

This is Affidavit #1 of D. Somers  
dated February 25, 2014

Court File No. 13-14

**FEDERAL COURT**

BETWEEN:

ALLAN ADAM on his own behalf and on behalf of all other members of  
Athabasca Chipewyan First Nation; ATHABASCA CHIPEWYAN FIRST  
NATION

Applicant

AND:

MINISTER OF THE ENVIRONMENT,  
ATTORNEY GENERAL OF CANADA, and SHELL CANADA LIMITED

Respondents

**AFFIDAVIT #1 OF DOREEN SOMERS**

I, Doreen Somers, Consultation Coordinator of Athabasca Chipewyan  
First Nation (“ACFN”) Industry Relations Corporation (“IRC”), of 220  
Taiganova Crescent, Fort McMurray, Alberta, T9K 0T4, SWEAR THAT:

1. I have personal knowledge of the facts and matters deposed to in this Affidavit, save and except where the same are stated to be on information and belief, in which case I believe those facts and matters to be true.
2. Where I have attached as an Exhibit to this Affidavit a copy or excerpted copy of a document that is available online on a website or in the IRC’s electronic files, I have compared the print copy I attach and the version I viewed on the computer screen to ensure it is an accurate copy. Further, where I attach as an Exhibit a letter, email or other document that I received or sent electronically, I have compared the print copy I attach to the version I received or sent

electronically ensure it is an accurate copy. Finally, where I attach a copy of document, the original of which exists in the IRC's records, I have compared the copy of the document to the original that resides in the IRC's records to ensure it is an accurate copy.

3. I am a Haudenosaunee woman from Ontario. I am a member of the Mohawk Nation and I hold Treaty 9 Rights.

4. I have conducted consultation activities on behalf of government, industry, and First Nations since 2004. I have been employed by the IRC since 2010.

5. It is the IRC's mandate to protect ACFN members' ability to exercise their Aboriginal and Treaty 8 Rights (the "**Rights**") now and into the future. The IRC is responsible for managing consultation with Crown and industry on behalf of ACFN, and under direction from ACFN leadership. It acts as the facilitator between ACFN, the Crown, and developers.

6. We communicate with ACFN membership and leadership, proponents and the Crown about proposed developments and policies and their implications for ACFN through meetings, workshops, correspondence, policy and technical reviews and participation in hearings. Currently the IRC has seven staff members. . We are the only paid staff at ACFN to fulfill this role.

7. I was actively involved in preparing and participating in ACFN's intervention for the Joint Review Panel hearing of the Jackpine Mine Expansion (the "**Hearing**"). I have had conduct of the IRC's Jackpine Mine Expansion (the "**Project**") file since approximately November 2012.

8. Because ACFN knew that the Joint Review Panel (the "**Panel**") would be making a decision under the *Oil Sands Conservation Act* on whether to allow the Project to proceed, ACFN asked the Panel, by way of a Notice of Question of Constitutional Law, to consider as part of its review of the Project whether the Crown's consultation and accommodation efforts with ACFN to that point had

been adequate. Attached as **Exhibit “1”** to my Affidavit is ACFN’s Notice of Question of Constitutional Law, dated October 1, 2012.

9. The Panel declined to consider our question. ACFN applied for leave to appeal this decision at the Alberta Court of Appeal. The Alberta Court of Appeal denied our application for leave. We applied for leave to appeal to the Supreme Court of Canada. This application was also denied.

10. In response to ACFN’s Notice of Question of Constitutional Law, Canada argued that we had brought our question prematurely. Canada said that Crown consultation and accommodation was integrated with the Panel’s process and so was not yet complete. Canada further stated (at paragraph 10 of its written submissions) that the Panel was “uniquely well placed to make” an assessment of the significance of the environmental effects affecting aboriginal people under section 5(1)(c) of the *Canadian Assessment Act 2012* (“**CEAA 2012**”). At paragraphs 5, 75, 76, 86 and 91 of its written submissions, Canada said that the Panel process was a planning process that would inform Canada’s subsequent decision making, including decisions about the adequacy of consultation and accommodation. Canada concluded at paragraph 94 that it had “the capacity to respond to whatever recommendations the Panel may see fit to make, and awaits the Panel Report. How the Crown may exercise its capacity is dependent upon the content of the Panel Report. . .” A copy of an excerpt of Canada’s October 15, 2012 submissions to the Joint Review Panel are attached to my Affidavit as **Exhibit “2”**.

11. Canada made similar representations to the Alberta Court of Appeal, and a copy of an excerpt of its Response in that Court is attached to my Affidavit as **Exhibit “3”**. See for example paragraph 24.

12. Canada again made similar submissions to the Supreme Court of Canada. A copy of an excerpt of Canada’s Supreme Court of Canada Response is attached to my Affidavit as **Exhibit “4”**. For example, see paragraphs 37 and 53. See also paragraphs 44, 45 and 46, where Canada acknowledged that it was obligated to

consider whether its consultation and accommodation for the whole of the process of taking up land under Treaty 8 had been adequate before issuing a decision statement for the Project under *CEAA 2012* (the “**Decision Statement**”). A decision statement is the document that sets out Canada’s final decision on whether to approve a project under *CEAA 2012* and any associated conditions of approval.

13. On June 24, 2013, shortly before the Panel issued its report on the Project (the “**Panel Report**” or “**Report**”), ACFN’s legal counsel, Jenny Biem, emailed Ms. Carolyn Dunn, Crown Consultation Coordinator for the Canadian Environmental Assessment Agency (“**Agency**”) for the Project, on my instruction. Ms. Biem requested that the Agency provide the opportunity for ACFN to review and if necessary, negotiate changes to, the proposed post-Panel consultation process before that consultation started.

14. In response to ACFN’s request, Ms. Dunn provided Ms. Biem and me a draft letter that listed topics on which the Agency wished to receive ACFN’s views, as well as a chart showing the consultation process the Agency would follow with ACFN. A copy of this email string, on which I was copied, is attached as **Exhibit “5”** to my Affidavit. A copy of the draft letter is attached as **Exhibit “6”** to my Affidavit, and a copy of the process chart is attached as **Exhibit “7”**.

15. The topics that the Agency requested written comments on and wished to discuss with ACFN were as follows:

- a) In their report, did the Panel appropriately characterize the concerns raised by ACFN during the joint review process?
- b) Do the recommendations made by the Panel address some/all of your concerns?
- c) Do you have any residual concerns that are not addressed in the Panel’s report (i.e. are there residual impacts on potential rights

and/or interests that weren't covered by the report)? If you do have residual concerns, what are your recommendations on how to address them?

- d) Are there any outstanding issues relating to cumulative effects that are related to (a) your Aboriginal rights or (b) other interests/concerns?
- e) Are there any additional recommendations that you feel would alleviate/address these concerns?

16. The Panel Report was issued on July 9, 2013. Ms. Dunn provided ACFN with a link to the Panel Report. A copy of the email I received from Ms. Dunn on July 9, 2013 is attached as **Exhibit "8"** to my Affidavit. A copy of the Panel Report found at the link provided in Carolyn's email, is attached to my Affidavit as **Exhibit "9"**.

17. The Panel found that the Project would have direct and cumulative adverse, significant adverse – and in some cases irreversible – impacts upon ACFN's traditional land use, rights, and culture as well as upon several traditional resources important to ACFN. The Panel also found a lack of effective mitigation measures in relation to several of those impacts. Because the Report is over 400 pages long, I include in this Affidavit some of the Panel's key findings relevant to impacts on ACFN:

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 mitigations 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. (para. 9)

The Panel notes that a substantial amount of habitat for migratory birds that are wetland or old-growth forest dependent will be lost entirely or lost for an extended period. The Panel finds the project effects on wetland and old-growth forest-reliant migratory birds to be . . . potentially irreversible given that some habitat types cannot be reclaimed. The Panel concludes that these effects would be significant. The Panel further concludes that there would be significant cumulative effects on wetland and old-growth forest-reliant migratory birds, mainly as a result of the effects on habitat loss of past, present and future projects in combination with the Project. (28)

The Panel notes that caribou, a species at risk that appears to be declining to extirpation in some herds, are traditionally and culturally important to Aboriginal people. The Panel finds that there has been and would continue to be significant adverse cumulative effects on caribou largely due to the catastrophic loss of caribou habitat. . . (29)

The Panel finds that the Project will result in the loss of lands and some resources used for TLU activities and that this will affect some Aboriginal people who use the Project area. . . the mitigation measures proposed by Shell are not sufficient to fully mitigate these effects. (33)

. . . the Panel finds that project effects, in combination with the effects of other existing, approved and planned developments and other disturbances in the region surrounding the Project are likely to result in significant adverse cumulative effects on Aboriginal TLU, rights and culture. The Panel finds that significant areas have already been or will be lost for the purposes of TLU as a result of existing, approved, and planned activities. The Panel also finds that. . . other resources important for the practise of Aboriginal TLU, rights and culture such as wetlands, old-growth forests, traditional plant potential areas, migratory birds and wildlife species such as caribou, have been or will be subject to significant adverse cumulative effects. . . the landscape will be significantly altered and some species loss may be irreversible. The long-term and possibly irreversible nature of these effects has significant implications for the sustainability of traditional ecological knowledge, TLU practices, Aboriginal and treaty rights, and culture. (34)

Particularly concerning to the Panel is the complete and irreversible loss of the lenticular patterned fen, a land-cover type found in the LSA [Local Study Area] and nowhere else in the RSA [Regional Study Area]. (647)

The Panel notes that long after closure and reclamation, the irreversible effects on traditional plant potential areas in the LSA will contribute to the

adverse cumulative effects on traditional plant potential areas at the regional scale (758)

The Panel finds that the capacity of the natural landscape for use by Aboriginal people for solitude, cultural practice, and spirituality will be significantly affected in the LSA for a time greater than one generation and may be permanently affected because of changes in land shape, form, and ecosite types. The Panel finds that the natural landscape in the RSA is already significantly affected by current and approved projects, and that this is affecting current and future needs. The Panel acknowledges that this will in turn affect the use and knowledge of this area by Aboriginal people. (1214)

The Panel has determined that the Project will likely result in significant adverse effects at the LSA [local study area] level on several terrestrial resources of importance to ACFN including wetlands, traditional plant potential, biodiversity, and wetland-dependant migratory birds and species at risk. (1472)

. . . mitigation measures proposed by Shell do not provide adequate mitigation for the loss of traditional use in the interim. The Panel, therefore, finds that the Project will result in long-term loss of TLU opportunities for ACFN members. . . the Project effects on ACFN's TLU and Aboriginal treaty rights are adverse, but not significant. (1473)

. . . ACFN has provided evidence of existing cumulative effects on its TLU activities leading to loss and avoidance of use and that traditional users are finding it increasingly difficult to relocate and find lands of equivalent value. The Panel, therefore, finds that Project effects, in combination with the effects of other existing, approved, and planned projects, are likely to have a significant adverse effect on ACFN's TLU and Aboriginal and treaty rights in the broader region surrounding the Project. (1476)

The Panel acknowledges and understands the traditional and cultural importance of caribou, wood bison, and moose to ACFN. The Panel notes that the clearing of the land for the Project will reduce habitat availability for all three species and result in increased difficulties accessing the species by ACFN members. (1478)

. . . the Panel believes that oil sands activity and other development and activities within the RMWB [Regional Municipality of Wood Buffalo] have already contributed to significant socioeconomic and cultural change for ACFN. . . The Panel finds that the cumulative effects on some elements of ACFN's culture are already adverse, long-term, likely irreversible, and significant and that these effects are likely to increase in

the future if the projects identified in the application case and PDC [Planned Development Case] proceed as planned. (1483)

18. In its Report, the Panel made 88 recommendations to the Crown to address the issues it had identified. Many of those recommendations relate to the expected impacts of the Project on ACFN's Rights, culture and traditional land use activities and the resources upon which those activities depend. The Panel's recommendations can be found in context throughout my Affidavit, and are also listed at Appendix 6 to the Panel Report, which starts at text page 373 of **Exhibit "9"** of my Affidavit.

19. The Panel recommended conservation offsets (also known as conservation allowances) several times, i.e. Recommendations 28, 36, 52, 55, 76. ACFN understands conservation offsets to be lands set aside to protect certain values as compensation for what would be destroyed by the Project – for example wetlands, caribou habitat, and lands critical for continued rights exercise. For example, the Panel stated:

Given that few options are available for avoiding or minimizing the adverse effects of large surface mines, the use of conservation offsets may be necessary. The MBCA [*Migratory Birds Convention Act*], the SARA [*Species at Risk Act*], the CWA [*Canada Wildlife Act*] and CEAA, 2012 all provide opportunities for EC to consider a proposal for conservation allowance as a means of mitigating residual environmental effects. (para 699) The Panel recommends that before other provincial and federal approvals are issued, the Governments of Canada and Alberta cooperatively consider the need for conservation offsets to address the significant adverse project effects to wetlands, wetland-reliant species at risk, migratory birds that are wetland-reliant or species at risk, and biodiversity and the significant adverse cumulative effects to 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, biodiversity and Aboriginal traditional use. . . . Integration of Aboriginal traditional use needs should be part of the implementation process. Where possible, the requirements for conservation offsets should be formalized through permitting or approval conditions (para. 1828).

20. Some of the other Panel recommendations related to impacts on ACFN and its traditional resources are listed below.

The Panel recognizes that ACFN has significant unresolved concerns about the proposed diversion of the Muskeg River, including the potential for impacts on its TLU activities, the exercise of Aboriginal rights, and on the spirit of the river (408). The Panel notes that ACFN has significant unresolved concerns related to Shell's plan to divert the upper portion of the mainstem of the Muskeg River, including its effect on the spirit of the river (1483) . . . in light of ACFN's unresolved concerns, the Panel recommends that the Governments of Alberta and Canada consider ACFN's unresolved concerns about the diversion of the Muskeg River and the need for additional consultation, mitigation, or accommodation before other provincial and federal approvals are issued. (1484).

the Panel recommends that the Governments of Canada and Alberta ensure that Shell monitors the distribution and behaviour of caribou predators (namely wolves) and their usual prey (e.g. deer and moose) following clearing of the LSA to assess the potential indirect effects to the Richardson Range. (853)

The Panel recommends that the Government of Canada ensure that Shell conducts further research and survey work to determine the extent to which caribou are using the LSA, and if they are, to determine the number of people inhabiting the area and their connection to the caribou in the Richardson Range. The Panel recommends that the Government of Canada ensure that Shell work collaboratively with Aboriginal groups in carrying out this research. The results of this work should be provided to the Government of Alberta to help update caribou range plans in Alberta (854).

The Panel notes that the federal recovery strategy under SARA is over 10 years late. . . .(873) Given that the recovery strategy is considerably overdue, the Panel recommends that the Government of Canada consult with Aboriginal groups to help inform the federal recovery strategy for wood bison and ensure its expeditious deliver. The Panel also recommends that critical habitat for bison be identified in the federal recovery strategy to provide context for future decisions on oil sands development in the Athabasca region. (878)

21. At paragraph 1463, the Panel acknowledged ACFN's frustration with a perceived unwillingness by Canada to meaningfully consult and work with ACFN to address its concerns about the Project, the taking up of lands, and the assessment and management of cumulative effects. The Panel noted Canada's statement there would be additional opportunities for consultation after the Panel's report had been completed and before Crown decisions or regulatory authorizations were issued for the Project. The Panel recommended that before

other federal approvals issued, Canada consider the adequacy of the Crown's consultation with each of the affected Aboriginal groups in light of the issues identified in the Panel Report, including likely significant adverse Project and cumulative effects to a number of resources important to Aboriginal people and likely significant adverse cumulative effects to Aboriginal traditional land use, rights and culture: see paras. 1305 and 1465.

### **Post Report Consultation**

22. Under *CEAA 2012*, Canada had until November 6, 2013 to decide whether to approve the Project and if so, on what conditions.

23. On July 9, 2013, Ms. Dunn contacted me via email and explained that the Panel Report had come out, and that she wished to meet with ACFN in mid August for one day to discuss the Panel Report. A copy of Ms. Dunn's email and the attached letter are attached to my Affidavit as **Exhibit "10"**. The letter asked ACFN to answer the same questions that were contained in the draft letter that Ms. Dunn had sent to ACFN on June 25, 2013. The letter requested ACFN's answers in writing by August 9, 2013.

24. A meeting was scheduled for August 13, 2013 (the "**August 13 Meeting**"). This was a very inconvenient time for the IRC as we were busy preparing for the hearing of a large scale winter exploration and drilling program in support of Teck's proposed Frontier Mine that could impact the Ronald Lake Bison herd. The Agency strongly communicated that it needed to meet within a very specific time frame, so we did our best to accommodate their needs.

25. On July 16 Ms. Dunn emailed me an ACFN-specific excerpt of a draft Crown Consultation Report (the "**First Draft Report**") and a summary of the Agency's issues tracking table. The issues tracking table had not been updated to reflect the findings of the Panel Report. A copy of Ms. Dunn's July 16 email is attached to my Affidavit as **Exhibit "11"**. A copy of the First Draft Report is

attached to my Affidavit as **Exhibit “12”**. A copy of the summary of the issues tracking table is attached to my Affidavit as **Exhibit “13”**.

26. On August 1, 2013 the Agency’s Ms. Dhaliwal emailed me a Draft Agenda and list of participants for the August 13 Meeting. A copy of the email, list of participants and agenda is attached to my Affidavit as **Exhibit “14”**. The list of participants included representatives from Alberta and Shell. I replied to object to the presence of Shell and Alberta, and to request that federal decision makers attend the meeting. On August 2 Ms. Dunn clarified that Shell had been included in error and would not be attending the meeting. A copy of this email string is attached as **Exhibit “15”** to my Affidavit. Alberta was eventually removed from the list of participants.

27. On August 2 the IRC’s Amanda Annand requested that Canada attend an ACFN-Alberta meeting regarding the Ronald Lake Wood Bison herd. Ms. Dunn replied on August 6 and a copy of this email string, on which I was copied, is attached to my Affidavit as **Exhibit “16”**.

28. On August 7 Ms. Dunn wrote to remind the IRC that ACFN’s deadline for written comments on the Panel Report was August 9 and that the focus of our written comments and of the August 13 Meeting would be for Canada to hear ACFN’s views on the questions posed in Canada’s July 9 letter. A copy of this email is attached to my Affidavit as **Exhibit “17”**.

29. On August 8 IRC staff Amanda Annand wrote to the Agency and requested that Environment Canada representatives be prepared to speak to a specific matter regarding the Ronald Lake Wood Bison herd at the August 13 Meeting. Ms. Dunn replied on August 9 that although Wood Bison were discussed in the Panel Report, ACFN’s technical questions and concerns regarding Wood Bison may be better addressed in a different forum, and that consultations on the Wood Bison Recovery Strategy were proposed for late 2013. Ms. Dunn reminded Ms. Annand that the purpose of the August 13 Meeting was “most importantly, for the federal team to hear ACFN’s views on” the questions

posed in the Agency's July 9 letter. A copy of this email string, on which I was copied, is attached to my Affidavit as **Exhibit "18"**.

30. ACFN's legal counsel replied to Ms. Dunn's email of August 9, on my instruction, and that email is part of **Exhibit "18"**. In that email, ACFN's legal counsel proposed an additional purpose to the meeting, namely that Canada share its preliminary views on five issues:

- (i) the Panel's findings and recommendations;
- (ii) the severity of impacts to ACFN's Treaty Rights;
- (iii) what Canada currently considers to be potential mitigation and accommodation measures;
- (iv) what the Agency is currently considering recommending to the Minister; and
- (v) what Canada intends to consider in its justification and analysis under section 52(4).

31. On August 12 I sent a letter to Ms. Dunn (dated August 11, 2013) in preparation for the August 13 Meeting (the "**August 11 Letter**"). A copy of my August 11 Letter and cover email are attached to my Affidavit as **Exhibit "19"**.

32. In the August 11 Letter, I answered the Agency's questions on behalf of ACFN as best I could given that the Report was over 400 pages and that the IRC had not yet secured new direction from Council since the issuance of the Report, as summer holiday schedules precluded meeting over that period. I noted matters that ACFN considered well-handled in the Report and points that ACFN considered the Panel to have mischaracterized or neglected. I reviewed Panel recommendations that ACFN supported, and identified modifications that ACFN would like to see to some of the Panel's recommendations. I identified residual concerns of ACFN that were not addressed in the Report and proposed measures to address those residual concerns.

33. I raised some additional matters in my August 11 Letter, including the following:

- a) I reminded Ms. Dunn that Canada had committed to ACFN and in arguments to the Panel, the Alberta Court of Appeal and the Supreme Court of Canada that it would engage in substantive consultations about the Project *after* the Panel had released its Report and that it would still have the capacity, at that time, to deal with ACFN's concerns "in good faith, and with the intention of substantially addressing them".
- b) I stressed that immediate, tangible and fundamental changes are required to the management of the oil sands industry if Canada is to honour its Treaty 8 promises to ACFN and if ACFN's culture, traditional uses, knowledge and resources are to survive.
- c) I reiterated ACFN's call for a five year moratorium on oil sands development while the Crown gathers the information required to properly understand the impacts of that industry on the environment and on ACFN's rights and also implements management systems to make that industry sustainable and help protect ACFN's Treaty rights, traditional land uses and culture.
- d) I stressed that ACFN consistently sought to engage the Crown prior to the release of the Panel Report that the time allowed for Phase IV consultation under *CEAA 2012* is too short for this Project, and I requested, on behalf of ACFN, an extension of the timeline for Canada's decision-making.
- e) I emphasized that the current timeline placed an extremely difficult and unreasonable burden on ACFN given its limited resources.
- f) I identified ACFN's extensive problems with the First Draft Report.

- g) In light of the failure of the First Draft Report to come even close to capturing ACFN's concerns about the Project and the outstanding issues, I requested a direct meeting between the ACFN Chief and Canada's Minister of Environment (the "**Minister**") to discuss the findings of the Panel and what steps Canada is willing to take to uphold its Treaty 8 commitments to ACFN.
- h) I requested that ACFN have the opportunity to make submissions directly to Cabinet about whether the significant adverse impacts identified by the Panel could be justified in the circumstances before Cabinet decided whether to approve the Project.
- i) I also requested that upcoming meetings include Crown representatives with the mandate to negotiate and implement binding mitigations and accommodations.
- j) I requested that Canada share its views on most of the issues that Ms. Biem had identified for Ms. Dunn in her email of August 9, which I describe above, so as to ensure a two-way consultation process between Canada and ACFN. This included a request that Canada share that section of the Crown Consultation Report that explained the Crown's views on the adequacy of consultation and accommodation with ACFN.

34. I was frustrated that after years of Canada telling ACFN that its concerns would be addressed after the Panel Report, that ACFN should put its issues before the Panel, and that the Panel hearing process and Report would inform the Crown Consultation Report, the Agency had tabled what seemed to me to be such a short, erroneous, misleading, and dismissive summary of ACFN's concerns and recommendations as what was contained in the First Draft Report.

35. ACFN poured tremendous financial and human resources into an intervention at the Hearing to try to make sure that the Crown and the Panel

would understand its concerns and the impacts of the Project on ACFN's Rights. We submitted thousands of pages of written evidence, provided days of live testimony, and hours of final argument. The Panel heard ACFN on many issues, but those Panel findings were not reflected in the First Draft Report. It seemed to me that the Agency could have written the First Draft Report simply based on earlier correspondence with ACFN, and without ACFN having bothered to go through the long and arduous Panel process at all.

36. The August 13 Meeting largely involved a review of ACFN's August 11 Letter, with the Agency mostly seeking clarifications.

37. Some of Canada's representatives, including Marek Janowicz and Cheryl Baraneicki, had not reviewed relevant sections of the Panel Report yet and were unable to engage in a fulsome discussion with us. For example, Mr. Janowicz could not speak to the ability of the Department of Fisheries and Oceans ("**DFO**") to implement certain recommendations. Ms. Baraneicki was not yet in a position to discuss what Environment Canada thought it could do to implement the Panel's recommendations. With few exceptions, Canada's representatives did not respond to the issues, questions or concerns that ACFN raised. During this meeting, Ms. Dunn advised that Canada's representatives had only planned to review our written comments and meet with us once before advising the Minister on Crown consultation and the Project.

38. We ran out of time at the August 13 Meeting and so we met again on August 16 to continue our discussion of the items raised in ACFN's August 11 Letter. During this meeting, Jenny Biem asked if ACFN could see the recommendation on the adequacy of Crown consultation with ACFN before it was provided to the Minister. Ms. Dunn noted the request but said that the recommendation may be considered confidential as a briefing to the Minister.

39. On August 23, Ms. Dunn emailed me a revised ACFN-specific excerpt of the draft Crown Consultation Report (the "**Second Draft Report**"). She did not share any section regarding the adequacy of consultation and accommodation,

despite our repeated requests to see this. A copy of Ms. Dunn's email and the Second Draft Report is attached to my Affidavit as **Exhibit "20"**.

40. On September 9, I emailed a letter to Ms. Dunn. A copy of the email and letter are attached to my Affidavit as **Exhibit "21"**. In my letter, I requested that Canada address issues that I and other ACFN representatives had raised in writing in the August 11 Letter and in person on August 13 and 16, such as:

- a) Canada's preliminary views on a number of issues relevant to the consultation process, including the Panel's findings and recommendations and the severity of the impacts of the Project on ACFN's Treaty rights;
- b) whether Canada would extend the timeframe for issuing its Decision Statement for the Project;
- c) whether ACFN could meet with the Minister to discuss the Project.

41. In my September 9 letter I also provided ACFN's response to the Second Draft Report. I requested that ACFN be given a draft of any recommendations going to the Minister and Cabinet so that we would be able to correct any misunderstandings. My letter identified many problems with the Second Draft Report. I again expressed the need for ACFN to have direct access to Canada's decision makers, so that meaning would not be lost in translation and so that ACFN could efficiently consult about mitigation and accommodation measures. I noted that in this case, the Crown consultation report format appeared unable to adequately and accurately convey the ACFN's evidence of adverse impacts and concern provided, or the related Panel findings and recommendations.

42. I highlighted the Second Draft Report's failure to convey the depth and urgency of ACFN's concerns overall. I noted the omission of ACFN's concerns and Panel findings related to the failures of and potential for the current regulatory system to allow for informed decision making and to address or effectively manage impacts to ACFN's s. 35 rights.

43. I also stressed that the Second Draft Report did not provide the Minister or Cabinet with an accurate picture of the level of effort ACFN had put into trying to engage with Canada in relation to Project between 2007 and 2013.

44. I alerted Canada to the fact that the Second Draft Report relied on an outdated traditional knowledge and land use report provided by ACFN to the Agency in 2011, and asked them to ensure that the next draft reflect ACFN's updated September 15, 2012 version that had been submitted to the Panel. I also noted the Second Draft Report's omission of ACFN's traditional knowledge and land use report's assessment of impacts to caribou, bison, and reserves.

45. I noted that the summary of consultation failed to explain ACFN's concerns, and failed to acknowledge that they were substantiated by expert evidence. I expressed my shock that the Second Draft Report reduced the Project's socio-economic and cultural effects on ACFN to three lines of text. ACFN had submitted to the Panel a large body of written and oral evidence on these points and raised multi-faceted concerns regarding such effects, explaining how they were linked to its Rights.

46. I observed that the Second Draft Report did not communicate to the Minister or Cabinet ACFN's specific concerns regarding the consultation process and our suggestions for what should be done as next steps in this process to address ACFN's concerns.

47. I noted that the summary of Panel conclusions on ACFN's concerns in the Second Draft Report omitted or understated key findings. For example, woodland caribou is a key concern for ACFN. The Panel found that there was a catastrophic loss of caribou habitat, and made several important findings and recommendations to Canada regarding caribou that were omitted. I identified many other errors, omissions and mischaracterizations in the Second Draft Report.

48. On September 11, 2013 I sent an email to Ms. Dunn to clarify a small error in my September 9 correspondence: that ACFN sought a 5 year moratorium for approvals north of the Firebag River, rather than a 5 year moratorium in the oil sands as a whole. Ms. Dunn replied and a copy of this email string is attached to my Affidavit as **Exhibit “22”**.

49. On September 19, 2013 IRC staff member Amanda Annand followed up with Ms. Dunn to request that Canada answer the questions we had posed in August and reiterated in my September 9 letter, prior to September 23. Ms. Dunn replied that Canada was still working on its response. A copy of Ms. Annand and Ms. Dunn’s email exchanges on this matter, on which I was copied, is attached to my Affidavit as **Exhibit “23”**.

50. Ms. Spagnuolo, on behalf of Ms. Dunn, emailed Ms. Dunn’s September 27 letter in response to our letter of September 9, but it did not answer most of ACFN’s questions. A copy of Canada’s September 27, 2013 correspondence is attached to my Affidavit as **Exhibit “24”**.

51. I was surprised to learn from the September 27 letter that Canada now refused to share its issues tracking table with ACFN, which contained a summary of information provided by ACFN. I was very surprised to learn that Canada could not share its preliminary views and positions on the Panel’s recommendations because it was still analysing them. The September 27 letter indicated that almost 12 weeks after the Panel Report issued, and just over five weeks from the deadline for a decision on the Project, Canada was still unsure as to which Panel recommendations were within its jurisdiction. This was extremely frustrating to me. Despite our limited resources and vacation schedules, ACFN’s team worked very hard to provide preliminary views and positions to Canada on August 12.

52. Ms. Dunn attached to her letter some sparse minutes from two teleconferences the Agency had with Shell and Alberta to discuss Shell’s consultation with First Nations on Project. The teleconferences were held in April

and June 2013 respectively. During the Hearing, ACFN conducted cross examination, provided testimony, and made final argument about the practice of government agencies meeting with proponents behind closed doors to discuss First Nations concerns and impacts. All parties with an interest in Crown consultation on the Project were present at those teleconferences except the Aboriginal groups whose rights consultation is intended to protect.

53. On September 30, Ms. Dunn emailed me to clarify a small error in her correspondence. A copy of this email is attached to my Affidavit as **Exhibit “25”**.

54. On Friday, October 11 at 5:01 pm I received an invitation from Ms. Dunn for ACFN to meet with Canada during the week of October 21, where Canada proposed to describe its contemplated responses to the Panel recommendations, as well as the mitigation and accommodation measures Canada was considering. When I saw this email, I made efforts to contact various ACFN members to see if they could attend a meeting that week. I replied to Ms. Dunn on Wednesday October 16 advising that I could not yet confirm a meeting date.

55. In my email of October 16, I also requested that Ms. Dunn provide the information she proposed to discuss in writing, in advance of the ACFN-Canada meeting. I asked her to include Canada’s views on how Canada’s responses, mitigations and accommodations related to ACFN’s information and stated concerns. I asked her to clarify whether Canada would discuss what the Agency would recommend to the Minister regarding the adequacy of consultation, and to clarify whether the Agency’s Bruce Morgan, who was scheduled to attend our upcoming meeting, had the mandate to negotiate with ACFN and to revise Canada’s proposed responses, mitigations and accommodation measures. On October 18, Ms. Dunn advised that the Agency would respond to some of my requests in writing. A copy of this email string is attached to my Affidavit as **Exhibit “26”**. A copy of each of the attachments provided by Ms. Dunn with her email, called Jackpine JRP-Recommendations Oct18-2013.pdf, and Draft Agenda

Jackpine ACFN CEAA, are attached as **Exhibit “27”** and **Exhibit “28”** respectively.

56. **Exhibit “27”** contained three tables: “List of Panel Recommendations to the governments of Canada related to *CEAA 2012* section 5 effects”, “List of Panel Recommendations to the governments of Canada not related to *CEAA 2012* section 5 effects”, and “List of Panel Recommendations to the government of Alberta”. Later that day Mr. Morgan clarified that recommendations in **Exhibit “27”** in the table titled “not related to *CEAA 2012* section 5 effects” were items that Canada could not address through conditions under *CEAA 2012* but that it could address by other means. A copy of an excerpt of that email string is attached to my Affidavit as **Exhibit “29”**.

57. On October 18, I was copied on a letter that our legal counsel Jenny Biem wrote to the Honourable Leona Aglukkaq, on my instruction, following up on ACFN’s August 11 Letter request that the time for decision on the Project be extended in order to allow for a respectful and legal consultation process between Canada and ACFN. A copy of this letter is attached to my Affidavit as **Exhibit “30”**.

58. On October 23, I received an email from Ms. Dunn attaching a letter from Mr. Morgan about consultation on the Project, as well as a table of Canada’s potential responses to the Panel’s recommendations (the “**October 23 Table**”). This was essentially two tables. The first table reviewed the Panel’s recommendations and proposed what Project approval conditions Canada should adopt, in light of those recommendations, if Canada approved the Project. The second table reviewed the Panel’s recommendations and proposed what other responses Canada should adopt in light of those recommendations if Canada approved the Project. A copy of the email, letter, and draft agenda is attached to my Affidavit as **Exhibit “31”**. A copy of the October 23 Table is attached to my Affidavit as **Exhibit “32”**.

59. On October 23 I wrote to Minister Aglukkaq on behalf of ACFN Chief Adam. I expressed concern with the consultation progress on the Project and reiterated the request that the Minister meet directly with Chief Adam, and that she extend the time for the Crown's decision on whether to approve the Project. A copy of this email is attached to my Affidavit as **Exhibit "33"**.

60. On October 24, I received an email from Margaret Fairbairn at Environment Canada enclosing a letter from Cheryl Baraniecki that discussed certain of ACFN's concerns regarding wood bison and woodland caribou, both listed under the *Species at Risk Act*. A copy of this email and letter are attached to my Affidavit as **Exhibit "34"**. Throughout the Project's consultation process, ACFN had repeatedly requested that Emergency Orders issue to protect certain woodland caribou herds within its traditional lands, and the Ronald Lake Wood Bison herd. Environment Canada did not respond to our recent requests for the Woodland Caribou emergency order, except to refer us to a January 13, 2012 Ministerial decision that there was no imminent threat to the survival or recovery of the boreal population of woodland caribou in Canada as a whole. Canada told us to follow up with Alberta regarding the progress and implementation of range plans for woodland caribou.

61. Regarding the Ronald Lake Bison herd, Ms. Fairbairn reported that the Minister had not evaluated whether to issue an Emergency Order for wood bison in general or the Ronald Lake herd in particular.

62. I was surprised to read that Canada was now saying that a draft Recovery Strategy for wood bison would be done in 2014. During the Hearing, I heard Environment Canada witness, Mr. Richard Wiacek, say that a draft Wood Bison Recovery Strategy would be ready by the end of 2013). In 2010 during the joint review panel hearing for a different project, Total's Joslyn North, Environment Canada witness Dr. Dave Duncan said that he anticipated that draft Wood Bison Recovery Strategy would be issued in 2011. A copy of an excerpt of the certified

transcript for the Total Joslyn North Panel hearings, Volume 8, October 7, 2010 is attached to my Affidavit as **Exhibit “35”**.

63. On October 30, 2013, Minister Aglukkaq responded to my email of October 23 in which I had requested that she meet directly with ACFN and in which I had noted that the Crown had thus far failed to respond to our request for an extension of the Phase IV consultation process. In her letter, the Minister told ACFN to continue to engage with the Agency so that ACFN’s concerns “can be considered”. She did not comment on ACFN’s request to extend the consultation period. A copy of the Minister’s correspondence is attached to my Affidavit as **Exhibit “36”**.

64. On October 30, 2013 Alberta Environment and Sustainable Resource Development Minister Diana McQueen wrote to Minister Aglukkaq regarding the Lower Athabasca Regional Plan and other provincial policies of interest. I did not see a copy of this letter until February 13, 2014, when it was forwarded to me by ACFN’s legal counsel Jenny Biem. She told me that her office had received the letter as part of the Crown’s disclosure of its decision-making record for this litigation. I wish ACFN had had the opportunity to review and provide comments and questions to Canada about the letter before it approved the Project. I will provide some examples of how this letter provides an inaccurate or misleading account of the efforts that Alberta is making to address issues of concern to ACFN.

65. On October 31 ACFN met with Canada (the “**October 31 Meeting**”). I attended that meeting. The first question the Chair of ACFN Elders’ committee, Pat Marcel, asked Canada’s representatives was about access to Canada’s decision makers, and whether those in attendance had the mandate to negotiate with us. Bruce Morgan, Vice-President of Operations at the Agency, told us that Canada’s representatives did not have the mandate to negotiate with us, beyond potentially saying “yes” to some types of changes to Canada’s proposed Project approval conditions. Mr. Morgan advised he would be meeting with the Minister,

and would take a few key messages to impress on the Minister from each Aboriginal group.

66. I told Canada's representatives at the October 31 Meeting that we needed more time to have a reasonable and fair consultation process.

67. I told Canada's representatives that ACFN had little confidence in Project approval conditions that relied on the proponent to address ACFN's concerns. Mr. Morgan referenced the compliance and enforcement provisions of *CEAA 2012* but later in the meeting Mr. Morgan advised that Canada would not apply provisions such as stop work orders or prosecutions to enforce approval conditions requiring the proponent to work with ACFN.

68. I alerted Canada's representatives to ACFN's statutory request, filed pursuant to the *Alberta Land Stewardship Act*, for the review and amendment of Alberta's Lower Athabasca Regional Plan ("**LARP**"). I explained some of the problems with LARP in its treatment – or more specifically, neglect of, s. 35 rights. We wanted Canada to know they could not rely on LARP in particular or Alberta in general to address impacts to ACFN's Rights. Mr. Morgan advised that Canada was seeking written commitments from Alberta and that those would be shared with ACFN. ACFN asked that information about exchanges between Alberta and Canada be shared, including a copy of any such written commitment from Alberta. Mr. Morgan advised that the Agency's objective was to make that statement public, in the interests of transparency.

69. I let them know that even if they implemented all of ACFN's suggestions on the proposed Project approval conditions, these measures would not suffice to accommodate ACFN's Rights. I stated that some of the Project's impacts could not simply be addressed through Project-specific conditions. For example, permit conditions that require Shell to maintain water quality and quantity in the Muskeg River Diversion do not address the cultural heritage impacts and mental health impacts that ACFN members will experience from the destruction of the River.

70. During the October 31 Meeting, Elder Pat Marcel explained the critical importance of the Ronald Lake Bison herd to ACFN, and the importance of maintaining the herd's habitat for its survival. He expressed his concerns about Shell's proposal to build its fish habitat compensation lake within the herd's habitat, and about the fact that other development was proposed for the habitat as well.

71. I noted that Canada was already many years late in developing the recovery strategy for bison, and that is why ACFN was seeking an emergency protection order for the Ronald Lake Bison herd. Canada Mr. Morgan told us during the October 31 Meeting that Canada would not provide an emergency order to protect the Ronald Lake Bison herd as accommodation, because emergency orders are "hard to come by" and are reserved for when they are required for the species as a whole.

72. Elder Marcel also described the need to protect habitat for woodland caribou herds. We discussed the cultural and spiritual importance of the Muskeg River to ACFN, and how conditions regarding the biophysical qualities of the water or reclamation did not address the impacts associated with diverting the river.

73. At the October 31 Meeting, I asked Canada to explain how its proposed conditions and responses in the October 23 Table addressed the particular concerns and requests of ACFN, and what gaps still required mitigation and accommodation. I asked them to provide that analysis. Mr. Morgan replied that Canada was continually trying to get a sense from ACFN of what the gap was between Canada's proposed actions and the Project impacts expected by ACFN. I pointed out that if Canada still wasn't clear on what the impacts were, it would be difficult to properly mitigate and that Canada and ACFN needed more time to consult meaningfully, in a way that went beyond simply reading documents and commenting on them.

74. We talked a bit about conservation offsets at the October 31 Meeting. Bruce Morgan advised that Canada did not think that Project specific offsets would be required as conditions for Project approval. The Agency had determined that conservation offsets were best developed at the regional level.

75. Mr. Morgan advised ACFN in the October 31 Meeting that the Agency would try to provide the revised Crown Consultation Report to ACFN but that the schedule was outside of his control because the Crown was due to decide whether to approve the Project by November 6. Therefore, he told us that ACFN might not get the opportunity to review the revised Crown Consultation Report before it went to the Minister.

76. Mr. Morgan committed to providing ACFN with a copy of the Agency's notes for the October 31 Meeting, with the Agency's revised recommended approval conditions, and a written explanation as to how Canada's proposed approval conditions related to ACFN's residual concerns with the Project.

77. On November 1, I wrote to Canada regarding ACFN's overarching concerns with Canada's proposed conditions and responses to the Panel recommendations. My assistant Laura Mitchell emailed this letter, along with a chart of those detailed comments that ACFN was able to provide given the constraints of time and funding. We did not reiterate many of the mitigation and accommodation proposals that ACFN had previously tabled, even where they remained outstanding, but rather tried to focus on the Agency's October 23 Table of proposed conditions and responses to the Panel recommendations. Ms. Mitchell's email and my letter are attached as **Exhibit "37"** to my Affidavit. Ms. Mitchell had to split the chart into several sections to transmit it via email, and the sections were not sent in order. A copy of ACFN's comments is attached to my Affidavit as **Exhibit "38"**. I have compared the copies sent to Canada on November 1 against the copy attached to my Affidavit. I confirm the content is the same, but that the pages have been re-ordered for ease of reading.

78. On November 1, Ms. Mitchell also emailed to Ms. Dunn, Mr. Morgan and others ACFN's two-part Request for a statutory Review of the LARP that ACFN had filed under the *Alberta Land Stewardship Act*. My sense was that Canada intended to rely on Alberta's LARP to mitigate and accommodate several of the direct and cumulative impacts of the Project on ACFN. ACFN wanted to remind Canada that in addition to voicing our concerns with the LARP for several years prior to its implementation in September 2012, a fact that we had emphasized at the Hearing, ACFN was now taking legal action to have LARP amended because it provides no meaningful protection for ACFN's section 35 rights. A copy of ACFN's August 19 statutory Review Request is attached as **Exhibit "39"** to my Affidavit. A copy of ACFN's August 31 Supplemental Request is attached as **Exhibit "40"** to my Affidavit.

79. Under *CEAA 2012*, Canada had a deadline of November 6, 2013 to issue its Decision Statement. Ever since the Panel had issued its massive Report, ACFN had been repeatedly requesting, in writing and in our meetings with the Agency, that Canada extend that deadline in order to allow for meaningful Crown-ACFN consultation to take place. Canada finally responded to our request on November 6, when Ms. Dunn wrote to let us know that the Minister had extended by 35 calendar days the timeline for issuing the Decision Statement. A copy of this email is attached to my Affidavit as **Exhibit "41"**.

80. On November 8 I wrote to Ms. Dunn and Mr. Morgan to highlight the fact that Canada needed more than 35 days to complete its consultation process with ACFN. However, I also stated in the letter that ACFN was prepared to do its part to accomplish as much as possible over the next month. I requested assurances that prior to our members and leadership putting more time into the process, Canada would appoint a mandated negotiator to work with ACFN to identify and secure appropriate mitigation and accommodation measures. I expressed ACFN's discomfort with the fact that many of the proposed conditions and responses in the Agency's October 23 Table amounted to vague commitments that Canada might perhaps take action at some future date and made it clear that the ACFN

requires real commitments to act, to do. I requested a response to our November 1 comments so that we had up-to-date information to present to the ACFN community. A copy of my email and the letter are attached to my Affidavit as **Exhibit “42”**.

81. In early November, I contacted Cheryl Baraniecki, Regional Director, Environmental Protection Operations Directorate, Prairie & Northern Region, Environment Canada to let her know that Chief Adam and I would be in Edmonton on November 13, and that it might be a good opportunity for us to have a constructive dialogue on certain issues ACFN had raised in relation to the Project. Ms. Baraniecki indicated she was available, so on November 7 I sent her a proposed agenda that included discussion around Canada’s reliance on Alberta and specifically on LARP to address the impacts of Project on ACFN. A copy of my email is attached to my Affidavit as **Exhibit “43”**.

82. Chief Adam and I met with Ms. Baraniecki, a number of other Environment Canada representatives, November 13 in Edmonton. Mr. Morgan and Mr. Wayland participated by telephone. A copy of my notes from this meeting is attached to my Affidavit as **Exhibit “44”**.

83. At this meeting we discussed several items, including but not limited to the following:

- a) The Minister indicated that an additional 35 days was required to reach her decision, and that the 35 days would be used to ensure the views brought forward by Aboriginal groups were considered as part of decision making for the Project.
- b) A recent breach of a tailings pond into the Athabasca River. Environment Canada agreed to confirm with ACFN what role Environment Canada had with respect to the breach.
- c) Mr. Ingstrup agreed that the Ronald Lake Bison herd needs to be protected and that the herd and its habitat were worthy of

protection, but that the recovery plan for bison had been delayed due to disease concerns, although testing to date has shown that the herd was disease free. We discussed ACFN's request for an Emergency Order, Environment Canada's timeline for taking the request to the Minister, and ACFN's view that the analysis should include a consideration of Canada's constitutional obligations and the herd-specific concerns raised by ACFN.

- d) We discussed the proposed Decision Statement for the Project, including some of the information it would require, or should require.
- e) We discussed conservation offsets, and Canada's view that project-specific offsets for the Project were not the best way to deal with the issues, and that conservation offset recommendations would be better dealt with through the LARP. ACFN was clear that we believed Project-specific conservation offsets were appropriate, and that Canada should not rely on LARP.
- f) Chief Adam proposed that a work plan be developed and that the Minister delay decision-making for six months so that Canada and ACFN could work to address some of the impacts associated with the Project. I understood Mr. Morgan and Ms. Baraniecki to express enthusiasm for this idea. Mr. Morgan agreed to brief the Minister regarding Chief Adam's proposal for a work plan. ACFN committed to providing a draft work plan to Environment Canada by November 28 that would inform further consultations prior to a decision being made on the Project. We understood that Environment Canada would work with us to finalize the workplan prior to December 3.

84. On November 15 I followed up with another email to Ms. Dunn requesting a response to my November 8 correspondence. A copy of this email is enclosed in the email string that is attached to my Affidavit as **Exhibit “45”**.

85. On November 18 Ms. Dunn provided via email Canada’s draft notes from our October 31 Meeting. Copies of the email and draft notes are attached to my affidavit as **Exhibit “46”**. Ms. Dunn requested ACFN’s comments by close of business on November 25. This was not possible for us to do with our limited staffing and resourcing. In particular, I was very busy working on drafting the work plan that Chief Adam had suggested, and that we understood Environment Canada had agreed to at the prior meeting. ACFN had committed to producing a draft of the work plan by November 28th. It seemed more important, with my limited time, to focus upon the work plan, something of substance that could help move the consultation process forward. As such, I did not have time to respond by November 25th but I did provide ACFN’s comments to Canada’s draft notes in early December, as I explain below.

86. On November 19 Ms. Dunn emailed me a letter from Mr. Morgan in response to ACFN’s November 1 and 8 correspondence. A copy of each of the email and letter are attached as **Exhibit “47”** to my Affidavit.

87. ACFN was extremely disappointed by Mr. Morgan’s November 19 letter. By this point, ACFN had provided the Agency with detailed feedback on potential mitigations and accommodations for the Project via all of our correspondence as well as in our meetings with the Agency. Canada, for its part, had provided only limited responses to our feedback or our proposals, and in some cases had not yet responded with any feedback at all.

88. Mr. Morgan’s letter of November 19 was brief and did not even touch on several of the specific questions we had asked, or concerns that we had raised, including, but not limited to:

- a) ACFN's unresolved concerns regarding the diversion of the Muskeg River;
- b) impacts on caribou, including Panel recommendations and ACFN's request for an Emergency Order;
- c) ACFN's request for Canada's proposal for accommodation measures in response to Recommendation 69, and for its response on whether it accepted certain Panel findings regarding loss of traditional land use and irreversible impacts to culture;
- d) ACFN's request for financial support programs for harvesters;
- e) ACFN community monitoring program to receive a portion of the funds currently allocated to the Joint Monitoring Program;
- f) requiring Shell to enter into an enforceable mitigation and accommodation agreement with ACFN, and making any federal authorizations conditional upon completion of said agreement in advance of construction;
- g) the collection of information and design of appropriate mitigations to protect migratory birds; and
- h) ACFN's request that recommendation 16 – that Shell update its models to account for sources of aerial deposition of mercury and PAH and provide results to Canada to determine appropriate mitigation measures - be implemented prior to Decision.

89. Hoping that a more detailed response to ACFN's feedback and proposals was still to come, I emailed Ms. Dunn on November 20 asking if there was a response coming to my November 1 and 8 letters. Ms. Dunn confirmed that the letter I received on November 19 was Canada's response. A copy of that email string is attached to my Affidavit as **Exhibit "48"**.

90. On November 21, Canada's Ms. Hendrickson emailed me Canada's notes of the November 13 meeting. A copy of this email and Canada's meeting notes are attached to my Affidavit as **Exhibit "49"**. I did not have time to review these notes until after I finalized ACFN's draft work plan on November 26. I did not realize that ACFN and Canada had such different understandings of the purpose of the workplan. I reviewed these meeting notes after I reviewed Mr. Morgan's letter of November 29, 2013, wherein he stated that the work plan I provided was not the workplan that had been discussed nor agreed to at the meeting. I observed that at the bottom of the page containing the heading "Workplan", Mr. Morgan had made a comment that he did commit to brief the Minister on the work plan, but that Canada needed to carefully frame the outcome. The outcome as framed below the comment does not accord with my recollection of what we discussed on November 13.

91. I worked very hard to produce a draft work plan for Canada's review, in an attempt to help Canada and ACFN move forward in the Project consultation process. I emailed this draft work plan to Mr. Morgan, Ms. Dunn, ACFN Chief and Council and others on November 26. A copy of that email and ACFN's draft work plan is attached to my Affidavit as **Exhibit "50"**.

92. Along with ACFN's draft work plan, I sent a number of enclosures including the following:

- a) I sent an email from Jennifer Grant of the Pembina Institute to me enclosing a September 19, 2013 letter from the Institute to Minister Aglukkaq, which is attached to my Affidavit as **Exhibit "51"**.
- b) I sent the entire transcript and transcript errata from the Teck winter drilling hearings, which I provided to Canada because it contains a lot of valuable traditional knowledge and technical discussion about bison, as well as discussion about the nature and scope of ACFN's s. 35 rights. I have only attached key excerpts of those transcripts to my Affidavit, as **Exhibit "52"** that discuss our

members' use and reliance on bison, and attachment to the lands where the Ronald Lake Bison herd is currently harvested.

93. In early November, I became aware that the Auditor General's office had released a 2013 Fall Report of the Commissioner for the Environment and Sustainable Development. I referenced some of the findings of the Commissioner in the workplan, but I did not attach it to my November 26 email. An excerpt of a copy of that portion of the Report called "The Commissioner's Perspective, Main Points Chapters 1 – 8" is attached to my Affidavit as **Exhibit "53"**. I confirmed on February 25, 2014 that the entire report can be located online at: [http://www.oag-bvg.gc.ca/internet/English/parl\\_cesd\\_201311\\_e\\_38658.html](http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201311_e_38658.html).

94. On November 29 Ms. Dunn emailed me Mr. Morgan's response to ACFN's draft work plan. This email and Mr. Morgan's response are attached to my Affidavit as **Exhibit "54"**. It is only at this point that I and others at ACFN realized that Canada understood that the work plan would serve a much more limited purpose than ACFN had understood. It had been clear to us that MR. Morgan would be briefing the Minister, and thus, this would include the "whole federal family" as he was employed by the Agency and the work plan was Agency related. This was very surprising, and disappointing, to us. Canada did not provide an alternative draft work plan. We had all agreed at the meeting - and I do not believe that there was any misunderstanding on this point - that Canada and ACFN would have completed a work plan by November 29 or, at the very latest, by December 3.

95. On December 4 I received an email from Ms. Dunn attaching a letter from Mr. Morgan. A copy of Ms. Dunn's email and Mr. Morgan's letter are attached to my Affidavit as **Exhibit "55"**. The letter explained that Canada has sought to accommodate ACFN's concerns about the Project through the preparation of potential conditions and preparation of potential responses to Panel recommendations, some of which it described. This letter did not alleviate my

concern about the lack of progress that had been made to date in the Phase IV consultation process. It was clear to me that there was still much work to be done.

96. On December 5, on behalf of Chief Adam I forwarded ACFN's draft work plan and attachments to Minister Aglukkaq, along with a letter from Chief Adam explaining ACFN's view of the work plan and the Phase IV process. Chief Adam's letter enclosed ACFN's draft supplemental work plan, which reflected some of what Mr. Morgan had listed in his November 29 correspondence as appropriate subjects for the work plan. We wanted to make sure that Minister Aglukkaq was aware of our November 26 correspondence. A copy of this email, and Chief Adam's letter, are attached as **Exhibit "56"** to my Affidavit. A copy of the draft supplemental work plan is attached as **Exhibit "57"** to my Affidavit.

97. On December 5, 2013 I provided ACFN's revisions to the Agency's draft October 31 Meeting Minutes. A copy of the email and revised meeting notes are attached to my Affidavit as **Exhibit "58"**. I believe that the Agency's notes as revised by ACFN reflect a more balanced and accurate record of the October 31 Meeting.

98. On December 5, 2013 I received a copy of Minister Aglukkaq's December 5 letter from ACFN's legal counsel. A copy of Minister Aglukkaq's December 5 letter is attached to my Affidavit as **Exhibit "59"**. This letter states:

The Athabasca Chipewyan First Nation's views have been and will continue to be brought to my attention by the Agency and will inform my decision with respect to the proposed project under *CEAA 2012*. To assist in this regard, on November 6, 2013, I extended the time limit for issuing the decision Statement by 35 days.

99. Minister Aglukkaq's letter confirmed my understanding that no final decision on the Project had been made yet, and that any further submissions from ACFN would be considered by the Minister prior to decision. At this point I was working hard to prepare supplemental submissions for Canada's consideration, in which I planned to include a discussion about the emergency order ACFN had

requested for certain woodland caribou herds. It appeared to me that Canada had lost track of that request and had not responded to this very important issue.

100. During the week of December 2, I also worked to prepare some supplemental submissions for Canada's consideration prior to its decision. A copy of that email and my letter are attached to my Affidavit as **Exhibit "60"**. The IRC's receptionist, Krissie Anderson, emailed these submissions to the Minister and Bruce Morgan on December 6, 2013, at 2:58 MST. She then emailed related attachments a few minutes later, copies of which are attached to my Affidavit as **Exhibits "61" and "62"**.

101. By this time, it was obvious to me that Canada was going to approve the Project. It had come to my attention that Canada was spending millions on a campaign to promote the oil sands. A copy of a Canadian Press article discussing this matter, which I cited in my letter of December 6, is attached to my Affidavit as **Exhibit "63"**. Therefore, ACFN insisted that, at minimum, a proper consultation process, resulting in some concrete mitigations and accommodations, be followed prior to decision.

102. In my letter of December 6, I also referred Canada to Mr. Eyford's report dated 29 November, 2013 in which Mr. Eyford, appointed as Canada's special representative on west coast energy infrastructure, shares his recommendations for Canada and First Nations to constructively address and reconcile their respective interests ("**Eyford Report**"). The focus of the report is on west coast energy infrastructure projects, but Mr. Eyford's recommendations appear relevant to energy developments in the oil sands region. I was hopeful that given Mr. Eyford's advice, Canada might once again delay its Decision Statement for the Project in order to complete consultation with us in a manner consistent with his recommendations. I confirmed on February 25, 2014 that the Eyford Report is available on Natural Resources Canada's website at: <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/www/pdf/publications/ForGP>

art-Online-e.pdf . A copy of an excerpt of the Eyford Report is attached to my Affidavit as **Exhibit “64”**.

103. I learned later that afternoon that Ms. Dunn emailed me notice of Canada’s Decision Statement and Government Response to Panel Recommendations at 2:50 MST on December 6. Copies of the email and letter are attached to my Affidavit as **Exhibit “65”**. I was dismayed to learn that Canada had reached a final decision, particularly in light of the Minister’s December 5<sup>th</sup> letter, which implied that the Minister had not yet reached a decision and which indicated that ACFN’s comments would continue to be brought to her attention and inform her decision-making.

104. Canada did not provide ACFN with any reasons for why it had concluded that the impacts of the Project on ACFN’s Rights were justified, nor did Canada provide ACFN with any reasons on or after December 6, 2013, for why it considered the Decision Statement and Response to Panel Recommendations to provide an adequate accommodation of ACFN’s Rights.

#### **Demands of the Project Phase IV Consultation Process on ACFN**

105. Given the large size of the Project and the significant adverse impacts that ACFN will experience from it, the timelines associated with Phase IV consultation on this Project were unrealistic and extremely taxing for ACFN. Canada was, or should have been aware, of the severe staffing and resourcing challenges faced by the IRC because I testified about these challenges during the Hearing, a Hearing that Canada said would inform its Phase IV consultation with ACFN. A copy of the certified transcript of my November 8, 2012 testimony on this issue is attached as **Exhibit “66”** to my Affidavit.

106. The IRC typically deals with dozens of project applications at any given time, many of which concern major projects. As I explained at the Hearing, we are very short staffed in relation to our workload. I typically receive over 100 emails or more in a week in my capacity as Consultation Coordinator. If another

staff person is away on leave or even for sick days, and I am covering for them, the amount of emails I will be expected to process will increase substantially. It is very difficult to arrange coverage when staff are on leave due to the socioeconomics of the area. Furthermore, working at the IRC requires specialized skills and training – its not something we can provide for shorter periods of time. I am not always able to answer emails promptly, as we have obligations at meetings, and work on other files, although I try my best. IRC staff put in significant amounts of overtime. Even so, we are not able to devote the attention I believe is reasonably required to participate in a meaningful or effective manner in the processes for many proposed developments and government actions.

107. The Agency demonstrated little understanding of ACFN’s capacity constraints during the Phase IV consultation. The Minister’s November 6, 35-day extension of Canada’s decision-making process was too short and came too late to alleviate the pressure that ACFN had already experienced by that point from the unrealistic consultation schedule.

108. I am informed by paragraph 80 of Canada’s October 15 submission to the Panel, a copy of which is attached to my Affidavit as **Exhibit “67”**, and I believe it to be true, that although Alberta relies on the Panel process as part of its consultation with us, Alberta has a general policy to not “participate or provide a written submission in the Joint Review Panel hearings. . .[because] the potential risks and workload demands for the Government of Alberta in preparing submissions and appearing at a Joint Review Panel hearing outweigh the potential benefits to the participating departments.”

109. Because the Crowns both say they rely on joint review panel hearings to inform their consultation with ACFN, we don’t have the luxury of opting out as Alberta has chosen to do. However, the cost to ACFN and increased workload demands on the IRC associated with full participation in the Hearing process were tremendous.

110. The Agency provided \$97,000 to facilitate ACFN's participation in the Hearing process.

111. The Agency provided \$12,800 to facilitate ACFN's participation in Phase IV consultation. This represents a small fraction of the costs that ACFN incurred engaging with Canada in Phase IV.

112. Shell also provided some funding. However, the funding received from each of the Crown and Shell did not come close to covering the costs of ACFN's participation in the process.

113. ACFN simply does not have limitless dollars to spend trying to convince Canada to meaningfully consult with the Nation on every project within its traditional lands. In addition to multiple mining and Steam Assisted Gravity Drainage oil sand development proposals, ACFN is also faced with dozens of winter drilling, forestry, aggregate extraction, and other development proposals each year.

114. The IRC also lacks sufficient human resources to participate as intensively as it did on the Project environmental assessment and consultation process for all projects that ACFN believes could have significant adverse impacts on its Rights. Currently we have seven staff. .

115. The pace of development on ACFN's traditional lands is intense and enormous in scope. The IRC participates in many project reviews and other governmental processes in an attempt to preserve the ability of current and future ACFN members to exercise their Rights, engage in their traditional uses, and maintain their culture. Serious engagement in such processes requires resources, particularly since these processes generally involve reviewing lots of technical information and analysis and also because the Crown generally expects ACFN to substantiate all of its concerns about the adverse effects of development on its Rights with evidence and analysis.

116. At the same time, my experience with the Project environmental assessment and consultation process leaves me unsure about the actual benefits of ACFN's participation in such processes, and I know from speaking with the ACFN Council members and the other staff at the IRC that others share my concern.

117. On the one hand, ACFN's participation had a real impact on the Panel Report. The Panel Report relied very heavily on ACFN's evidence, especially around traditional land use, rights and culture. To my knowledge, this is the first joint review panel report concerning an oil sands project to acknowledge significant adverse environmental impacts, and to acknowledge adverse impacts to traditional land use, Aboriginal and treaty rights, and culture. I believe that if ACFN had not participated to the extent that we did, the Panel would not have had sufficient information to discharge its mandate, or to make the findings that it did. Although ACFN was disappointed that the Panel concluded that the Project was in the public interest, and although it was disappointed that the Panel's recommendations to address the adverse impacts of the Project on ACFN's Rights did not go further, ACFN was pleased to see extensive recommendations aimed at addressing those adverse impacts.

118. Ultimately though, Canada did not implement most of the Panel's recommendations, and the Decision Statement and federal Response to the Panel Report fail to address most of ACFN's outstanding and serious concerns with the Project. From ACFN's perspective, the Decision Statement and Response do not come close to providing appropriate accommodation of ACFN's Rights.

119. So ACFN is in a catch 22: ACFN has to participate intensively and very proactively in major project reviews early on in order to inform the Crown of the project's potential impacts on its Rights and to try to secure meaningful protection of its Rights. At the same time, it is not clear that such engagement is worth the significant human and financial resources involved as the end result in this case

(the Decision Statement and Response) does not meaningfully protect ACFN's Rights.

120. If we do not show up and participate at hearings, it is unlikely that we will see any movement towards protecting our Rights. Our concerns will not likely be given weight, as they were not in the environmental assessment of Total's Joslyn North oil sands mine. An excerpt of that joint review panel decision is attached to my Affidavit as **Exhibit "68"**. If we don't participate in an environmental review process, then any resulting joint review panel report, which the Crown says it relies upon to guide consultation, will not reflect our concerns. But the time, energy and resources ACFN devoted to the process for this Project still leave ACFN's primary concerns outstanding and its Rights remain unprotected.

121. As a representative of ACFN, I am very disheartened and frustrated by the Project consultation process, and by how little impact ACFN's engagement, concerns, and proposals had on Canada's ultimate decision.

### **The McQueen Letter**

122. We weren't given the opportunity to review and comment on the October 30, 2013 from Alberta's Minister McQueen to Canada's Minister Aglukkaq regarding the LARP and other matters ("**McQueen Letter**"). A copy of this correspondence is attached to my Affidavit as **Exhibit "69"**.

123. We asked the Agency during our meeting on October 31 for information about exchanges between Alberta and Canada, including the names of who Canada was speaking with, as well as a copy of the correspondence from Alberta that contains assurances that issues would be addressed by Alberta. Mr. Morgan indicated that the Agency's objective was to make the written statement Canada received from Alberta public, in the interests of transparency. Had Canada followed through and shared the McQueen Letter with ACFN, I would have commented on the following aspects of the McQueen Letter.

124. In the third paragraph of page two of the McQueen Letter, Minister McQueen states “the Government of Alberta has been working collaboratively with stakeholders to further its offsets policy discussion”. I would have alerted Canada to the fact that ACFN had not been invited to discuss an offset policy with Alberta.

125. In the fourth paragraph of page two, Minister McQueen described the pilot conservation offset project underway in southeast Alberta, and stated:

The conservation offset pilot is an essential step in the development of fundamentally sound and practical conservation offset tools that could be delivered through a broader provincial offset program.

126. If given the opportunity to comment, I would have highlighted for Canada the fact that First Nations were not one of the parties listed as being involved in the collaborative approach; that the pilot sought to respond to industry’s business models and private land owner needs but not to the needs of First Nations, and that this approach was at odds with the spirit of the Panel recommendations regarding conservation offsets and the honour of the Crown.

127. Minister McQueen states, at the top of page 2, that Alberta’s wetland policy is expected to be fully operational by summer 2015. Given the opportunity, I would have provided examples to Canada of instances where Alberta’s representatives have told ACFN that certain steps would be taken within certain time frames, but are not. I would have strongly cautioned Canada against relying on this policy being operational by summer 2015. I would have recommended that Canada seek further information from Alberta about how the benefits provided by wetlands for the exercise of treaty rights and traditional land use were factored into Alberta’s Wetland Policy, and how Alberta would be applying the Wetland Policy to the Project.

128. While I did provide some information to Canada about whether it should rely on LARP in its decision regarding the Project, there some specific statements

in the McQueen Letter that I would have discussed with Canada, if given the opportunity. For example, this statement from the fifth paragraph on page 4:

. . . the Lower Athabasca Regional Plan also commits the Government of Alberta to the development of a Surface Water Quantity Management Framework and Tailings Management Framework. Aboriginal communities are engaged in the development of the Surface Water Quantity Management Framework for the Lower Athabasca River. Consultation is occurring this fall and the frameworks are nearing completion.

129. I would have alerted Canada that, in fact, consultation did not occur with ACFN in the fall. Our first meeting with Alberta to discuss the Surface Water Framework did not occur until February 14, 2014.

130. I would also have alerted Canada to my view that Alberta's assertion that "Aboriginal communities are engaged in the development of" was misleading. To my knowledge, ACFN's last formal involvement in the new rules for water withdrawals on the Athabasca was to make submissions to DFO and Alberta on the Phase 2 Framework Committee's non-consensus recommendation in 2010, before the subject of water withdrawals from the Lower Athabasca River got shuffled into LARP. To my knowledge, ACFN has not received any response from Alberta as to how the input it provided in 2010 was incorporated, if at all, into the current draft of the Water Management Framework. Our experience with Alberta's processes is that we provide input, but nothing changes. To my mind that does not qualify as being "engaged in the development of" anything.

131. In short, I would have done my best to communicate to Canada that most regional processes had been, and would likely be, little more than places to vent, where ACFN explains the concern and offers potential solutions but nothing changes. At this stage, we should be moving to actually reconcile the issues. These issues are not simply going to go away.

132. I would have noted that the discussion of the regional biodiversity management framework on pages 4 and 5 of the McQueen Letter does not include any reference to the establishment of targets based on traditional ecological

knowledge, Aboriginal harvesting needs, or the protection of Rights. I would have encouraged Canada to ask Alberta whether, and if so how, the biodiversity management framework would consider Aboriginal needs, and how it would address the significant Project-specific and cumulative impacts to biodiversity that the Panel report identified.

133. In relation to the discussion of caribou in paragraphs 3 and 4 on page 5, I would have informed Canada that ACFN is in active discussions about the Project with Alberta, that we had raised impacts to woodland caribou as one of ACFN's concerns, and that to our knowledge, range plans for the Richardson and Red Earth (Birch Mountain) herds were not being developed and had not even been started as of October 30. This understanding was confirmed during a meeting with Alberta regarding the Project on February 11, 2014 where I was advised by ASRD wildlife biologist Paul MacMahon that currently a range plan is only being developed for the Little Smoky and A La Peche herds and that there are currently no range plans being developed for the Richardson and Red Earth herds.

134. I would have let Canada know that as of December 5, ACFN had not been engaged on the regional biodiversity management framework.

135. In relation to the Minister's reference to the Richard Backcountry Initiative on page 6, I would certainly have let Canada know that although Scott Duguid, Director, Sustainable Development Branch had told me in April 2012 that ACFN would be engaged within a few months to begin discussions on the Richardson Backcountry Initiative, and then told us in July that discussions would begin in the fall, as of December 5, 2013 those discussions still had not occurred despite ACFN's follow up inquiries on the matter.

136. On page 8 at pages in paragraphs 3, 4, and 5 Minister McQueen describes the Joint Canada Alberta Implementation Plan for Oil Sands Monitoring I ("JOSM"). I am not clear, and Alberta does not tell us in this letter, how simply monitoring alone will enhance regulatory regime because to my knowledge, all that is in place to date is guidelines and frameworks that are not enforceable.

137. The training initiative did provide a few jobs for a specific amount of time for a few band members, but employment has been very sporadic. You can't feed a family on sporadic income. This is especially so when families can no longer rely as heavily on traditional resources due to contamination, and due to general decline in availability of wildlife and other traditional foods.

138. ACFN and Mikisew tabled a terms of reference for JOSM that was not accepted. We wanted to have a role in decision making about what gets monitored, and how traditional ecological knowledge will get incorporated into that. Right now, First Nations have no place in the governance structure for JOSM.

139. I have reviewed the Final Crown Consultation Coordinators Report for the Project, ("**Final Consultation Report**") as provided to ACFN's legal counsel by Canada. I did not see a copy of this report until February 14, 2014.

140. The Final Consultation Report does not describe the Minister's November 6 decision to extend her timeline for decision, nor does it describe the consultation activities during the months of November and December including a meeting, workplan development, and correspondence between Canada and ACFN. ACFN spent a lot of time and resources engaging with Canada in November and early December of 2013. This engagement is not reflected in the Final Consultation Report.

141. Further, the Final Consultation Report does not contain a section analysing outstanding ACFN concerns for which mitigation has not yet been provided and identifying mitigation that could address those concerns, as Agency representative Sheila Risbud told ACFN would occur during our May 3, 2011 meeting.

Affirmed Tawn  
SWORN BEFORE ME at the City of )  
Fort Chipewyan in the Province of )  
Alberta, this 25 day of )  
February, 2014. )  
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\_\_\_\_\_)  
A Commissioner for the taking of )  
affidavits in Alberta )

  
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**DOREEN SOMERS**

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