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1. Introduction

The Athabasca Chipewyan First Nation (ACFN) is an Athabascan speaking Dene sułine people. Our traditional lands stretch north, east, west and south from the Peace Athabasca Delta in Alberta, including the Lower Athabasca River and lands to the south of Lake Athabasca, and the lands south of Fort McMurray and Fort MacKay. We are a signatory to Treaty 8, which guarantees ACFN the ability to utilize the land, water and resources provided by the creator, in order to continue their way of life as their ancestors have for generations.

ACFN is a signatory to Treaty 8, which guarantees our Nation the right to maintain their traditional way of life. The Treaty is meant to protect our ability to use the land, water and resources provided by the creator, in order to continue their way of life as our ancestors have for generations. ACFN members continue to sustain our way of life through hunting, fishing, trapping, gathering and we regularly engage in cultural and spiritual practices within our territories.

On November 24, 2016, our Nation presented to the Expert Panel and explained the challenges we have faced, the concerns we have with the present environmental assessment process and

our vision for the future. This written submission expands upon that presentation with a focus on 13 discrete aspects of environmental assessment where we have made concrete suggestions for change.

For our Nation, cultural, social and spiritual health cannot be separated from the biophysical health of our territory. Our confidence in the health of our waters and resources is similarly connected to the health of our community and our ability to maintain our distinctive way of life. Our ability to exercise our Treaty rights is tied to how well the government protects the biophysical and human environment. Accordingly, environmental assessments are a critical tool that can and should be used to assist the Crown and First Nations in understanding the potential consequences of authorizing land uses in our territory. Without rigorous assessment, informed by Indigenous knowledge, the Crown cannot expect to uphold its obligation to ensure that our Nation continues to be able to meaningfully carry out our way of life, as guaranteed by Treaty 8.

The current environmental assessment regime does not fulfill this critical function. Instead, this regime has consistently facilitated development in our territory despite our Nation raising serious concerns about the methodologies used for the environmental assessment and the results of those environmental assessments. Our experience is that our concerns are routinely ignored or minimized by proponents insisting that our members can simply "go elsewhere" to exercise Treaty 8 rights. This is despite the fact that these processes, by design, are designed to not consider impacts on our rights, instead focusing on potential effects to narrow biophysical indicators. Even where environmental assessments have identified significant adverse environmental effects in our territory, such results have never led to a project being declined regulatory approval.

The mandate given to the Expert Panel is a once in a generation opportunity to re-envision the statutory framework surrounding environmental assessments in a way that implements the Calls to Action of the Truth and Reconciliation Commission requiring the federal government to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples. The ACFN have been a strong voice for this change and have diligently exhausted all our options within the current system. We have made every attempt to work within the system, and saw little done to protect our livelihood. Our vision is for an environmental assessment regime that puts reconciliation and indigenous participation at the heart of the environmental assessment process. For our Nation, this means an environmental assessment system that:

- Is engaged when Aboriginal and Treaty Rights may be adversely affected
- Supports Indigenous participation at each stage of the assessment process by providing appropriate timelines and capacity funding

- Is facilitated by an independent agency with power to conduct assessments that are not predetermined by proponents
- Allows for Indigenous led assessments where appropriate
- Clarifies the relationship between the Crown's duty to consult with potentially affected First Nations and the assessment process
- Requires consideration of potential effects on not only environmental components, but on the continued ability of First Nations to meaningfully exercise Aboriginal and Treaty Rights
- Requires consideration of effects on a regional level;
- Facilitates meaningful cumulative effects assessment;
- Requires meaningful and respectful collection and consideration of Indigenous knowledge;
- Results in transparent decision making; and
- Requires meaningful follow up and enforcement after the environmental assessment is completed.

In the following sections, we summarize our concerns with the present environmental assessment regime and set out our vision for an environmental assessment system that will foster Indigenous participation and confidence in the conclusions reached in environmental assessments.

2. Role of Agency/Crown in EAs

The Canadian Environmental Assessment Agency (the Agency) has been one of the main hurdles we have encountered in EAs because, despite a veneer of inclusiveness, the Agency contributes to our indigenous knowledge and way of life as being treated as less valid, or static in nature. The Agency, is routinely non-responsive to our questions, prevents us from engaging with other departments and is a primary cause of the lack of clarity regarding how rights will be assessed and how or what consultation will be undertaken.

In our view, the present statutory regime is a significant cause of our negative experiences with the Agency, because the Act leaves the Agency and interested departments without clear responsibilities or a meaningful mandate in the assessment process other than as a collector of paper. In short, consultation becomes nothing but a file building exercise rather than one that seeks to actually deal with the issues that impact our Treaty and Aboriginal rights. Our suggestion is that the Act be amended to established an independent agency, funded by government and proponents seeking regulatory approval, which will have the responsibility to do at least three things: (1) prepare independent environmental assessment materials, (2) require federal departments to gather information and undertake studies, as needed, and (3)

conduct engagement with all stakeholders, including First Nations. This could be achieved by re-establishing the Agency with clear statutory obligations to take a more active role in EAs, particularly at the initial scoping stages or by creating a new agency and clarifying that federal departments have greater duties in the assessment process than they do currently.

Establishing such a Crown role in the assessment process in this way is a significant undertaking, but would have many advantages over the present system. In particular, this will assist in rebuilding confidence in the environmental assessment process by offering independent review to all stakeholders in an environmental assessment and ensure that gaps in the assessment process left by proponents are filled in a timely fashion.

Such an agency would also assist in bringing First Nations' concerns into the environmental assessment process in a more fair and effective manner. Proponents are often unable or unwilling to engage in particularized analysis of issues that seem to go beyond the footprint of their proposed projects. An independent agency, empowered to conduct its own assessment studies where required, could greatly increase the understanding of the potential direct and cumulative effects of a proposed project. This would result in higher quality information being made available to First Nations and the Crown.

The Agency should also be expressly tasked with facilitating consultation and accommodation with First Nations by directly engaging with First Nations and connecting federal departments with subject matter expertise to the consultation process.

3. Projects that trigger federal environmental assessment

One of the significant changes to federal environmental assessment brought about by the Canadian Environmental Assessment Act, 2012 ("*CEAA, 2012*") was the narrowing in the scope of the application of the Act – from applying to all projects for which there was a federal trigger to only a limited list. This can result in projects that adversely affect Aboriginal and treaty rights escaping assessment, and is particularly concerning with respect to new kinds of projects not anticipated by the *Regulations Designating Physical Activities.*[1] In our territory, many projects directly and indirectly impact areas of clear federal jurisdiction (navigable waters, fish, species at risk, Canada's largest national park, Canada's largest World Heritage Site, migratory birds, Indian Reserves and Section 35 rights), but federal environmental assessments are rare. Cumulatively, these projects have driven these areas of federal jurisdiction to, and in many cases past, tipping points, yet the federal environmental assessments regime is not engaged. To address these issues we recommend the following changes.

[1] SOR/2012-147.

First, the federal triggers for environmental assessment under section 5(1) of *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 should be reinstated. Additional triggers should be developed in consultation with Indigenous communities, to ensure projects that may infringe on Aboriginal or treaty rights are federally assessed. These additional triggers should include but not be limited to:

(a) Any project that may have an adverse impact on Federal Lands and lands of international significance including National Parks, Indian reserve lands, water bodies designated under the Navigation Protection Act, and World Heritage Sites.

(b) Any project that may have an adverse impact on treaty settlement lands under a modern treaty or land claim agreement.

(c) Any project that may impede the federal government's carbon emission target, other climate change commitments or other national environmental objectives. This could be a general trigger or be broken down into more precise triggers such as "any project that has the potential to contribute X amount of Greenhouse Gases".

(d) Any project that would impact more a species designated under the *Species at Risk Act*[2] as a species at risk (endangered, threatened or of special concern).

(e) Any project that may discharge a substance listed under the *Canadian Environmental Protection Act, 1999*[3] or the *Canada Water Act*.[4]

(f) Any project that may affect migratory birds protected under the *Migratory Birds Convention Act, 1994*.[5]

(g) Any projects prescribed by regulation.

In addition to federal triggers, the *Regulations Designating Physical Activities* should remain in place to provide greater certainty about specific kinds of projects that require assessment. Where regional or strategic assessments suggest other triggers or other kinds of projects that should be subject to assessment, these should be added to the regulations.

Given the unique size, scale, and impacts of activities in the oil sands region (not to mention that the oil sands region is located along one of North America's most important migratory bird

[2] S.C. 2002, c. 29.
[3] S.C. 1999, c. 33.
[4] R.S.C. 1985, c. C-11.
[5] S.C. 1994, c. 22.

flyways, within critical habitat for species at risk and important navigational waterways and we now know that activities in this region have significant downstream impacts on fish, a national park, Indian Reserves, Species at Risk and treaty rights – all federal matters), we also suggest that the Act have a region-specific regulation to ensure that there is are clear, predictable federal environmental assessment triggers that reflect the unique realities of the oil sands region. As noted by provincial and federal auditor generals and many leading scientists, there is simply no other area in Canada like the oil sands region when it comes to environmental impacts.

If a project is subject to one or more of the triggers the Proponent should submit a Project Description to the Agency. The Agency should then examine the Project Description, be required to consult with First Nations within the territory and solicit public comment. If there is to be an exclusion list under the Act, triggers should be developed in consultation with Indigenous communities, exclusions should be limited, and they should not allow any project to be excluded if there is a reasonable possibility that the project or activity may adversely impact Aboriginal or treaty rights. The previous exclusion list under the *Exclusion List Regulations*[6] could be used as a starting point for discussion of appropriate exclusions, but we are not suggesting it simply be reenacted. Instead, a consultation process with Indigenous peoples on appropriate exclusions should be conducted.

Under this framework, where projects are more minor, but not excluded, the content of the EIS Guidelines could be tailored to reflect the level of complexity of the project.

4. Timelines

Improving opportunities for Indigenous participation in the environmental assessment process requires that the timelines for environmental assessment set out in sections 27(2) (365 days for an assessment by a responsible authority and the Minister's decision) and 38(3) (24 months for an assessment by a review panel and the Minister's decision) be replaced with statutory provisions that account for the unique challenges that face Indigenous peoples in environmental assessments.

The currently legislated timelines have operated to deprive our Nation of the ability to collect Indigenous Knowledge to inform the environmental assessment process and to respond to information divulged by better resourced proponents late in the assessment process. While there is discretion to extend the above noted timelines, that discretion is very limited and not

[6] SOR/2007-108.

sufficient to respond to the needs of Indigenous participants in environmental assessments. We provide a few specific examples:

- On multiple occasions the Agency has prevented federal departments from exercising their statutory power to require proponents to provide information that the departments and indigenous peoples view as necessary for an effective assessment on the basis that the Agency wants to "manage the clock" so as to stay within the legislative timelines set out in the Act.

- In a recent environmental assessment for the Frontier Project, we were provided only 30 days to review a 10,000+ page project update.

- We are often provided with only 60 days notice of hearings for complex projects

We have several recommendations for how the problematic timeline approach in the Act might be addressed:

1. Grant the Agency, federal departments participating in assessments, and the Minister broader statutory powers to suspend and/or extend timelines for completing environmental assessments and decision making.
2. Set minimum time periods in the legislation for comment on draft Environmental Impact Statement Guidelines, comments on Environmental Impact Statements and any revisions to the EIS, comments on panel Terms of Reference and comments on the draft environmental assessment report.
3. These minimum time periods should "stop the clock" like requests to Proponents for further information, and not be counted towards the overall time.
4. Provide triggers for extending these minimum timelines and the overall timelines for the environmental assessment process including those relevant to engagement with Indigenous peoples such as:
    a. An automatic extension of timelines if participant funding is delayed; and
    b. Request by an Indigenous community participant, provided they give reasonable justification for their request.

5. Funding

Funding levels currently provided under the Agency's Participant Funding Program hinder meaningful Indigenous participation in EA processes. These processes are complex and given the importance of the environmental assessment in informing the duty to consult, the consequences are significant. Indigenous peoples will often need to retain consultants with

legal, technical or scientific expertise to support their participation. This is especially true given the reluctance of non-Indigenous society to accept Indigenous knowledge or laws at face value. The current reality Indigenous peoples face in the EA process is that the information provided by Indigenous knowledge holders needs to be "legitimized" by the involvement of experts (anthropological, sociological, technical, scientific or legal) when it is in conflict with other legal, scientific or technical information provided by a proponent. This comes at a significant cost with respect to human and financial resources of the ACFN.

Often, funding provided by the Agency will not even cover a technical review of the EIS, let alone technical or legal review and drafting of responses to any other documents such as panel terms of reference, project updates and information responses; hearing participation; consultation meetings; community briefing and consultation with members; and environmental baseline studies or Indigenous knowledge studies. It is also phased and we must "fit" our timelines and work within the CEAA determined phases. Additionally, it creates a heavy administrative burden on our already burdened resources. Along with this submission we are providing a copy of an independent review of the staffing needs of our offices just to cover day-to-day consultation work. That study indicates that ACFN (and its neighbor, the Mikisew Cree First Nation) requires stable funding to help it meaningfully participate in consultation. Despite the heavy workload created by federal consultation and environmental assessment work in our region, the Agency provides no stable funding for our office.

One way to address the shortfall in funding provided to Indigenous communities for participation would be to increase the funding available to indigenous communities and broaden the cost recovery provisions under s. 59 of the Act and the *Cost Recovery Regulations* to provide the Agency with power to recover costs related to funding Indigenous participation in an EA from proponents in order to cover the difference.

6. First Nation Led Assessments

In addition to participation in EAs under *CEAA 2012*, Indigenous groups across the country are increasingly conducting EAs of their own. This may be done as an exercise of Indigenous law, under a land code or other framework. New federal legislation should consider how meaningful recognition of these other assessment bodies could uphold principles in UNDRIP, including article 18 which recognizes that

> *Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*

Additionally, EA processes where Indigenous groups are decision-makers are another way of fulfilling the principle in UNDRIP article 32(1) where Indigenous groups have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. In light of the Truth and Reconciliation Report (TRC) calling on all levels of government and sectors of Canadian society to adopt UNDRIP as a framework for reconciliation, mechanisms in federal legislation should be considered to meaningfully integrate Indigenous environmental assessments into environmental management and decision making.

Participatory assessments are also simply a matter of good EA practice. The Act should discourage situations where proponents lead assessments of matters relating to indigenous rights, culture, socio-economic conditions and other matters where communities are the experts. The Shell Jackpine Expansion environmental assessment is a good example of why this is. There, the proponent declined to work with us when preparing a cultural impact assessment, the result being an "expert" report prepared by the same consultants that had previously dismissed the relevance of all of our traditional use information, that was pan-aboriginal, based on a few trapline holders and that took the position that money was a primary driver of our culture. Due to resource and time limitations, we were unable to prepare a fulsome report to rebut this problematic report.

There are a range of examples in Canada where First Nations are working with provincial and territorial governments to develop collaborative models for environmental assessment that advances recognition of First Nations' inherent jurisdiction as stewards of their lands. In the Northwest Territories, the Mackenzie Valley Environmental Impact Review Board is a co-management board responsible for the environmental impact assessment process in the Mackenzie Valley. Aboriginal land claim organizations nominate half of the board members and the federal and territorial governments nominate the other half of the board members. In Ontario, the provincial government is negotiating with a group of First Nations in northern Ontario to develop a terms of reference for a joint review panel that includes a First Nation appointee, and that accommodates First Nation decision making in respect of panel recommendations. We see no reason that these types of decision making bodies cannot exist within the province of Alberta.

We request that federal legislation be amended to include provisions to harmonize timelines and information collection between federal, provincial, and Indigenous assessments processes where Indigenous groups chose to conduct their own, stand alone assessments.

7. Crown Consultation and the federal environmental assessment regime

The stakes are high when it comes to Crown-Aboriginal engagement in EAs. EAs are an important forum in which First Nations are provided an opportunity to finally engage with the Crown regarding projects that can have serious consequences for their way of life. Because the Crown often relies on EAs to discharge its duty to consult, the constitutionality of Canada's actions, progress towards reconciliation and Canada's commitment to the United Nations Declaration on the Rights of Indigenous Peoples are at stake in these processes

Unfortunately, our experience has been that the Crown integrates the duty to consult into EAs in a manner that undermines the fairness and effectiveness of both processes to the detriment of Aboriginal interests. We highlight a few examples:

> *Creating uncertainty*: The most significant overarching issue is that the Crown is routinely unclear as to the role of the EA in consultation and whether key aspects will be coordinated, such as whether the EA will include the assessment of impacts to Section 35 Rights, assessment of whether the rights will be infringed by the project, and assessment of whether such infringements can be accommodated or justified. First Nations are routinely told that the EA process is the primary or even the only venue to put forward their information with respect to their Section 35 Rights and other interests that may be impacted. Then they are told that the Panel or responsible authority has no power to consider impacts to their rights. Other times, the Crown conducts additional engagement outside the EA process, but then relies on the EA process to limit what it does outside the EA process and say the duty to consult has been fulfilled. First Nations are left guessing in the case of each project, what role the EA will play in consultation. It is unfair for the Crown to rely on this uncertainty.
>
> *Non-responsiveness*: federal departments take the position in EAs that the Act precludes them from sharing feedback and doing anything with information provided by First Nations until, possibly, after the EA process.
>
> *Passive participation*: We routinely request that the Crown help us collect baseline information relevant to assessing impacts to the environment and Section 35 rights. We have never encountered a situation where the Crown has assisted in collecting information.
>
> *Closed mind*: While the Crown asks us to submit comments on certain guiding documents in EAs, our comments relating to issues such as incorporation of indigenous knowledge, information gathering, and factors for assessing impacts to rights are

universally met with the response that the clarity we requested would be contrary to the Act.

Late consultation: Instead of working with us at the outset of an EA to shape a more inclusive and effective process and identify information necessary for an EA, the Crown tells us to wait until after the EA process is complete to talk about what may have been missed. This is too late for effective engagement and, in any event, the Crown fully relies on the EA report (deficiencies and all) when we get to that later stage.

Obscuring roles and decisions: In response to most questions and requests we pose during consultation in EAs, the Agency responds with some form of "we will take a whole of government approach to that issue, as and when appropriate". This limits any engagement with federal departments and decision makers.

Creating appropriate federal engagement with indigenous peoples in assessments is necessary. It is necessary from the perspectives of good EA practice. It is necessary from the perspective of the United Nations Declaration on the Rights of Indigenous Peoples. And, should the Crown continue to rely on EA processes for consultation, it is necessary from the perspective of the duty to consult. Improved Crown engagement in EAs should have the following elements:

1. clearly defined roles of the Agency, Panel or responsible authority, the Minister, the relevant departments and staff and the powers and mandate necessary to carry out those roles;

2. if the government is going to rely on the EA process to fulfill the duty to consult, clearly established powers, mandates and processes for Crown participants (or the agency identified above) to carry out that duty in full. To carry out consultation the Agency or other responsible authority must be given the explicit power and mandate to:
    - Engage early with First Nations;
    - Engage in dialogue with First Nations;
    - Assess the strength of Section 35 Rights claims;
    - Assess impacts to Section 35 Rights;
    - Assess whether there is a potential infringement of those rights;
    - Assess the adequacy of consultation given the potential infringement;
    - Respectfully engage with and consider Indigenous knowledge, perspectives and laws;
    - Request information from other departments or ministries as necessary to provide information to First Nations or provide First Nations with feedback as necessary to carry out this mandate;

- Bring in and facilitate discussions with other departments or ministries where necessary to provide appropriate accommodation;
- Ensure that all laws are being adhered to (such as duties and obligations under SARA, Navigable Waters, DFO legislation);
- Order proponents to undertake mitigation measures; and
- Provide accommodation.

3. if the role of the EA process in consultation is to be one of only informing the consultation process, it can only do this if the Agency or responsible authority has the power and mandate to:
    - Assess impacts to Section 35 Rights;
    - Assess whether there is a potential infringement of those rights;
    - Assess the adequacy of consultation given the potential infringement;
    - Respectfully engage with and consider Indigenous knowledge, perspectives and laws;
    - Request information from other departments or ministries as necessary to provide information to First Nations or provide First Nations with feedback as necessary to carry out this mandate; and
    - Order proponents to undertake mitigation measures

4. explicit requirement for the Crown to identify of effects resulting from proposed projects directly on Aboriginal and treaty rights;

5. clearer requirements for Crown engagement with aboriginal groups at key steps in an assessment;

6. statutory minimum standards for terms of reference for EAs that require that the factors and indicators of interest to First Nations are included in assessments;

7. requirements for indigenous involvement in the design, scoping and carrying out of studies pertaining to, at a minimum, assessing project effects on rights and culture;

8. Clearer authority for federal departments to gather information requested by First Nations and to provide feedback to First Nations, when so requested, in EA and factors to guide the exercise of that authority; and

9. Where the Crown intends to rely on an EA process for consultation, it should clearly indicate that it will do so before the commencements of the process and require the relevant decision maker to assess the adequacy of consultation

8. Require consideration of effects on Aboriginal and Treaty rights

The concept of free, prior and informed consent requires that Indigenous peoples and the Crown be informed about the potential effects of proposed development on the ability of Indigenous peoples to continue to exercise constitutionally protected aboriginal and treaty rights. For First Nations to have confidence in environmental assessment processes, these processes must assess the potential adverse effects of development on aboriginal and treaty rights. The present statutory and regulatory scheme does not require that effects to aboriginal or treaty rights be assessed in the context of federal environmental assessments.

Instead, section 5 of the *CEAA, 2012* limits the consideration of effects on the environment that may impact aboriginal peoples to the four aspects covered in 5(1)(c) (health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes, or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance).

This narrow definition unduly constrains environmental assessments and deprives First Nations and the Crown of the knowledge necessary to understand whether a proposed land use will diminish the ability of First Nations to exercise aboriginal and treaty rights. This definition imposes an undue constraint as impacts to the continued ability of First Nation to exercise rights on lands and waters cannot be assessed by evaluating the likely impacts of a development on the current use of lands by First Nations or on physical and cultural heritage. Effects on aboriginal and treaty rights must instead be informed by understanding the nature of the asserted or proven rights, including the conditions necessary for First Nations to exercise those rights.

Collecting this information and conducting a direct assessment on potential effects to aboriginal and treaty rights is a necessary component of reconciliation. Unless this information is collected, First Nations cannot provide informed consent to resource development that may impact their rights, and the Crown cannot fulfill its constitutional obligations to not infringe upon those rights. A renewed environmental assessment process can replace guess work with evidence based analysis on the potential impacts of proposed land uses.

The assessment of potential effects to Treaty rights must take place as part of the Crown consultation process, but is currently being conducted separately from those carried out under

CEAA 2012, if at all. For example, with respect to the Northern Gateway project, the majority of the Federal Court of Appeal wrote that:

> The inadequacies—more than just a handful and more than mere imperfections—left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored. Many impacts of the Project—some identified in the Report of the Joint Review Panel, some not—were left undisclosed, undiscussed and unconsidered. It would have taken Canada little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples. But this did not happen.[7]

Environmental assessments can be appropriate and flexible enough to identify the effects of proposed projects on section 35 rights. When Aboriginal nations are included in the scoping of environmental assessments they can inform the selection of biophysical and human components studied in the assessment process. There are many examples of environmental assessments that have been conducted to determine effects on Aboriginal interests including section 35 rights. By updating the factors that must be considered in section 5 of CEAA to include the Aboriginal and treaty rights recognized and affirmed in section 35 of the Constitution Act, 1982, it will be made clear that environmental assessments must include an assessment of project effects directly on the rights of Aboriginal peoples.

Requiring the identification of indicators that can credibly represent each Aboriginal group's rights, the collection of information regarding those indicators, and an assessment of that information in the environmental assessment process will allow the EA to meaningfully inform Crown consultation. Project proponents are expected to assess all other potential Project effects; the potential effects on the rights of Aboriginal peoples should be treated no differently. The cost of assessing effects on Aboriginal peoples and their rights should be borne by proponents and not by Aboriginal groups. While project proponents are in a position to mitigate some of the direct effects of their operations on Aboriginal and treaty rights, some effects of development are more properly addressed by governments. Requiring proponents to identify such effects will provide the Crown with information it can use in its accommodation process.

To ensure that environmental assessments evaluate potential effects to aboriginal and treaty rights, we request that CEAA, 2012 be amended to expressly require that aboriginal and treaty rights protected under s.35 of the *Constitution Act, 1982* be defined either as a "component of the environment" under s.5(1)(a) or as an aspect of the effects that are required to be assessed

[7] *Gitxaala Nation v Canada*, 2016 FCA 187.

under s.5(1)(c). We also request that the "Purposes" section of CEAA, 2012 be amended to include, as a purpose of the act, "to protect aboriginal and treaty rights guaranteed under s.35 of the *Constitution Act, 1982".*

9. Regional/Strategic Environmental Assessment

Project based assessment without a structured approach to cumulative effects assessment is ineffective and can miss or underestimate the long term effects of a development, many of which are disproportionately experienced by Indigenous communities who continue to reside and rely on their lands. As noted above, this has been noted repeatedly in the oil sands region by auditor generals and leading academics.

Federal environmental assessment legislation should provide for regional studies which focus on understanding the cumulative effects of activities because it is not possible or reasonable for individual project proponents to have the correct information or conduct an assessment at this scope. The legislation should provide criteria for when a regional assessment must occur, or at least provide it as a clear option. Triggers could include situations such as:

- the proposed project is in a region or ecosystem that has a unique value, including significant cultural value to one or more Indigenous groups;
- the region or ecosystem has already been subject to heavy development, or significant development is anticipated; and
- cumulative effects are expected and are of particular concern.

10. Meaningful Cumulative Effects Assessment Methodology

The *CEAA, 2012* model of determining significant impacts and potential mitigations for project by project approvals misses the long term adverse impacts of development. This is particularly the case in green field scenarios where the approval of one project may cause a domino effect of further development and infrastructure approvals. It is also the case where significant development has already occurred and a further project approval can be 'the straw that broke the camel's back' with respect to the ability of Indigenous peoples to continue to practice their Aboriginal and Treaty rights.

The case law provides guidance on the proper approach to meaningful assessment of the cumulative effects a proposed project may have on Aboriginal and Treaty rights. The

Honourable Chief Justice Finch of the British Columbia Court of Appeal in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, endorsed an approach that takes historical erosion of Treaty rights into consideration when assessing the affects of a new industrial activity:

> [117] I do not understand Rio Tinto to be authority for saying that when the "current decision under consideration" will have an adverse impact on a First Nations right, as in this case, that what has gone before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners' treaty right, and the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt.
>
> [118] The amended permits authorized activity in an area of fragile caribou habitat. Caribou have been an important part of the petitioners' ancestors' way of life and cultural identity, and the petitioners' people would like to preserve them. There remain only 11 animals in the Burnt Pine herd, but experts consider there to be at least the possibility of the herd's restoration and rehabilitation. The petitioners' people have done what they could on their own to preserve the herd, by banning their people from hunting caribou for the last 40 years.
>
> [119] To take those matters into consideration as within the scope of the duty to consult, is not to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the exploration programs.

Chief Justice Finch's reasons in *West Moberly* also mandated a broad forward looking approach to cumulative effects assessment in considering impacts on Aboriginal and Treaty rights:

> [122] It is correct that the consultation in this case must be directed at the Bulk Sampling and Advanced Exploration Permits and their impact. However, the result of this consultation will necessarily determine not only what constitutes reasonable accommodation for the exploration permits, but will also affect subsequent events if the exploration proceeds.
>
> [123] On my reading of the chambers judge's reasons, it does not appear that he gave much, if any, weight to the potential impact of a full mining operation as a relevant factor in the Crown's duty to consult. However, the whole thrust of the petitioners' position was forward looking. It wanted to preserve not only those few animals remaining in the Burnt Pine caribou herd, but to augment and restore the herd to a condition in which it might once again be hunted. If that position were to be given meaningful consideration in the consultation process, I do not see how one could ignore

at least the possibility of a full mining operation, if it were shown to be justified by the exploration programs. That was the whole object of the Bulk Sampling and Advanced Exploration Programs.

An approach to cumulative effects assessment that can provide meaningful insight into the real impact of a proposed development on Aboriginal and Treaty rights could be secured by amendments to CEAA 2012 that require proponents to provide, and assessors to consider, information such as the following:

1. a description of existing and potential cumulative impacts or changes to the environment caused by all past, present and reasonably foreseeable future projects and human activities, including the potential social, cultural, health, economic and environmental impacts on Aboriginal and Treaty rights, and which shall include:
    a) amount (quantity and percentage) of potential industrial development within the traditional territory of each Indigenous group;
    b) amount (quantity and percentage) of lands within the traditional territory of each Indigenous group that is currently leased for exploration and industrial development;
    c) percentage of tenures developed within the traditional territory of each Indigenous group in past 10 years;
    d) amount of land within each Indigenous group's traditional territory taken up for other developments (i.e., converted from natural vegetation);
    e) amount of each Indigenous group's traditional territory no longer available for exercise of Aboriginal rights because of direct, indirect and cumulative impacts of existing, planned and reasonably foreseeable development;
    f) identification of all linear corridors (pipelines, transmission lines, roads, seismic lines) within each Indigenous group's traditional territory and in the vicinity of the project;
    g) estimated size of area of direct and indirect disturbance to wildlife within each Indigenous group's traditional territory and in the vicinity of the project, and description of methodology for gathering such information;
    h) identification of all other tenure holders within the vicinity of the project, including exploratory leases or tenures, and the size of area held by other tenure holders within the vicinity of the project;
2. a description of the pre-disturbance baseline from which to assess the project's cumulative impacts, in order to fully understand the potential adverse impacts of existing and planned development in the project area upon section 35 rights, including changes in the patterns of resource use and the exercise of rights by the Indigenous groups and the reasons for such changes;

3. all relevant and previous baseline information and studies, submissions, reports and applications related to the project;
4. quality baseline data, benchmarks and modeling that identifies the pre-development situation with respect to vegetation, fish and wildlife populations and habitat, access and pre-development uses, and the exercise of Aboriginal and Treaty rights; and
5. the assessment of the current situation of vegetation, fish and wildlife populations and habitat, access, permanent structures and the exercise of Aboriginal and Treaty rights.

A related methodology concern of assessing cumulative effects under *CEAA 2012* is the practice of only assessing cumulative effects with other anticipated projects for the valued components for which a residual effect has been determined. This should be prohibited by the legislation, as it misses many cumulative effects that will occur when multiple minor effects can combine to have serious implications for ecological and socio-economic well being

In addition, cumulative effects assessments under CEAA 2012 have tended to focus on ecological components; human well-being and regional sustainability must be included in these cumulative effects assessments by mandating it in the legislation.

Finally, the ideal framework for project assessment should not be "mitigation of significant adverse effects" but a more positive and comprehensive objective of "contribution to sustainability", which should include a comparative evaluation of best options for making positive contributions to lasting wellbeing.

11. Incorporating Indigenous Knowledge

Indigenous knowledge (also known as "Traditional Knowledge (TK)" or "Aboriginal Traditional Knowledge (ATK)"), Indigenous perspectives and Indigenous laws are not adequately incorporated into the current Environmental Assessment process. "Indigenous knowledge" includes ecological knowledge, social rules, spirituality and Indigenous philosophy. "Indigenous perspectives" include the views, opinions, perceptions and interpretations of circumstances or events shaped by the world view of an Indigenous people. "Indigenous laws" means the laws of an Indigenous community, including teachings, protocols, rules of conduct and laws of more recent origin.

The lack of respect for Indigenous knowledge, perspectives and laws which is often shown in the EA process undermines the ability of Indigenous peoples to fully participate and is inconsistent with the principles of the United Nations Declaration on the Rights of Indigenous Peoples and the concept of reconciliation. In panel reviews, elders and other knowledge holders are commonly subject to irrelevant cross-examination. It is neither appropriate nor relevant, for example, for elders or Indigenous knowledge holders to be subject to cross-

examination focusing on their lack of "formal" (non-Indigenous academic, scientific or technical) education or training. Formal education in non-Indigenous institutions is not the source of the value, legitimacy or reliability of Indigenous knowledge, rather it is based in culture, experience and oral tradition. To encourage more respectful engagement with Indigenous knowledge, perspectives and laws the "Purposes" of CEAA, 2012 should be amended to include:

> 4(1)(j) to respectfully engage with and consider Aboriginal knowledge, Aboriginal perspectives and the laws of Aboriginal people in environmental assessments;

This purpose should inform and be reflected in Agency and Panel procedures at all stages of the process.

First, the Act currently states that environmental assessment "*may* take into account community knowledge and Aboriginal traditional knowledge" (emphasis added).[8] This should be made mandatory and the Act should be amended to instead read:

> …must take into account community knowledge and <u>Aboriginal knowledge, Aboriginal perspectives and laws of Aboriginal people, where this information is provided to the review panel or responsible authority</u>.[9]

Indigenous knowledge and Indigenous perspectives must inform every stage of environmental assessment. It is important that Indigenous peoples' views are incorporated in the early stages of review, such as the Terms of Reference in a Panel EA or the EIS Guidelines and EIS in an Agency EA. If Indigenous perspectives are not incorporated at this stage, the assessment can be framed in a way that devalues Indigenous knowledge. Terms of Reference and EIS Guidelines should explicitly require that each potentially affected Aboriginal group's perspective inform the development of Valued Components, rather than being left up to the discretion of the proponent.

This is important if impacts to Aboriginal and treaty rights are to be properly characterized and assessed. For example, in considering the impact to a hunting right, the Indigenous perspective requires consideration of much more than the number of animals available to hunt, such as:

- what conditions are required for the exercise of rights;
- what cultural connections does the Indigenous group have to the area and resources in that area;
- what is the timing of harvest;

[8] Section 19(3).
[9] We have used the word "Aboriginal" rather than "Indigenous" in our suggested changes to the Act because of its recognized meaning in Canadian law and use in section 35 of the *Constitution Act, 1982.*

- what is the availability of the resource;
- what is the quality of the resource;
- is there potential for avoidance reactions (e.g. might the exercise of the right be impacted by safety concerns or concerns over contamination of wildlife);
- what cultural transmission activities occur in the area;
- what is the habitat availability and quality in other accessible areas; and
- where and when do members of the Indigenous community prefer to exercise their rights.

The development of Valued Components and the assessment of impacts should also consider whether the Project may directly or indirectly violate or disrupt any Indigenous laws. For example, there may be a law that harvest of a particular resource should occur only at certain sites which the Project will render unusable, forcing community members to hunt elsewhere in violation of their own Indigenous laws.

Second, more flexibility should be accorded in agency environmental assessments and panel reviews to accommodate culturally appropriate ways to receive and consider Indigenous knowledge. In addition to changes to the panel process such as restrictions on irrelevant cross-examination, this might also include mechanisms to protect Indigenous knowledge information that is considered confidential by the community from release to the public.

Third, for panel reviews where infringement of Aboriginal and treaty rights by the project is reasonably likely, the panel should include Indigenous member(s). Section 42(1) of CEAA, 2012 should be amended to include the language underlined below:

> 42(1) Subject to subsection ~~(2)~~ (3), if the environmental assessment of a designated project is referred to a review panel, the Minister must establish the panel's terms of reference and appoint as a member one or more persons who are unbiased and free from any conflict of interest relative to the designated project and who have knowledge or experience relevant to its anticipated environmental effects.
>
> (2) Where the project has the potential, prior to consideration of any effect of mitigation measures, to have adverse impacts on Aboriginal or treaty rights, at least one of the panel members appointed under subsection 1 must be an Aboriginal person or have knowledge or experience relevant to the consideration of Aboriginal knowledge, perspectives and laws.

Finally, EA Reports should include an explanation of how Indigenous knowledge, Indigenous perspectives and Indigenous laws were considered and incorporated into the Environmental Assessment. In this regard, the *Reference Guide Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the* Canadian Environmental Assessment Act,

2012[10] provides good guidance that is not consistently put into practice. It recognizes that western and traditional knowledge will often provide complementary insights in the EA, however, where they cannot be reconciled, the EA should demonstrate how each type of knowledge was considered. To ensure consistency, this should be a legislated requirement for EA Reports. This could be done by revising sections 22 and 43 of the Act as follows:

Responsible authority's obligations

22 The responsible authority with respect to a designated project must ensure that

(a) an environmental assessment of the designated project is conducted; ~~and~~

(b) a report is prepared with respect to that environmental assessment; and

(c) the report demonstrates how any information provided to the Agency regarding Aboriginal knowledge, Aboriginal perspectives and laws of Aboriginal people were considered in the environmental assessment.

Review panel's duties

43 (1) A review panel must, in accordance with its terms of reference,

(d) prepare a report with respect to the environmental assessment that sets out

(i) the review panel's rationale, conclusions and recommendations, including any mitigation measures and follow-up program, ~~and~~

(ii) a summary of any comments received from the public, including interested parties, and

(iii) how any information provided to the Agency regarding Aboriginal knowledge, Aboriginal perspectives and laws of Aboriginal people were considered in the environmental assessment.

12. Impact Benefit Agreements and other Agreements between proponents and First Nations

Crown consultation coordinators have been known to request information about capacity funding arrangements between proponents and First Nations that allow Nations to undertake studies and review EA materials. When this has occurred, funding to support First Nation participation in an EA is then characterized as a mitigation and accommodation measure. This practice undermines Indigenous participation in EA processes and mischaracterizes the nature of capacity funding. We request that the Panel make a clear statement that funding provided to

[10]Canada, Minister of Environment. Ottawa: Public Works and Government Services Canada, 2014, p. 6

First Nations that assists their participation in an EA should never be considered a project mitigation measure. It is never a benefit to a nation to have to participate in a process that is seeking to annihilate their rights.

In ACFN's presentation to the Panel, the Panel has asked whether the EA process should take into account Impact Benefit Agreements and whether these agreements should be reviewed in the EA process. This is a complex question. When we have encountered this question in previous EAs, it has come from federal representatives who query whether they or the EA process should bother to undertake impact assessments relating to First Nation concerns because, in the words of representatives from CEAA, "First Nations will just enter into an IBA anyway." This is clearly an egregious view and is grounded in ignorance.

Our agreements with industry are the result of difficult choices. We are well aware that projects undergoing federal EAs are almost universally approved, typically with little if any regard for First Nations' concerns. Our Nation has little confidence that the terms of approval for projects will rigorously address the issues that matter most to us or result in significant protections for Aboriginal and Treaty Rights: from this perspective, agreements are less about mitigating impacts and more about not being left behind when our rights are trampled. Even where we do enter into agreements with industry, they do not address the majority of the concerns we raise in the EA process, they grossly fail to address cumulative impacts and they do not compensate for the vast generational losses that will exist on the lands being taken up for development. We continue to rely on federal environmental assessments and permitting requirements for the protection of our section 35 rights, cumulative impacts, species at risk, habitat protections, and climate change.

The Panel must strongly discourage the practice of delaying or avoiding assessments where IBAs may occur because it undermines the EA process and, in fact, it pushes First Nations into agreements with Proponents because it makes First Nations feel that the EA process will not take their concerns seriously. Whether a First Nation may enter into an agreement is irrelevant to the EA process of identifying the effects of projects, including effects on Aboriginal and treaty rights. It bears emphasizing that while some project effects may be mitigated by proponents, there are many which may only be properly addressed by governments. We also request that the Panel not make recommendations about disclosure of IBAs and leave that to the discretion of the First Nations and proponents negotiating agreements.

13. Require transparent decision making

It is difficult to see how EAs processes will ever respectfully incorporate indigenous participation and promote responsible decision making when, after we spent hundreds of

thousands of dollars and years of time when we encountered a situation like the following outcome of the EA process for the Shell Jackpine Mine Expansion Project:

EA conclusion:

> [9] The Panel finds that the Project would likely have significant adverse environmental effects on wetlands, traditional plant potential areas, wetland-reliant species at risk, migratory birds that are wetland-reliant or species at risk, and biodiversity. There is also a lack of proposed mitigation measures that have been proven to be effective. The Panel also concludes that the Project, in combination with other existing, approved, and planned projects, would likely have significant adverse cumulative environmental effects on wetlands; traditional plant potential areas; old-growth forests; wetland-reliant species at risk and migratory birds; old-growth forest reliant species at risk and migratory birds; caribou; biodiversity; and Aboriginal traditional land use (TLU), rights, and culture. Further, there is a lack of proposed mitigation measures that have proven to be effective with respect to identified significant adverse cumulative environmental effects.

Federal response:

> "In accordance with paragraph 52(4)(a) of CEAA 2012 the Governor in Council decided that the significant adverse environmental effects that the Designated Project is likely to cause, are justified in the circumstances"

CEAA, 2012 removed the responsibility for determining whether a project would have significant adverse effects from responsible departments and granted those powers to the Minister of the Environment. This change provided the Minister or the federal Cabinet with inappropriate amount of decision making discretion. One aspect of this discretion is the power of Cabinet to authorize developments that are likely to cause significant adverse effects if, in the judgment of Cabinet, such "effects are justified in the circumstances" (s.52(2)).

Allocating discretion to justify significant adverse effects solely to Cabinet undermines confidence in the environmental assessment process as Cabinet deliberations are protected by privilege and Cabinet is not required to demonstrate how it has determined that such effects are justified. In practice, Cabinet has exercised this discretion to justify without providing reasons; instead baldly asserting that significant environmental effects are justified in the circumstances. Attempts to require Cabinet to disclose reasons justifying such environmental effects have been rejected.[11]

[11] *Adam v Canada (Environment),* [2014] FC 1185 at paras 79-81

In the context of environmental assessments that have determined that a proposed development will have significant adverse environmental effects on First Nation's, this is particularly troubling as significant effects that limit the exercise of aboriginal or treaty rights may be authorized without the Crown demonstrating either that it understands the nature of those aboriginal or treaty rights or that there are circumstances which justify the potential infringement of those rights.

Our view is that decision making under *CEAA, 2012* should be made transparent and that decision makers should be required to identify the matters that have been considered in determining that any significant adverse effects are justified. Without such requirement, confidence in a revived environmental assessment process may be undermined by decisions that purport to justify environmental effects without actually indicating why such environmental effects are justified.

Our request is that *CEAA, 2012* be amended to clarify the discretion to justify adverse environmental effects by requiring the Minister or Cabinet to demonstrate with evidence based criteria upon which adverse effects will be justified and provide transparent written reasons justifying those significant environmental effects.

14. EA Follow-Up and Enforcement

There are two aspects of post-EA follow-up that are not working: verification of proponent predictions in the EA process and government responses.

Verification of EA predictions: The EA system is based on predictions and, absent a robust system to verify the accuracy of the predictions over time, it will continue to incentivize the underestimation of project effects during the assessment process. To address this problem, the Act should be revised in three ways: (1) explicitly require that a proponent whose project is approved under the Act must report on all assessed valued components within a period prescribed in a condition or in the Act; (2) require that this information be posted publicly and (3) establish new offences under the Act relating to failures to report and others pertaining to failing to meet predictions.

Recommendations to governments: Often environmental assessments result in recommendations that governments to take a variety of actions, such as undertake cumulative effects studies, develop new environmental benchmarks, develop land use frameworks and develop new monitoring plans. Unfortunately, while the Crown points to these recommendations to justify project approvals, they routinely go un-implemented , to the detriment of future environmental assessments.

The 2013 Joint Review Panel report for Shell Canada's Jackpine Mine Expansion is the most recent example and illustrative of a larger pattern. In the three years since the panel's report was released, Canada has declined to implement recommendations such as (i) developing a precautionary cut-off flow approach for the Athabasca River, (ii) preserving ecosystems and biodiversity in the oil sands region; (iii) improving monitoring programs and (iv) protecting bison habitat.

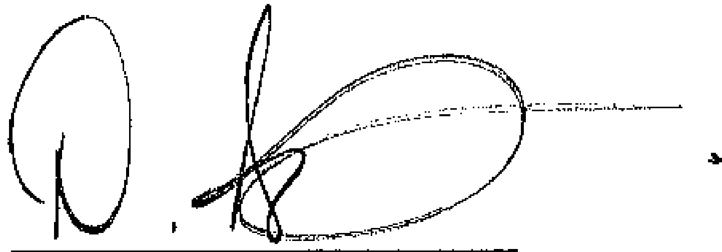
To address this problem, the Act should, similar to the *Species at Risk Act*, set timelines in which the government must develop an action plan for implementing EA recommendations that are made to the federal government.

15. Eliminate substitution and delegation

An important feature of the federal EA regime is that, even where it falls short, it provides us access to the federal crown and federal departments. While we have concerns with the way that federal EAs have been designed and carried out, it has been our experience that federal departments more actively and diligently identify where proponents have failed to provide sufficient information about contaminants and potential environmental effects of projects than provincial departments.

Canada's role in assessing and managing resource development in our territory has also been critical because Alberta does not actively participate in environmental assessments of oil sands projects. In Alberta, regulators conducting EAs do not seek First Nation input into information deficiencies and do not engage First Nations when determining EA completeness. And Alberta has a flawed land use planning and consultation process that excludes consideration of cumulative effects from EAs. And if this wasn't enough, provincial EAs are undertaken by a regulator funded by industry with a statutory mandate to develop oil resources and a regulatory process that takes a highly restrictive approach to public participation and rarely hold hearings on projects.

While coordinating procedural steps of provincial and federal EA can benefit all parties, the Act should not allow delegating or substituting key aspects of the federal assessment process to other levels of government or otherwise diminish the federal role to fulfil any of the elements of the reconciliation based environmental assessment process described herein.



Doreen Somers, Acting Director IRC