province without the  
                  infrastructure identified. It's  
                  put on as raw land and sold as  
                  developed land. And it spirals the  
                  cost up and does not give the very  
                  thing you're looking for which is  
                  the coordinated design and actually  
                  ends up increasing the costs for  
                  all of us because then those  
                  designs are put on after the land  
                  is sold instead of before."

                  Proceedings at Hearing Transcript, November 13,

1 2012, page 2712, lines 17-25

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All of this, I submit, creates:

- 1) Uncertainty for the development community;
- 2) A chronic shortage of land; and
- 3) Escalating costs.

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

### **Transportation and Traffic**

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

Clearly, from all accounts, the current transportation network within the Regional Municipality does not have capacity.

Notwithstanding CRISP and other programs, traffic

1 and transportation remains a major issue.  
2 Mr. Laubenstein gave evidence that CRISP is  
3 unfunded and no government department has taken the  
4 lead on implementation. Mr. Laubenstein's evidence  
5 can be summed up as follows:

6

7 - Highway 63 north of Fort  
8 McMurray is at times beyond its  
9 capacity.

10 - The heavy traffic creates  
11 congestion and safety issues; and

12 - Highway 63 is the only route  
13 through Fort McMurray and this  
14 creates a bottleneck. Proceedings at  
15 Hearing Transcript, November 13, 2012, page 2705,  
16 lines 15-23; page 2706, lines 16-24; page 2707,  
17 lines 6-16

18

19 On the issue of transportation, the Regional  
20 Municipality is proposing an Eastern Bypass Route.

21 The Eastern Bypass Route is needed to take  
22 pressure off Highway 63 through Fort McMurray. The  
23 bypass would reduce the construction and oil sands  
24 operations traffic on Highway 63 in the Fort  
25 McMurray Urban Service Area and allow residents to

1 move more freely around the Urban Service Area with  
2 respect to commutes and for other pursuits. <sup>Proceedings</sup>  
3 at Hearing Transcript, November 13, 2012, page 2708, lines 18-24

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. <sup>Proceedings at Hearing</sup>  
11 Transcript, November 13, 2012, page 2708, lines 5-11

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

15 The Regional Municipality has proposed to the  
16 Province that an alternative funding model should  
17 be discussed with industry so this highway can be  
18 built. But, currently, there is no initiative for  
19 this to take place. <sup>Proceedings at Hearing Transcript, November</sup>  
20 13, 2012, page 2709, lines 14-15

21

22 **Coordination: Municipal, Provincial, Industry**

23 With respect to both land release and  
24 transportation, the Regional Municipality asserts  
25 that there needs to be a more unified voice from

1 the Province in its co-ordination of both land  
2 release and transportation issues.

3 Mr. Laubenstein is proposing for the Regional  
4 Municipality that some type of authority be put in  
5 place that would have the Province, the Federal  
6 Government, the Regional Municipality, and industry  
7 at the table to deal with these issues. Proceedings at  
8 Hearing Transcript, November 13, 2012, page 2735, lines 9-25; page 2736,  
9 lines 17-21

10 Now, I want to return for a minute and talk  
11 about the relationship of land release and  
12 accessibility.

13

#### 14 **Access for New Housing Development**

15 The Regional Municipality made it clear in  
16 its evidence that bringing land on the market  
17 without adequate road access does not and will not  
18 solve the housing issue. There needs to be a  
19 co-ordination by the Provincial Government on land  
20 release and land access. Proceedings at Hearing Transcript,  
21 November 13, 2012, page 2713, lines 1-25; page 2714, lines 1-11

22 This was amplified by the Regional  
23 Municipality's housing expert, Mr. Gordon, and I  
24 quote him:

25

1                    "I want to talk briefly about  
2                    residential land.

3                    While some progress has been  
4                    made in convincing the Alberta  
5                    Government to release more land,  
6                    there are still significant  
7                    challenges in making the bulk of  
8                    that land accessible to enable  
9                    residential development. And the  
10                   example I'll use is Parson's Creek.  
11                   While Parson's Creek, you know,  
12                   provides an opportunity for a large  
13                   development, to date, only 1,000  
14                   units are available. And that's  
15                   because the subdivision isn't  
16                   accessible by road. So there's  
17                   still a lot of challenges."

18                   Proceedings at Hearing Transcript, November 13,  
19                   2012, page 2680, lines 19-25; page 2681, lines 1-5

20  
21                   I want to turn now and discuss work camps.

22

23                   **Work Camps**

24                   Project accommodations or work camps have  
25                   proliferated in an atmosphere where there is a huge

1 demand for housing but little accommodation  
2 available. Developers have resorted to  
3 fly-in/fly-out operations to mitigate the scarcity  
4 of housing. The Regional Municipality asserts that  
5 this is only a short-term solution, and in the long  
6 run, fly-in/fly-out has a negative impact on the  
7 community. Generally, the Regional Municipality  
8 would prefer to have workers live within the  
9 community. And I now quote from the Regional  
10 Municipality's Brief:

11  
12 "The Municipality encourages  
13 and supports the efforts of  
14 companies that choose to not use a  
15 fly-in/fly-out model for their  
16 operations workers. Encouraging  
17 operations staff to live within the  
18 community is key to the development  
19 of a thriving and sustainable  
20 region that will support the  
21 development of the oil sands  
22 industry. The Municipality accepts  
23 that temporary or construction  
24 labour may, under certain  
25 circumstances, be housed within



1 project accommodations; however,  
2 the Municipality is eager to work  
3 with the Province and the oil sands  
4 industry to develop strategies to  
5 encourage permanent, operations  
6 staff to take permanent residency  
7 in the region." Brief, Page 11, Section  
8 3(c), 2nd Paragraph

9  
10 At this point, and at this time, the Regional  
11 Municipality accepts that Shell's construction  
12 workers may well need to live in work camps, but it  
13 encourages and supports operational workers living  
14 in the community close to the project.

15 While the overall short-term and long-term  
16 impacts of fly-in/fly-out operations are not well  
17 understood, as indicated by the Regional  
18 Municipality's evidence, the Regional  
19 Municipality's housing and socio-economic experts  
20 who gave evidence at the hearing were both of the  
21 opinion that fly-in/fly-out models had negative  
22 impacts for the host community. Brief, Page 11,  
23 Section 3(c), 4th Paragraph

24 Firstly, Mr. Gordon gave this evidence  
25 regarding work camp growth:

1

2

"From 2002 to 2005, Fort

3

McMurray captured 92 percent of the

4

population growth and the work

5

camps captured about 8 percent."

6

...

7

"From 2005 to 2012, Fort

8

McMurray captured only 29 percent

9

of the growth, 70 percent of the

10

growth was in work camps."

11

12

His conclusions from these trends of workers

13

not locating in the community and therefore not

14

having their families relocate with them is that it

15

creates the following:

16

17

- a population imbalance in the

18

community with an oversupply of

19

single males;

20

- it reduces potential

21

population growth because

22

population grows with a single

23

worker versus a worker and his or

24

her family; and

25

- it reduces the availability

1 of workers for other sectors of the  
2 economy, such as retail.

3 Mr. Gordon indicated that, in his opinion,  
4 all of this will make it very difficult to build an  
5 inclusive and sustainable community in Fort  
6 McMurray. Proceedings at Hearing Transcript, November 13, 2012, page

7 2674, lines 21-25; page 2675, lines 1-2, 8-25; page 2676, lines 1-2

8 Mr. Howery, the Regional Municipality's  
9 socio-economic expert had this to say, and I quote  
10 him:

11

12 "Firstly, it was estimated  
13 that in 2001, the population of  
14 work camps was 25 percent of the  
15 total population. By 2012, the  
16 work camp population comprised  
17 40 percent of the population."

18 Proceedings at Hearings Transcript, November 13,

19 2012, page 2685, lines 8-16

20

21 "Secondly, this increase is  
22 significant, because with growth,  
23 generally you expect the population  
24 will grow through families and not  
25 single workers. The effect is lost

1 to the community."

2

3 Mr. Howery went on to say:

4

5 "It's something that  
6 typically you take for granted  
7 that, as a population of a  
8 community grows, that its residents  
9 are comprised of families. And  
10 those families provide a variety of  
11 things to the community that, as I  
12 say, often are taken for granted.  
13 In particular, the family provides  
14 a support base for the family and  
15 for the workers in those families  
16 within that family unit. And that  
17 support base is comprised of a  
18 whole bunch of things which enable  
19 people to thrive and enjoy their  
20 work and non-work life." Proceedings at  
21 Hearings Transcript, November 13, 2012, page 2686,  
22 lines 13-24

23

24 Mr. Howery was also of the opinion that the  
25 community is deprived of those family workers to

1 provide a labour force for other local businesses  
2 and that the community was also deprived of  
3 non-paid work activities and volunteer activities.

4 Proceedings at Hearing Transcript, November 13, 2012, page 2687, lines 5-23

5 And this is what Mr. Howery had to say about  
6 that:

7  
8 "... there's another  
9 component to having the complete  
10 family available within a community  
11 is that oftentimes the family also  
12 supports non-paid work activities  
13 and volunteer activities which are  
14 also important to the social fabric  
15 of the community, including schools  
16 and other social support  
17 organizations which are available  
18 in the community to help the  
19 residents of that community."

20 Proceedings at Hearing Transcript, November 13,  
21 2012, page 2687, lines 24-25; page 2688, lines 1-7

22  
23 He also indicated that having the family in  
24 the community enhances the economic retail base of  
25 the community. Proceedings at Hearing Transcript, November 13, 2012,

1  
2  
3  
4  
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10  
11  
12  
13  
14  
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24  
25

page 2688, lines 13-19

Therefore, clearly there's evidence before the Panel that there are significant negative impacts to a fly-in/fly-out model being used by developers of the oil sands.

Now, Shell actually supports the Regional Municipality's view of operational workers living in the community, and you probably will recall the evidence that Mr. Broadhurst gave. And there was just one exchange that I wanted to point out to you, and that comes from a question that Mr. Perkins asked and that Mr. Broadhurst responded to in this way:

"Our focus has always been and, in fact, it is with all of our operations in Canada, to look to have our operating workforce reside close to the operating location. That, we think, is the best for the community."

Proceedings at Hearing Transcript,  
page 1546, lines 15-20

I now want to turn and talk about the operational and permitting challenges of work

1 camps.

2

3 **Enforcement Within Camp: Safety Concerns**

4 The Regional Municipality illustrated the  
5 following challenge with respect to work camps:

6

7 "While there is a municipal  
8 requirement that work camps be  
9 permitted by the Regional  
10 Municipality, many developers do  
11 not seek to comply with municipal  
12 regulations for work camps. In  
13 2012 alone, the Regional  
14 Municipality found 28 existing  
15 camps that were not permitted."

16 Brief, Page 13, Section 3(c) 4th Bullet

17

18 Mr. Evans of the Regional Municipality's  
19 witness panel believed that part of the problem  
20 stems from a lack of cooperation with AESRD. And  
21 he had this to say:

22

23 "The leases are issued. It's  
24 a miscellaneous land lease is  
25 issued by formerly SRD, now AESRD.

1           And one of the provisions in the  
2           leasing process says, more or less,  
3           meeting the requirements of this  
4           lease should not be construed as  
5           meeting any other requirement such  
6           as municipal, DFO, what have you.  
7           But when the lease is issued,  
8           nobody at the Province follows up  
9           to make sure that the proponent has  
10          gone to any other agencies. And if  
11          the Province doesn't share the  
12          leases with us, we don't know that  
13          anybody's established a camp. So  
14          there have been instances where  
15          operators have received a lease  
16          from the Province and they've  
17          assumed, deliberately or  
18          accidentally, that that was  
19          sufficient and gone on to build  
20          their operation without obtaining a  
21          development permit from the  
22          Municipality." Proceedings at Hearings  
23          Transcript, November 13, 2012, page 2768, lines 1-17  
24  
25          Again, from the evidence, this has resulted



1 in 2012 finding out that there was 28 unpermitted  
2 camps.

3 Basically on this issue, the Regional  
4 Municipality is concerned with the lack of  
5 communication from AESRD to the Regional  
6 Municipality that a lease has been issued and that  
7 AESRD does not require the developer to show proof  
8 that it has obtained a municipal development permit  
9 to construct and operate the camp. Clearly this  
10 creates safety issues because the Regional  
11 Municipality needs to know where populations are  
12 located for such things as fire suppression and  
13 emergency response.

14 Mr. Laubenstein had this to say when he  
15 reported on the issue, and I quote him:

16  
17 "And you may not recall, but  
18 I think I mentioned earlier on,  
19 this is all, once again, part of  
20 the transportation network. These  
21 camps are approved in isolation,  
22 without input from us originally,  
23 they are all over the place, they  
24 are not coordinated, the  
25 transportation to and from them

1           isn't there, the quality of life  
2           issues that could be made available  
3           to the camp, people that live in  
4           the camps, aren't there because  
5           they are not clustered.

6                        So those are some of the  
7           things that are addressed in CRISP  
8           as a need to deal with these  
9           things, but there's really nobody  
10          doing it." Proceedings at Hearing Transcript,  
11          November 13, 2012, page 2770, lines 10-22

12  
13                        In conclusion, regarding the permitting and  
14          operation of camps, the Regional Municipality is  
15          concerned about safety, emergency access, and  
16          unnecessary impacts on the environment. Proceedings at  
17          Hearing Transcript, November 13, 2012, page 2659, lines 24-25; page 2660,  
18          lines 1-17

19                        With regard to permitting, the issue could be  
20          better managed by:

- 21  
22                        1)        AESRD alerting the  
23                        Municipality to any applications  
24                        for camp accommodations;  
25                        2)        AESRD requiring a condition

1           that the applicant obtain a  
2           development permit from the  
3           Regional Municipality and provide  
4           proof of that; and  
5           3)     That AESRD require monitoring  
6           and reporting of camps with yearly  
7           reporting on:

- 8                     (a)   worker spaces that are  
9                     available in the camp, and;  
10                    (b)   for the reporting  
11                    period, the number of workers  
12                    per month that resided in the  
13                    camp.

14  
15                    The Regional Municipality supports the  
16                    recommendations of CRISP and the goal of its own  
17                    MDP, both of which support a centralized camp  
18                    approach through the development of multicamp  
19                    nodes.   *Brief, Page 13, Section 3(c), 5th Bullet*

20                    This will lessen safety, transportation, and  
21                    environmental impacts.

22                    On the issue of fly-in/fly-out operations,  
23                    the Regional Municipality presented evidence in its  
24                    Brief and through Mr. Laubenstein's evidence at the  
25                    hearing that operational expenditures will soon

1           outpace construction expenditures.   Brief, Page 18,  
2           Section 4

3           The Regional Municipality asserts that now is  
4           the time for regulators and industry to promote,  
5           encourage and support workers living in the  
6           community where they work.

7           Now, I want to turn and speak briefly about  
8           the SEIA process.

9  
10       **SEIA Process**

11           Since approximately 2000, the Regional  
12           Municipality has undergone transformative changes  
13           largely because of oil sands development. However,  
14           in the Regional Municipality's opinion, research  
15           concerning project-specific and cumulative  
16           socio-economic impacts is lacking. AESRD has  
17           indicated that it is not adequately resourced to  
18           review the information provided. In the Regional  
19           Municipality's view, this creates an ineffective  
20           and inefficient assessment of socio-economic issues  
21           facing the region. The Regional Municipality would  
22           like to see a more coordinated approach, which  
23           includes both senior levels of government, the  
24           Regional Municipality, and industry so that  
25           socio-economic impacts can be identified, mitigated

1 and monitored.

2 Prior Review Panels have indicated that they  
3 understood the challenges facing the Regional  
4 Municipality. The Regional Municipality believes  
5 that it is once again the time for the Joint Review  
6 Panel to take the lead and provide further comment  
7 on this issue. Regional Municipality Brief, Pages 14-16

8

9

10 **In Conclusion**

11 Now, in conclusion, I just want to go through  
12 some summarizing points with respect to my  
13 presentation and also with respect to  
14 recommendations that the Regional Municipality  
15 would like the Joint Review Panel to make.

16 1. The Regional Municipality and its  
17 residents are directly impacted by the Project  
18 specifically and by oil sands development generally  
19 on a cumulative basis.

20 2. The Regional Municipality does not oppose  
21 Shell's application of Expansion of its Jackpine  
22 Mine as it relates to socio-economic issues that  
23 impact the Regional Municipality and its residents.

24 3. The Regional Municipality leaves issues  
25 of air quality, water quality, land use, and

1           Aboriginal and Treaty Rights to those parties that  
2           are statutorily and otherwise responsible for these  
3           issues.

4                     4. The Regional Municipality remains  
5           concerned about the manner in which socio-economic  
6           reviews are conducted and recommends that the Joint  
7           Review Panel recommend to the Provincial Government  
8           that the Regional Municipality be consulted earlier  
9           in the process so that:

10

11                     (i) there is more collaboration  
12                     amongst the Province, the Regional  
13                     Municipality and industry on  
14                     project-specific and cumulative  
15                     impacts; and

16                     (ii) there is more clarity on the  
17                     socio-economic assessment mandate  
18                     of the Joint Review Panel.

19                     Clearly, further work needs to be  
20                     done having regard to the  
21                     unprecedented impacts on the region  
22                     and what is yet to come.

23

24                     5. The Regional Municipality is concerned  
25           and frustrated with the lack of a coordinated

1 provincial approach to land release in the region.  
2 The Regional Municipality requests that the Joint  
3 Review Panel strongly urge the Government of  
4 Alberta to implement and execute a coherent land  
5 release policy having regard to the unique issues  
6 in the Wood Buffalo region. This policy should  
7 include servicing, access, and valuation of land  
8 that reflects these unique issues.

9 6. The Regional Municipality is concerned  
10 about the dramatic increase and proliferation of  
11 work camp population and the process of  
12 fly-in/fly-out operations and requests that the  
13 Joint Review Panel recommend to the Province of  
14 Alberta that its Ministries work more closely with  
15 the Regional Municipality to report work camp  
16 applications, require proof of municipal  
17 permitting, and recommend to Alberta and Canada to  
18 identify, assess, and monitor the impacts of  
19 fly-in/fly-out workforce models on host  
20 communities. The Regional Municipality  
21 specifically requests that the Joint Review Panel  
22 find on the evidence presented in this hearing that  
23 fly-in/fly-out operations have a negative impact on  
24 the region.

25 7. The Joint Review Panel recommend to

1 Canada that it participate in funding of  
2 transportation projects of regional significance,  
3 prioritized by the Alberta Oil Sands Area  
4 Transportation Coordination Committee. There are  
5 tremendous benefits that flow to Canada from the  
6 development of the oil sands and there's very  
7 little evidence of funding for infrastructure back  
8 from the Federal Government.

9 8. The Regional Municipality requests that  
10 the Joint Review Panel recommend to the Government  
11 of Alberta that it fund CRISP so that critical  
12 infrastructure can be built on a timely basis; and,  
13 finally

14 9. The Regional Municipality asks the Joint  
15 Review Panel to make it a condition of its approval  
16 that Shell comply with all municipal regulations  
17 that are not inconsistent with the Joint Review  
18 Panel's approval of the Project.

19 Thank you very much.

20 THE CHAIRMAN: Thank you, sir.

21 Mr. Lambrecht?

22 MR. LAMBRECHT: Sir, I have a number of  
23 submissions that I intend to make. Having regard  
24 to the suggestion from the Panel earlier that we  
25 should perhaps take more frequent breaks, what I



1           would propose to do is to deal with two of the  
2           issues that I need to deal with and then suggest  
3           that we take a break at that point. That's a  
4           natural point in the submissions. And I will then  
5           turn to the third issue which takes up the bulk of  
6           the time in my submissions here.

7       THE CHAIRMAN:                    Sir, how long do you think  
8           you'd be in total?

9       MR. LAMBRECHT:                  About an hour I now think.  
10           It was a little more than what I'd initially  
11           estimated, but I need to be responsive to some of  
12           the things that were said here.

13       THE CHAIRMAN:                  What we could do is take a  
14           break now for about 15 minutes and then you  
15           wouldn't have to break up your flow.

16       MR. LAMBRECHT:                  That will work for me  
17           perfectly. And what I would suggest in that period  
18           of time is that I intend to make reference to one  
19           exhibit. I will refer to other exhibits in the  
20           course of my submissions, but it might be helpful  
21           if the Panel staff and other counsel had 005-021  
22           available when we return. These are the  
23           submissions of the Attorney General in response to  
24           the Notices of Constitutional Question filed with  
25           the Joint Review Panel. I'll be making some

1 reference to some of the factual materials there  
2 during the course of my submissions.

3 THE CHAIRMAN: Thanks, sir.

4 So I have 1:50 p.m. We'll take 15 minutes.

5 MR. LAMBRECHT: Thank you, sir.

6

7 **(The Afternoon Adjournment)**

8

9 THE CHAIRMAN: Mr. Lambrecht, would you like  
10 to proceed?

11 MR. LAMBRECHT: Thank you, sir.

12

13 **FINAL ARGUMENT OF THE ATTORNEY GENERAL OF CANADA, BY**

14 **MR. LAMBRECHT:**

15 MR. LAMBRECHT: My name is Kirk Lambrecht. I  
16 represent the Attorney General of Canada in this  
17 proceeding. The Attorney General has two functions  
18 in this respect: First, we represent Transport  
19 Canada, Natural Resources Canada, the Department of  
20 Fisheries, and Environment Canada, who had  
21 presented scientific or expert information or  
22 knowledge which may assist the Panel both in their  
23 report on October 1st in the evidence which their  
24 panel gave and in the various aspects in which they  
25 have participated in the **EPEA** process leading to

1 the appointment of this Panel; in particular, in  
2 the SIRs in that process.

3 I have submissions on three issues that are  
4 set out in the final argument issues list provided  
5 by counsel for the Panel: 4.d., Air Emissions,  
6 which is very brief; 5.c., Wildlife, which is very  
7 brief; and 7, Aboriginal Groups and Issues, which  
8 is the most extensive of the submissions that I  
9 will be making to the Panel this afternoon.

10 Time is limited and it is not possible to  
11 address all the recommendations outlined in the  
12 evidence of Transport Canada, Natural Resources  
13 Canada, Environment Canada, and the Department of  
14 Fisheries and Oceans filed on October 1st. So I  
15 would like to thank the Panel and the staff for  
16 their consideration of those and the consideration  
17 of the evidence that the Federal Government  
18 witnesses gave during cross-examination and through  
19 undertakings.

20 At this point, I would note that there are  
21 seven undertakings outstanding. I have advised my  
22 clients of the importance of providing undertakings  
23 before the close of argument and I continue to  
24 advise them of the importance of providing  
25 undertakings as soon as possible.

1                   So with respect to issue of 4.d., Asphaltenes  
2                   in Co-Generation, Environment Canada would like to  
3                   note that evidence within the departmental  
4                   submission dated on October 1st did not contain  
5                   specific concerns related to the use of asphaltene  
6                   for co-generation. This was a direct result of  
7                   communications between Environment Canada and the  
8                   JRP in a letter dated December 6th, 2011, and  
9                   Shell's response dated January 18th, 2012,  
10                  indicating that Shell was not currently seeking  
11                  approval of Asphaltene Energy Recovery, or AER, as  
12                  a part of the Jackpine Mine Expansion Project.

13                  Should the Project proceed and should Shell  
14                  reconsider that position, and the proposed use of  
15                  asphaltene for co-generation in future, Environment  
16                  Canada would like to note that there has not been  
17                  an adequate assessment of the impact of the burning  
18                  of asphaltenes for co-generation and, therefore,  
19                  that it would like to participate in the additional  
20                  information-gathering and assessment that should be  
21                  required in that respect.

22                  With respect to issue 5.c., Wildlife,  
23                  Environment Canada's operational framework for the  
24                  use of conservation allowances provides guidance on  
25                  important design elements that may be used when

1 allowances are considered. An important  
2 consideration that allowances are in addition to  
3 existing legislation regulations, programs, land  
4 use plans and funding, and are intended to provide  
5 an overall net benefit following land disturbance,  
6 ultimately, how conservation allowances and  
7 conservation areas may be viewed by Alberta under  
8 LARP or integrated into LARP is unknown as the  
9 biodiversity framework and landscape management  
10 plan of LARP have not yet been developed and will  
11 not be completed until the end of 2013.

12 Although the final intent of the Province of  
13 Alberta is not known, page 45 of LARP does  
14 recognize the potential role of conservation  
15 offsets in landscape planning. This is referenced  
16 outside the consideration of conservation areas as  
17 defined within LARP.

18 Now, with respect to issue number 7,  
19 Aboriginal Groups and Individuals, I would like to  
20 spend some time on what I understand to be the  
21 functions of the Panel regarding Aboriginal Rights  
22 and Interests.

23 The theme of this submission, I think, is  
24 going to be that the Panel has a potential role as  
25 a catalyst in policy development via its

1            recommendations. And so the functions of the Panel  
2            in this regard are set out in clause 6.2 of the  
3            Joint Review Panel Agreement. And these require  
4            the Panel to make findings of effects of the  
5            Project on Aboriginal and Treaty Rights, and I  
6            would assume in this that "effects" includes  
7            environmental effects as now defined in  
8            Section 5(1)(c) of **CEAA, 2012**, and also requires  
9            the Panel to make recommendations respecting the  
10          manner in which the Project may adversely affect  
11          the Aboriginal and Treaty Rights asserted by the  
12          participants.

13                    I note, to begin, that many of the Aboriginal  
14          parties and the other parties involved have been  
15          very supportive of the Panel process. Ms. Bishop,  
16          in her submissions, described it as a very  
17          rewarding process. Chief Adam thanked the Panel,  
18          as I understood him, or as I heard him, for taking  
19          the time to listen to the ACFN concerns. And  
20          Mr. Mallon indicated that governments listen to  
21          Panel recommendations, or at least have done so in  
22          the past.

23                    So in the larger picture of the function of  
24          this Tribunal within the Project development  
25          process, it may be helpful to look at the chart at

1 page 86 of the submissions that I filed in response  
2 to the Notices of Question of Constitutional Law  
3 that are at Exhibit 005-021. This, in effect,  
4 summarizes in a satellite-level picture how a  
5 project development for major projects like the  
6 Shell Jackpine Mine Expansion go through stages of  
7 development and that there are different procedural  
8 requirements appropriate to different problems at  
9 different stages of the project development  
10 process.

11 So in general, in general terms, in my  
12 submission, the jurisprudence establishes that  
13 Treaty and Aboriginal Rights fall within the  
14 existing frameworks of Canadian law. And that  
15 framework in Canadian law has long recognized that  
16 the legislative branch of government may create  
17 specialist tribunals, and, indeed, the Energy  
18 Resources Conservation Board is a good example of  
19 one of the long-standing tribunals in Canadian  
20 history, dating back to a very early time in the  
21 history of Alberta and the management of resources  
22 under Alberta's jurisdiction.

23 For controversial projects, it is, indeed,  
24 reasonable for the Crown to integrate its  
25 Aboriginal consultation with existing tribunal

1 process. In other words, it is reasonable for the  
2 Crown to rely on quasi-judicial tribunals  
3 recognized as operating independently of the  
4 executive branch of government to fulfill the  
5 functions described in Section 6.2 of the Terms of  
6 Reference of this Panel; that is, to make findings  
7 of effects of the Project on Treaty and Aboriginal  
8 Rights and to make recommendations respecting the  
9 manner in which the Project may adversely affect  
10 Aboriginal and Treaty Rights asserted by the  
11 participants.

12 This is consistent with the decision of the  
13 Supreme Court of Canada in *Haida*, where, at  
14 paragraph 51, the Court said that:

15  
16 "It is open to governments to  
17 set up regulatory schemes to  
18 address the procedural requirements  
19 appropriate to different problems  
20 at different stages..."

21  
22 Of the project development process. So the  
23 key here is to recognize that major projects like  
24 the Shell Jackpine Mine Expansion move through  
25 stages. I have attempted to present these in



1 paragraph 86 of the exhibit that I've referred you  
2 to as Planning, Approval and Development. And if  
3 you accept that overarching analysis, then where we  
4 are now is in the planning stage of the Project,  
5 asking the tribunal to determine what are the  
6 effects of the Project on Aboriginal and Treaty  
7 Rights. This is the findings aspect of the Panel's  
8 jurisdiction. And then the question arises: "What  
9 should be done about such effects?"

10 Now, here, I am going to focus my submissions  
11 on the Project-specific effects, briefly, but also  
12 some of the cumulative effects.

13 You will see in both the Terms of Reference  
14 issued by Alberta Environment for the Environmental  
15 Impact Assessment, which is prepared under **EPEA**,  
16 and in the Terms of Reference for this Panel, so  
17 both of these Terms of Reference, the one for the  
18 Environmental Impact Assessment and the one for the  
19 Panel, that a Cumulative Effects Environmental  
20 Assessment is done. And this is where the  
21 Aboriginal concerns intersect with the functions of  
22 the Panel.

23 In my submission, the responsibility for  
24 answering the question "What should be done about  
25 such effects?" is distributed. It does not rest

1 solely upon the Crown. First, and you heard  
2 Mr. Denstedt make some submissions to you about  
3 this earlier on, it falls to Shell to discharge the  
4 consultation obligations that fall upon it under  
5 the EIA Terms of Reference and to do what it can do  
6 to address Aboriginal concerns. Mr. Denstedt  
7 outlined some of these things, but they are, for  
8 example, since we are at the planning stage of the  
9 Project, it is possible to make relatively  
10 cost-effective changes in the design of the Project  
11 to address or attempt to address Aboriginal  
12 concerns. The illustration of this that Shell  
13 advances is the position it has taken with respect  
14 to the diversion of the Muskeg River.

15 Shell is also in a position to attempt to  
16 structure the economic benefits of the Project in  
17 such a way that it can engage in the process of  
18 give-and-take with Aboriginal groups who can,  
19 therefore, benefit from the economic activity  
20 around them without in any way limiting their  
21 desire to pursue traditional lifestyles pursuant to  
22 Treaty or asserted Aboriginal Rights.

23 So Shell has some capacity to address  
24 Project-specific concerns and it also has some  
25 capacity to address cumulative concerns. And you

1 heard the vice-president of heavy oil operations  
2 testify that Shell's willing to do its part in  
3 participating with stakeholder groups of different  
4 kinds and regional initiatives of different kinds  
5 to address cumulative effects.

6 After Shell comes this Panel. This Panel has  
7 the ability to make conditions of its approval.  
8 And the capacity of these to address Aboriginal  
9 concerns is outlined in some evidence which I have  
10 set out at paragraph number 89 of the exhibit that  
11 I've taken you to. And this is a document dated  
12 September 30th, 2011 where this JRP clarified the  
13 Panel's mandate respecting Aboriginal rights and  
14 interests and Aboriginal consultation obligations.

15 It indicates here, and I'm going to refer you  
16 to the indented passage in paragraph 89 and read  
17 sentences from it, beginning with this one:

18  
19 "The Panel's mandate in  
20 relation to aboriginal rights and  
21 interests is set out in Article 6  
22 of the Joint Review Panel  
23 agreement. The Panel has a clear  
24 mandate to receive information  
25 about perceived impacts on

1           aboriginal rights, including treaty  
2           rights, and the effects the project  
3           may have on those rights. The  
4           Panel is also required to document  
5           in its final report all such  
6           information provided by  
7           participants. This clearly  
8           indicates that the Panel has a  
9           mandate to hear and report on the  
10          concerns described by the ACFN and  
11          MCFN in your letter, to the extent  
12          those relate to the project and the  
13          environmental assessment to be  
14          undertaken by the panel."

15  
16                   And then going on at the passage at the  
17          bottom of page 34 of the submissions and the top of  
18          page 35:

19  
20                               "The Panel is not the Crown  
21                               and does not have a consultation  
22                               obligation arising out of the duty  
23                               of the Crown, as described in the  
24                               **Haida** and **Mikisew** decisions. The  
25                               common law has established that the

1 regulatory process is well-suited  
2 to address issues that are site or  
3 project-specific..."

4

5 And that is the passage that I want to  
6 emphasize here in underscoring the role of the  
7 Panel in addressing some Aboriginal concerns.

8 So I go on in the quotation:

9

10 "... but it is not intended  
11 or designed to address larger  
12 issues of the overall impact of  
13 development, on a regional basis,  
14 on rights exercised throughout the  
15 region. Such regional concerns may  
16 be raised by parties in the course  
17 of the proceeding and the  
18 information so provided reported by  
19 the Panel, but the Panel cannot  
20 give any advance assurance that it  
21 will make decisions based on what  
22 it hears about those concerns. The  
23 Panel's hearing process may,  
24 however, assist the Crown to meet  
25 its consultation obligations to

1 First Nations."

2

3 Now, the evidence that has been placed before  
4 you in terms of what at least is the intent of the  
5 Crown after the Panel makes its report with its  
6 findings and recommendations is set out on the  
7 Federal side in Appendix 3 of these written  
8 submissions, and on the Provincial side, at  
9 paragraph 80 of the written submissions.

10 Let me restate this.

11 The Crown has a capacity to consult and  
12 accommodate after the Joint Review Panel report and  
13 before making any additional decisions which are  
14 essential preconditions to the final investment  
15 decisions by Shell and its joint venture partners.  
16 How that capacity may be exercised should be  
17 informed by the Panel report and its  
18 recommendations. And here, I restate the theme  
19 that there is a potential here for the Panel to act  
20 as a catalyst for policy evolution via its  
21 recommendations.

22 Now, I would like to take a moment to address  
23 a submission made by Ms. Biem on behalf of the ACFN  
24 during her submissions when she indicated with  
25 respect to the evidence of the Department of

1 Fisheries and Oceans particularly that nobody  
2 considered the Treaty Rights. With the greatest of  
3 respect, this is honestly mistaken. The transcript  
4 at page 3558, line 20, to 3559, line 10, which is a  
5 question from Mr. Perkins to Mr. Makowecki,  
6 indicates that Mr. Makowecki did, indeed, consider  
7 Treaty Rights. Similar, the same effect is  
8 transcript passage 3658, line 4, to 3659, line 17,  
9 which was a question from Panel Member Cooke to  
10 Mr. Makowecki.

11 The ACFN in the course of their evidence have  
12 filed an entire binder containing the complete  
13 record of correspondence between various  
14 departmental officials and the ACFN on the issues  
15 of Aboriginal consultation. That's Exhibit 006-013  
16 and its appendices. And an examination of that  
17 will indicate that Mr. Makowecki and DFO -- that  
18 DFO officials participated in that. The DFO  
19 written evidence of October 1st also makes this  
20 clear.

21 So I'm merely going to refer here to certain  
22 parts of the DFO evidence that is filed on the  
23 record. The bottom of page 8 of that document,  
24 under the heading "Traditional Use of Lands and  
25 Resources", it shows on the face of it that the

1 Department of Fisheries and Oceans considered  
2 Treaty Rights and Métis rights in the course of the  
3 preparation of their evidence.

4 Recommendations 2 and 3 include  
5 recommendations respecting the incorporation of  
6 components of cultural significance and traditional  
7 uses of land and resources. So does recommendation  
8 number 9.

9 And with respect to fish, Aboriginal  
10 fisheries particularly, paragraph 22 contains the  
11 following statement:

12  
13 "Assessing the influence of  
14 oil sands development on the status  
15 of commercial, recreational and  
16 Aboriginal fisheries and the fish  
17 and fish habitat that support them  
18 is challenging. The review of the  
19 monitoring information to date  
20 indicates that there is limited  
21 spatial coverage within the fish  
22 population dataset, a lack of  
23 reference areas and sites, a  
24 limited number of years of  
25 information gathered and the



1                    complication of alterations to the  
2                    sampling design between years.  
3                    These factors make it difficult to  
4                    establish the level of natural  
5                    variability of fish populations at  
6                    the regional level."

7  
8                    So I turn to the main theme of my submissions  
9                    here. Far from it being the case that no one is  
10                  considering Aboriginal or Treaty Rights. The truth  
11                  of the matter is is that everybody here is  
12                  considering Treaty and asserted Aboriginal Rights.  
13                  The submissions of Mr. Denstedt outline what Shell  
14                  did in that respect. And I heard him to say that,  
15                  at least with respect to Métis rights, that they  
16                  assumed that such rights existed; a point that I  
17                  will come to later when I indicate that the Panel  
18                  process is not a process of proof of rights but one  
19                  of avoidance of impacts on actual or asserted  
20                  rights.

21                  The Panel's Terms of Reference require it to  
22                  consider Aboriginal and Treaty Rights, and that is  
23                  the case with respect to both the Terms of  
24                  Reference for the EIA and the Terms of Reference  
25                  for this Panel.

1                   And the evidentiary submissions of Canada  
2                   show that they considered Aboriginal Rights. I  
3                   have taken you to some of the evidence with respect  
4                   to the Department of Fisheries and Oceans. I would  
5                   like to take you to the conclusion of the evidence  
6                   of Transport Canada at page 15 of its submissions  
7                   where it says -- oh, I'm sorry, I'm going to come  
8                   to that in due course. What I wanted to take you  
9                   to is the submissions of Transport Canada filed on  
10                  October 1st at page 7 of the document itself,  
11                  quoting, under the heading "Potential Cumulative  
12                  Effects on Navigation:

13  
14                                 "Transport Canada  
15                                 acknowledges that navigability of  
16                                 the Athabasca River is important to  
17                                 traditional use activities and  
18                                 general recreational use.  
19                                 Transport Canada understands that  
20                                 Aboriginal groups are concerned  
21                                 with water withdrawals from the  
22                                 Athabasca River and the potential  
23                                 impacts on navigation, including  
24                                 during low flow open water periods  
25                                 in the lower Athabasca River and

1           the Peace Athabasca Delta. Taking  
2           into consideration concerns  
3           expressed, and based upon a review  
4           of the information provided by  
5           Shell in the environmental  
6           assessment review process including  
7           the updated cumulative effects  
8           assessment, Transport Canada is of  
9           the opinion that impacts to  
10          navigation on the Athabasca River  
11          would be negligible."

12  
13           So all of the parties, without exception,  
14          have taken care to try to bring the best science  
15          that they could to this Panel, and this Panel has  
16          heard that, with respect to all of parties,  
17          recognizing that the positions of the parties and,  
18          in some cases, the positions of the scientists do  
19          not necessarily correspond with one another. This  
20          is normal in the course of panel proceedings of  
21          this type. And in that sense, what I mean is that  
22          it is natural in our tribunal process and in the  
23          presentation of scientific opinion that opinions  
24          may vary. And that is why the legislative branches  
25          of government have conferred upon this Panel a

1 fact-finding and advisory function.

2 And so I am not here to make submissions to  
3 you about what recommendations you should make or  
4 how you should exercise the difficult job that  
5 falls to you of making findings and making  
6 recommendations. But I am here to observe that  
7 many of the submissions -- I wish to direct some  
8 submissions to what I see as a rather challenging  
9 issue that has arisen in this proceeding. And it  
10 is this: That many of the Aboriginal submissions  
11 seek recommendations, which are often broad, and  
12 which may be said, at least in some cases, to be  
13 only remotely related to Project-specific effects.

14 In a more plain-language way, I think it is  
15 fair to say that at this stage in the development  
16 of oil sands in this region of Alberta, everyone  
17 recognizes that concerns have the capacity to  
18 transcend project-specific planning process. The  
19 Aboriginal recommendations that I have heard have  
20 root in two different sources: One is cumulative  
21 effects, of what is often described as the  
22 development case scenario, or just generally  
23 cumulative effects of what exists today and what  
24 may exist in future, together with issues  
25 respecting Crown Consultation and accommodation

1 issues generally.

2 And so, for example, to illustrate some of  
3 this, the ACFN and the MCFN, if I may refer to them  
4 by those acronyms because those acronyms appear  
5 frequently in the filed evidence, request a TRUMP,  
6 Treaty Resource Use Management Plan, an acronym  
7 which clearly has a double entendre; firstly, it is  
8 not only proposed as a valuable planning document  
9 for a panel like this and other decision-makers,  
10 but it is also intended as a pre-condition to any  
11 development within the traditional lands of those  
12 First Nations.

13 The Métis, as I understand their submission,  
14 seek inclusion of Métis in Alberta's Aboriginal  
15 Consultation Policy.

16 The Fort McKay filed Exhibit 009-011, which  
17 included a number of recommendations, and there's  
18 two that I'd like to refer to; I just need a moment  
19 to locate that document. Yes, the first of these  
20 is the third bullet under paragraph 22 (a), and it  
21 asks that the Panel recommend to Alberta and  
22 Canada:

23  
24 "A commitment and process by  
25 Alberta and Canada to consult and

1 accommodate Fort McKay with respect  
2 to the impacts of regional  
3 development on its aboriginal and  
4 treaty rights."

5

6 And the opening words of paragraph 23 are  
7 similar:

8

9 "Fort McKay also requests  
10 that the Panel recommend to Canada  
11 and Alberta that they appoint  
12 negotiators with the necessary  
13 mandate to negotiate accommodation  
14 measures with Fort McKay..."

15

16 Mr. Mallon, on behalf of the MCFN, made it  
17 clear that the MCFN concerns were cumulative  
18 effects with respect to overall development in the  
19 region and that the MCFN did not oppose the  
20 development of this particular project.

21 Mr. Malcolm, for his part, sought recognition  
22 of rights and Section 35 rights, including a  
23 consultation process with capacity funding.

24

25 So if we go back to some of the basic  
questions: "What are the effects of the Project

1 and what can be done about these effects?"

2 The effects are clearly, some of them,  
3 Project-specific, and I'm going to leave those to  
4 the jurisdiction of the Panel and its staff.  
5 There's tremendous expertise here to deal with  
6 Project-specific effects. The Panel has a mandate  
7 with respect to hearing Aboriginal concerns and  
8 reporting on these. And through this mandate have  
9 come a flood of recommendations, some of which I  
10 just listed for you. And the question is, well,  
11 what to do with these? Clearly, the ability of  
12 Shell to address some of these issues has been  
13 exhausted or it's simply beyond Shell's capacity.

14 In addition, this Panel is limited by the  
15 mandate conferred upon it by the legislative branch  
16 of government. And that mandate does not extend to  
17 some -- except in the respect of making the  
18 recommendations and the reporting of what it has  
19 heard -- does not extend to compelling the Crowns  
20 to take these steps that are requested.

21 So what should we do with these?

22 My submission to you is that the Panel should  
23 report these matters and, in that respect, what I  
24 have found from participating in this Panel process  
25 over the last month, but especially in the last

1 three weeks when the parties bring evidence and  
2 that evidence is tested by way of  
3 cross-examination, that you, Panel Members, are in  
4 an absolutely unique place because of your role in  
5 the Project development process at this early time  
6 and because of the mandate that has been conferred  
7 upon you.

8 No one in this country is better placed than  
9 you, at this time, to articulate and to some extent  
10 to prioritize according to the views that you see  
11 fit what may need to be done to reconcile the  
12 intrusion of industrial development into a boreal  
13 landscape that, prior to that time, had supported  
14 Aboriginal use from time immemorial.

15 And in addition to the reporting that you're  
16 obliged to do by the Terms of Reference, I  
17 encourage you to have the courage to do what the  
18 Regional Municipality urged you to do in its  
19 submissions: Which is to take the lead. Or which  
20 the Mikisew Cree urged upon you in its submissions:  
21 Which is to put the heat on the governments.

22 I prefer the Regional Municipality expression  
23 of that, but I recognize that there are many  
24 challenges that governments face. So, for example,  
25 to go back to the point about the growing maturity



1 of oil sands development and our appreciation of  
2 that in this region, no one really disputes that  
3 oil sands development will have cumulative effects  
4 within this region. I heard Shell acknowledge that  
5 in its evidence and in its submissions of counsel.  
6 I'm hearing that from the Regional Municipality. I  
7 doubt that any of the Aboriginal groups would  
8 disagree with that observation. And you will find  
9 that expression in the evidence of the Government  
10 of Canada.

11 So, for example, at page 15 of the submission  
12 filed on October 1st by Environment Canada, you  
13 will find the following paragraph:

14  
15 "EC shares concerns with the  
16 Aboriginal groups regarding the  
17 potential cumulative environmental  
18 effects on air quality, greenhouse  
19 gases, water quality, and wildlife,  
20 including biodiversity, resulting  
21 from oil sands development in  
22 northern Alberta. Individual  
23 project reviews may not fully  
24 account for the broad range of  
25 cumulative regional impacts given

1           their project-scale focus. The  
2           need to address cumulative effects  
3           on a regional scale requires the  
4           cooperation and collaboration of  
5           all orders of government,  
6           proponents, stakeholders and  
7           Aboriginal groups to coordinate  
8           actions to minimize and mitigate  
9           risks, monitor effects, and to  
10          manage consequences related to  
11          development."

12  
13           And so you can see that there has been  
14          progress here. Many of the counsel before you are  
15          outstanding counsel. Well, I think they are all  
16          outstanding, but I've been struck by the fact that,  
17          really, you have before you some of the counsel  
18          that have been here almost from -- that have  
19          participated in so many regulatory hearings  
20          involving oil sands mines, that there's a  
21          tremendous richness of depth.

22           Mr. Perkins, I heard him say he has done nine  
23          of these. I'm not sure if that relates to oil  
24          sands specifically. Ms. Buss has been here from  
25          the beginning. The Mikisew Cree have been here

1 from the beginning and I think represented by  
2 Mr. Mallon for many, many years. And we go on down  
3 the line. Mr. Denstedt saying he's had 23 years of  
4 experience of practice in front of this Panel. And  
5 I know, Mr. Dilay, that you have been involved in  
6 some of the other panels involving oil sands  
7 particularly.

8 So we all know that the tools that are used  
9 to manage cumulative effects have certainly  
10 evolved. As I see it, one of the primary catalysts  
11 to policy evolution were prior recommendations from  
12 this Panel; noting that each case, in the absence  
13 of some broader framework of thresholds, against  
14 which the Panel could measure individual project  
15 contributions within a regional framework, the  
16 absence of such a thing weighed more heavily in the  
17 public interest with each passing case. I'm sorry  
18 that I did not take the time to find the exact  
19 articulation of that language, but the "weighs more  
20 heavily" phrase is found in a number of the reports  
21 from the early reports of this century, of these  
22 Joint Review Panels, from prior oil sands mines in  
23 the early part of the century.

24 Now, the response, as I understand it, is  
25 that the Government of Alberta introduced the

1           **Alberta Land Stewardship Act** and made the Lower  
2 Athabasca Regional Plan, or LARP, the highest  
3 priority under that Act. And LARP is now beginning  
4 to be rolled out.

5           In addition, the Government of Canada is  
6 trying to work jointly with Alberta in the joint  
7 Canada-Alberta Monitoring Plan. That found  
8 expression -- that found support in the report of  
9 the Auditor General of Canada in October 2011,  
10 Chapter 2 at paragraph 2.4.2, where the Auditor  
11 General said:

12  
13                         "We are encouraged by the  
14                         government's commitments in  
15                         response to the work of the Oil  
16                         Sands Advisory Panel. We will  
17                         monitor the government's progress  
18                         in putting into effect monitoring  
19                         systems in keeping with the  
20                         principles set out by the Panel."

21  
22           So everyone recognizes that there is a need  
23 to better manage cumulative effects in this region.  
24 This Panel has recognized that in the past. And,  
25 indeed, you've heard from some of the participants

1           about some of the frustrations in that regard; the  
2           interim nature of the Muskeg River Water Management  
3           Framework, the lack of apparent completion of the  
4           Phase 2 Water Management Framework for the  
5           Athabasca River, et cetera.

6                         What I'm here to submit to you is that,  
7           having regard to the many challenges that the Crown  
8           faces, the report that you will prepare will not  
9           only be informative but may have an actual  
10          catalytic effect on policy development. And I  
11          encourage you to consider the potential of your  
12          capacity in this regard.

13                        I was intrigued in listening to the evidence  
14          of the Regional Municipality which described how  
15          challenging it was in working with the Province on  
16          such a simple matter as finding out whether a  
17          miscellaneous lease was issued. So the  
18          Municipality has to come here to ask you to  
19          recommend to the Alberta Government that it please  
20          tell the Municipality that it has issued a work  
21          camp lease or general lease on which there'll be a  
22          work camp.

23                        I don't mean this to be critical. I mean  
24          this to be a sober observation that what some  
25          describe as the unlimited capacity of the Crown is

1 really not unlimited. The Crown has capacity to  
2 attempt to address Aboriginal concerns and to  
3 accommodate them where necessary, but there are  
4 many, many challenges in meeting that.

5 Amongst these, I would point out, that we are  
6 now operating in a period of fiscal restraint  
7 arising from the economic crash in 2008. And while  
8 we were sitting, both the governments of Alberta  
9 and Canada noted that international conditions are  
10 such that the fiscal restraint period will carry on  
11 for a longer period of time than had been budgeted  
12 for just even last year.

13 Now, this has implications for many of the  
14 requests that the First Nations put in front of the  
15 Panel, or indeed that the Regional Municipality  
16 puts in front of the Panel. But amongst them,  
17 amongst the issues that I heard today were capacity  
18 funding, the funding for what is described as the  
19 TRUMP, and the funding for various accommodations  
20 requested of the government.

21 To this I would add human resource  
22 constraint. It is often said as an almost  
23 automatic response that the government has  
24 unlimited resources, but the government acts  
25 through personnel and those personnel or human

1 resources are precious and limited and,  
2 particularly, under stress in periods of time of  
3 fiscal restraint.

4 So if you are so inclined to take the lead on  
5 prioritizing some of what you see that governments  
6 can do to accommodate and address Aboriginal  
7 concerns before they make further decisions in the  
8 Project development process, or, if you prefer, if  
9 you are inclined to put the heat on governments in  
10 this respect, I invite you to do so. Because, as  
11 I've said at the beginning, the Crown has the  
12 capacity after the Panel report, and before it  
13 takes any further decisions in respect of this  
14 Project, to do some consultation and accommodation,  
15 but there are many challenges in that respect. And  
16 how the Crown may exercise that capacity should be  
17 informed by this Panel report.

18 And so if you should choose to prioritize  
19 some of the recommendations that you're obliged to  
20 report, and add the commentary that is within your  
21 privilege because of the unique position that the  
22 Panel has not only in respect of this Project but  
23 in prior projects, sitting at the middle of the oil  
24 sands development and being the primary tribunal in  
25 the planning process for oil sands development, I

1 would invite you to do so.

2 Whether you do so is up to you. How the  
3 Crown responds is beyond my capacity to predict.  
4 But I think we have here an important institution  
5 of democratic government that Aboriginal groups  
6 have described as very rewarding and which they  
7 hope the government will listen to.

8 So, sir, Panel Members, subject to any  
9 questions you have, those are my submissions.

10 THE CHAIRMAN: We have no questions, sir.

11 Thank you very much.

12 MR. LAMBRECHT: Thank you very much.

13 THE CHAIRMAN: We'll take about 15 minutes  
14 and turn to your reply, Mr. Denstedt.

15 MR. DENSTEDT: Fifteen minutes is fine, sir.

16 THE CHAIRMAN: Thank you.

17

18 **(BRIEF BREAK)**

19

20 THE CHAIRMAN: Mr. Denstedt, Shell's reply?

21 MR. DENSTEDT: Mr. Chairman, Panel, thank  
22 you.

23

24 **REPLY SUBMISSIONS OF SHELL CANADA, BY MR. DENSTEDT:**

25 MR. DENSTEDT: Reply is always a little



1 ragged based on putting things together, so don't  
2 expect much flow from this. We're just trying to  
3 hit the issues we want to remark on. Where we  
4 haven't responded to somebody, we believe it's  
5 clear on the record what the issues are and what  
6 our position and their position are, so I'm going  
7 to try and resist the temptation to go back to my  
8 very, very lengthy final argument and stick with  
9 what's new.

10 So let me start with the Métis Nation and,  
11 first of all, deal with some of the legal issues  
12 that my friend, Ms. Bishop, raised. And quite  
13 frankly, I wasn't sure what her point was in  
14 respect of **R. v. Powley**. That is a case that is  
15 used to determine whether in fact or not the Métis  
16 group has rights. As we've said all along, Shell  
17 has assumed that the Métis have the rights that  
18 they assert, and they consulted on that basis.

19 Which brings me to Ms. Bishop's references to  
20 **Haida** where she indicated that in that case there  
21 were asserted rights which created the obligation  
22 to consult. And, again, Shell agrees with that.  
23 It does have that obligation and it did fulfill  
24 that obligation in respect of the procedural  
25 aspects of consultation.

1                   Where we disagree is where Ms. Bishop says  
2                   Shell did not consult. And I would simply refer to  
3                   Panel to the record and, in particular, the  
4                   Traditional Land Use Studies that Shell provided  
5                   funding for for the Métis Locals 125, 1935, and 63.

6                   My friend also said that the *Mark of the*  
7                   *Métis* book which was filed as part of the evidence  
8                   here shows in those maps that are in that book that  
9                   traditional uses were being exercised in the LSA.  
10                  I'd urge the Panel to take a close look at those  
11                  maps and take a close look at Mr. Fortna's  
12                  testimony. And I'd suggest to you that, first of  
13                  all, the Métis Nation doesn't seem to know where  
14                  the Project footprint is. And those maps do not  
15                  demonstrate uses in the Local Study Area.

16                  And she also said yesterday, "Remember Johnny  
17                  Grant and that Shell didn't speak to him." And,  
18                  again, we find ourselves in agreement with  
19                  Ms. Bishop: "Remember Mr. Grant." And take a look  
20                  at his will-say statement. His trapline is located  
21                  30 miles north of the Project on the Margeurite  
22                  River. And that would not qualify him for  
23                  consultation under Directive 56 even, let alone  
24                  under this process. So I'd say take a look at  
25                  that.

1           So Shell consulted with the Métis Locals and  
2           the Métis Nation and the Region 1. They provided  
3           material funding. And they also provided funding  
4           for what the Locals wanted. My friend seemed to  
5           suggest that Shell was only interested in funding  
6           things like golf tournaments and Christmas parties.  
7           But Shell provided funding based on what those  
8           Métis Locals wanted. We've only heard what the  
9           Métis Locals wanted in respect of traditional land  
10          use and other issues from Mr. Fortna and  
11          Ms. Bishop. When the Métis Locals asked for  
12          funding for those studies, they got that funding.

13                 So let me turn now to Fort McMurray 468. And  
14          first of all, my friend suggested to you: Well,  
15          this is a multi-billion dollar project, there's  
16          lots of money to go around here. And the funding  
17          that Fort McMurray needs to participate in this  
18          process is lost in the rounding.

19                 And he seemed to indicate, what I heard, was  
20          that it really doesn't matter whether a group  
21          asserts rights; if the project is big enough, it  
22          doesn't matter whether the rights are affected, you  
23          should provide them some funding and some money and  
24          have them participate in the process and not look  
25          at what those potential impacts are. And he went

1 on to say that that's the low watermark of  
2 consultation.

3 Well, quite frankly, Mr. Chairman, I'd  
4 suggest that you can determine what is the low  
5 watermark of this process based on some of those  
6 comments. Consultation has nothing to do with a  
7 capital cost of a project. Whether it's  
8 \$50 billion or \$500,000, consultation relates to  
9 potential impact on a right being asserted.

10 And one thing my friend did get right; Shell  
11 is a blue chip company. They are also a blue chip  
12 company that takes a very principled approach to  
13 consultation. They take it seriously. They  
14 provided opportunities to Fort McMurray 468 to  
15 participate in the process. They've been meeting  
16 with them since 2007. They've been working with  
17 them to understand what their traditional land uses  
18 are since that time. 468 has been provided with  
19 numerous opportunities to participate in this  
20 process and demonstrate how their rights might be  
21 impacted in order to work more closely with Shell.

22 The facts of the matter are, is that they  
23 showed minimal use in the Project area. And they  
24 did receive project information. And Shell did  
25 cooperate and work with them. And it was on that

1 basis that Shell and 468 proceeded with their  
2 relationship.

3 And he also indicated that Shell has a  
4 problem on the record. And I, with great respect,  
5 disagree with that. Shell has no problem on the  
6 record. Its consultation record with 468 is deep  
7 and complete and comprehensive based on the  
8 potential impacts on the rights that that group has  
9 asserted.

10 I might also add that, when I listened to  
11 Mr. Jeerakathil speak, there seemed to be, and I'm  
12 not saying I'm intimately familiar with the record,  
13 but there seemed to me to be a fair bit of  
14 information that was not evidence before the Panel.  
15 I don't think anything turns on it, but I think the  
16 Panel should be cautious in looking at those  
17 submissions and make sure that the information that  
18 he provided is in fact evidence.

19 His clients could have attended the  
20 proceeding. It was in Fort McMurray for three  
21 weeks. It didn't seem to take a lot of capacity to  
22 participate in the process for a day and bring  
23 their concerns before the Panel. They did receive  
24 \$77,000 in funding from the CEAA Agency. I'm not  
25 sure why they didn't at least show up and provide

1           that evidence. Nonetheless, it's not  
2           Mr. Jeerakathil's job to provide the evidence to  
3           the Panel.

4           He also criticized the definitions of the  
5           RSA, the LSA, ecological content, and the  
6           significance determinations, but he didn't explain  
7           or provide any evidence why Shell's position was  
8           incorrect.

9           And finally, he dealt with three Joint Review  
10          Panel reports, and I'm just going to touch on them  
11          briefly because, quite frankly, again, the facts of  
12          those reports bear no relationship to what's before  
13          the Panel.

14          In respect of the Kemess Mine, that was a  
15          gold mining project that had a very short life,  
16          predicted for 11 years, and there was some doubt  
17          whether, in fact, that mine would last that long.  
18          On the other side of the ledger, the tailings  
19          clean-up from that project was going to last  
20          thousands of years. Thousands. It bears no  
21          relationship to this Project.

22          And the Whites Point Quarry, that involved a  
23          basal quarry in Nova Scotia which was to be sited  
24          adjacent to an existing fishing village that had  
25          received UNESCO and UN Heritage awards for its

1 sustainability and it was found to be incompatible  
2 with that village. Again, no relationship to the  
3 facts before you.

4 In respect of Prosperity Mine, that involved  
5 the decimation of an entire lake that that panel  
6 found to be critical to the Aboriginal users in the  
7 area, without compensation. Again, no relationship  
8 to the facts before you.

9 So let me move on to OSEC. And let me start  
10 with this morning's presentation by Ms. Gorrie.  
11 And just a few things in her comments which I'd  
12 like to take the time to fix up.

13 First of all, she indicated that there would  
14 be tailings in the end pit lakes. As we know,  
15 that's not correct.

16 She said that the consultants for Shell  
17 assumed that all mine fleets would be TIER-IV  
18 compliant in the modelling. Again, that's  
19 incorrect. The consultants assumed that every  
20 other mine operator would have TIER-II compliant  
21 mine fleets, not TIER-IV. Only Shell was assumed  
22 to be TIER-IV in the far future.

23 And, finally, again I don't think this was on  
24 the record anywhere, but she indicated that someone  
25 had said that the RAMP consultants were the same as

1 Shell's consultants. That's just flat wrong. They  
2 are not.

3 And I won't again go into any more details in  
4 respect of our comments with Dr. Schindler, other  
5 than to say that the Summary by the editors of the  
6 *Journal of Limnology*, Aherne and Shaw, I think  
7 provides a useful summary to the Panel in pulling  
8 together what the basis or what the conclusions of  
9 those six reports were. It's not put forward as a  
10 scientific study, but it's put forward for what it  
11 is, which is a summary of the six scientific  
12 studies that were in that journal. And I think  
13 it's useful and I think the Board should have a  
14 look at it.

15 And in respect of some of the other comments  
16 that were put forward by my friend in contradiction  
17 to what Shell's position was by Dr. Schindler, I  
18 would simply recommend the Board take a look at the  
19 submissions he filed on Monday and satisfy  
20 themselves.

21 And in respect of the air emissions, my  
22 friend suggested that the Millennium Station shows  
23 that we are at or near the limit of NO<sub>x</sub> emissions.  
24 What she didn't tell you, and you can go check the  
25 WBEA document on the record, is that at that



1 station, the emissions level has actually been  
2 declining for the last three years; that in the  
3 face of increasing production. And that was  
4 reported without explanation.

5 And in respect of the emissions from the mine  
6 fleet, my friend said, well, the issues of mercury  
7 and PAHs and the transport of those into the  
8 ecosystem are relevant to Shell even without an  
9 upgrader. And, again, I refer you to the  
10 cross-examination or the questioning that we had  
11 with Environment Canada where they agreed that, in  
12 fact, the emissions from the mine fleet would fall  
13 very close to the source and the Shell evidence was  
14 indicated that those emissions would likely be  
15 within the fenceline of the Project.

16 And while we continue to hear the comments  
17 and the assertions in respect of mercury emissions  
18 and acid deposition and PAHs in relation to this  
19 Project, I just remind the Panel -- I'm not going  
20 to quote a scientist here, but I will quote a  
21 higher authority, my mother, who said, "Saying  
22 something is so doesn't make it so."

23 And, finally, I'd simply say that in respect  
24 of the greenhouse gas emissions and climate change,  
25 my friend said that Shell's position was that it

1           should be taken in the global context and that's  
2           wrong because that diminishes the impact. Well,  
3           Shell never said that at all. What we said:  
4           There's a context you should look at, because this  
5           is a global issue. But in respect of this Project,  
6           Shell's position was they will comply with what the  
7           Federal and Provincial governments require on  
8           greenhouse gas emissions, because it is a global  
9           issue that must be addressed through regulation at  
10          the Provincial and Federal level. And, finally, we  
11          provided a list to you of the Project-specific  
12          things that Shell is doing in respect of climate  
13          change.

14                 And my friend also raised the issue of the  
15          selection of the RSA and LSA, and others did as  
16          well, so I'll try and deal with it all at once  
17          here.

18                 In respect of the LSA, this is the same  
19          approach that has been taken at four Joint Review  
20          Panels before this: For the Jackpine Mine, for  
21          CNRL's Horizon Project, for Suncor's Voyager  
22          Project, and for the Muskeg River Mine Expansion.  
23          This is not a new approach to addressing  
24          environmental effects and it's quite appropriate in  
25          the circumstances. And we said this before; it

1 doesn't make any sense to me, as a kid growing up  
2 on the farm, to suggest that you'd look at the  
3 footprint and decide the significance of an impact  
4 based on the footprint of a project. The potential  
5 impacts of that project should be considered in a  
6 much larger context and determine whether, in fact,  
7 the environment is being impacted.

8 But don't believe it when they say Shell  
9 didn't look at the impacts in the Local Study Area.  
10 Just take a look at the documents. Don't believe  
11 me either. Go back and read the EIA, sir. Have a  
12 look at the EIA. The information's all there.

13 And that brings me to the selection of the  
14 RSA. And, again, I'd recommend the Panel go back  
15 to the evidence and have a look at Volume 5,  
16 Section 7.2.4. And, there, it's described pretty  
17 clearly that the Regional Study Area is based on  
18 the ecological factors that are needed to encompass  
19 existing effects and understand what the real  
20 effects of the Project are. Again, it's the same  
21 RSA that's been used and determined as part of the  
22 approval process for the four projects I noted  
23 before. Environment Canada agreed that the RSA was  
24 appropriate in these circumstances. And, by the  
25 way, this RSA has been in the Application and in

1 the public domain since 2007; for five years.

2 My friend also talked about thresholds and  
3 she suggested that what Shell is telling you,  
4 Panel, is that, as a matter of thresholds, Shell's  
5 relying on an ecological threshold, and their  
6 assessment depends on the threshold that says if it  
7 befalls below that, it's catastrophic. Well,  
8 that's not what Shell is saying. Shell put that  
9 information in front of the Panel to provide  
10 context in respect of the speed limit that was  
11 being suggested by Mr. Dyer. That's the only  
12 purpose that was used for. Shell has not used that  
13 as the test for whether there's a significant  
14 impact. What Shell has said is what you should do  
15 is look at the facts and look at the analysis in  
16 determining effects and not just simply look at a  
17 number that is chosen arbitrarily.

18 My friend also raised the issue of **SARA** and  
19 that Shell's proposal is not compliant with **SARA**.  
20 Again, we would submit that that's incorrect.  
21 Section 79 of the **Species at Risk Act** provides that  
22 proponents in an environmental assessment process  
23 must identify adverse effects on species and their  
24 critical habitat and the proponent must provide  
25 measures on ways to avoid or lessen the effects and

1           then monitoring proposals for those effects.  
2           That's exactly what Shell has done in these  
3           circumstances. And the information provided is  
4           compliant with the ***Species at Risk Act***.

5           My friend also suggested, I think she  
6           suggested that my position was ludicrous, but I may  
7           have heard it wrong, but I'll take it as that, in  
8           respect of cumulative effects. And I simply refer  
9           the Panel on this issue when I suggested cumulative  
10          effects assessment of the PDC in particular, that's  
11          for use for providing recommendations to  
12          governments and regulators on how to manage these  
13          cumulative effects. That's what the purpose of  
14          that was for. And the OPS on cumulative effects,  
15          which is the operating policy statement for CEAA,  
16          agrees with that. And here's what they say, and I  
17          quote:

18  
19                            "Information concerning the  
20                            cumulative environmental effects of  
21                            the project under assessment  
22                            combined with hypothetical projects  
23                            may contribute to future  
24                            environmental planning; however, it  
25                            should not be the determining

1 factor in the environmental  
2 assessment decision under the Act."

3  
4 Again, I suggest to you that the PDC case  
5 fits those circumstances perfectly and the PDC case  
6 should not be used as a determining factor in this  
7 case.

8 And, finally, my friend raised a case, or a  
9 decision before this Panel, Decision 94-8, which  
10 was the Whaleback decision. And she may have not  
11 known this, but on a snowy winter night back in  
12 1993, Mr. O'Farrell, from my former firm, and I  
13 drove up to the Whaleback. We were the first  
14 counsel contacted by that group of interveners to  
15 assist them in opposing Amoco's project. We were  
16 subsequently conflicted out, but I can tell you the  
17 basis of their concerns and the primary issues were  
18 twofold: One was the lack of consultation around  
19 the Emergency Response Plan and the need for that  
20 in respect of the critical sour gas well that was  
21 being proposed; and, secondly, that the Whaleback  
22 itself at that moment was a candidate for the  
23 Special Places 2000 program by Alberta Environment.  
24 Neither of those situations fit the facts in this  
25 case, sir.

1                   So that brings me to the ACFN. And I've got  
2 a few comments on there, but not too many, so we  
3 should be done in a reasonably expeditious time.

4                   So first, let me respond to my friend's  
5 question or confusion about why I put in front of  
6 the Panel some information around the consultation  
7 process. And let me put everyone's mind at ease.  
8 I'm not suggesting that the Panel should provide a  
9 decision on the adequacy of consultation. That  
10 ship has sailed and the decisions have been made.  
11 But I did think it would be useful for the Panel to  
12 have that information in front of them to  
13 understand the types of information and the  
14 relative importance of the information that they  
15 might collect up and summarize and put in front of  
16 the governments as part of their panel report  
17 pursuant to the terms of the agreement. And I  
18 thought that would be a useful discussion.

19                   So my friend also suggested that the **Taku**  
20 case did not stand for the proposition that these  
21 processes and these panels can be used to fulfill  
22 or part of the consultation and in furtherance of  
23 the consultation process. I disagree with that.  
24 But, again, don't believe me; have a look at the  
25 case and decide for yourselves. I'm content with

1           that approach. What she didn't mention, though, is  
2           that the **Brokenhead Ojibway** case was a case that  
3           related to the National Energy Board's role in  
4           fulfilling the consultation process, which is a  
5           process very similar to the process that we're in  
6           today.

7                         And she also raised a case out of British  
8           Columbia where she talked about the length of the  
9           consultation record and the details around the  
10          information and that doesn't necessarily mean that  
11          the consultation was meaningful. And in response  
12          to that, I say that there's a case out of  
13          Newfoundland called the **NunatuKavuu Community**  
14          **Council**, which is a Métis group, which challenged  
15          the Nalcore Energy proposal for the Lower Churchill  
16          Falls Project where the logs that were provided  
17          there demonstrated the sufficiency of consultation  
18          and the Court found that in that process,  
19          consultation was fulsome and generous. I don't  
20          think anything turns on that case or on Ms. Biem's  
21          case. I think it's fact specific. And the  
22          information that the Panel should summarize is  
23          what's in front of it in this proceeding and not  
24          worry about either of those cases.

25                         So just a few things again and in no



1 particular order. My friend made some comments  
2 about hydrology and the lack of reliance that the  
3 Panel should place on Shell's assessment of water  
4 quantity and quality in their climate change  
5 conclusions as being unscientific and having  
6 implied bias. Well, I'd again invite the Panel to  
7 have a look at the evidence. It's not unscientific  
8 at all. There is no implied bias. The model has  
9 been verified by real life data from the Muskeg  
10 River. And we've provided that information to the  
11 Panel on October 15th.

12 In respect of consultation, my friend says  
13 Shell never responded to the concerns of their  
14 client. And with great respect, I disagree. Shell  
15 did respond to their client. Shell's been in  
16 consultation with their client for 15 years. They  
17 understand their issues well. They understand  
18 their concerns well. They responded to the issues  
19 that were being provided to them and the concerns  
20 that were being raised with them. And they would  
21 suggest in their responses, and there are more than  
22 300 of them that were on the record, with here's  
23 how we've designed the project to address that  
24 concern, or here's the mitigation that we're using  
25 to address that issue, or we're participating in a

1 regional initiative and that takes care of your  
2 concern in that place. The fact you don't agree  
3 with the response or you don't like a response does  
4 not mean that the Proponent has not made an attempt  
5 to respond. And in this case, I'd suggest, again,  
6 have a look at the record and make your own  
7 determination on that.

8 People can disagree. And a good example of  
9 that is the Phase 2 Framework. The Athabasca  
10 Chipewyan First Nation has clearly demonstrated in  
11 this proceeding and previously that they have a  
12 concern with water levels and water quantity.  
13 Shell's response was that it was going to be  
14 participating in the initiative around the Phase 2  
15 Framework and that it was going to work through  
16 that process to address that concern. That is in  
17 fact a response. The ACFN may not be happy with  
18 that response, but that is an appropriate response.  
19 And it's up to the Panel, then, to sort out this on  
20 the record and determine what that potential impact  
21 might be.

22 My friend also suggested that Shell has  
23 usurped the role of the Provincial and Federal  
24 Government in deciding who to consult with. Again,  
25 I would suggest that is not correct. Shell filed

1           its Consultation Plan with the Provincial  
2           Government in 2007. It was approved by the  
3           government and they provided additional Aboriginal  
4           groups that Shell was required to consult with.  
5           That was updated and approved again by the  
6           Provincial Government in 2010. And the Federal  
7           Government has also reviewed those plans and found  
8           that they were appropriate.

9           And, finally, on respect of consultation, my  
10          friend said that Shell seems to indicate that an  
11          agreement is required with them in order to arrive  
12          at any mitigation. Shell has never said that  
13          anywhere in the record and does not require an  
14          agreement. It takes two parties to get an  
15          agreement. We all know that. And Shell has never  
16          said it needs an agreement in order to provide  
17          mitigation.

18          She also raised the issue about a breach of  
19          contract, that a lawsuit has been filed by the  
20          Athabasca Chipewyan First Nation against Shell.  
21          Again, I can tell you this, that Shell has filed a  
22          Statement of Defence in response to that breach of  
23          contract claim and they are going to defend it  
24          vigorously. So I think in that response, the Panel  
25          can take away that there's a dispute as to whether,

1 in fact, Shell has lived up to its commitments or  
2 not.

3 If I could turn to some of my friend's  
4 comments on the LARP and she used that in relation  
5 to some of the evidence that Ms. Larcombe had  
6 provided. Again, in respect of the LARP, it has  
7 identified a number of conservation areas. And  
8 that can be found at Exhibit 001-070S. And I'd  
9 specifically refer the Panel to Adobe page 88 which  
10 lists the various conservation areas that have been  
11 identified. And it includes Richardson Wildland  
12 Park. And we heard the ACFN witnesses say in  
13 response to a question I believe it was from the  
14 Panel about what would be useful to them. And one  
15 of the witnesses said, "Well, some land in the  
16 Richardson Backcountry would be good." Well, the  
17 Richardson Wildland Park is 265,000 hectares in  
18 size. And according to the LARP, oil sands and  
19 petroleum and natural gas and surface minerals are  
20 not permitted there. And I'm not sure whether  
21 Dr. Larcombe had this or not, but in August of this  
22 year, the Department of Energy issued Information  
23 Letter 2012-30 which said that the government is  
24 going to be cancelling the oil sands and PNG leases  
25 in those conservation areas, which is not what was

1 suggested by my friend.

2 And, finally, on some of the basic issues I'm  
3 running through here is, in respect of mitigation,  
4 my friend characterized Shell's mitigation as being  
5 a vague hope of success. With respect, again, I  
6 disagree. And I think I can refer the Panel to the  
7 evidence on this; that Shell has a concrete and  
8 comprehensive package of evidence in front of this  
9 Panel on the potential effects of the Project, on  
10 the mitigation that they proposed, and how that  
11 mitigation will be implemented. There's a high  
12 level of certainty in respect of those predictions.  
13 And it's based on analysis and review and modelling  
14 and verification of modelling.

15 The follow-up monitoring and the adaptive  
16 management programs that are planned by Shell are  
17 to demonstrate that those predictions are accurate,  
18 and to the extent they are not accurate, then to  
19 implement the adaptive management program. So I  
20 find myself in agreement with my friend that the  
21 Pembina case is useful in this situation because it  
22 said where there is sufficient information to  
23 proceed, adaptive management is a perfectly  
24 acceptable condition.

25 In respect of co-management, we heard that a

1 couple times in the recommendations and also from  
2 Chief Adam. I simply have this to say: I think a  
3 recommendation to suggest that there be  
4 comanagement of the resources in the province of  
5 Alberta goes far beyond the mandate of the Panel  
6 because it would result in a fundamental change in  
7 the legal structure of how resources are managed in  
8 this province and I suggest that it is not a  
9 recommendation that would be available to the Panel  
10 within the framework of the Joint Agreement.

11 In respect of wildlife corridors, we heard  
12 from a number of parties that the corridors will  
13 not be available. And with respect, again, the  
14 record is clear on this, that this Project will not  
15 bisect or dead-end any wildlife corridors along the  
16 Muskeg River. Wildlife will be able to continue to  
17 use those corridors into the future and the  
18 monitoring has shown that wildlife are using those  
19 corridors currently. Further, there's ongoing  
20 monitoring of those corridors under CONRAD through  
21 the Wildlife Habitat Effectiveness and Corridor  
22 Monitoring Program. So there's a high level of  
23 confidence that these corridors not only are being  
24 used but will be used.

25 We also heard that access was an issue. And

1 Fort McKay provided information on trails and  
2 access that Shell reviewed as part of that Fort  
3 McKay specific assessment and integrated that into  
4 their EIA and they incorporated that into their  
5 update. The complaint that access was cut off is  
6 not accurate. There will be continued and ongoing  
7 access, first of all, around both the eastern and  
8 northern sides of the Project. And as we heard  
9 from the Shell witnesses, there's additional access  
10 provided through contact with the company to get  
11 access across the mine site as well; an activity  
12 and action that Ms. Tourangeau is well used to  
13 exercising and participating in. So I would  
14 suggest that access is not the issue that my  
15 friends would suggest it is.

16 My last kind of environmental issue I wanted  
17 to deal with is in respect of bison. And we heard  
18 that bison are important. And Shell understands  
19 that and respects that. But the facts are, and I'd  
20 refer you to Exhibit 001-116, that where the  
21 compensation lake is proposed is not an area of  
22 rare habitat type. Extensive winter range exists  
23 for bison, for the Ronald Lake bison herd. And as  
24 we heard from a number of parties, that bison in  
25 north-eastern Alberta are not habitat limited, so

1           it's not an issue of habitat of why there's a  
2           dwindling bison population. And also we heard that  
3           bison are only available to ACFN members from the  
4           Ronald Lake bison herd. Again, look at  
5           Exhibit 001-116, which demonstrates in the evidence  
6           that the bison herd at Wood Buffalo National Park,  
7           which has increased by two or threefold in the last  
8           10 years, are now starting to migrate outside of  
9           that park as well. So you should consider that in  
10          your deliberations.

11                 Finally, I come to the conclusion of my  
12          remarks, and I'd turn to my friend, Mr. Murphy's  
13          comments yesterday when he talked about the **Badger**  
14          case and the Indian Claims Commission consideration  
15          of Bennet Dam. And I think his words were, from  
16          the ICC report, that a project can't destroy or  
17          fundamentally alter the ability of an Aboriginal  
18          group's right to exercise their Treaty Rights. And  
19          I think that focuses the Panel on their task ahead.  
20          And, first of all, I'd say, "Is this Project going  
21          to destroy or fundamentally alter the exercise of  
22          ACFN's rights?" And the answer to that is no. But  
23          that means that the Panel's obligation here is to  
24          understand, assess what the real impact is of this  
25          Project on the exercise of the ACFN's rights. So



1           that's the real issue in front of the Panel. And  
2           so I'd say that focuses kind of the context of what  
3           you need to consider.

4                     And when I say that, in the deliberations,  
5           what the Panel should look at, they need to put  
6           that into context. And the context in front of the  
7           Panel at this proceeding is that the ACFN have a  
8           vast territory. That's one of the things that is  
9           germane to your deliberations. They need to  
10          understand what is the use that the ACFN exercise  
11          in the Local Study Area and how extensive is that  
12          use. That's a consideration. What are the  
13          mitigation plans that Shell's providing? What are  
14          the opportunities for exercise of those rights  
15          elsewhere? What are the impacts and benefits to  
16          all parties in the process, and not in the process,  
17          the Province of Alberta, and the people of Alberta  
18          and the people of Canada? You have to look at all  
19          those things and put this in context.

20                    And my friend, Ms. Biem, seemed to indicate  
21          that Shell said if you impact individuals, that  
22          does not affect the ACFN. Well, I don't think that  
23          reflects what Shell said. And if she took that  
24          from my comments, then it's my fault. Because what  
25          Shell did say was that the Panel needs to look at

1           the impact on the collective rights. And that  
2           assuming that has a significant impact on an  
3           individual does not necessarily translate to a  
4           significant impact on the collective rights. And  
5           for that I'd refer the Panel, again, to the  
6           Mackenzie Gas Project's determinations. And that  
7           panel was a member of seven panels. They spent two  
8           years travelling around the North trying to  
9           understand the impacts of the Mackenzie Gas Project  
10          on a multitude of Aboriginal groups. Four of the  
11          seven members of that panel were Aboriginal  
12          members.

13                 And in their report, and I'm just going to  
14          provide the quote that I provided to you in final  
15          argument, just to focus this. And here's what they  
16          said:

17  
18                         "There may well be impacts on  
19                         regions or communities that would  
20                         be significant. To those regions  
21                         or communities but which the Panel,  
22                         in its collective judgment, has  
23                         concluded are not significant in  
24                         the context of its overall Mandate.  
25                         There may well be impacts on

1 individuals that, from an  
2 individual perspective, would be  
3 significant but which, again, the  
4 Panel might conclude would not be  
5 significant in the broader  
6 context."

7  
8 And I'll leave that with you, Panel, to make  
9 sure that, when you're conducting your  
10 deliberations, that you put the issues in front of  
11 you in the broader context to understand what, in  
12 fact, is the significance of a particular impact.

13 Mr. Chairman, that concludes my submissions.  
14 I'd urge the Panel to find that the Project is in  
15 the public interest.

16 In closing, I would like to thank the counsel  
17 and parties who participated in this process for  
18 their civil and collegial approach to the process.  
19 I thank the Panel staff, and Mr. Perkins will pass  
20 it on to those who have left, and to Mr. Gill, and  
21 my sincere apologies and thanks to Ms. Nielsen who  
22 is ever the star of the show. Thank you very much.

23 THE CHAIRMAN: Thank you, sir.

24 Mr. Perkins, is there anything left to hear?

25

1       **HOUSEKEEPING MATTERS SPOKEN TO:**

2       MR. PERKINS:                       There's two matters that I  
3               would like to address, sir, just before we wind  
4               things up.

5               With respect to a discussion yesterday with  
6               respect to a request by the Fort McMurray First  
7               Nation, Mr. Jeerakathil, and I had asked you if you  
8               would take under advisement his request to redact  
9               from the web the internet version of the Registry  
10              two maps, so to follow that up, sir, I can advise  
11              you that Mr. Jeerakathil has had discussions with  
12              Mr. Birchall, and I understand from Mr. Birchall  
13              that Mr. Jeerakathil is going to pursue the matter  
14              outside of the Panel, the Panel's authority for the  
15              time being, so I ask that you let that work through  
16              between Mr. Jeerakathil and Mr. Birchall and  
17              whatever other organization he's suggested this go  
18              through. If that's acceptable to you, sir?

19      THE CHAIRMAN:                   That's fine. Thank you.

20      MR. PERKINS:                   And finally, sir, I thought I  
21              just might reiterate that, as Mr. Lambrecht has  
22              indicated, there are some outstanding undertaking  
23              responses, and we assume those will be coming in  
24              soon, but given that there are rights that start to  
25              run against the clock when this proceeding is

1 closed, I would offer up to you, sir, that when the  
2 Panel indicates that the record is closed, the  
3 Secretariat will send a letter out to parties  
4 indicating when that happened or that that has  
5 happened and what date that occurred on so that  
6 that might assist the participants in whatever they  
7 think is important in relation to that date.

8 THE CHAIRMAN: That's helpful, sir. Thank  
9 you.

10 MR. PERKINS: And that is all I had, sir.  
11 Thank you.

12 THE CHAIRMAN: Thank you very much.

13

14 **CLOSING COMMENTS BY THE CHAIRMAN:**

15 THE CHAIRMAN: Ladies and Gentlemen, I won't  
16 keep you. People need to travel and some places  
17 are feeling the brunt of winter, so you'll need to  
18 check the roads and check your flights.

19 I, too, would like to thank all of the  
20 participants for their very professional approach  
21 in the proceeding. We had mishaps along the way,  
22 but there were very few of them and we found a way  
23 to work through them with your cooperation.

24 I want to thank my colleagues on the Panel,  
25 the Members of the Panel Secretariat, and the

1 people behind the scenes for all of their hard work  
2 so far.

3 I, too, would like to thank Ms. Nielsen and  
4 her colleagues, our reporter, and Mr. Van Mechelen  
5 who supplies the sound system and operates it so  
6 capably.

7 The record is very extensive, in the tens of  
8 thousands of pages, and the transcript is thousands  
9 of pages. Clearly, the effort required to deal  
10 with such an extensive file will be significant.  
11 We'll do our best to make our decisions and  
12 recommendations in a reasonable time.

13 As Mr. Perkins has pointed out, there are  
14 some undertakings that remain and we'll look  
15 forward to having those completed in due course.

16 Have a safe trip home and happy holidays that  
17 are just around the corner.

18 The hearing is closed.

19

20 **(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.

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**Nancy Nielsen, RCR, RPR, CSR(A)**  
**Official Realtime Reporter**

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## Shell Jackpine Mine Expansion, Fort McKay, Alberta - Volume 17 (With Footnotes)

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