

This is Affidavit #1 of N. Nicholls  
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 NICOLE NICHOLLS**

I, Nicole Nicholls, consultant to the Athabasca Chipewyan First Nation  
("ACFN") Industry Relations Corporation ("IRC"), of P.O. Box 113, St. Lina  
Alberta, T0A 2Z0, 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. I was also responsible for coordinating ACFN's participation in Alberta's regional planning process for the Lower Athabasca Regional Plan from 2009-2011.

3. Where I have attached as an Exhibit to this Affidavit a copy or excerpt 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.

4. I hold a degree in anthropology. I have worked with First Nations and in the field of environmental assessment for 14 years. I also hold a certificate in Project Management from Royal Roads University. I worked as a staff Project Manager for the IRC from 2008 until June 2011. I worked steadily as a consultant for the IRC until June 2012, and I have worked intermittently for it since that time. I became involved with the Shell Jackpine Mine Expansion (the "**Project**") sometime in 2009, and I became the project manager for the file sometime in 2010. I assisted with the preparation of ACFN's intervention in the Jackpine Mine Expansion Joint Review Panel hearing ("**Intervention**" and "**Hearing**"). I was responsible for developing and managing the various Traditional Resource Use Plan and Traditional Land and Resource Use Plan ("**TLRUMP**") proposals that ACFN tabled with government initially as part of consultation on the Project as well as another proposed Shell project, Pierre River Mine.

#### **Consultation on the Project**

5. When I attended meetings related to the Project, I often took meeting notes and minutes on behalf of ACFN.

6. Attached as **Exhibit "1"** to my Affidavit is a copy of minutes that I took at a March 20, 2009 No Net Loss Planning ("**NNLP**") meeting between representatives of Shell Canada Ltd. ("**Shell**"), Canada and ACFN. Shell was in the early stages of planning how it would compensate for the fish habitat that the Project would destroy. This is known as No Net Loss Planning. At this meeting we discussed ACFN's concerns with Shell's proposed diversion of the Muskeg

River and Shell's fish habitat compensation plans. Lisa King, myself and IRC staff member Ian Peace explained that the Muskeg River was culturally important to ACFN, that there were ethical issues with the proposed diversion, that the proposed compensation lake would not address those concerns and that ACFN would prefer the Muskeg River to be left in place.

7. Attached as **Exhibit "2"** is a copy of my minutes from the meeting between ACFN and representatives of the Canadian Environmental Assessment Agency (the "**Agency**") regarding the Draft Aboriginal Consultation Plan (the "**Draft Consultation Plan**") for the Project and Shell's proposed Pierre River Mine, held on January 28, 2011, in Fort McMurray (the "**January 28 Meeting**"). I took these minutes on behalf of ACFN. This document was filed as Appendix F, Tab 62 of ACFN's Intervention. In attendance at the January 28 Meeting were myself, Lisa King and Doreen Somers from the ACFN IRC; Jay Nelson, ACFN legal counsel; Sheila Risbud, who was at the time the Agency's Crown Consultation Coordinator for the Project; Shannon Armitage of the Agency; and Mai-Linh Huynh, who was at the time coordinator of the federal application review team. The Draft Consultation Plan that we discussed at the January 28 Meeting concerned the Project and the Pierre River Mine, because at that time the Agency was planning to review both projects in a single environmental assessment.

8. During the January 28 Meeting, Ms. Risbud advised that the Agency would meet with ACFN to discuss items falling outside the mandate of the Joint Review Panel that would be reviewing the Project (the "**Panel**"), but that the mandate of the Agency's Crown Consultation Coordinator was limited and did not include Aboriginal consultation and accommodation, it was just coordination.

9. Ms. Somers noted that the consultation was not meaningful because there was no evidence that mitigation and accommodation would happen. Ms. Risbud agreed that the process was frustrating that there needed to be radical changes, and that the parties needed to find ways to make engagement more than a paper

exercise. ACFN's legal counsel Jay Nelson explained that it was a problem that the consultation plan looked like a one-way street, and the "real" consultation wasn't meant to occur until after the Panel report issued, and that it was questionable whether or not the most important issues would really be dealt with at that late stage. Mr. Nelson noted that the Draft Consultation Plan was unclear on how and when the Crown would engage, and should include immediate and on-going engagement.

10. Ms. Risbud advised that the Agency was responsible for things that fell outside of department-specific mandates. Ms. Huynh noted that line ministries usually can only put conditions on the permits that they issue for the Project. Ms. Risbud advised she would be briefing her higher ups on ACFN's constitutional questions. Ms. Risbud further advised that she was going to brief up about ACFN's views on the Draft Consultation Plan.

11. Attached as **Exhibit "3"** is an excerpt of minutes of a February 17, 2011 NNLP meeting between representatives of Shell, the Department of Fisheries and Oceans ("**DFO**") and several First Nations. These minutes were enclosed in an August 29, 2012 letter from Autumn Eaglespeaker of Shell to Lisa King. The comments and additions to text in red font are comments that I had previously inserted and circulated to DFO and Shell in an earlier draft of the February 17, 2011 meeting minutes. During this meeting, Lisa King noted ACFN's objection to mining through the Muskeg River and the impacts of such mining to ACFN's Aboriginal and Treaty 8 rights ("**Rights**"). Marek Janowicz of DFO noted that DFO's mandate addressed the loss of physical fish habitat, but not the loss of traditional use rights, and that there is a gap between these two issues. The parties discussed the fact that the loss of traditional use rights was not factored into any of the analysis of Shell's proposed NNLP compensation lake.

12. Attached as **Exhibit "4"** to my Affidavit is a copy of a May 10, 2011 letter that I emailed to Sheila Risbud, of the Agency, on behalf of Lisa King and Melody Lepine of the Mikisew Cree First Nation ("**Mikisew**"), to Sheila Risbud.

Mikisew is a neighbouring First Nation with whose consultation department (Mikisew Cree Government and Industry Relations) the IRC has collaborated on certain issues of mutual concern. The letter lists action items arising from the May 3, 2011 meeting between ACFN, Mikisew and the Agency (the “**May 3 Meeting**”); reiterates the Nations’ position on the Draft Panel Agreement and Terms of Reference; requests a prompt determination from Transport Canada on whether impacts to ACFN’s navigation from water withdrawals are within its mandate; and invites Crown clarifications and amendments to an enclosed copy of the minutes that I took during the May 3 meeting.

13. Generally, the May 3 Meeting was intended to allow for an overarching discussion regarding the Project and Pierre River Mine, including a discussion of consultation, cumulative effects, preservation of treaty rights, TLRUMP, correspondence, hearing issues, and outstanding technical issues. I discuss this meeting in more detail below.

14. Attached as **Exhibit “5”** to my Affidavit is a copy of a track changes version of the May 3 Meeting minutes. I took the original minutes, and then Ms. Risbud of the Agency provided ACFN with the attached track changes version of those minutes on May 26.

15. During the May 3 Meeting, we discussed Canada’s approach to understanding when mitigations and accommodations were required for impacts to ACFN’s Rights. Ms. Risbud indicated that there was an onus on the departments to develop mitigations. If a proposed mitigation did not adequately address treaty and Aboriginal rights, the Agency would have to note this fact and discuss measures that could adequately address them in the Crown Consultation Coordinator’s report at the end of the process (see page 6 of the minutes).

16. Ms. Risbud also explained that issues that fell through the regulatory ‘cracks’ would be highlighted in the Crown Consultation Report, and it would be up to Cabinet to determine how to address those issues. She stated that it was important for the Crown Consultation Report to reflect the issues that had not

been addressed to the satisfaction of First Nations (see page 10 of the minutes). Ms. Huynh explained that the Agency takes its analysis of impacts to the Rights, and proponents proposed mitigation measures and looks at the outstanding impacts. She provided an example: reclamation may not be sufficient as mitigation for loss of land to hunt because it could take 80 years (see page 9 of the minutes; Mai-Linh p 10). Ms. Risbud advised that the section of the Crown Consultation Report on ACFN would be shared. ACFN could then provide its views on that section, and those views would in turn be shared with Cabinet. Ms. Risbud expressed hope that if there were outstanding issues that the Agency and ACFN should be in agreement with what those were. (see p. 34 of minutes).

17. Mr. Nelson and Ms. Somers specifically asked Ms. Risbud to assure ACFN that the Crown would share with ACFN its views on the strength of ACFN's rights claims and the adequacy of consultation and accommodation prior to final decision-making on the Project. Ms. Risbud responded that there was no reason why Canada couldn't show ACFN the information related to ACFN. (see p. 34 of minutes).

18. Ms. Risbud encouraged ACFN to present its concerns to the Panel and make its views known because the Panel had jurisdiction to ask both Canada and the Province to follow up with mitigation and accommodation (see p. 11 of minutes). Mr. Janowicz told ACFN that there was a commitment from the federal government to follow the Panel recommendations (see p. 17 of minutes).

19. At the May 3 Meeting, we discussed the mandates of DFO and Transport Canada to address impacts to Treaty rights. Mr. Janowicz advised that DFO could not consider wildlife or land use in its decision. (see p. 9 of minutes) Mr. Janowicz further advised that DFO's policies limit when DFO can say "no" to a project, and that DFO had never said "no" to a project on account of Aboriginal concerns (see p. 22 of minutes).

20. Ms. Risbud said that federal Crown representatives would have a mandate to propose or negotiate accommodations, as they relate to federal mandates, for impacts on Aboriginal and Treaty rights, prior to the decision on whether to approve the Project. Those issues falling outside mandates would be flagged in the final Crown Consultation Report as outstanding issues not mitigated or accommodated in the environmental assessment process (see minutes pp. 36).

21. At the May 3 Meeting, Ms. King explained ACFN's concerns with water levels, loss of wildlife, cultural impacts of not being able to provide country foods to elders, contamination of country foods, migratory birds, bison, and the mining out of the Muskeg River (see minutes pp. 13-14). Ms. King noted that there was a gap between ACFN's broad concerns and the departments' specific mandates, and Mr. Janowicz agreed and noted that a lot of the issues ACFN was raising were beyond DFO's mandate (see minutes p. 15).

22. Ms. King alerted the Agency to the difficulties ACFN had experienced in the past where projects are approved and multi-stakeholder agencies are designated to address outstanding issues after the fact. She indicated that ACFN wished to avoid that "trap." And ensure that relevant information gaps were filled prior to decision-making (meeting minutes, p. 20).

23. In closing at the May 3 Meeting, Ms. King raised ACFN's request that the Project not be approved unless some core issues were addressed, such as respect for treaty rights, completion and implementation of the TLRUMP, co-management of certain lands and resources, a sufficient land base to practice rights, and that Canada find a way under its legislative acts and powers to ensure the protection of the resources that ACFN uses and needs such as bison, caribou, moose, bears and medicine plants; and protection of the Poplar Point reservation.

24. On October 26, 2011, representatives of ACFN, Mikisew and the federal Crown met to discuss the Draft Consultation Plan, the issues the Agency had tracked to date, various technical submissions and Shell's response to those submissions, TLRUMP, funding to participate in the Panel process, and

methodology to assess impacts to rights and culture (the “**October 26 Meeting**”). I took minutes at that meeting and circulated them to the Mikisew and ACFN representatives who had attended the meeting. I incorporated the changes that they made to my minutes and then circulated them. Attached as **Exhibit “6”** to my Affidavit is a copy of a November 8, 2011 email from Sébastien Fekete to Sheila Risbud, and others, on which I was copied, attaching the meeting notes that I prepared on behalf of ACFN with Mikisew’s changes.

25. At the October 26 Meeting, Ms. Risbud advised that the Cabinet’s decision would be informed by the Crown Consultation Report, and the Panel report. She advised that some portions of the Crown Consultation Report would be a confidential cabinet document. She shared her understanding that the Crown Consultation Report had to contain a recommendation, analysis of infringement, a discussion of which Aboriginal concerns had been mitigated, and a discussion of outstanding Aboriginal concerns.

26. At the October 26 Meeting, Ms. Risbud advised that Crown representatives present at the October 26 meeting didn’t have a mandate to talk about broader, cumulative, regional issues but that the representatives of departments attending the meeting could talk about specific compensation and mitigation relating to the Project and their department’s mandate. Ms. King explained that ACFN has been told on previous projects that ACFN’s rights will be mitigated through a regional plan, but that this never happens. She asked why the government couldn’t stop or delay the project until a plan was in place and things are protected (page 5).

27. Shauna Sigurdson of the Agency advised at the October 26 Meeting that the Crown Consultation Report would be heavily based on the Panel report. The advice going up to Cabinet would be along the lines of ‘this is the evidence before us; these are options to address the issues. Then it would be up to Cabinet on how to proceed.

28. Ms. Sigurdson advised that it was important that ACFN refer the issues to the Panel because that was a place where change could occur.

29. Mikisew's legal counsel, Bob Freedman, asked Canada's representatives at the October 26 Meeting what the Crown looked at or measured to determine whether a project has adverse impacts to treaty rights. Mr. Janowicz advised that DFO didn't have a process to measure or determine whether there are adverse impacts to treaty rights that DFO just deals with fish habitat. (see minutes p. 8).

30. Ms. Sigurdson said that now that Canada knew that fish compensation may not meet Aboriginal cultural needs, that would be documented and go to Cabinet.

31. Mr. Janowicz further advised that Canada needed the First Nations to submit a lot of information to the Panel, and that it was asking the Panel to assess the issues, because that was the only way biologists such as Mr. Janowicz could deal with Aboriginal issues. Without the First Nations submitting the information, biologists such as Mr. Janowicz could not make the judgement call.

32. ACFN did not receive a clear answer from the Crown representatives at the October 26 Meeting as to who had the mandate to assess impacts to ACFN's Rights. Ms. Sigurdson did advise that the matter of addressing accommodations would go to federal departments. Ms. Risbud advised that a broader discussion would happen after the Panel released its report in which outstanding issues would be identified and noted in the Crown Consultation Report, and that there would have to be a Cabinet decision to have a larger discussion on cumulative impacts. Ms. Sigurdson advised that after the Panel report came out, the Crown would develop its Crown Consultation Report, discuss with Aboriginal communities the Project impacts and proposed accommodations, and that any outstanding issues or disagreements would go to Cabinet. Ms. Huynh advised that accommodation would happen at the Cabinet stage.

33. At the October 26 Meeting, Ms. Huynh acknowledged that because in this case there would be significant impacts, the duty to consult was high.

34. Ms. Huynh advised at the October 26 Meeting that Canada was using an issues tracking table to identify Aboriginal concerns with the Project. The table would have one column for Aboriginal concerns, one column for recommendations, one column for the proponent's response and one column for the Panel's recommendations. Then outstanding issues would be identified and accommodation follows that identification. Ms. Huynh also advised that Canada would be relying on the Panel to identify what impacts the proponent has mitigated, what the Crown can do to address Aboriginal concerns, and what concerns are left unaddressed.

35. During the October 26 Meeting, the Agency's representatives acknowledged that they were well aware of ACFN's concerns about the Project relating to migratory birds, bison, caribou, the Muskeg River diversion, cultural impacts, socioeconomic impacts, and health impacts including spiritual and mental health impacts on members. There was a discussion about diversion of the Muskeg River and Ms. King raised the spirit of the water again.

36. Ms. Huynh acknowledged that consultation is not mitigation, and that the proponent often proposed consultation as mitigation.

### **TLRUMP**

37. The purpose of a TLRUMP is to provide information necessary to understand the land and resource uses, interests and treaty and Aboriginal rights of the First Nations in provincial and federal land and resource management planning, decision-making, and consultation processes.

38. The focus of a TLRUMP differs from that of any other impact assessment studies by identifying thresholds and criteria for lands and resources that are required to sustain, into the future, ACFN's treaty harvesting rights, traditional livelihood and associated aspects of their culture. The thresholds and criteria

essentially serve to establish the quality and quantity of lands and resources required in order for ACFN members to be meaningfully able to exercise their Treaty harvesting rights. I consider such knowledge critical to ensure that lands and resources are not taken up and compromised to the point where ACFN members can no longer meaningfully exercise their Rights.

39. During the years I have worked for ACFN, I have heard again and again from leadership, Elders and community members, that ACFN's Rights, culture and wellbeing are approaching a point where sustaining them may not be possible into the future. In response to the growing concerns of ACFN, the focus of work for the IRC during the time of my employment there was to support ACFN's goal of ensuring that Rights were properly assessed and accommodated in consultation on Crown initiatives and regulatory decisions. I provided this testimony in the Hearing on November 8, 2012 and it is included in the excerpt attached to my Affidavit as **Exhibit "7"**.

40. If implemented by the Crown, TLRUMP could support regulatory efficiency and improved decision-making about development that actually takes into account and accommodates the meaningful exercise by ACFN members of their Treaty rights, as well as supporting ACFN's efforts to determine their own future and to develop a healthy, sustainable community. The Panel reached a similar conclusion in its Report.

41. I explained the concept of the TLRUMP, and how it could help to remedy the Crown's current failure to plan for and make decisions that respect Treaty Rights in my testimony at the Hearing. This testimony is included in the Hearing transcript excerpt that is attached to my Affidavit as **Exhibit "7"**.

42. ACFN raised the concept of a TLRUMP, or Traditional Resource Use Plan as ACFN and Mikisew first called it, in the context of consultation on the Project and Pierre River Mine beginning in 2009. ACFN requested that a TLRUMP be completed prior to any approvals of the Project or Pierre River Mine.

43. At the request of Sheila Risbud of the Agency and Alvaro Loyola, then Manager, Regulatory Support, Aboriginal Relations, Alberta Environment, ACFN and Mikisew provided a more detailed draft TLRUMP proposal on September 20, 2010 ("**TRLUMP Proposal**"). I drafted this letter and was involved in drafting the TLRUMP Proposal. Attached as **Exhibit "8"** to my Affidavit is a copy of a September 20, 2010 letter from Lisa King of ACFN, and Melody Lepine of Mikisew, to Alvaro Loyola and Sheila Risbud enclosing the TRLUMP Proposal.

44. Attached as **Exhibit "9"** to my Affidavit is a copy of a letter from Alvaro Loyola to Lisa King and Melody Lepine, dated January 20, 2011. Both myself and Sheila Risbud were copied on this correspondence, which was filed as Appendix F, Tab 59 of ACFN's Intervention. The letter explained that the TLRUMP Proposal had been disseminated to relevant ministries and that provincial and federal government representatives met to discuss the proposal on December 1, 2011. Mr. Loyola indicated that both governments agreed that TLRUMP could provide them with important information, and that they were developing revisions to the TLRUMP Proposal.

45. At the January 28 Meeting between ACFN and the Agency that I have described above, Ms. Risbud advised that federal and provincial government departments had met to consider the TLRUMP proposal and would provide some feedback soon.

46. Attached as **Exhibit "10"** to my Affidavit is a copy of a letter from Sheila Risbud, to Lisa King and Melody Lepine dated April 1, 2011 regarding several matters related to consultation on the Project. This letter included the Agency's response to our TLRUMP Proposal. I was copied on the email that transmitted the letter to Ms. King and Ms. Lepine. Ms. Risbud explained that the federal government wished to discuss and further define elements of TLRUMP that could be supported by way of existing government initiatives. In short, although Canada acknowledged the value of TLRUMP, Canada was not prepared to support TLRUMP as proposed.

47. Attached as **Exhibit "11"** to my Affidavit is a copy of a letter from Lisa King and Melody Lepine, dated April 5, 2011. I assisted in drafting this letter. In this letter ACFN expressed its disappointment that Canada had rejected the TLRUMP Proposal as currently presented. ACFN noted that it had tabled the TLRUMP Proposal because existing initiatives were not properly assessing or managing the cumulative impacts of development on Treaty Rights.

48. As I described above, ACFN met with the Agency and other federal representatives on May 3, 2011 and minutes for this meeting are included as **Exhibit "5"** to my Affidavit. One of the topics discussed at the May 3 Meeting was TLRUMP. Ms. King explained why a TLRUMP was needed (see minutes p. 13).

49. Ms. Risbud told us at the May 3 Meeting that the Agency saw value in the TLRUMP (see minutes p. 7). She acknowledged that there is an information gap in how the Crown assesses impacts to rights. Ms. Risbud explained that the Agency got the federal and provincial departments together for a workshop to discuss TLRUMP. There was lots of support for the idea, and an appetite for the proposal, but the parties would have to be creative about how they made it fit with department-specific funding requirements. (see minutes p. 31). Ms. Risbud indicated that briefings had gone to upper levels in government about the issues (see minutes, p. 32).

50. Attached to my Affidavit as **Exhibit "12"** is a copy of a letter from Sheila Risbud to Lisa King, and to Melody Lepine dated May 16, 2011 regarding TLRUMP. I was copied on the email that transmitted this letter.

51. ACFN participated in a series of meetings proposed by the Agency in order to find a way to advance a TLRUMP in whole or in part through various government departments. These meetings included me, Lisa King, Mikisew staff, Sheila Risbud, as well as other representatives from other federal departments such as Indian Affairs, Transportation, DFO, and various representatives from Alberta. In the course of discussions, Ms. Risbud and Mr. Loyola (representing

Alberta) requested that ACFN produce another proposal focused on early phases of the TLRUMP project. A number of other suggestions were also provided about the format and content of the proposal. For example, the inclusion of objectives, and the inclusion of an expert workshop. They, and the other government participants on the working group, provided specific suggestions and track change revisions to the proposal. The government representatives explained that such changes would increase the likelihood that it could be funded by both levels of government.

52. I worked with Mikisew staff to produce another TLRUMP proposal that accommodated the suggestions made by government representatives. It was called the TLRUMP Scoping Project.

53. Attached as **Exhibit "13"** to my Affidavit is a copy of the letter from Lisa King and Melody Lepine, to Sheila Risbud and Karina Andrus, Alberta Environment and Water, dated November 14, 2011, and the TLRUMP Scoping Project. I assisted with drafting this letter.

54. In the November 14, 2011 letter, ACFN and Mikisew noted that the TRLUMP Scoping Project would not result in the collection of information that the full TLRUMP would have produced. ACFN and Mikisew noted that the governments had not gathered sufficient information or developed a methodology or tool for assessing or managing impacts to Aboriginal and treaty, and so are not upholding its duty to properly assess and manage impacts to Treaty Rights, and that federal representatives have recently confirmed this with us. The TRLUMP Scoping Project was a suggested workplan for how to take the first steps towards developing a TLRUMP. It presented the specific objectives, deliverables and costs to more fully identify the scope of the methods, data collection and community involvement to be included in development of a TLRUMP.

55. Attached as **Exhibit "14"** to my Affidavit is a copy of an email and enclosed letter from Sheila Risbud, Lisa King, and to Melody Lepine dated December 9, 2011. I was copied on this email. Ms. Risbud's email transmittal

states: "We are looking forward to discussing the revised proposal with you as soon as possible." Ms. Risbud's letter notes that the government departments are "pleased" and that the proposal "offers the necessary level of detail for both governments to identify funding opportunities" and that "Both Canada and Alberta are committed to working collaboratively with ACFN and MCFN on the TLRUMP".

56. ACFN, Mikisew, the Agency and Alberta scheduled a teleconference on February 3, 2012 to discuss the TRLUMP Scoping Project, but Karina Andrus of Alberta sent an email Feb 2, 2012 saying she and her colleague Scott Duguid could not attend the meeting. A copy of this email is attached to my Affidavit as **Exhibit "15"**. In the email, Ms. Andrus said that she and Mr. Duguid would follow up directly but they never did. Lorne Fidgette, of Alberta's International, Intergovernmental and Aboriginal Relations Ministry advised during the February 3, 2012 teleconference that he was seeking potential funding opportunities and sources within his Ministry, but to my knowledge ACFN never heard back from that Ministry. As of December 6, 2013, to the best of my knowledge, ACFN had not heard back from Alberta again on TLRUMP

57. I participated in the February 3, 2012 conference call. During that call, we were informed by DFO's Loriena Melnick that the Federal government could not provide any firm commitments on funding. DFO said they had some funding available, but that it could be applied to only portions of the TRLUMP Scoping Project and that it had to be tied to their mandate (fish and fish habitat). On March 29, 2012 I had a telephone call with Loriena Melnick of DFO as a follow up to her offer to discuss funding available from her department. Ms. Melnick informed that DFO funds had to be spent on things that included fish/fish habitat components, and she could not comment on how much funding was available. Ms. Melnick committed to getting back to us on the amount of money available from DFO, but to the best of my knowledge she never did. To the best of my knowledge, ACFN never received funding from DFO to carry out any aspect of a TLRUMP.

## **Lower Athabasca Regional Plan (“LARP”)**

58. ACFN was actively engaged in consultations with Alberta regarding the LARP process since it began in or around 2009. ACFN participated on the understanding that once the LARP was developed it would shape development in the region for decades to come, which would in turn affect the ability of ACFN members to exercise their Treaty rights. ACFN saw the land use planning process as a critical opportunity for the Crown to take stock of, and plan for, ACFN’s land and resource needs for the sustainable and meaningful exercise of its Treaty rights at a regional level.

59. ACFN tried very hard to convince Alberta to include planning and management for sustainable, meaningful Treaty Rights as part of the LARP and provided many submissions throughout the process. The submissions ACFN provided to Alberta on November 2010 are included below as **Exhibits “17”, “18”, “19” and “20”**. By May of 2011, it was becoming apparent to ACFN that Alberta did not intend to develop the LARP in a way that took into account Treaty rights. The Alberta government issued the final LARP on or about August 2012.

60. In the May 3 Meeting that I have discussed above and the minutes for which can be found at **Exhibit “5”** to my Affidavit, ACFN, Mikisew, and representatives of the Federal Crown discussed the LARP. ACFN and Mikisew expressed concerns about the ability of the LARP to protect its Rights. Mr. Dale Kirkland of Parks Canada advised that the LARP did not include conservation areas that Parks Canada had requested (see minutes, p. 13). Ms. Risbud advised that Canada had not yet decided whether the federal government would use the LARP in its decision-making, but that if Canada did, this would trigger a duty to consult (see minutes p. 13).

61. On May 11, 2011, I forwarded all of ACFN’s November 2010 LARP submissions (“**LARP Submissions**”) to Sheila Risbud in order to explain to Canada ACFN’s concerns about the lack of provincial planning for the survival of

sustainable and meaningful Treaty rights. In ACFN's view, this was a critical problem with the context in which Canada was being asked to approve the Project.

62. Attached as **Exhibit "16"** to my Affidavit is a copy of a May 11, 2011 email string between myself and Sheila Risbud, indicating that I transmitted the LARP Submissions and that Ms. Risbud had received them. What follows is a brief review of some of the LARP Submissions. In addition to what is described below, the LARP Submissions included a western-science based report on cumulative environmental impacts by the ALCES Group; ACFN's suggestions for co-management arrangements for the Richardson Backcountry, and ACFN's suggested thresholds for water withdrawals in the Athabasca River.

63. Attached as **Exhibit "17"** to my Affidavit is a copy of the November 22, 2010 cover letter from Lisa King to Dave Bartesko enclosing a document called "Athabasca Chipewyan First Nation Advice to the Government of Alberta Regarding the Lower Athabasca Regional Plan" ("**ACFN LARP Advice**"). I drafted this cover letter. In this correspondence Ms. King outlines ACFN's vision for how LARP could affect reconciliation of Crown – First Nation interests, including through greater First Nation involvement in decision making and the implementation of the TLRUMP.

64. Attached as **Exhibit "18"** to my Affidavit is a copy of the ACFN LARP Advice. The document was a response to a key document in the LARP planning process, *Advice to the Government of Alberta Regarding a Vision for the Lower Athabasca Region*, which had been prepared by the Lower Athabasca Regional Advisory Council ("**RAC Advice**"). I was involved in drafting this document.

65. In the ACFN LARP Advice, ACFN advances a comprehensive vision, including concrete tools to achieve the vision, for how a regional planning process could consider and protect ACFN's Rights. The document provides information on the rights incidental to ACFN's Treaty rights to hunt, trap, fish and gather. It delineates "Cultural Protection Zones" that, if specially managed, could

contribute to the continued ability of ACFN members to exercise their Rights. Some of the Cultural Protection Zones became the foundation for the Regional Study Area that ACFN used to analyze the impacts of the Project on its traditional land use, Rights and culture.

66. In the ACFN LARP Advice, ACFN explains how the RAC Advice conflicts with the protection of ACFN's Treaty rights and traditional use needs. ACFN provides detailed feedback on how LARP could be protective of Treaty rights. ACFN also explains how ACFN had not been consulted on critical questions that set the direction of the LARP process at the outset regarding regional priorities, assumptions, land-use conflicts and key land use questions. We proposed that LARP provide, at minimum, for

- a) Rights-based cumulative effects thresholds for the tangible and intangible factors that underlie the exercise of treaty rights;
- b) A regulatory decision-making system that requires the analysis of rights-based impacts and has information and tools to do so.

67. Attached as **Exhibit "19"** to my Affidavit is an excerpted copy of Appendix 1 to ACFN's LARP Advice. This was a joint letter with Mikisew and Chipewyan Prairie Dene First Nation to Dave Bartesko of the Alberta Land Use Secretariat regarding RAC Advice. It highlights ACFN's concerns that its information had been excluded from the RAC Advice, and that the vision for LARP appeared to prioritize economic development at the expense of conservation and Treaty rights. ACFN raised its concerns about the failure of Alberta to meaningfully include Treaty rights and the needs of Aboriginal people in the foundational visioning document for its regional land use planning process.

68. Attached as **Exhibit "20"** to my Affidavit is a copy of Appendices 6 and 7 to ACFN's LARP Advice. These documents show that calls have been made by regional aboriginal leaders since 2008 for a moratorium on oil sands development

until their cumulative impacts are understood and some of their serious impacts are addressed.

69. Alberta issued a draft LARP in August 2011 ("**Draft LARP**"). The IRC, myself included, reviewed the Draft LARP. On June 3, 2011, ACFN emailed materials to Dave Bartesko of Alberta in response to the Draft LARP ("**ACFN's Draft LARP Response Materials**"). While I did not transmit these materials directly to the Agency, they were all filed as part of ACFN's Intervention as Appendix F, Tabs 82-82P. I describe some of ACFN's Draft LARP Response Materials below.

70. Attached as **Exhibit "21"** to my Affidavit is a copy of an email I sent to Alberta's Dave Bartesko on June 3, 2011. It itemizes all of the ACFN Draft LARP Response Materials. This email was also filed as Appendix F, Tab 82 in ACFN's Intervention.

71. Attached as **Exhibit "22"** to my Affidavit is a copy of a letter enclosed with my June 3, 2011 email. The letter is from Lisa King and Melody Lepine to Mr. Bartesko. It was included in the ACFN Draft LARP Response Materials. This letter was also filed as Appendix F, Tab 82L of ACFN's intervention. The June 3, 2011 letter highlights the results of the ACFN and Mikisew's review of the Draft LARP. In essence, it outlined our many problems with the Draft LARP from a traditional land use and Treaty rights perspective.

72. Attached as **Exhibit "23"** to my Affidavit is an excerpted copy of "Review of the Draft Lower Athabasca Integrated Regional Plan", a report prepared by Management and Solutions in Environmental Science for the IRC, dated May 2011. It was included in the ACFN Draft LARP Response Materials. In this report, MSES found that the Draft LARP was not informed by ecological analysis or First Nations' needs. In particular, MSES observed that conservation area selection appeared to be based on minimizing interference with oil sands leases rather than on ecological criteria and

Aboriginal traditional use; that the lands proposed for protection were already disturbed; and that under the Draft LARP, numerous activities incompatible with traditional uses would still be permitted on those lands.

73. Attached to my Affidavit as **Exhibit “24”** is a copy of a Review of the Draft Lower Athabasca Regional Plan, prepared by Peter Cizek. It was included in the ACFN Draft LARP Response Materials, and in ACFN’s Intervention as Appendix F Tab 82P. Mr. Cizek reviewed the Draft LARP from a land use planning perspective. In his report, Mr. Cizek found that the Draft LARP did not have any of the characteristics of recent “best practice” regional land use plans from across northern Canada. In particular, the Draft LARP did not include any of the following: partnerships between First Nations and government; commitment to cutting-edge science and traditional knowledge; establishment of large protected areas between 30% to 50% of each total plan area based on intensity of aboriginal land use; or use of Special Management Zones that serve to control development.

74. Attached to my Affidavit as **Exhibit “25”** is a copy of the Legal Review of the Draft Lower Athabasca Integrated Regional Plan. It was included in the ACFN Draft LARP Response Materials, and in ACFN’s Intervention as Appendix F Tab 82M. Among other things, this document explains how the Alberta legislation that applies to conservation areas imposes many restrictions on activities that are inconsistent with Aboriginal harvesting and other traditional land use activities.

75. Attached to my Affidavit as **Exhibit “26”** is a copy of the final *Lower Athabasca Regional Plan 2012-2022* (i.e. the LARP). It was filed as Appendix H, Tab 1 of ACFN’s Intervention.

76. The LARP was finalized in August 2012. It is the first regional plan to be developed under the *Alberta Land Stewardship Act* and pursuant to Alberta’s Land Use Framework. The LARP sets the Government of Alberta’s long term

vision for a large area of north eastern Alberta. Its geographical scope overlaps substantially with the areas that ACFN has identified it needs to sustain the meaningful exercise of its Rights.

77. The LARP's stated objectives include setting economic, environmental and social outcomes and objectives for the region; describing the strategies, actions, and tools required to achieve these outcomes and objectives; and using a cumulative effects management approach to balance economic development and social and environmental considerations (p. 2 of the LARP).

78. The LARP includes policy components – the Strategic Plan and an Implementation Plan - which describe a regional vision and set out how that vision is to be achieved, including through a series of strategic directions that are intended to guide decision makers.

79. The LARP also includes a set of binding regulations called the “LARP Regulatory Details Plan” which came into force on September 1, 2012. The final component of LARP, which remains under development, is a series of frameworks establishing thresholds and targets for biophysical components such as land disturbance, air quality, water quality, water withdrawals, and biodiversity.

80. I have reviewed the final LARP to see whether it addresses the concerns raised and vision put forward by ACFN in its original “Advice to LARP” document. It does not.

81. ACFN's fundamental problem with the LARP is that the protection of Treaty rights is excluded from its outcomes, objectives, and strategies. In other words, the LARP's stated goals do not include protecting adequate lands and resources to ensure sustainable and meaningful Treaty rights, nor are its strategies designed with that objective in mind.

82. ACFN articulated this concern to Alberta during the LARP planning process as well as in its written and oral submissions to the Panel. Attached to my Affidavit as **Exhibit “27”** is an excerpt of the transcript of ACFN’s oral argument to the Panel on this point.

83. The Panel agreed with ACFN that the LARP fails to address Aboriginal traditional land use (“TLU”) or rights at para. 1477 of its Report (see also paragraphs see paragraphs 36 and 1304):

[1477] The Panel agrees with ACFN that assessing the effects of individual projects on the TLU and Aboriginal and treaty rights of ACFN and the other Aboriginal groups is not efficient or effective and that *LARP* does not specifically address the issues of Aboriginal TLU or rights. The Panel has therefore included a recommendation that Alberta develop, in collaboration with Canada, the Aboriginal groups, and other stakeholders, a TLU management framework as part of the *LARP*.

84. Here are some of the other major problems that ACFN has with the LARP:

- a) It prioritizes bitumen extraction in many areas where ACFN has traditionally exercised its Treaty rights, including the Project area.
- b) It does not protect integral ecosystems, which are required to support current and future traditional land uses. For example, it does not protect important rivers, tributaries or other water bodies.
- c) It establishes conservation areas that are too small and too fragmented to promote abundant and healthy natural resources and, by extension, meaningful harvesting opportunities for ACFN.
- d) Existing oil sands, metallic, industry or coal exploration or exploitation, commercial forestry, activity and multi-use corridors are permitted to continue within some conservation areas. Moreover, the LARP states that park boundaries can be re-examined if deemed necessary or acceptable as a result of the regulatory review for the

mining development, which means that the LARP specifically contemplates that mining might trump the purposes of maintaining a park.

- e) The conservation areas fail to address the fact that parks management and recreational use can adversely impact the exercise of treaty rights.
- f) The management frameworks to be developed pursuant to the LARP do not acknowledge or require the consideration of what is necessary for the meaningful practice of treaty rights and therefore will lack thresholds or triggers to protect these rights.

85. ACFN has elaborated on these problems and others in its Draft LARP Response Materials.

**October 30, 2013 Letter of Minister McQueen to Minister Aglukkaq**

86. Attached to my Affidavit as **Exhibit “28”** is a copy of Minister McQueen’s October 30, 2013 letter to Minister Aglukkaq. (the “**McQueen Letter**”). It was provided to me by ACFN’s legal counsel, Jenny Biem on February 13, 2014, and I had not seen it previously. I have been informed by Ms. Biem that ACFN only received a copy of this letter on February 13, 2014, when Canada’s counsel in this matter provided it to ACFN’s legal counsel.

87. I wish to address several statements in the McQueen Letter about Alberta’s land use planning process and how it relates to treaty rights. I would have shared these comments with ACFN during its consultation with the Crown on the Project had I seen the McQueen Letter in time to do so. My views about the inaccuracies and problems with Minister McQueen’s statements about the LARP are based on my work for ACFN on the LARP over the years and ACFN’s submissions to Alberta during the LARP process; I believe that ACFN would have expressed these concerns to the federal Crown during the Phase IV

consultation on the Project. I also note that Ms. Risbud, the Crown Consultation Coordinator, had told ACFN at the May 3 Meeting that if Canada relied on the LARP, ACFN would have been not only notified, but consulted on this matter.

88. Minister McQueen states at page 2 of the McQueen Letter (page number at top of page) that Alberta's Land Use Framework "provides a blueprint for land-use management and decision-making that addresses Alberta's growth pressures". She then asserts on p. 3 that one of the Land Use Framework's guiding principles and explicit strategies "is to ensure that land-use decisions will be respectful of the constitutionally protected rights of Aboriginal communities." I disagree that the Land Use Framework provides for land use decisions that are respectful of Treaty and Aboriginal rights.

89. Attached to my Affidavit as **Exhibit "29"** is a copy of the Land Use Framework, which I read in 2008, and reviewed on February 15, 2014 at the following Government of Alberta website: <https://landuse.alberta.ca/LandUse%20Documents/Land-use%20Framework%20-%202008-12.pdf>.

90. Although Minister McQueen is correct that one of the guiding principles of the Land Use Framework is entitled "Respectful of the constitutionally protected rights of aboriginal communities" (see p. 16 of the document), the Land Use Framework proceeds to describe this principle as simply an obligation to consult and work with Aboriginal communities. The strategy includes no commitment about any kind of substantive *outcome* in land use planning to protect treaty rights.

91. In other words, although Minister McQueen acknowledges that the Land Use Framework is intended to address "Alberta's growth pressures", it articulates no commitment to ensuring or trying to ensure that Alberta's land use planning maintains sufficient and adequately healthy lands and resources to sustain the meaningful exercise of treaty rights.

92. The lack of any substantive commitment regarding the protection of treaty rights in the Land Use Framework is confirmed by its one Aboriginal-specific strategy, which Minister McQueen notes at p. 7 of the McQueen Letter: “the inclusion of Aboriginal peoples in land use planning.” This strategy, which is included at p. 21 of the Land Use Framework, concerns only process, not outcome.

93. The Land Use Framework’s commitment to engagement, with no further commitment to the actual protection of treaty rights, is very problematic given that the land base available to ACFN to exercise its Rights is steadily eroding. Moreover, ACFN’s experience with the LARP process confirms for me that the Land Use Framework’s commitment to engage with Aboriginal peoples on land use planning, without more, is hollow: although ACFN provided extensive and detailed recommendations on how to develop the LARP and what to include in that critical document in order to ensure the sustainability of meaningful Treaty rights, these views are not reflected in the LARP.

94. Page 3 of the McQueen Letter includes this statement: “The Lower Athabasca Regional Plan reflects an ongoing commitment to engage Aboriginal peoples in land-use planning. . . Alberta recognizes that First Nations and Métis communities that hold constitutionally protected rights are uniquely positioned to inform land-use planning”.

95. First, neither in the above passage nor anywhere else in the McQueen Letter does Minister McQueen claim that the LARP is actually protecting the constitutionally protected rights of Aboriginal peoples. As I have indicated above, and as reflected in ACFN’s submissions to Alberta during the LARP process, ACFN is firmly of the view that LARP does not protect its Treaty rights.

96. Second, as I discuss above, ACFN’s consultation experience with Alberta in the development of the LARP demonstrates that Alberta has a poor track record of engagement and lacks any commitment to meaningful consultation.

97. Minister McQueen states that Alberta's engagement with Aboriginal peoples on the LARP "resulted in a total of 107 meetings over a two-year period" (page 3) and she points out that Alberta provided \$100,000 to each First Nation to support their engagement with the LARP (p. 6). I do not know whether these figures are accurate, but in any case I observe that the number of meetings held between ACFN and Alberta is not an indicator of the quality of consultation. It merely reflects the Nation's concern with LARP. ACFN initiated a number of meetings and was willing to put its resources towards meeting because of the great concern ACFN had about LARP and its potential to limit ACFN's Rights into the future. ACFN saw a real opportunity for LARP to address the on-going issues related to rights, although this opportunity was not realized in the end. In ACFN's case, Alberta's capacity funding and number of meetings did not translate into meaningful engagement in the development of the LARP.

98. Moreover, ACFN invested significant financial and human resources of its own to participate the LARP process and inform the Crown on how to consider ACFN's rights in a meaningful way, well beyond the funding provided by Alberta.

99. The McQueen Letter refers to the representation of Aboriginal groups on the Regional Advisory Council, which provided recommendations to Alberta to inform the LARP (p. 3). As I have already mentioned above, ACFN was very dissatisfied with the RAC Advice. It was fundamentally incompatible with ACFN's vision of land use planning. As I explained above, ACFN responded to the work of the Regional Advisory Council with submissions of its own to Alberta, the ACFN Advice to LARP and in the Draft LARP Response Materials.

100. Minister McQueen states at p. 4 of her letter that Alberta compiled the input received from Aboriginal groups in the Crown-Aboriginal LARP consultation into a document called "Response to Aboriginal Consultation on the Lower Athabasca Regional Plan." ("**LARP Response**"). I reviewed a copy of this

document on the Government of Alberta's Environment and Sustainable Resource Development website at

<https://www.landuse.alberta.ca/LandUse%20Documents/Response%20to%20Aboriginal%20Consultation%20on%20the%20Lower%20Athabasca%20Regional%20Plan%20-%202013-06.pdf> on February 15, 2014. A copy of the LARP Response is attached to my Affidavit as **Exhibit "30"**.

101. The McQueen Letter credits the LARP Response with explaining to First Nations why certain of their input was not incorporated into LARP. I have reviewed the LARP Response and I disagree with that statement. The LARP Response only discusses Aboriginal input at a high level and it does not discuss the specific recommendations that ACFN made for how the LARP should be developed or what it should include. The LARP Response even fails to explain why Alberta did not adopt ACFN's high level and fundamental recommendation that the LARP include amongst its objectives, and set parameters to help achieve, the protection of a sufficient land base to ensure the sustainability of meaningful Treaty rights in the Lower Athabasca region.

102. At page 4 of the McQueen Letter, Minister McQueen discusses the regional frameworks of the LARP and their role in managing cumulative environmental effects. While these frameworks are a positive step, it is important to note their limitations, particularly in how they relate to treaty rights.

103. First, some of the regional frameworks provided for under the LARP, such as the Biodiversity and Surface Water Quantity framework, have not yet been developed and/or finalized, and thus it remains to be seen what kinds of thresholds those frameworks will set and how effective they will be at promoting a healthy regional environment and healthy natural resources. Second, the frameworks are being developed with no obligation to incorporate the thresholds required to ensure the protection of meaningful, sustainable treaty rights, even where ACFN has made that information available.

104. In short, it would be premature to conclude that the regional frameworks of the LARP are going to be effective at managing cumulative environmental effects, and they will not manage those effects with the objective of understanding, never mind providing, the lands and resources that are required to sustain, into the future, ACFN's treaty harvesting rights, traditional livelihood and associated aspects of their culture.

105. In the McQueen Letter, Minister McQueen makes representations to the effect that LARP has increased the percentage of protected land in the region from 6% to 22%. This is a misleading statement for reasons outlined at paragraph 84 above, as well as in ACFN's final argument to the Panel, attached above to my Affidavit as **Exhibit "27"**. More importantly, it is misleading to suggest that an increase in protected lands will in and of itself actually improve ACFN's ability to sustain its Treaty rights into the future, in a meaningful way.

106. It is also important to understand that the fact that an area is protected as a park does not mean it provides meaningful opportunities for the exercise of treaty rights and traditional land uses generally. In Alberta, parks are explicitly meant to be used for recreation and tourism. The presence of recreational users can make it unsafe to hunt and trap. It can also eliminate the solitude that is an integral part of how ACFN members enjoy their harvesting rights and pursue spiritual traditional activities on the land. Where allowed, recreational harvesting may increase competition for natural resources that ACFN members harvest. Recreational activities such as use of all terrain vehicles can damage the land and also be disruptive to wildlife and the pursuit of traditional activities.

107. Minister McQueen cites the Richardson Backcountry Initiative as an example of how the LARP "considers impacts to treaty rights to hunt, fish and trap" and of ongoing engagement with First Nations under the LARP (p. 6). ACFN has concerns with the Richardson Backcountry Initiative.

108. First, the existing commercial tenures within the area will remain in place, thereby allowing existing development to continue and creating the potential for further development.

109. Moreover, the Richardson Backcountry Initiative prioritizes tourism and recreation over Aboriginal land use in the Richardson backcountry. This is problematic because as discussed above, this objective can conflict with the meaningful exercise of ACFN Treaty rights and other traditional land uses. The Initiative is therefore a missed opportunity to maximize the value of the Richardson Backcountry for traditional land uses.

110. Another concern is that if the Richardson Backcountry becomes one of the only areas within the LARP where traditional use can occur, this will intensify competition, for and pressure, on the traditional resources in that area.

111. While Minister McQueen states at p. 6 that the Initiative “considers impacts to treaty rights”, the stated purpose of the initiative is intended to provide direction for access management. More than access management is required to ensure that ACFN is able to exercise its Rights in the Richardson Backcountry in future. There is no evidence that the Initiative is intended to protect ACFN’s Rights.

112. Thus the Richardson Backcountry Initiative commitment is of limited value given that Alberta has not been amenable to addressing ACFN’s fundamental concerns with the Initiative’s capacity to support the exercise of treaty rights and traditional Aboriginal land uses.

113. Finally, although Minister McQueen asserts at p. 4 of the McQueen Letter that the “Government of Alberta is moving quickly to address gaps in implementing the Lower Athabasca Regional Plan,” her letter is silent on Panel Report Recommendation #65 that Alberta develop, in collaboration with Canada, aboriginal groups and other stakeholders, a TLU management framework as part of LARP. She does not even acknowledge this critical Recommendation, let alone

commit to implementing it. Thus, even if one treated the McQueen Letter as accurate, it fails to communicate any intention on Alberta's part to address the most serious deficiency in the LARP

114. What I discuss above are examples of where I take issue with the content of the McQueen Letter as being inaccurate or misleading. Had Canada shared this letter with ACFN when it received it, during the Phase IV consultation process for the Project, ACFN would have had the opportunity to share these and other concerns with the Agency.

AFFIRMED BEFORE ME at the City )  
of St. Paul in the Province )  
of Alberta, this 25 day of )  
February, 2014. )  
\_\_\_\_\_)  
Christina L. Tchir)  
\_\_\_\_\_)  
A Commissioner for the taking of )  
affidavits in Alberta )

Nicole Nicholls  
NICOLE NICHOLLS

**CHRISTINA L. TCHIR**  
**BARRISTER & SOLICITOR**