

EPEA Application No. 001-
247548, Water Act File No. 303079, CEAA Reference No. 65505 and ERCB
Application No. 1709793



Final Argument of the Mikisew Cree First Nation

for the Hearing regarding the proposed Frontier
Project

Submitted to:

Joint Review Panel
Established to review the proposed
Frontier Oil Sands Mine Project
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Part 1: Introduction

1. Hello Panel, Mr. Chair, Panel Secretariat. Today my colleague Karey Brooks and I have the privilege of delivering the closing arguments of the Mikisew Cree First Nation in this proceeding.
2. Mikisew's closing argument is roughly divided into four sections. I'll begin with a few preliminary matters to situate Mikisew's submission for you. After those preliminary remarks, I will provide an overview of what the legal framework for this proceeding means, in Mikisew's submission, for your work in the coming months. Then Ms. Brooks will take you through the evidence that Mikisew submits is most relevant for your review and decision-making and what that means for the nature of the mitigation measures Mikisew is seeking. In closing, I will summarize the dispositions sought by the Mikisew.
3. First, I want to draw you back to the introduction in Mikisew's August written submission. Mikisew stated it would take a different approach in this proceeding. Specifically, Mikisew said that it would focus its participation on:
 - a. one - bringing forward the best western science and indigenous knowledge information available about the risks that the Project poses to key Mikisew interests,
 - b. two - showing the Panel where Teck and Mikisew have found common ground on ways to reduce those risks and, finally,
 - c. three - helping the Panel understand how those issues where further actions are needed to mitigate or reduce risks can be addressed through government commitments prior to issuing final approvals.
4. Mikisew certainty for its lands, rights and culture as you consider this project.

5. As Ms. Lepine described on the 3rd day of Mikisew's panel evidence: "The first two panels provided evidence about our needs and our concerns with the project. We provided that evidence for a very specific reason. It wasn't to debate Teck, it was to help you Panel and Mr. Chairman, understand why our joint conditions with Teck and our recommendations to government are absolutely necessary and supported by strong evidence"¹ Mikisew's closing argument today is meant to be in the same vein.

6. Although you will hear again today that there are areas where Teck and Mikisew disagree about the level of a potential effect on or risk to certain environmental components that support Mikisew's rights and culture, those differences do not place you in a position of having to make a binary decision. Rather, the evidence from Mikisew and from Teck lead you to the same two outcomes:
 - a. First, the evidence confirms that the joint conditions developed by Mikisew and Teck are of critical importance to the Mikisew and must become binding regulatory conditions for the Project.

 - b. Second, while Teck has done what it can to limit Project effects on Mikisew's rights, the evidence shows outstanding issues remain that can and must be addressed by governments before their final approvals are issued for the Project. I emphasize "their approvals" because it is up to governments to address the outstanding Project issues. Under the statutory schemes relevant to this project, governments have another opportunity to make those commitments in the period between your report and when the final decisions are made to permit this project.

7. Next, I'd like to comment on how this hearing has been unique. I'll start with the simplest: this is a unique project in terms of its affects on Mikisew's Treaty rights and its most cherished places and resources: it is the closest open pit oil sands

¹ Hearing Transcript Volume 13, October 18, 2018 ("Transcript, October 18") CEAA Document 623, p 2668.

mine ever proposed to Wood Buffalo National Park; it is the first to involve mining a watershed that flows directly into Lake Claire, a key part of the Peace Athabasca Delta, and in areas that Mikisew has requested to be off-limits to development; and it is the first to so directly and substantially disturb the habitat of the Ronald Lake Bison Herd. That herd is the only disease free bison herd that Mikisew can legally hunt in its entire territory. This is also the first JRP to take place after the World Heritage reactive monitoring mission and the Wood Buffalo National Park Strategic Environmental Assessment, which both confirmed that the environment of the Wood Buffalo National Park is failing to meet international World Heritage standards and there are causal linkages to the oil sands industry.

8. A number of aspects make this hearing unique with respect assessing effects on Section 35 rights:
 - a. First, this is the first oil sands hearing where a Joint Review Panel has been presented with a formal methodology, not to mention one collaboratively developed by an indigenous group and a Crown agency, for how to assess Project effects on Section 35 rights.² Unlike other proceedings, this JRP has been presented with a valuable the roadmap to follow in carrying out that assessment.
 - b. Second, this is the first oil sands hearing where a First Nation has undertaken a comprehensive assessment of Project effects on its Treaty rights.³ The fact that the terms of reference for Mikisew's Rights and Culture Assessment were developed with Teck is notable as it speaks to the collaboration between Mikisew and Teck.
 - c. And third, this is the first oil sands hearing where the federal government has submitted evidence at the hearing stage about its views of Project effects on Mikisew's Treaty rights. The independent evidence provided by

² CEAA Registry #394

³ CEAA Registry #497, Appendix 1C at pdf 482

CEAA confirms Mikisew's conclusions that the project will have a high level of impact on the Treaty rights of Mikisew.⁴

9. In Mikisew's submission, all of this means that the guesswork that has stymied previous regulatory proceedings on s.35 rights assessments is not present here.
10. Finally this hearing is different with respect to the key issue of project mitigation. Here, the Panel has been presented with proposed regulatory conditions jointly developed by Teck and Mikisew that help to reduce a number of critical Project effects. Those regulatory conditions came out of the negotiation of a Participation Agreement between Mikisew and Teck, which further evidences the real work that has been done by Mikisew and Teck to establish a constructive relationship and resolve a number of issues important to Mikisew that are within Teck's power to resolve or undertake.
11. As a result, the scope of issues that need further mitigation has been narrowed to allow this hearing to be more focused on core outstanding issues. For those, Mikisew has provided a concise package, supported by clear evidence, of the measures that need to be taken by governments to resolve the remaining outstanding issues and risks associated with this project - the Nikechinahonan Framework.⁵
12. There is no doubt that this Panel faces a complicated task as you prepare your report and your decision. But, with respect to Mikisew's core concerns, you have a better roadmap than previous panels. Mikisew submits that the evidence in this proceeding will not only help you follow that roadmap, but supports Mikisew's request for the joint conditions and government actions as laid out in the Nikechinahonan Framework.

Part 2: The Framework for this Review

⁴ Hearing Transcript, October 23, 2018 at 3277-3278; CEAA Registry #489 at pdf 591-593, 599-601, 604-605 and 616

⁵ CEAA Registry #621

13. Now I would like to briefly turn to a review of the legal framework that must guide the Panel as you discharge your core responsibilities.

Panel Responsibilities in relation to conducting an environmental assessment

14. One responsibility of the Panel is to undertake an environmental assessment pursuant to *the Environmental Protection and Enhancement Act* and the *Canadian Environmental Assessment Act, 2012*. As a planning tool that identifies and evaluates potential consequences of a project, environmental assessment is an integral component of sound decision-making.⁶
15. An environmental assessment is tasked with the management of future risk and in so doing, must be guided by the precautionary principle: lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation or reduce potential risks.⁷
16. Here, the Panel must carry out an assessment taking into account these principles, so that government decision makers can make rational and informed decisions with an understanding of the consequences of their decisions. The consequences of decisions on this project are ultimately borne by current and future generations of Mikisew people who rely upon the environment in and around this Project for their personal, cultural, and social health.
17. In undertaking this EA, we ask the Panel be mindful of the unfortunate experiences that Mikisew has had in previous environmental assessments. Mikisew often finds that in trying to voice its concerns, the regulatory process silences its perspective or at best, treats Mikisew's elders and youth as less valid and less legitimate than the perspective of people who have interacted with these issues only as words on a page but are seen as more credible because they work for large consulting firms.⁸ It is critical that in coming to your decision on this

⁶ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3.

⁷ *114957 Canada Lteé (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40.

⁸ CEAA Registry #129

Project, the Panel place a high and equal value on the Mikisew Cree, its knowledge, culture or perspective.

Panel Responsibilities in relation to the Outstanding Universal Value of Wood Buffalo National Park

18. Part III of the Panel's terms of reference requires you to consider information related to potential environmental effects of the Project on Wood Buffalo National Park ("the Park"), including any cumulative effects of the Project. To discharge this responsibility, the Panel must have regard to the World Heritage Convention, the Operational Guidelines for the World Heritage Committee and the substantial body of principles and guidance that has been developed in relation to the Outstanding Universal Value or OUV of world heritage sites.
19. The OUV of the Park is based on criteria which are set out in the World Heritage Convention, and the Operational Guidelines for the World Heritage Committee. The OUV of the Park is not synonymous with the Park as a whole. It is possible to increase risks to OUV without pushing the full Park over an ecological tipping point. In Mikisew's submission, the three attributes of the Park's OUV most at issue in this proceeding are
 - a. The great concentrations of migratory wildlife (Criterion VII)
 - b. The rare and superlative natural phenomena of the large inland delta, meaning the PAD (Criterion VII)
 - c. the only place where the predator-prey relationship between wolves and wood bison has continued, unbroken, over time (Criterion IX)
20. Canada has recently undertaken an inclusive process for defining the desired objectives for each of these OUV attributes. These objectives provide an important measure against which you can assess risks that the Project poses for the OUV. I'll take some time to review those desired outcomes.

21. The desired outcomes for the attribute of the OUV relating to migratory wildlife are:
 - a. Great concentrations of viable, healthy populations of migratory waterfowl species continue to use the Park seasonally.
 - b. Adequate quantity and quality habitat, unimpaired by contamination, is available for migratory waterfowl to fulfil all key life cycle stages while present in the Park.
 - c. Indigenous groups are able to maintain traditional harvest of waterfowl species and practice their way of life with confidence in healthy, sustainable and accessible populations of waterfowl.

22. The desired outcomes for the attribute of the OUV relating to the Peace Athabasca Delta are:
 - a. Flow regimes and water quality into the PAD maintain the ecological function of the ecosystem
 - b. Flow regimes and water quality into the PAD sustain vegetation communities and healthy and abundant populations of key ecological and cultural species including waterfowl, muskrat, fish, bison and wolves.
 - c. Indigenous groups have access to the PAD and are confident enough in the health of the PAD to maintain traditional use and way of life through hunting, fishing, gathering, and cultural activities.

23. The desired outcomes for the attribute of the OUV relating to wood bison, which includes the Ronald Lake Bison Herd are:

- a. The predator-prey relationship between wolves and wood bison that spend time in the Park remains intact and within natural ranges of variation
 - b. Populations of both species remain viable, evolve as naturally as possible and support Indigenous traditional use and ways of life.⁹
24. Those are the benchmarks that Mikisew submits are most helpful to you. With those benchmarks in mind, I'll walk you through some of the principles from World Heritage guidance that must guide your assessment of the effects or risks that the Project may create for the OUV of the Park:
- a. Criterion VII has both objective and subjective aspects, which means that the experiential, cultural and spiritual value of those aspects need to be considered.
 - b. Cultural understandings of the OUV from indigenous people should not be ignored.
 - c. Indigenous knowledge and the social, cultural, religious and spiritual values and practices of indigenous people are respected and recognized in understanding biodiversity.
 - d. Indigenous people are to be involved in the evaluation of the state of conservation of OUV.
 - e. Conservation values should be interpreted in a manner that includes an understanding of affected people including indigenous people.¹⁰

⁹ Final Report, Strategic Environmental Assessment of Wood Buffalo National Park Heritage Site, 2018, (*"SEA Report"*) at p 3-14.

¹⁰ CEAA Registry #497, Appendix 1E, Exhibit A, Tabs 1 and 2, including pages 16-17 of the Urgent Call report

25. What all of this means, in Mikisew's submission is that you must consider Mikisew's relationship with the OUV in your OUV assessment.

Panel Responsibilities in relation to the Public Interest

26. In its role as the AER, the Panel must consider the public interest. Under section 3(b) of the *Oil Sands Conservation Act*, one of the primary purposes of OSCA is "to ensure orderly, efficient and economical development in the public interest of the oil sands resources of Alberta".¹¹ The AER may only approve an application for the recovery of oil sands if "in its opinion it is in the public interest to do so".¹²
27. Guidance from the Supreme Court of Canada confirms that the public interest includes the specific interests of Aboriginal people and the impacts that a decision will have on s. 35 rights.¹³ The Supreme Court has also indicated that a "special" and heightened public interest arises when there is a constitutional dimension to a proposed decision.¹⁴ Finally, the Supreme Court has explicitly stated that: "A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest".¹⁵ Simply put, the JRP has a legal duty to consider effects to Treaty rights in your public interest analysis.
28. It is therefore necessary that the Panel, in its consideration of whether this project is in the Public Interest, consider the impacts or risks that this Project will create for Mikisew's constitutionally protected rights and, in Mikisew's submission, give effect to the Joint Conditions and the Nikechinahonan Framework.
29. In Mikisew's submission, the public interest threshold can only be met where the Panel incorporates Mikisew's proposed conditions in its decision as the AER and

¹¹ *Oil Sands Conservation Act*, RSA 2000, c O-7 ("OSCA") s 3(b).

¹² OSCA, s 10(3).

¹³ *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 70.

¹⁴ *Ibid.*

¹⁵ *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 ("Clyde River") at para 40.

recommends that the Governments of Canada and Alberta commit to the Nikechinahonan Framework before issuing final approvals.

Panel Responsibilities in relation to Aboriginal Rights and interests

30. Next, I would like to briefly outline the Panel's responsibilities with respect to Aboriginal issues. Part III of the Panel TOR imposes two different types of requirements on the Panel with respect to Aboriginal rights and interests: a procedural requirement to receive certain types of information, and a substantive requirement to consider certain criteria in preparing your report.
31. You have received clear and uncontested information about the nature of Mikisew's Treaty rights and potential effects on those rights. For example, Mikisew asserts that its Treaty right to harvest bison is engaged in this proceeding. Mikisew is not asking you to decide as a matter of law that it has a Treaty right to harvest bison, but submits that the Terms of Reference requires you to assess effects on Mikisew's rights as asserted.
32. Mr. Chair and Panel, a number of factors must guide you as you consider effects on Treaty rights. First, given the fundamental purpose of s. 35 is the "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship"¹⁶ the Panel has a duty to consider how it is giving effect to reconciliation when making decisions and formulating recommendations.
33. Second, we agree with Teck's argument that there are differences between the evaluation of environmental effects and the consideration of effects on Section 35 rights. It is now widely recognized that a biophysical approach to assessment of impacts on indigenous rights is unduly restrictive and inappropriate for assessing impacts to Section 35 Rights.¹⁷ To really understand impacts to

¹⁶ *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10; *Mitchell v Minister of National Revenue*, 2001 SCC 33 at para 29.

¹⁷ Joint Review Panel Report, Shell Canada Energy Jackpine Mine Expansion Project, 2013 ("*Shell Jackpine Report*") at para 1801.

Treaty rights and what mitigations are required, the factors that influence whether and how Mikisew members exercise their rights and culture must be considered. In addition, consideration must be given to the avoidance of areas and resources that can result from perceived contamination and incompatibility with cultural values.¹⁸ Assessing impacts on Treaty rights also requires an understanding of the context of cumulative effects in which rights are exercised.¹⁹

34. An assessment of effects on Treaty rights must also be based on an understanding that there are historical, cultural, familial and spiritual reasons why certain areas and resources are particularly critical. Assuming that Mikisew members can “go elsewhere” in response to project impacts would make for a flawed assessment because it would ignore undisputed evidence that Mikisew provided to that members like GM, Larry, Jocelyn and Terry cant go elsewhere for cultural and ecological reasons.²⁰
35. For this Project, a rights-based methodology was jointly developed by Mikisew and the Canadian Environmental Assessment Agency.²¹ It the first publically available methodology of its kind. Ms. Candace Anderson, the Crown consultation coordinator from CEAA for the Project, testified that the rights-based methodology was intended to be used during the environmental assessment of the Project, not just in Crown consultation; that Canada recognized a structured approach to assessing impacts to rights and culture was required; that the methodology ultimately developed was informed by and consistent with consultation case law, academic literature, and best practices. She also testified

¹⁸ *Shell Jackpine Report* at paras 1789, 1792.

¹⁹ *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at paras 237, 241.

²⁰ Hearing Transcript, October 16, 2018 at 2303-4, 2306, 2283, 2321; see also *Shell Jackpine Report* at para 1790.

²¹ See Mikisew Cree First Nation and Canadian Environmental Assessment Agency, *Methodology for Assessing Potential Impacts on the exercise of Aboriginal and Treaty Rights of the Proposed Frontier Oil Sands Mine Project*, (May 25, 2018) (“*Methodology for Assessing Potential Impacts*”) CEAA Document 394.

the methodology underwent senior management review before being submitted to you.²²

36. As described by Melody Lepine and Ms. Anderson, it was necessary to develop a methodology that was specific to assessing impacts to rights because of the inadequacies in traditional environmental assessments. Such an observation has also been made by the Supreme Court of Canada recently in *Clyde River* where the Court confirmed that rights-based impacts can be distinct from environmental impacts.²³ Ms Anderson described the differences this way:

*The environmental assessment process as set out today does focus quite extensively on biophysical assessments. What makes this approach particularly unique is that it does take into consideration impacts on rights which could be broader than what the Statute sets out, things like consideration of how a sense of connection in place and attachment to the land can better be considered through a rights-based approach. And that's what this methodology sets out to capture.*²⁴

37. Ms. Lepine also provided the examples of the differences between rights-based impact assessments and environmental impact assessments. For example, this methodology would assess how shifts in to movement of the Ronald Lake Bison Herd will impact Mikisew's culture and way of life.²⁵ The methodology recognizes that the exercise of rights depends on a broader range of factors. For example, rights under Treaty 8 include a range of component that inform when, how, where and why harvesting activities take place, many of which are informed by cultural considerations and Indigenous laws.
38. Ms. Lepine and Ms. Anderson testified that this methodology was developed to help inform decision makers and Teck about the potential impacts to Mikisew's

²² Hearing Transcript Volume 16, October 23, 2018 ["Transcript, October 23"] CEAA Document 650, pp 327–3271.

²³ *Clyde River* at para 45.

²⁴ Transcript, October 23, p 3273.

²⁵ Hearing Transcript Volume 12, October 17, 2018 ["Transcript, October 17"] CEAA Document 620, pp 2404–2405.

rights and culture with respect to the Project.²⁶ It was also intended to assist in identifying more effective mitigation to ensure that impacts to rights and culture are avoided or minimized as much as possible. Importantly, a unique rights based impact methodology gives appropriate weight to the Indigenous perspective.²⁷

39. So that it is fresh in your mind, the impacts to rights methodology for the Project consists of the following steps:
 - a. First, determining the context in which potential impacts on rights will occur. Under this step, the assessor is to identify the conditions that support a community's exercise of rights, understand how historic, existing and approved activities have affected those conditions and consider the importance of the Project location in relation to the exercise of rights.
 - b. Second, evaluating potential project impacts to rights. Under this step, the assessor is to identify the pathways for potential impacts of the Project on the exercise of rights and determine whether the Project will have a low, medium, or high level impact across specific indicators
 - c. Third, follow-up and evaluation
40. The joint Mikisew-CEAA methodology provides a cogent and principled approach for conducting an assessment of impacts of the project on Mikisew's Treaty rights that meets all legal and methodological standards.
41. Mr. Chair, you will recall the rights-based methodology was applied twice - by a consultant retained pursuant to a Terms of Reference developed jointly by

²⁶ Transcript, October 23, p 3272.

²⁷ See also four examples demonstrating the need for the Joint Review Panel to give reasonable weight to the Indigenous Knowledge evidence provided by the Mikisew Cree Elders (2018), CEAA Document 497, Appendix 1C, p 1611.

Mikisew and Teck²⁸ as well as by the Canadian Environmental Assessment Agency.²⁹ Both assessments found the potential for a serious adverse impact to Mikisew's rights and culture if the Project is approved.

42. Next, it is critical to comment on what Alberta's land use planning regime means for how you discharge your responsibilities in relation to aboriginal issues. As the AER, the Panel is bound under the *Responsible Energy Development Act* to act in accordance with any applicable regional plan, which in this case is the Lower Athabasca Regional Plan and its associated frameworks.³⁰
43. Interpreting this provision of REDA to constrain your consideration of cumulative effects on Treaty rights would be a serious error. To assume that consistency with LARP simultaneously discharges your consideration of cumulative effects on Treaty rights would be inconsistent with the approach set out by the courts for analysing impacts to Treaty rights. It would also be inconsistent with statements made by senior Alberta Environment and Parks officials to Mikisew during this regulatory process, which are in the evidentiary record before you in Ms. Lepine's Affidavit regarding cumulative effects.³¹ LARP does not purport to set thresholds or measures relating to Treaty rights and nothing in the statutory scheme for this Panel would allow for such an interpretation. Confirming compliance with LARP is not confirming compliance with the *Constitution Act, 1982*
44. Lastly, it is important to recognize that your duty to act constitutionally also applies to your recommendations. The Federal Court has held that the obligation of an administrative body to act constitutionally also arises when the body is making recommendations, as opposed to final and binding decisions.³² This

²⁸ See Gibson, G. *Wiyôw'tan'kitaskino (Our Land is Rich): A Mikisew Cree First Nation Culture and Rights Assessment for the Proposed Teck Frontier Project*, (September 15, 2015) CEEA Document 497, Appendix 1C, Tab 5 ("Culture and Rights").

²⁹ See Canadian Environmental Assessment Agency, *Whole of Government Preliminary Assessment of Potential Impacts on Aboriginal or Treaty Rights* (August 31, 2018) CEEA Document 489, CEEA 001 ("CEEA Preliminary Assessment of Potential Impacts").

³⁰ Responsible Energy Development Act, RSA 2012, C R-17.3, s.20(1)

³¹ CEEA Registry #497, Appendix 1E at para 73.

³² *Canada (Attorney General) v Telbani*, 2012 FC 474.

means that when you are considering recommendations for measures to mitigate effects on Treaty rights, you must be informed by the imperative of reconciliation.

45. Mr. Chair, the evidence before you and the principles just described, support Mikisew's submission that the joint conditions proposed by Mikisew and Teck and the further action by governments, the Nikechinahon Framework, are essential for respecting Mikisew's Treaty rights.

Guidance for assessing the weight of evidence

46. As part of discharging your duties, the Panel must consider the weight to give to evidence it has received. Where a party has provided evidence but declined to adopt it under oath or make itself available for questioning, the decision-maker or trier of fact must be very cautious in attributing any weight to this evidence given the inherent unreliability of untested evidence.³³
47. Alberta has filed the ACO Report, along with the ACO Hearing Report (together the "ACO Reports") in this proceeding. The ACO Reports purport to provide opinions on what actions or mitigation measures are required to address the potential adverse impacts on Treaty rights. Mikisew submits these reports be given no weight in your deliberations and that to do so would undermine the fairness of this Proceeding.
48. Unlike all other participants in this hearing, the ACO has twice submitted materials without making itself available for questions. This is strike one. Despite providing opinion evidence, the ACO has not provided any qualifications for the person providing it. That is strike two. Nor has the ACO adopted its reports under oath, unlike all other participants in this proceeding. That is strike three.
49. There are further reasons why the Panel cannot give weight to the ACO Reports. Alberta's refusal to allow any party to test the Reports by way of cross-examination is particularly problematic given that the findings of the Reports are

³³ *Saskatchewan Wheat Pool v Steffenson*, 2006 SKQB 103 at para 28.

inconsistent with evidence on the record regarding mitigation measures for bison and project-related cumulative effects.³⁴

50. Further, the ACO Reports cites no evidence that is before the Panel to support its conclusions. To the extent that the ACO Reports rely on evidence that has been provided outside of the record, the Panel's reliance on it would significantly undermine the fairness of the hearing.
51. As explained by Mr. Stuckless, the original ACO Report relies on an approach that is inconsistent with clear guidance from the courts for considering impacts on Treaty rights. The absurdity of the ACO's approach was made clear in Mikisew's evidence, which showed that the ACO has confirmed that:
 - a. the site-specific test cannot be met where a First Nation can go to another location to practice the right, even if they demonstrate a degree of connection with the area in and around Project for the exercise of rights or any level of hardship resulting from having to go elsewhere; and
 - b. typically 97-99.5% of First Nations concerns regarding impacts of oil sands Projects on Treaty rights are determined by the ACO to be not site specific, no matter what evidence is provided by a First Nation.³⁵
52. The new ACO Report adopts the same fundamentally flawed approach as the original report critiqued by Mr. Stuckless. Importing the ACO's analysis into yours would result in errors by the Panel and create procedural unfairness.
53. I will now turn the podium to my colleague, Karey Brooks, who will speak to the next part of Mikisew's closing argument.

³⁴ CEAA Document 397; Appendix E to Mikisew's written submission (Affidavit #1 of Melody Lepine) at CEAA Document 497; Affidavit # 1 of Melody Lepine, paras 71-96.

³⁵ CEAA Registry 497, Appendix 1F (provincial consultation affidavit) at paras 50-53; Hearing Transcript, October 18, 2018 at 2617-2622

Part 3: Evaluation of Project Effects and Proposed Mitigation Measures

54. My comments provide an overview of Mikisew's assessment of adverse impacts its rights and culture, and to the environment generally.
55. Mikisew submits the Project has the potential to result in adverse impacts to its Treaty rights and culture, the Ronald Lake Bison Herd (RLBH), water quantity, water quality, air quality, human health, migratory birds, and the Outstanding Universal Value of the Wood Buffalo National Park.
56. Mikisew has worked diligently with Teck to develop conditions that will mitigate or reduce many of these adverse impacts. As Chief Waquan stated:

Mikisew leadership appreciates its relationship with Teck and the work that has been done through the participation agreement and joint conditions to resolve issues that are within Teck's power to resolve or undertake.³⁶
57. As I discuss the potential adverse impacts, I will refer to these mitigations where appropriate. However, they can be found in full in Mikisew's initial submission filed August 31, found at CEEA Registry Doc. 497, Appendix 2.
58. As Mikisew has informed the Panel throughout the proceeding, some important mitigation measures are beyond the control of Teck, and instead require government action. Mikisew has proposed a number of government actions through the Ni-key-che-nah-honen Framework to address outstanding risks to Mikisew's rights and culture. That framework was presented in Panel 3, and is found at Exhibit 621. However, I will also refer to these government recommendations where appropriate in this presentation.

³⁶ Transcript, October 17, p 2389.

Rights and Culture Impacts

The Conditions that Support Mikisew's Rights and Culture

59. My presentation follows the Rights Methodology structure referred to by Mr. Gustafson. I will start, therefore, with the conditions Mikisew members need to support a meaningful exercise of their rights and culture.

Sakaw pimacihiwini (Bush way of Life)

60. First, Mikisew members described living a bush way of life. The evidence presented made it clear that the ability of Mikisew members to practice their Aboriginal and Treaty rights is connected to a healthy, land-based way of life.

61. This includes the harvesting of plants, fish and other wildlife such as bison, moose, and migratory birds in accordance with Mikisew's seasonal round.

62. You heard that for Mikisew, every season has a purpose. Elder Terry Marten, Elder George Marten and Jocelyn Marten gave extensive evidence about what activities they did with their families, in what areas, and at what times of year.

63. Mikisew's evidence also shows that its way of life depends on more than hunting and trapping. Relying *confidently* on clean water and *abundant* lands and resources in *familiar* areas is critical for Mikisew way of life. Mikisew members described in detail living on the land in places where their ancestors lived previously, including at cabins and camps along the Athabasca River and around Lake Claire. As put by Elder Terry Marten: "I was born and raised out on the land. We had love there. We had ownership there with our parents. All our family members. Everything was your friend. You're just in harmony with nature."³⁷

64. She reinforced how integral the bush life was to Mikisew identity. She testified: "...we are part of the land. We are with the land and water as soon as the day

³⁷ Transcript, October 16 at p 2315.

you are born ... We have that identity, we have that ownership right from the day we were born.”³⁸

Ayapaskaw – the Peace Athabasca Delta (Cultural Landscape)

65. The PAD is a key cultural landscape for the Mikisew. It is a primary location for harvesting, social, economic, political and cultural activities that are vital to the cultural continuity of Mikisew.
66. The Athabasca River provides an essential corridor for Mikisew members to travel and harvest. It also plays an integral role in creating and replenishing the PAD.³⁹ As stated by Elder George Marten stated: “We need the two rivers to flow proper, to have enough water to flow -- the Athabasca River and the Peace River. Because if they're flowing when they have high level, high water, they're very, very powerful and they bring in all the water into the delta. It makes it into a clean, healthy environment.”⁴⁰
67. Mikisew testified that the PAD is their grocery store, their classroom, their medicine cabinet, their church, their highway, their photo album, and the place where their happiest memories live.⁴¹ Elder George Marten reflected fondly on his memories of the PAD. He stated: “I was born in the Delta... Birch Mountain country is where I was raised. I was a trapper at a very young age. Everything then... was very nice. The water level was high. We had... all different types of species in our Delta. Everything was alive. The humans were happy, the animals, everything. We were happy to live on the land”⁴².

³⁸ Transcript, October 16 at p 2247.

³⁹ Mikisew, *An Urgent Call to Rehabilitate a Global Treasure*, Mikisew Cree First Nation's written submission to the 2016 Joint World Heritage Centre/IUCN Reactive Monitoring Mission to Wood Buffalo National Park World Heritage Site, CEAA Document 497, Appendix 1E, Ex. A, tab 2 (“*Urgent Call*”), p 57-58; *Culture and Rights*, p 13, 18, 105, 108-109; *SEA Report*, p 5-44 to 5-50.

⁴⁰ Transcript, October 16 at p 2270.

⁴¹ Urgent Call, pg. 57-58; *Nipî tapîtam (Water is Everything): An indigenous understanding of the OUV of Wood Buffalo National Park*, May, 2016, CEAA Document 497, Appendix 1E, Ex. A, tab 3 (“*Water is Everything*”), p 4-6, 10-12.

⁴² Transcript, October 16 at p 2243.

68. Elder Larry Marten confirmed the abundance of the resources in the PAD was critical to Mikisew's way of life. He stated "We had a lot of water. Everything was good... [And] when you mentioned buffalo, they were all over... The delta was rich, the whole delta, not just one area."⁴³

69. Jocelyn Marten described that the PAD is her therapist and essential for helping youth live a healthy Mikisew life. She stated

[w]hen I'm docking my boat at the big dock and going home to Lake Claire, it's like I'm going home to see my therapist. I'm sure a lot of people here maybe have their own therapist. I have my own, which is Lake Claire, Gull River, Frog Creek. It's a place that just takes everything away from me. Again, the memories come back. It's just a great feeling... It's... my therapist. My mother. My home.⁴⁴

70. The northern part of the Project will cross into the Buckton watershed. This watershed flows directly northward into Lake Claire in the PAD. Elder George. Martin emphasized the importance of this watershed. He said:

"[B]uckton River is very, very important. It brings life. It brings life to the environment, to the habitat, to all the animals, to the rivers. They're healthy, and that's what I like about that area, because in other places, they don't have very much water, so pollution settles. And with the pollution settling, then you have thistle and you have willows growing. But in Buckton, you know, there's still hope, it's still healthy. That's my territory, that's where I loved hunting for all types of animals, that's where I did my trapping, and that's where I made my livelihood."⁴⁵

71. Other Mikisew members agreed the health of the Buckton watershed is necessary for the integrity of the PAD and Mikisew's cultural and spiritual

⁴³ Transcript, October 16 at p 2257.

⁴⁴ Transcript, October 16 at p 2322.

⁴⁵ Transcript, October 16 at p 2272.

relationship to it.⁴⁶ Jocelyn Marten explained: [th]e river from Birch Mountain...flows into the Buckton area... into the lake, and it's a healthy water that flows from Buckton.”

72. She stressed the importance this place. She said “And I cannot leave that area because that’s where I grew up. That’s my area. That’s where I’m from. It’s my home. It’s the place that I grew up. It’s the place that I was taught my way of life. It’s memories that I have as a child. It’s important for me to go to these places to teach my children, my two girls, and my grandson especially, and to take other family members there to show them the places I’ve been.”⁴⁷

Nipi tapitum (Water is Boss)

73. The next key condition is water. It is not possible to spend time in Fort Chipewyan without obtaining an understanding of the phrase “water is boss.” Clean, abundant water provides for safe drinking and healthy wildlife and vegetation, and supports the ecosystem in the PAD, and is needed for Mikisew people to travel throughout the area and have the resources required for harvesting.⁴⁸

74. Elder Terry Marten put it plainly:

In our territory, water is everything. We need plentiful, healthy water to access our lands and have resources to be able to harvest... everything in our territory, in our land is connected to water, and that's why.. "the water is boss"...It is life. It gives life to humans, to our water systems, the rivers, the lakes...for accessibility, to practise our rights, to live our way of life, to give good...for the animals, to have good, clean water for the animals to

⁴⁶ Candler, C and, Malone, M. *Addendum to The Mikisew Cree First Nation Indigenous Knowledge and Use Report and Assessment for Teck Resources Limited's Proposed Frontier Oil Sands Mine Project*. (May 28 2015) CEAA Document 497, Appendix 1C, tab 3 (“TLU Addendum”), p 40; Culture and Rights Report, p 63, 75-76.

⁴⁷ Transcript, October 16 at p 2306.

⁴⁸ *SEA Report*, p 2-5 and p 5-44 to 5-61; *Water is Everything*, p 4-6, 10-12; *Urgent Call*, p 14.

drink...Every... living species needs...good, clean water to be able to live. That's where [water is boss] came from. ... quality and quantity of water is crucial for us to be able to go to our territories, our lands, because the river systems and the lakes are our transportation.⁴⁹

75. Jocelyn Marten also stressed the importance of water. She said:

“First of all, we need healthy water before we can harvest anything. It's important for the birds and all other animals. We need water levels to be high at the right times...Water is important all year round, but fall and spring are the most critical times for the water to be able to harvest in the fall or spring. Floods give fresh water into the land lakes that you need for healthy plants.... Water stays in the summer to keep healthy vegetation... high spring water will tell you how the year will help you to harvest throughout the year. You can predict whether it's going to be a good summer, a good fall, a good winter to harvest.⁵⁰

She also emphasized passing down knowledge requires water. She said: “...to pass on my knowledge and my teachings to my children and grandchildren, I need access to my traditional hunting-trapping-fishing areas, my home. I need water -- I need clean water.⁵¹

76. Similar sentiments were expressed by Elder George Martin who stated: “I just wanted to reaffirm that we had a wonderful way of life when water was high.⁵²

Sakaw Mostos – Wood Bison (Keystone Species)

77. Bison is a key component for the meaningful exercise of rights and culture.⁵³

Bison is a preferred meat. It is also a keystone cultural species to the Mikisew,

⁴⁹ Transcript, October 16 at p 2272.

⁵⁰ Transcript, October 16 at p 2324.

⁵¹ Transcript, October 16 at p 2261.

⁵² Transcript, October 17 at p 2373.

⁵³ See McCormack, P. *The People of the Mikisew Cree First Nation, Athabasca Chipewyan First Nation, and the Northern Bison* (August 30, 2018) CEEA Document 497, Appendix 1C, Tab 1 (“*The People of the Mikisew Cree First Nation*”); Candler, C., Leech, S., and Whittaker, C. *Sakaw Mostos (Wood Bison)*

with the skulls used in sweat lodges, as altars, and in ceremonies in many households.

78. As stated by Elder George Marten: “[E]verybody relies on the buffalo, even the animals. For example, the wolves, they kill the bison for food. Then the little birds will come there and feed off that carcass of the bison, the foxes would come there as well and eat from that kill. So everybody, all the animals, had food from that bison. We did not kill bison to have trophies. We only killed bison for survival and to bring food home.”⁵⁴
79. The bush way of life tied closely to bison hunting. The bison hunt and the practices and customs that accompany the hunt are also considered by Mikisew members as important opportunities for transmission of culture and knowledge from elders to younger land users.
80. Dr. McCormack, a Professor Emeritus at the University of Alberta, and ethno historian, filed a report that describes Mikisew’s reliance on bison.⁵⁵ She stated that the Indigenous signatories understood that the Treaty promised them the continued freedom to choose their way of life and to use all the wildlife resources into the future, including bison.⁵⁶ She stated that the “treaty commissioners made the strongest assurances that nothing would interfere with the land-based resources and the way of life.”⁵⁷
81. Dr. McCormack’s findings are consistent with the community evidence collected by Dr. Candler and detailed in his report.⁵⁸ Dr. Candler stated “it is clear that

Mikisew Cree First Nation Indigenous Knowledge Study. (April 10, 2015) CEAA Document 497, Appendix 1C, Tab 4 (“*Sakaw Mostos IK Study*”); and Komers, P. and Kopach, B. *Using Indigenous Knowledge of the Mikisew Cree and Western Science to Estimate Habitat Availability and Population Viability of the Ronald Lake Bison Herd*. (September 2017) CEAA Document 497, Appendix 1C, Tab 6 (“*Using IK to Estimate Habitat Availability and Population Viability of the RLBH*”).

⁵⁴ Transcript, October 16 at p 2330.

⁵⁵ *The People of the Mikisew Cree First Nation*.

⁵⁶ *The People of the Mikisew Cree First Nation*, p 83.

⁵⁷ *Ibid.*

⁵⁸ *Sakaw Mostos IK Study*.

MCFN members have relied on bison, both culturally and for sustenance purposes, for generations. They continue to rely on them today.”⁵⁹ He notes that although MCFN relationship with and use of bison has remained continuous, their practices have changed because of Park regulation and reduced access.

82. Mikisew evidence showed that the conditions required for harvesting of bison include *healthy* bison (free from disease; having natural qualities); *abundant* bison (population size sufficient for sustainable harvesting – 1 bison per member; per year); *accessible* bison and in *preferred* locations; *legal* harvest of bison; *preferred* means (winter with a dog sled or snow machine); *away* from industrial disturbances; where successful hunting is likely; where continuity between generations can be maintained.⁶⁰

Wiyow'tan kitaskino (Our Land is Rich)

83. Abundant resources are critical. Mikisew's treaty rights depend on having access to sufficient quantity of each kind of traditional resources, such as bison, moose, migratory birds, fish, in culturally relevant areas.⁶¹ Elder Rita Marten confirmed that “[p]rior to 1899 the Mikisew people, our ancestors and our families, our parents, our grandparents... had an abundance of everything. They were very wealthy. They could harvest... anything they wanted.”⁶²
84. Mikisew members testified that the exercise of their Treaty rights requires a sufficient diversity or richness of resources. This allows Mikisew members to maintain a seasonal round so that no resource becomes depleted through overharvesting.⁶³

⁵⁹ *Sakaw Mostos IK Study*, p 22.

⁶⁰ *Sakaw Mostos IK Study*, p 37-38.

⁶¹ *Culture and Rights*, p 71 and 163.

⁶² Transcript, October 16 at p 2308.

⁶³ *Culture and Rights*, p 163.

Certainty

85. Mikisew's evidence shows that *experiencing* environmental health, including being *able to trust* the quality of water and traditional resources, is a necessary condition for the exercise of Mikisew's rights.⁶⁴ This was described through the notion of "certainty".

86. Elder Terry Marten similarly spoke to the importance to certainty in places for intergenerational knowledge transfer. She stated:

We need certainty to be able to go out to our areas, to our land where we live in harmony with nature, where we need to be able to get out there and teach our young ones, our younger generation, about exactly where they came from, who they are, and what they need to be able to identify themselves as Mikisew Cree First Nation people so they don't get lost in the future where they don't know where they come from. We need that.⁶⁵

87. If water is polluted or perceived to be polluted confidence in the resources erodes. As put by Elder G. Marten "[w]hen you see or notice that water is not healthy you will notice that the water has a funny smell, and no one wants to go there. Even I am afraid to walk in the water because I am afraid that you know it's all polluted and I don't want to get ill. You know how the water is not healthy. You see how the grass grows. I always observe how the water flows. In the wintertime you can tell when the water is polluted because sometimes I take my axe and I make a hole in the ice and the water looks black. It's black, so I know it's polluted. I am not a scholar; however, I do know my own way of -- my way of life. I learn from observing. I learn how the environment is."⁶⁶

⁶⁴ *Urgent Call*, p 61; *Culture and Rights*, p 20, 49-51.

⁶⁵ Transcript, October 16 at p 2280.

⁶⁶ Transcript, October 16 at p 2285–2286.

Access

88. A persistent theme in what Mikisew members need to exercise their rights was access. As a community dependent on a delta, adequate amounts of water are needed for Mikisew members to access harvesting areas and areas where other customs, practices and traditions that support Treaty rights can occur.⁶⁷
89. As put by Jocelyn Marten: “[i]n order for me to pass on my knowledge and my teachings to my children and grandchildren, I need access to my traditional hunting-trapping-fishing areas, my homer.”⁶⁸ Elder Terry Marten stated, “[i]n our territory, water is everything. We need plentiful, healthy water to access our lands and have resources to be able to harvest. Everything, everything in our territory, in our land is connected to water.”⁶⁹ She summarized: “[s]o therefore, quality and quantity of water is crucial for us to be able to go to our territories, our lands, because the river systems and the lakes are our transportation.”⁷⁰

Experience

90. “Sense of place” and maintaining ongoing relationships and connections with lands and waters is a necessary requirement for the exercise of Mikisew’s rights, including with respect to Mikisew’s spiritual connections. As Elder Terry Marten stated “We not only have the land as a teaching tool. We have our ceremonies out there, we have our own spiritual grounds... everything that you do with ceremonies has to be done in a very very clean area without any disturbance. So we need our land to be able to teach our young our way of life, whether it be today or in the future generations.”⁷¹

⁶⁷ Candler, C. Olson R. Deroy, S. “*As Long as the Rivers Flow: Athabasca River Use, Knowledge and Change*”, CEEA Document 497, Appendix 1E, Ex. E, tab 8 (“*As Long as the Rivers Flow*”) p 14; TLU Addendum, p 20-22 and 49; SEA Report, p 5-44 to 5-50.

⁶⁸ Transcript, October 16 at p 2261.

⁶⁹ Transcript, October 16 at p 2268.

⁷⁰ *Ibid.*

⁷¹ Transcript, October 16 at p 2333.

91. Sense of place is tied to sense of identity. Again, as put by Elder Terry Marten “There is such a tremendous amount of connection between the People and the land. You just can't separate them. It's a good feeling when you go out there. You feel good. I just put my hand in the water and you're back home, and it's beautiful.”⁷²
92. Mikisew indicators of a supportive sense of place include solitude, lack of sensory disturbances, safety, and cultural connections to an area. Conditions that are inconsistent with the experience required for the exercise of rights include, among other things, industrial sights, smells and sounds.⁷³

Future Generations

93. Finally, equally important to Mikisew's rights and culture is passing on this way of life to future generations. As Terry Marten put it: “We need our land to be able to teach our young our way of life, whether it be today or in the future generations. That's the importance of the land and the people, they're connected.”⁷⁴
94. Elder Rita Marten testified that the children “...normally went with their grandfathers at first and then later on ... their fathers, who taught them the proper way of bush survival, the way to navigate when you're going out on the lake. They taught them responsibility. They taught them how to respect the family. They were the ones who were to become the food providers, to bring food to their families.”⁷⁵

The Impact of Historic and Existing Activities on the Require Conditions

95. Next, in accordance with the Rights Methodology, the Panel must also understand how current conditions have deviated from the conditions that are necessary to support Mikisew's rights before considering Project effects.

⁷² Transcript, October 16 at p 2315.

⁷³ *Culture and Rights*, p 38, 42-44, 53-54.

⁷⁴ Transcript, October 16 at p 2333-2334.

⁷⁵ Transcript, October 16 at p 2309.

96. The evidence confirms that industrial development has contributed significantly to negative effects on Mikisew's territory and rights. Elder Larry Marten stated "...The delta was rich, the whole delta, not just one area. There were no oil plants in those days. There was one, Suncor. I remember that was the only oil plant there was. ... Ever since then we started losing water. There's willows and grass... The buffalo are all gone. [...].... The fish is no longer what it used to be. For the water we're right down in Lake Mamaway. That's our main travelling route going out to the Delta. There used to be eight feet of water. Now we're lucky if we have two feet of water."⁷⁶

Decline of key cultural landscapes

97. What the evidence demonstrated is that for Mikisew members, the once vibrant Peace Athabasca Delta is no longer meeting the conditions Mikisew members require to confidently and productively exercise their Treaty rights. You heard statements from Mikisew members the PAD used to be filled with many species, and water was abundant; but now, water levels are in significant decline which is driving away many of the species that used to live in the PAD, such as muskrats and bison. Mikisew members also describe how, as a result of low water levels, travel to different parts of the PAD can be difficult, if not impossible.⁷⁷

98. Elder Sloan Whiteknife spoke to this point – he said “. Wherever you travel, it's difficult.... Last summer I was travelling in my boat and in Lake Mamawi and I barely got through. I turned my motor lower... and even then I would hit the dirt because the water level is too low.”⁷⁸

99. Mikisew members no longer have the certainty the need about their lands and waters. Elder Larry Marten stated “The water's not –safe to drink. We never drink

⁷⁶ Transcript, October 16 at p 2257–2258.

⁷⁷ Transcript, October 16, 2018 at p 2241-2244.

⁷⁸ Transcript, October 16 at p 2255.

it. Years ago, we drank from the creek and river... But now ..., we have to carry our own water...water there is not safe.”⁷⁹

Precarious state of Wood Bison

100. Mikisew evidence shows that the availability of healthy and accessible wood bison in Mikisew’s traditional territory has been reduced to the Ronald Lake Bison herd. While there are bison herds in Wood Buffalo National Park, Mikisew evidence and the recent Strategic Environmental Assessment for Wood Buffalo National Park⁸⁰ show Park bison are diseased, diminishing, and losing habitat due to drying trends and the spread of invasive vegetation.
101. Elder George Marten testifies the buffalo are affected by low water. He stated “We had a lot of buffalo back in our area; now they are disappearing. Because of the water level, now they have thistle that is really taking over the Delta and that is really affecting the animals, the buffalo. They are unable to survive, so they move away. The muskrats used to live on goose grass, that was their feeding area, because back then the water was clean. The air quality was good. Now, with a low water depleting, all the living species are being affected.”⁸¹
102. Elder Larry. Marten also noted “....all our areas where the goose grass grows they’re all dried up, taken over by willows and thistle that nothing goes near. So that’s why nowadays we have no buffalo around the Delta, around my area, and that was the main area years ago..”⁸²
103. Elder Sloan Whiteknife commented that the Delta is drying and affecting the buffalo. He stated “you [use] to find buffalo all over Hay River, Lake Mamawi. Now, they’re leaving that territory because of the low water level and also because of the thistle and the willows that are growing in that area.”⁸³

⁷⁹ *Culture and Rights* p 167; *Urgent Call*, p 23-28, 39-42; *SEA Report*, p 6-1 to 6-15.

⁸⁰ *SEA Report*, p 5-55 to 5-56.

⁸¹ Transcript, October 16 at p 2243–2244.

⁸² Transcript, October 16 at p 2331.

⁸³ Transcript, October 16 at p 2277.

Declining abundance and richness of other traditional resources

104. In addition to bison, Mikisew's evidence shows that other traditional resources in Mikisew's territory are no longer available in *sufficient* amounts to meet the harvesting levels that were supportable prior to industrial development and Mikisew's desired harvesting levels.⁸⁴ Populations of caribou are rare and declining. Populations of moose are declining⁸⁵
105. This is also true of fish. As stated by Elder Sloan Whiteknife "In the past we used to go up to Birch River in my trapping area... and in the fall we would set nets and we used to get a lot of fish. We used to hang fish for the winter.There was a lot of jackfish, a lot of whitefish.Since they started mining industry, we are losing our fish... I remember in the winter time... right below our winter cabin we would set small nets, smaller nets. . . .we would... check the nets every two hours, we had so many whitefish. Today now there's no fish. There's more dams. Water level is very, very low and it's very, very sad to see that."⁸⁶
106. It's also true of migratory birds. As stated by Elder Larry Marten "There's very few birds that come by here in the spring time. They have no place to feed. They just come by here and go right through and you're lucky if you're in their path when they're flying, you might get a few birds. Not like the old days."⁸⁷
107. It's also true of muskrats, another cultural keystone species. Elder Larry Marten said "In the winter months I used to see when it was high water, I used to see muskrat houses in the wintertime. Now, you... see nothing like that, it's all willows and grass."⁸⁸

⁸⁴ *Culture and Rights*, p 90.

⁸⁵ *Culture and Rights*, p 96-113; *SEA Report* p 5-50 to 5-62.

⁸⁶ Transcript, October 17 at p 2375–2376.

⁸⁷ Transcript, October 17 at 2374.

⁸⁸ Transcript, October 16 at 2287.

Declining confidence in traditional resources

108. *As discussed by Panel 2, Indigenous knowledge of declining resource quality and quantity is corroborated by western research.*⁸⁹
109. Declining quality of resources is widespread in Mikisew’s territory and is eroding Mikisew confidence in the safety of water and the health of traditional resources. Simply put, Mikisew members no longer have the certainty that their lands, waters and resources are healthy, which is having real effects on the community.⁹⁰

Loss of Access

110. When waters fall below Mikisew’s navigation threshold, members are not able to travel their preferred routes⁹¹; hazards such as rocks and sandbars make it difficult and dangerous to travel by boat,⁹² aquatic weeds, grasses and willows can increase, further reducing accessibility; and low water levels make it difficult to transport harvested resources, such as moose, back to Fort Chipewyan. Mikisew witnesses described how when water levels are too low, they have to get out of their boats to push them,⁹³ or they have to “pole” their boats to try to move them.⁹⁴

⁸⁹ Schindler, David, “*Human-Caused Ecological Changes and Threats to the Peace Athabasca Delta and Wood Buffalo National Park: Summary of Current Scientific Findings and Assessments*” (May 2015) CEEA Document 497, Appendix 1E, Ex. A, tab 4 (“*Human-Caused Ecological Changes and Threats to the PAD*”) p 18–22; “*Polycyclic Aromatic Hydrocarbon (PAH) Levels in the Lower Athabasca River and Peace Athabasca Delta*” CEEA Document 497, Appendix 1C, tab 10 (“*PAH Report*”) p 9-11 and 24; Olsgard, M. *Environmental and Human Health Risks in the Peace Athabasca Delta and Wood Buffalo National Park Associated with Air Emissions from the Teck Frontier Oil Sands Mine*. (August 7, 2018) CEEA Document 497, Appendix 1C, tab 7 (“*Environmental and Human Health Risks*”).

⁹⁰ *Culture and Rights*, p 72, 80, 98, 118; *SEA report*, p EX-3, 4-24, 5-28.

⁹¹ Maclean, “*Community-Based Water Monitoring in the Peace-Athabasca Delta: Insights and Evaluation*” Report prepared for the Athabasca Chipewyan and Mikisew Cree First Nations, Aqua Environmental Associates, Nelson BC (2016), CEEA Document 497, Appendix 1E, Ex. D, 94 (“*Community Based Water Monitoring Report*”) p 46.

⁹² Transcript, October 16, p 2259.

⁹³ Transcript, October 16 at 2276.

⁹⁴ Transcript, October 16 at 2244.

111. As stated by Elder G. Marten “Today when I try and go out to my land, I find it difficult. I’m unable to recognize where I used to travel. For example, Little Sweet Grass Creek where I used to travel, right now there’s willows growing in there.”(2372)
112. Elder Larry Marten said “This year... we had a couple feet of water, but just the rivers and Lake Mamawi. Lake Mamawi is our main area where we pass going to the delta...This year we've been lucky. Maybe next year we'll have no water. We'll be stuck over there.”⁹⁵
113. Mikisew members also described how because the water levels are lower, certain travel routes freeze over earlier making them inaccessible.⁹⁶

Degraded Experience

114. Members indicate that industrial developments have resulted in a loss of sense of remoteness, solitude, privacy and a loss of comfort and knowledge of the landscape (including drying of wetlands and muskegs). The stress created by low water, in particular, can be very acute.⁹⁷ You will recall Elder George Marten spoke powerfully of the great sense of loneliness he has when he sees the current degraded state of Buckton Creek, Lake Claire and Lake Mamawi.

Inadequate policies, frameworks and other measures to address cumulative effects

115. Finally, it is important to note that Mikisew’s evidence shows that the plans, policies, frameworks and other measures developed by the Governments of Alberta and Canada to address cumulative environmental effects are not effective with respect to impacts to Mikisew’s Aboriginal and treaty rights.
116. Consequently, the LARP Frameworks for mitigating Project effects on Mikisew’s rights and culture cannot, Mikisew submits, be relied on. Alberta has in fact also

⁹⁵ Transcript, October 17 at 2364.

⁹⁶ Transcript, October 16 at 2282.

⁹⁷ *TLU Addendum*, p 39-40; *Culture and Rights Report*, p 50, 73, 164; *SEA Report* 5-44 to 5-50.

acknowledged that it has not included effective measures to protect Treaty rights in LARP frameworks, contrary to the ACO report.⁹⁸

117. Evidence from Mikisew and Parks Canada lead to the same conclusion. The Surface Water Quantity Management Framework cannot be treated as a mitigation measure for effects of any project on water quantity since it does not take into account Mikisew determined navigation needs.⁹⁹
118. The draft Biodiversity Management Framework cannot be treated as a mitigation measure for mitigations for effects of on bison, since indicator, thresholds, or management responses for wood bison are not included.¹⁰⁰
119. The Surface Water Quality Management Framework and Air Quality Management Framework also cannot be treated as mitigation measures, since there are no triggers, thresholds or management responses for key oil sands-related contaminants in areas surrounding Wood Buffalo National Park.¹⁰¹
120. Nor do the LARP frameworks assist with mitigating effects on the OUV of Wood Buffalo National Park.¹⁰²

Evaluating Potential Project Impacts to Rights

A. The Ronald Lake Bison Herd

The Importance of Bison to Mikisew

121. Now I'm going to highlight some of the key Project effects to Mikisew's rights and culture. First Bison.

⁹⁸ SEA Report.

⁹⁹ Affidavit # 1 of M. Lepine; *Urgent Call*, p 52; Carver, M. "How the Regulatory Regime is Bringing about Declining Water Levels in the Peace-Athabasca Delta and Degrading the Outstanding Universal Value of Wood Buffalo National Park" (July 2016) CEAA Document 497, Appendix 1E, Ex. A, tab 6 p 25-26.

¹⁰⁰ *Urgent Call*, p 55.

¹⁰¹ *Urgent Call*, p 52; *Environmental and Human Health Risks*, p 91; SEA Report, p 6-37.

¹⁰² SEA Report, p 6-29 - 6-32, 6-36 - 6 - 37.

122. The ability to hunt bison, and in particular the Ronald Lake Bison Herd, is of utmost importance to Mikisew, its culture and its way of life. You will recall Mikisew members explained in detail how they and their ancestors would rely on bison for food.¹⁰³
123. As I have already quoted, they also describe the significant decrease in bison within their territory.¹⁰⁴ You also heard that the Ronald Lake Bison herd is the only healthy herd accessible to Mikisew. The bison in the Park (which have been referred to as the Delta Herd) are diseased and illegal to hunt.
124. Mikisew members, therefore, described how important it is for them to have confidence that the Ronald Lake Bison herd will continue to be sustainable, healthy and viable.¹⁰⁵

The RLBH is not growing

125. Mikisew submits the Project presents serious risks to the Ronald Lake Bison herd. The Herd is a small herd of about 150-200. Dr. Komer's testified that data collected over the past four years by the University of Alberta and Indigenous knowledge suggests the population of the herd is not growing, and has not been growing for decades.¹⁰⁶

The Project would remove 20% of the current range

126. The current location of the herd is depicted by the yellow points in Figure 1 attached to your Handout, which is taken from Dr. Kopach's Slide deck.¹⁰⁷ ECCC reported that the Project will overlap with 19% of range (depicted in black) but

¹⁰³ Transcript, October 16, p 2329.

¹⁰⁴ Transcript, October 16, p 2331.

¹⁰⁵ Transcript October 18, p 2668.

¹⁰⁶ Transcript, October 17, p 2449.

¹⁰⁷ See Hearing Presentation, Ronald Lake Bison Herd ["RLBH Presentation"] CEEA Document 611.

that because project will also remove connectivity to southern portion of habitat the Project will actually affect 24% of herd's total range.¹⁰⁸

127. Dr. Candler testified that with the addition of the Project, 91% of Mikisew's preferred bison harvesting areas will be removed.¹⁰⁹ Dr. Candler also testified that Mikisew harvesters are unlikely to "go elsewhere" to practice their rights given the difficulty in recreating the same kinds of cultural confidences and cultural attachments in new areas..."¹¹⁰

Accessible Good Quality Habitat is Limited

128. Dr. Kopach estimated the habitat availability for the RLBH. He described the unique landscape features required for good quality habitat for the Ronald Lake Bison Herd based on western science and indigenous knowledge.¹¹¹
- a. *Low lying marsh meadows for forging,*
 - b. *Upland forest patches for protection from predators;*
 - c. *Upland meadows in the foothills of the Birch Mountains for calving;*
 - d. *Habitats away from areas of human activity; and*
 - e. *Long sandy ridges for travel corridors.*
129. To apply a habitat availability model (Circuitscape), Dr. Kopach relied on satellite image analysis and Indigenous Knowledge¹¹² of the current range, vegetation cover, and currently known bison movement in different seasons.¹¹³ Using this information he determined remaining areas for any good quality habitat.

¹⁰⁸ CEAA Document 497, Appendix 1C, PDF p 44.

¹⁰⁹ Transcript, October 17, p 2431.

¹¹⁰ *Ibid.*

¹¹¹ Transcript, October 17, p 2441.

¹¹² Transcript, October 17, p 2444.

¹¹³ Dr. Kopach testified that after his report was complete Ducks Unlimited provided new landscape structure data for the study area, which included an expanded wetland classification. He testified that this new information would be unlikely to impact his conclusions because expanded he relied on a number of environmental factors that the addition of wetland diversity would be unlikely to make much of a difference.

130. His conclusions are reproduced from his slide deck in Figure 2 of our handout. The figure shows the distribution of available habitat outside the current home range in summer and winter¹¹⁴ areas of high-quality habitat are shown in dark green, and located to the northwest of the current range inside WBNP. Dr. Kopach noted that although habitat is available south, the collared data indicates that bison largely avoid this habitat, likely because of sensory avoidance.
131. Areas with poor habitat quality are shown in red, and are located along the McIvor River and along Buckton creek. According to IK, it is more difficult for the bison to cross these areas because they are relatively wet and contain wind-fallen trees, which makes bison passage difficult.

RLBH May Move into the WBNP

132. In this conclusion, Dr. Kopach concluded there is a real risk the bison will move further north into WBNP. If the herd moves into the Park they will not be accessible to Mikisew. As noted by Teck, this also creates a greater risk of disease from mixing with the Delta Herd.¹¹⁵

The Viability of the RLBH is at Risk

133. Dr. Komer assessed the future viability of the herd using a population projection software program (vortex). The PVA compares the relative effects of potential scenarios. It relies on data relating to birth rates, mortality rates, population size, and the carrying capacity of the region.¹¹⁶
134. Given the lack of concrete data with respect to these factors for the Ronald Lake Bison Herd, Dr. Komer assumed that the herd acted in a way consistent with

¹¹⁴ RLBH Presentation, Slide 8.

¹¹⁵ Transcript, October 17, p 2446.

¹¹⁶ Transcript, October 17, p 2448.

average bison populations,¹¹⁷ which the exception of a slightly lower than average mortality rate to account for Indigenous hunting. He included two carrying capacity scenarios – one that assumed 200 bison (the actual size) could be sustained, and one that assumed a hypothetical 1000 bison could be sustained. Dr. Komer’s ran 100 iteration of the scenarios because of the exploratory nature of the inquiry.¹¹⁸

135. The results of Dr. Komer’s viability analysis is shown in figure 3 to our handout. The solid blue line shows that based on average mortality and birth rates the population would drop to about 25 in 100 years. The green and grey dashed lines show that if mortality rates are increased or birth rates decreased the population drops to 0 within 50 years.
136. However, Dr. Komer’s also noted that if calf mortality rates are reduced or birth rates are increased then the population can stabilize at about today’s population size of 150-200, as indicated by the orange and red dashed lines.
137. To grow the population, the Herd’s survival must be increased above average.¹¹⁹ Dr. Komer expressed concern that the fact they Herd had not been observed to be growing indicates high mortality rates or low birth rates, so it is particularly important that management actions be directed to these efforts.¹²⁰
138. *The carrying capacity makes no difference to these scenarios.*¹²¹

Proposed Mitigation for the RLBH

139. Mikisew submits the Project poses a high level of risk to the RLBH and Mikisew’s rights that depend on the RLBH. Teck and Mikisew have developed a number of

¹¹⁷ Hearing Transcript Volume 13, October 18, 2018 CEAA Document 623, (“Transcript, October 18”) p 2569.

¹¹⁸ Transcript, October 17, p 2450.

¹¹⁹ Transcript, October 17, p 2452.

¹²⁰ Transcript, October 17, p 2449.

¹²¹ Transcript, October 17, p 2452.

conditions so that, if Teck is incorrect about the risks to the herd, these impacts can be identified in real time. For example Teck has agreed to a regulatory condition requiring:

- a. One – for it to report annually on the implementation of its Ronald Lake Bison Mitigation, Monitoring and Adaptive Management Plan; and
- b. Two – for it to conduct an evaluation, in consultation with indigenous groups, of the status of the herd and verify the accuracy of its predictions as part of obtaining future approvals for the North Pit.

140. Teck and Mikisew have also co-developed the minimum content for Teck's Wildlife Mitigation, Monitoring and Adaptive Management plan, which requires consideration of:

- a. any species at risk recovery strategies applicable to the Ronald Lake Bison Herd;
- b. the latest available information from the Technical Team;
- c. the latest available Indigenous knowledge; and
- d. a follow-up program to verify the accuracy of the EIA predictions over the life of the Project.

141. As part of this, Teck has also agreed to review and update, as needed, its monitoring and management plan in response to any new information.

142. These joint conditions reflect what Teck can realistically do. However, in Mikisew's submission, these joint conditions must be augmented by further actions by governments. To be sure, current government efforts are not up to the task. As explained by Mr. Braun, the Ronald Lake Technical team is not a long term initiative and, critically, does not have any role in relation to the management of the herd or its habitat, rather it is an information collection body.

He explained that current habitat protection measures are insufficient and current cooperative management proposals are nothing more than window dressing.

143. In Mikisew's submission, two government actions are required to reduce the risks to the Herd. First, protection of the remainder of the herds' habitat. Establishing the full Biodiversity Stewardship Area would protect all remaining RLBH habitat beyond the Project footprint that does not currently have legal protection. Mikisew asks the Panel to recommend that the Governments commit to implementing the full Biodiversity Stewardship Areas by the start of construction
144. To deal with the risk of disease transmission and other issues relating to increasing the herd's viability, the second government action is to establish a bison co-management arrangement with Alberta, Canada and Indigenous groups (under the federal Species at Risk Act or some other mechanism). Dr. Komers, in emphasizing the need for such a co-management arrangement, stated the committee should be directed to: collecting data; protecting the remaining bison habitat; protecting connectivity of habitat patches; improving female reproduction; reducing mortality; and preventing the bison from contracting diseased bison in the Park. Monitoring must be done properly to measure effectiveness of management actions.
145. Mikisew asks the Panel to recommend that, within the next year, the governments of Alberta and Canada enter into an agreement with indigenous communities respecting research, monitoring and co-management of the RLBH.

B. Water Quantity

The Importance of Water Quantity to Mikisew

146. Having enough water in the lakes, rivers and tributaries within Mikisew territory is critical for members' navigational needs. The river and lake systems are to

Mikisew what highways are to urban dwellers.¹²² Figure 4 in the handout, taken from Mr. Maclean's slide deck, depicts Mikisew's key transportation routes.¹²³

147. As stated earlier, Mikisew members are noticing their lands, rivers, lakes and tributaries are drying up, making navigation much more difficult.¹²⁴ Mikisew members describe needing certainty there will be enough water for travel out onto the land"¹²⁵

The Community Based Monitoring Program

148. Because of concerns about decreasing water levels, Mikisew started a community based monitoring (CBM) program in 2008. The purpose of the CBM program was to track changes to the Peace Athabasca Delta.¹²⁶
149. The CBM program collects data about water depth and water quality twice a week, all year, at eight locations.¹²⁷ The CBM program analyzes the data to test concerns with respect to navigation and water contamination. Additionally, given that navigability can be impeded by shifting channels and weeds, the CBM program also marks channels for safe passage.¹²⁸

The Water Depth Required for Navigation is Four Feet (Aboriginal Extreme Flow)

150. The CBM program was also able to test the water navigation needs of Mikisew members. An Indigenous navigation threshold had been previously set as a result of a study conducted by Dr. Candler in 2010.¹²⁹ Based on his interviews with Mikisew members, Dr. Candler determined the "Aboriginal Extreme Flow" (AXF) - the amount of water needed to get "on step" with a harvested moose in the boat - was 400m³/s. The AXF refers to zero navigation.

¹²² *Ibid.*

¹²³ See Hearing Presentation, Navigability, CEAA Document 612, ("Navigability Presentation") Slide 4.

¹²⁴ Transcript, October 16, p 2288.

¹²⁵ Transcript, October 16, p 2284.

¹²⁶ Community Based Water Monitoring Report, pdf p 1606.

¹²⁷ Transcript, October 17, p 2460.

¹²⁸ *Ibid.*

¹²⁹ *As Long as the Rivers Flow.*

151. CBM findings demonstrated that the AXF relationship is valid and in fact the AXF is closer to 500 m³/s.¹³⁰ Further, the CBM tested the relationship between flow and depth and determined that the AXF results in a minimum depth of 4 feet.¹³¹ This relationship is illustrated in Figure 5 in your handout, which reproduced from Mr. Mclean's slide deck.¹³²

It shows Embarrass River near Cree Creek (CBM site M4) relative to the discharge of the Athabasca River below Fort McMurray. The dotted line shows the AXF minimum depth (4 feet). The graph shows that as water flow reaches 400-500 m³/s, a depth of four feet (122cm) is reached.

AXF is Frequently Exceeded

152. After 5 years of sampling the CBM findings showed the AXF depth was exceeded 95 times at the sites monitored during those years.¹³³ These findings are reproduced in the chart at Figure 6 of the Handout package.

Impacts to Navigability

153. Dr. Carver assessed impacts to Indigenous navigability on the lower Athabasca River system (which includes not only the main stem but important back channels as well).¹³⁴ Dr. Carver integrated various data sets including the CBM data; government water-depth maps; and IK hazard map to demonstrate the existing hazards distributed across Mikisew territory and to show that those hazards increase as flows decline.
154. Dr. Carver's assessment also confirmed the AXF is a reasonable limit. When the AXF is exceeded, he said, the navigability situation becomes dire, particularly if

¹³⁰ *Community-Based Water-Depth Monitoring.*

¹³¹ Transcript, October 17, p 2529.

¹³² Transcript, October 17, p 2461.

¹³³ *Ibid.*

¹³⁴ Carver, *Assessment of Impacts to Water Quantity, Indigenous Access and Traditional Use due to Teck's Frontier Mine Report (2018)* ["Assessment of Impacts to Water Quantity"] CEEA Document 497, Appendix 1C, pp 1410–1505.

you include the serious health and safety issues that arise within the AXF range.¹³⁵

155. In terms of the future, using a watershed model that simulates future flows from 10 to 200 years under various climate scenarios, and applying oil sands water withdrawals, Dr. Carver determined that the river flows are predicted to be lower by 25-50% during the Fall and late Summer seasons, and that the open-water season will be longer.¹³⁶ For Mikisew, this means significantly less water for navigation during the hunting season.¹³⁷ Additionally, Dr. Carver observed that as flows decline, oilsand withdrawals are proportionally more significant.
156. Dr. Carver concluded that climate change is leading to a reduction in the availability water for oilsands and other activities. Yet oilsand demands are projected to escalate while river flows are expected to decline. Dr. Carver put the future in these terms: “we are on a collision course...[a]ccess to the territory is already at risk, and as things stand, is not positioned to improve. We have a real problem on our hands.”¹³⁸
157. Dr. Carver noted the EIA and Alberta only assessed change a one location – which he described as a one-point approach.¹³⁹ Dr. Carver expressed concern that such an approach does not capture the complexity of navigability in terms of its diversity, its thresholds, its rate of change with flow, and the overall magnitude of the problem faced.¹⁴⁰

Proposed Mitigation for Navigation Concerns

158. In terms of mitigations, it is first important to note that Dr. Carver, Mr. Maclean and Dr. Davidson all testified about the inadequacy of the Surface Water

¹³⁵ Transcript, October 17, p 2475.

¹³⁶ Transcript, October 17, p 2472.

¹³⁷ *Ibid.*

¹³⁸ Transcript, October 17, p 2476.

¹³⁹ Transcript, October 17, p 2475.

¹⁴⁰ Transcript, October 17, p 2474.

Quantity Management Framework (SWQMF) as a mitigation measure *for potential project effects on Mikisew navigation as a result of Teck's water usage.*¹⁴¹

159. The ultimate measures Teck agreed to take to reduce risks to Mikisew navigation was the subject of extensive engagement between Mikisew and Teck and led to a series of jointly proposed regulatory conditions. These are set out in Mikisew's August 31 written submission at Appendix 2 (CEAA Registry #497) but I will briefly summarize them here.
160. Teck has agreed to regulatory conditions to
- a. Operate the Project to result only in negligible effects on water quantity in Lake Claire and the Ronald Lake Watershed, and plan water withdrawals to minimize water intake when the AXF is met, as part of obtaining future approvals for the North Pit
 - b. Design water diversion structures so they have no greater than negligible effects on water quantity in Lake Claire and the Ronald Lake Watershed
 - c. Update its mine water balance to take into account updated climate assessments as part of detailed engineering
 - d. Design water intake and storage ponds to minimize or avoid water intake when the Athabasca River is below the AXF
 - e. Ensure its Hydrology Plan includes a credible operational plan for meeting these objective of minimizing water intake when the Athabasca River is below the AXF
161. As stated by Teck, these measures do not guarantee absolute adherence by Teck to the Aboriginal Extreme Flow. Mikisew agrees with the recommendation of ACFN and the testimony of Katherine Cumming, Lead Agency Witness from Parks Canada that, to ensure there is a more comprehensive effort taken to

¹⁴¹ Transcript, October 17, p 2463 and p 2477

protect Mikisew navigation from cumulative effects of oil sands, Government actions are also required.

162. Accordingly, Mikisew submits that the Panel should recommend that Alberta revise the Surface Water Quantity Framework under LARP to be more protective of Indigenous navigation and the OUV of Wood Buffalo National Park in the manner put forward by Mikisew, ACFN and Parks Canada.

C. Water Quality

163. Mikisew also has concerns about whether the Project will likely contribute to increased water contamination or increase the risk of contamination. Mikisew members have reported smelling oil sand contaminants in the water and observing black particles around Lake Claire.¹⁴² Members have also observed malformations in fish.¹⁴³ Mikisew members describe how they are scared to touch the water because of concerns over contamination.¹⁴⁴ They also describe having to bring bottled water with them out of the land, rather than drinking from the creeks and rivers.¹⁴⁵
164. Mikisew members also describe how decreasing water quantity within their territory exacerbates concerns around contamination. They indicate that in areas where water levels are low, the pollution settles and is not flushed out by proper water flows.¹⁴⁶
165. Mr. Maclean testified that in addition to assessing issues related to water quantity, the CBM program collects data on metals and PAHs in the water. PAHs are carcinogenic and widespread in the environment. Mikisew is concerned about the risk that PAHs are increasing downstream of the oil sands in water and

¹⁴² Transcript, October 17, p 2481.

¹⁴³ Transcript, October 16, p. 2291 [Video Presentation].

¹⁴⁴ Transcript, October 16, p 2285.

¹⁴⁵ Transcript, October 17, p 2364.

¹⁴⁶ Transcript, October 16, p 2272.

sediment. PAHS are a concern from a human and wildlife health perspective as they can be highly toxic.¹⁴⁷

166. Mr. Maclean identified a number of contributors including: upgraders, vehicle emissions, mine dust, and natural bitumen. Part of the work of the CBM program was to determine whether oil sands development did contribute to PAHs. It sampled a number of sites along the Athabasca River and in the PAD near Lake Claire.¹⁴⁸ The locations chosen were upstream development; across from the main development on the Athabasca River; and downstream from development (in the PAD). Sampling locations were chosen deliberately on the basis they would allow the analysts to determine whether the oil sands were contributing to PAHs.¹⁴⁹
167. The results showed higher PAH levels at the Suncor, Syncrude, and CNRL sites. PAHs emitted from these operations were detected at the mouth of the Athabasca River. The results also showed small PAHs inputs are reaching the PAD.¹⁵⁰
168. Further, the PMDs (device) only collect dissolved PAHs. However, PAHs dissolve poorly in water, and bind to sediment. Sediment then settles in the PAD. Therefore, Mr. Maclean stated PMDs likely underestimate the true amount of PAHs in the PAD.¹⁵¹
169. Mr. Maclean further testified that the CBM analysts were able to differentiate between PAHS from forest fires, and those from oil sands based on two diagnostic ratios¹⁵². These tests revealed that at least two locations (Quatre

¹⁴⁷ Transcript, October 17, p 2481.

¹⁴⁸ Sampling locations are depicted on Hearing Presentation, Polycyclic Aromatic Hydrocarbons CEAA Document 614, ("Polycyclic Presentation") Slide 8.

¹⁴⁹ Transcript, October 17, p 2483.

¹⁵⁰ Transcript, October 17, p 2483.

¹⁵¹ Transcript, October 17, p 2484.

¹⁵² Transcript, October 17, p 2485.

Fourches and the Athabasca River site), PAHs were derived from oil sands, not forest fires.

Proposed Mitigations for Water Quality

170. The Joint Conditions developed by Teck and Mikisew include measures relating to Mikisew's water quality concerns. I won't repeat them here, but these appear in Appendix 2 to CEEA Doc 497 under the headings: *Project Construction and Operations in the Buckton Watershed; Operations: Water Management; Operations: Tailings; Environment: Water*. The Joint Conditions mark a clear recognition by Teck of the importance of this issue to Mikisew and is a considerable advancement from previous hearings.

171. However, in Mikisew's submission, the evidence before you suggests there remains risks of Project effects on the quality of waters relied upon by Mikisew around the Project area, including in the PAD. Given the importance of the waters around the Project to Mikisew's way of life, it is Mikisew's position that any risk, regardless of the magnitude, requires additional measures by government.

172. Mikisew submits that the additional risks created by the Project can be mitigated through the following set of government measures:
 - a. First, governments should enter into an agreement with Mikisew and other interested indigenous groups to establish and fund a Project Oversight Committee so that Mikisew can be part of the review of monitoring data with regulatory authorities;

 - b. Second, governments should include more sites for management of water quality issues in the Lower Athabasca Region and the PAD and improve the statistical framework for detecting change to water quality and

173. Third, governments should provide resources to Mikisew to monitor project effects, including investments in equipment and infrastructure for Fort Chipewyan.

Mr. Maclean indicated that to mitigate against increased PAHs in the Athabasca River system, and the PAD, Teck and/or governments should:

- a. Expand PAH monitoring under the CBM program*
- b. Expand PAHs to the priority substance list under CEPA (Canadian Environmental Protection Act)*
- c. Track PAH seepage from tailings to proponent operations*
- d. Create broader and stronger PAH guidelines¹⁵³*

D. Air Quality

174. Mikisew members have expressed concern about the extent to which their air quality is being impacted by oil sands development. Ms. Olsgard was retained to conduct an air quality assessment focusing on the Athabasca oil sand development area, specifically the PAD and WBNP.¹⁵⁴
175. Ms. Olsgard testified that Alberta has reported air quality in the region is currently deteriorated. She stated that Alberta relies on four key contaminants to assess air quality, including: particulate matter less than 2.5 microns (PM2.5), sulfur dioxide, nitrogen dioxide and ozone. All four indicators have exceeded management triggers and require, to varying degrees, management action.¹⁵⁵ (*particulate matter less than 2.5 microns* (PM2.5), sulfur dioxide, nitrogen dioxide and ozone*).
176. After determining the baseline, Ms. Olsgard conducted a screening level assessment to determine potential pathways and emissions, which would inform

¹⁵³ Transcript, October 17, p 2487.

¹⁵⁴ *Environmental and Human Health Risks*, PDF 785.

¹⁵⁵ Transcript, October 17, p 2493.

more detailed modelling. She testified that a screening assessment is “a simple and quick way to estimate a worst case predicted concentration.”¹⁵⁶

177. Ms. Olsgard used the model AERMOD, which used a 50km boundary. She chose AERMOD because of its near range modelling, which could then inform the evaluation from a second far range model, CALPUFF. Key areas to Mikisew including - the entrance to WBNP, Lake Claire, Richardson Lake, and Poplar Point are less than 50km from the Project location.¹⁵⁷ A 50km range is also consistent with observations of black particles on the snow in these areas by Mikisew members. She testified that if contaminants are deposited in Lake Claire, there is a risk they will reach further into the PAD.
178. Although Teck challenges the appropriateness of AERMOD, Ms. Olsgard testified that in her opinion modelling in EIAs must reflect both local and regional impacts and that no single model can accurately or precisely predict ground level concentrations on both spatial scales. Given culturally significant places to MCFN are within less than 50 km of the proposed development area, she testified both a near field and far range model are warranted. It should also be noted that Ms. Olsgard cited a number of peer review studies in her report to choose her model, not just the one that was put to her under cross examination.
179. To conduct the AERMOD modelling, Ms. Olsgard relied on Teck’s source data (Appendix 4A Project Update) in terms of receptor locations and source emissions with the exception of three differences:
 - a. Teck assumed all existing mine fleets meet Tier 4 emission standards, whereas Ms. Olsgard used Tier 2 standards reflecting how existing mine fleets currently operate (*Tier 4 have lower emissions of PM2.5, NO2, and hydrocarbons*)

¹⁵⁶ Transcript, October 17, p 2495.

¹⁵⁷ Transcript, October 17, p 2496.

- b. Teck assumed a bottom up approach to emissions from tailings pond whereas Ms. Olsgard used a top down approach which was indicated by the scaling factors collected under the Joint Oil Sands Monitoring Program, published by ECCC researchers (*she scaled the fugitive hydrocarbon emissions from tailings ponds to match the scaling factors*).
 - c. Ms. Olsgard relied on a smaller group of chemicals to align with the specific impacts Mikisew has reported in its territory (*including carcinogenic PAHs found in tumors on selected fish*).
180. As stated, Ms. Olsgard used receptors at locations that align with culturally valued indicators as identified by Mikisew.¹⁵⁸
181. As a result of her screening level air quality assessment, Ms. Olsgard found the model predicted a risk of contaminants reaching the WBNP and the PAD. (*including particulate matter, metals and PAHs, hydrocarbons and nitrogen dioxide*)
182. Her conclusion also confirms reports by Mikisew land users about the presence of black particulates in Lake Claire.
183. Ms. Olsgard's report supports the need for the Panel to implement the Joint Conditions relating to Air Quality that were prepared by Teck and Mikisew. In the Joint Conditions, Teck has committed both to undertake actions to verify its predictions and to include a new air attribution station in the region.
184. In her submission, Ms. Olsgard proposed mitigation measures for the issues she identified in her report, including the following measures for governments:
- a. Improve standards for dust suppression
 - b. Require mine fleet upgrades in the region

¹⁵⁸ *Environmental and Human Health Risks, Appendix 2.*

- c. Prohibit future development close to the WBNP
- d. Implement an air quality program that measures, assesses and monitors emissions¹⁵⁹

185. In Mikisew's submission, these recommendations bolster the need for multiple components of the Ni-key-che-nah-honen Framework. Specifically, one significant benefit of the proposed Biodiversity Stewardship Area is that it would draw a northern boundary for projects that could directly impact the airshed around Wood Buffalo National Park and its water quality. Improved air quality monitoring is also a key component for the Project Oversight Committee and Mikisew's recommendation for new investments in local monitoring capacity.

186.

E. Health Concerns

187. Ms. Olsgard also conducted a screening level human and environmental health assessment. She concluded that the risk to human health predicted in the project LSA by the EIA could extend into the WBMP and the PAD.¹⁶⁰ Although she stated the risks are small, evidence from Dr. Candler and Mikisew community members highlights that any increase risk can further erode their confidence in traditional resources.¹⁶¹

188. While the Panel heard that there are differences of opinion between Teck's evidence and that of Ms. Olsgard, both Teck and Mikisew have agreed that governments can take effective actions in light of the possible increased risk. Specifically, Teck and Mikisew have agreed on two government recommendations:

- a. One, Governments must develop, with Mikisew, improved community health baseline data and a robust program integrated monitoring program for evaluating Project and cumulative effects on community health.

¹⁵⁹ Transcript, October 17, p 2500.

¹⁶⁰ Transcript, October 17, p 2505.

¹⁶¹ Transcript, October 17, p 2505.

- b. Two, Governments must develop and implement robust measures with Mikisew to maintain the integrity of the traditional use in the territory throughout the life of the project.

189. The intent of these measures will be to maintain confidence in the species, water, and use of the land in the region (prevent avoidance reactions), to ensure the continual practice of rights.

F. Migratory Birds

190. Mikisew commissioned a report by Ms. Hechtenthal to assess the impact to migratory waterbirds in the Mineable Oil Sands Region (MOSR) and the PAD resulting from oil sands mines, including whether the Project would have an adverse effect on migratory birds.¹⁶² This report will assist the Panel for its bird and OUV assessments.

^{191.} *Ms. Hechtenthal concluded that because of the unique location and size of tailing ponds, the Project may contribute to a decrease in populations of migratory waterbirds in the MOSR and PAD. She also concluded that the Project may contribute to adverse impacts experienced by Mikisew land users in terms of reducing the number of birds available for harvest at predictable times and locations and reducing the harvest because of concerns about the safety of consumption.*¹⁶³

¹⁶² S. Hechtenthal, *Risks to Migratory Water Birds in Alberta's Mineable Oil Sands Region and Wood Buffalo Nation Park from Existing Development in the Project* (August 2018) ["Risks to Migratory Water Birds"] CEEA Document 497, Appendix 1C, p 1506.

¹⁶³ Transcript, October 17, p 2511.

192. The potential risks to waterbirds fall into three categories: exposure to contaminants; changes to habitat and food availability; and changes to migration routes.¹⁶⁴

Exposure to Contaminants from Contact with Tailings Ponds in the MOSR

193. Ms. Hechtenthal testified that Birds are exposed to contaminants because they mistake tailings ponds as natural wetlands during migration.¹⁶⁵

194. She stated that despite the presence of bird deterrents, tens of thousands of migratory birds are observed landing annually on tailings ponds. These are observations based on timed surveys. The actual number of bird contacts is higher – estimated at over 200 thousand per year, of over 110 species.

195. Contact with tailings ponds can cause various outcomes in waterbirds, including exposure to contaminants externally or internally through ingestion or inhalation.¹⁶⁶ The end points for bird that come in contact with tailing ponds are either mortality, a decrease in fitness (health, survival, growth, reproduction), sublethal effects, or no effects.¹⁶⁷

196. Ms. Hechtenthal stated the data for on-site mortality is currently unknown, although could be studied. The data for off-site mortality is also unknown, and difficult to measure given waterbirds can take days to die and do so miles away from the site of contamination.¹⁶⁸

197. Although Teck estimates on-site and off-site mortality at 5400 based on the number of oiled birds observed flying away from existing mine sites, Ms. Hectenthal testified that number of likely low. She stated: it does not account for

¹⁶⁴ Transcript October 17, p 2515.

¹⁶⁵ *Ibid.*

¹⁶⁶ Transcript October 17, p 2516.

¹⁶⁷ Transcript, October 17, p 2517.

¹⁶⁸ Transcript October 17, p 2517.

oil sheen; it does not account for the difficulty in observing oil on flighted birds; it does not account times when many waterbirds migrate - at dusk, night, or dawn.¹⁶⁹

198. Further, Ms. Hechtenthal stated that Teck does not comprehensively account for sub-lethal effects to birds. To date, she said, no studies have assessed sub-lethal impacts on wild migratory waterbirds in the MOSR.¹⁷⁰

Changes to Habitat and Food Availability in the MOSR and the PAD

199. Habitat loss can contribute to regional population declines of bird species. Ms. Hechtenthal testified that oil sands development has resulted in the loss of wetland habitats in the MOSR from project footprints and sensory disturbances and degradation.
200. She also testified the Project will contribute to the loss of regional diversity of wetlands. The LSA currently provides 15 different types of wetland habitat, yet at closure Teck is reclaiming only two, and adding two novel habitats (associated with End Pitt Lakes). The proposed reclaimed landscapes may not achieve the level of ecosystem productivity required to provide key migratory habitats¹⁷¹

Changes to Local Migration Routes in MOSR and the PAD

201. You also heard that land users have observed changes during the Fall and Spring migrations - to flock size, timing and patterns of habitat use, and expressed concern that birds are now diverting around the MOSR and the PAD to the east and west. Ms. Hechtenthal stated such diversions are plausible given birds use a variety of sensory and environmental cues to guide their migration.

¹⁶⁹ Transcript October 17, p 2518.

¹⁷⁰ Transcript October 17, p 2519.

¹⁷¹ Transcript, October 17, P 2521.

Fatalities

202. Finally, Ms. Hechtenthal noted that Teck's estimate that currently over 5000 waterbirds die annually as a result of contact with oil at mine sites should not be dismissed as insignificant. First, she noted the number would be higher if sheens or sub-lethal effects were included. Second, she noted the comparisons between other mortality sources are not appropriate. Hunting quotas apply to game bird species whose populations are known, monitored and managed (they are evidence based). Mortalities from window strikes or cats include millions of songbirds. Unlike songbirds, waterbirds species are long lived and have low reproductive rates..¹⁷²

Mitigation

203. In terms of mitigations, among other proposed measures, Ms. Hechtenthal testified that the Project Oversight Committee should be designed to address the numerous critical information and assessment gaps.¹⁷³

204. Ms. Hechtenthal also said an independent and systematic testing of bird deterrent systems at mine sites is required and recommended the development of a recovery and rehabilitation centre for migratory birds in the oil sands.¹⁷⁴

G. Effects on Outstanding Universal Value of Wood Buffalo National Park

205. Mr. Chair, earlier my colleague provided guidance on how to consider effects on the OUV of Wood Buffalo National Park. My comments have described much of the evidence that is also relevant to your consideration of effects on the OUV but I do have a few further things to add.

¹⁷² Transcript, October 17, P 2525.

¹⁷³ Transcript, October 17, P 2526.

¹⁷⁴ *Ibid.*

206. Mikisew testified that they felt they had to go to the international community to address their concerns that the Outstanding Universal Values of the Wood Buffalo National Park is diminishing and it at further risk with increased oil sand development. You will recall that Mikisew showed a video that documented their Petition.¹⁷⁵
207. As testified by Parks Canada, that UNESCO process has led to a change in the understanding of the health of certain aspects the OUV of Wood Buffalo National Park from the 2014 letter from the Government of Canada cited by my friend in his closing argument yesterday.¹⁷⁶ It is important that you consider the most current evidence about the status of the attributes of the Park's OUV most at issue in this proceeding.
- a. In the most recent state of conservation report, meaning the one prepared three years after the 2014 read by my friend, Canada acknowledged the findings of the 2016 Reactive Monitoring Mission, namely that the PAD is subject of severe concerns and that the declines identified by Mikisew are not overstated.¹⁷⁷
 - b. My friend also mentioned a 2014 International Union for Conservation of Nature Report about the state of the Wood Buffalo National Park. As described in the Affidavit of Ms. Lepine, IUCN released an updated assessment in 2017 that described the 2014 assessment had been revised from "good with some concerns" to "significant concerns." The 2017 updated assessment by IUCN determined that Wood Buffalo has the worst conservation outlook of any Canadian World Heritage Site and the second worst of any North American site.¹⁷⁸

¹⁷⁵ CEAA Registry #497, Appendix 1E, Exhibit A, Tab 62.

¹⁷⁶ October 23, 2018 Transcript at 3405-3406

¹⁷⁷ CEAA Registry #497, Appendix 1E, Exhibit A, T. 31

¹⁷⁸ CEAA Registry #621 at page 15; CEAA Registry #497, Appendix 1E, para 37; see also October 23 Transcript at 3404

- c. As you heard, the recent Strategic Environmental Assessment also confirmed that the PAD is far from having a good conservation outlook.

208. In short, there is a clear consensus that key attributes of the Park's OUV are no longer meeting OUV objectives and that almost all ecological indicators associated with the PAD are in decline. It is also accepted that corrective actions are urgently needed to restore the PAD.

209. Parks Canada is currently working on an Action Plan to address the Mission's 17 recommendations. Mikisew members testified that the current draft needs significant improvement if it is to help reduce the risks of the Project.

Mr. Chair, Mikisew would agree with Teck that the Frontier Project will not jeopardize the ecological integrity of the Park as a whole. But that is not the analysis that you have been asked to conduct.

210. In terms of your assessment approach, Mikisew agrees with Parks Canada that it is appropriate to assess risks to the OUV against the articulation of the desired outcomes from the Strategic Environmental Assessment. Mikisew submits that the Panel can rely on the SEA for an understanding of the current state and trend of specific OUV components.

211. The impacts and risks that I discussed earlier show that absent the implementation of effective project conditions and additional measures by governments, the Project will have adverse effects on the Outstanding Universal Value of Wood Buffalo National Park or otherwise increase the risk of negative effects to its OUV.

212. In Mikisew's submission, the appropriate response to these risks is to ensure that systems and structures are in place to proactively monitor OUV health and to ensure management actions if monitoring determines that Teck's predictions

were overly optimistic. In this regard, key mitigations for effects on the OUV, beyond the Joint Conditions, are: the Project committee requested by Mikisew as well as increased investments in monitoring capacity, particularly community based monitoring.

H. Effects on Aboriginal Rights and Interests

213. I have already reviewed a number of effects on Mikisew's rights and culture, but I would like to highlight a few other important potential adverse impacts before passing the podium to Mr. Gustafson for closing remarks.
214. Dr. Candler, cultural anthropologist specializing in cultural impact assessment and community-based research, testified that he prepared four studies specific to the Project that deal with impacts to rights and culture.¹⁷⁹ The Culture and Rights Study is a key study that combines the results of his research from his other reports.¹⁸⁰
215. For this study, Mikisew focused on a local study area – which was 5km of the Project footprint, and a larger regional study area within 25km that extended downstream to the receiving waters of Buckton Creek and the Athabasca River, including Lake Claire and the Athabasca Delta.
216. The LSA and the RSA show a high density of use in those areas. Dr. Candler testified there are critical place-based family histories connected to particular portions of the study area. He also stated there are critical cultural relationships to the resources in this area – for example the Ronald Lake bison. Finally, he found that the study areas contained critical place based Mikisew knowledge, including place names and ecological knowledge. This place base knowledge is

¹⁷⁹ CEAA Registry #497, Appendix 1C, PDF 129; PDF 326; PDF 418; PDF 483 [insert title of reports]

¹⁸⁰ Transcript October 17, p.2412

central to the ability of Mikisew members to practice cultural rights in the area and pass them on to future generations.¹⁸¹

217. The rights and culture report confirmed that the area around the Project is unparalleled in terms of the abundance of resources, trust in resources and uniqueness of resources. Over 350 Mikisew values are located within 5km of the Project footprint, and thousands more within the RSA. Mikisew's evidence shows more than 80 kill sites along the portions of the Athabasca River adjacent to the Project and towards the Birch Mountains¹⁸²
218. To illustrate his main conclusions to impacts to the practice of way of life – which includes the freedom to practice culture without fear of interference; the ability to return to places; the ability to maintain connections; and confidence and continuity – Dr. Candler constructed a cultural zone of influence. The Zone of Influence reflects what he refers to as a cultural footprint. This Zone of Influence has been reproduced from his slide deck in the handout in Figures 8, 9 and 10.
219. Figure 8 shows the baseline cultural footprint. Figure 9 shows the density of current practice. Figure 10 shows how the Project is expected to influence the cultural footprint based on how Mikisew way of life would be altered with the Project.
220. The findings show that the inclusion of the Project makes a radical difference. This is because of the Mine's location - its further north than any other oil sands mine; and includes a watershed that flows into the PAD. As a result confidence in these critical areas decreases.
221. Dr. Candler also found that for Mikisew to maintain its way of life, it also depends on the viability of harvest. This does not just mean any species or resource, hunted anywhere. Dr. Candler stated:” ...a key point that is brought home in the

¹⁸¹ Transcript October 17, p.2415-2417

¹⁸² *TLU Addendum*, p 33-34; *Culture and Rights* p 103 and 107.

report material is that a diversity, a variety of resources need to be present on the landscape and available in the vicinity of preferred areas at different seasons, at different times of the year. There needs to be that variety in order to have the flexibility.”¹⁸³

222. Focusing on two key resources – moose and bison - Dr. Candler testified that the number of preferred harvest locations for moose is reduced from 15% (current reduction levels) to 32% as a result of the Project.¹⁸⁴ And for Bison, from 3.5% to 91%. Dr. Candler emphasized that these reductions are serious in that people cannot simply recreate the same kinds of cultural confidence and cultural attachment in new areas that they are born into and learned as a child.¹⁸⁵
223. With respect to governance and stewardship rights, Dr. Candler concluded the impact on those rights depends on how the Project proceeds. If it moves forward with deep involvement of Mikisew knowledge holders, deep attention to Mikisew stewardship principles and obligations on the land, it is possible that the Project could actually reinforce Mikisew stewardship and governance practices. However, if the Project moves forward in a way that is not respectful of that, it would be a very serious blow to Mikisew governance rights.¹⁸⁶
224. I note that Canada also agreed as a result of its assessment there is a potential for serious impacts to Mikisew Culture and Rights (Transcript, October 23, p.3277-3278, 3281), and that there are outstanding issues that require further consultation and accommodation by government (Transcript, October 23, p.3278)
225. And on that note, I will hand it back to my colleague Mr. Gustafson to explain Mikisew’s submission on how the Project can move forward in a way that honours and respects its Culture and Rights.

¹⁸³ Transcript, October 17, p.2427

¹⁸⁴ Transcript, October 17, 2430

¹⁸⁵ Transcript, October 17, p.2431

¹⁸⁶ Transcript October 17, p.2432

Nikechinahonan Framework

226. Mr. Chair, as you know, Mikisew has done a lot of work to determine what can and must be done to mitigate the effects of the Project. In all of this work, Mikisew's Treaty rights and culture have been front and centre. In the words of Elder Terry Marten, "a rights and culture mitigation approach is needed."¹⁸⁷
227. There are two pillars of the rights and culture mitigation approach for this project. The first is the Joint Conditions, which as you've heard, were the product of extensive engagement and include real measures by Teck to do what's in its power to mitigate Project effects.
228. But, given the nature of a project like this one, being located where it is and the fact that it comes after a long line of other project, its unrealistic and unfair to expect a proponent to be able to fully address all risks and effects. That leads to the second pillar, which is the Nikechinahonan Framework. That framework is directed at how government can further minimize those effects or risks that the Project has on Mikisew's rights and culture.
229. The Ni-ke-chi-na-ho-nan Mitigation Framework aims to establish certainty that Mikisew culture and language will survive the next industrial development of the Teck Frontier Project. As Elder Terry Marten explained: "The purpose of the Nikechinahonan Framework, we need to know that there's a plan in place so that Mikisew people have certainty that our culture, language will survive and we can deal with the risks and changes caused by the project. We owe it to our elders and land users now and to our future generations."¹⁸⁸ I would suggest that is something that everyone in this room can support.
230. With the Ni-ke-chi-na-ho-nan Framework, Mikisew identified the necessary plans to protect our culture, land, water, and resources. Put in the words of Councilor

¹⁸⁷ Transcript, October 18, p 2611.

¹⁸⁸ Transcript, October 18, p 2661.

Waquan, the Ni-ke-chi-na-ho-nan Framework is what would make it possible for decision-makers to be responsive to Mikisew's stewardship values.¹⁸⁹

231. The first component of the Nikechinahonan Framework is the Biodiversity Stewardship Area.¹⁹⁰ You have heard competing information about whether the BSA is a mitigation measure. In Mikisew's submission, it is certainly a mitigation measure because it will help to alleviate uncertainty in the community about the proximity of development, the fate of bison habitat and the magnitude of potential contaminants from nearby projects. A BSA represents a check and balance on the march of development towards the PAD for the community and shows a measure of respect for Mikisew's stewardship values.
232. Mr. Chair, there is already significant momentum for the BSA and the first phase of its implementation, albeit a partial one, is going out for public comment this week. Your recommendation for its full implementation is crucial.
233. Other parts of the Nikechinahonan Framework relate to the creation of structures so that Mikisew can be part of ongoing decision-making related to Project effects. Put differently, a way to mitigate the uncertainties that the Project creates for Mikisew is to ensure that Mikisew has a real seat at the table. One part of this is the establishment of more effective habitat protections and co-management for the Ronald Lake Bison Herd.¹⁹¹ You heard from Dr. Gibson that this is something that happens in other regions and is imminently achievable.¹⁹² Again, this is something that looks likely but needs a recommendation from this Panel.
234. Another part of this is the proposed project committee.¹⁹³ To be responsive to Mikisew's stewardship values, it is of crucial importance that regulators and governments create a new, more effective relationship with Mikisew for oversight

¹⁸⁹ Transcript, October 18, p 2692.

¹⁹⁰ CEEA registry #621 at slide 20

¹⁹¹ CEEA Registry #621 at slide 20

¹⁹² Transcript, October 18, p 2671–2672 and 2678–2679.

¹⁹³ CEEA Registry #621 at slide 21

of the Project.¹⁹⁴ This committee, for Mikisew, is a key part of creating the ethical space between governments, regulators and Mikisew that Elder Alice Martin explained to you in detailed. In the words of Mr. Stuckless:

*So you have heard that there are you know differing views on Project effects and I think it is important to note that whether you agree with our experts or you agree with Teck's experts, the risk to Mikisew's way of life is fairly real and it is important to them. And that's why the Project Committee is needed.*¹⁹⁵

*We see the committee as a decision maker for our community to work with the Crown to help make better decisions and to help better respect the community's desires to be an active part of managing their lands.*¹⁹⁶

235. You heard how this is the norm with Projects in the north and in other areas of Canada.¹⁹⁷ Canada is supportive of the proposal and Alberta has now indicated to Mikisew that it agrees that there is a strong rationale for a new multi-stakeholder regulatory assurance committee and that Alberta will participate in the committee to the extent it has jurisdiction.¹⁹⁸

236. Finally, the last thing required to ensure that project decision-making minimizes risks to Mikisew's culture and way of life is investments by government in making Fort Chipewyan a healthy community and in providing Mikisew with resources to maintain their culture.¹⁹⁹ If you uncertain about what this means, look no further than the words of Elder Terry Marten:

If the project is approved, our culture will be even more at risk than it is already. This should be clear by now with the information that you have received. Practically, that means our community will have to undertake new initiatives to

¹⁹⁴ Transcript, October 18, p 2684.

¹⁹⁵ *Ibid* at 2683.

¹⁹⁶ *Ibid* at 2686.

¹⁹⁷ *Ibid* at 2687.

¹⁹⁸ Hearing Transcript, October 23, 2018 at 3278-9.

¹⁹⁹ CEAA Registry #621 at slides 25-26.

actively support community members to continue using the PAD, the Peace-Athabasca Delta. The land users in Lake Claire will need extra help and support, as will their children and grandchildren and future generations, to be able to maintain those connections and activities that make us Mikisew.

Mikisew will also have to be actively involved in monitoring so that the current monitoring information can be shared with the community members and regulatory authorities. We will need to go to great lengths to make Fort Chip a healthy, vibrant place.

Mikisew is up for the task, but we need the resources and supports to undertake it and that's what we want you to take in for us. We need the support from both governments to be able to -- with resources to be able to carry out our wish that we want to maintain our culture and language.²⁰⁰

237. As Dr. Gibson explained, support for the activities and measures Elder Marten described is about taking back the concept of stewardship.²⁰¹ In a region where projects have disempowered communities, this part of the Nikechinahonan Framework can turn that dynamic around and have real social outcomes and real changes self-confidence and self-esteem. It means that there is a way to maintain trust and empower land users.
238. These costs are minute in comparison with the government revenues Alberta would recoup should the Project proceed, but they are critically important to protect the rights and interests of the Mikisew Cree, one of the primarily impacted communities from this mega-project.

PART 7: CLOSING

²⁰⁰ Transcript, October 18, p 2697.

²⁰¹ Ibid at p 2698.

239. What does all of this mean for what Mikisew is asking of you, Mr. Chair and panel? Specifically, Mikisew's submission is that
- a. the Panel must conclude the Project will have adverse effects on Mikisew's Aboriginal and Treaty rights;
 - b. the Panel should recommend that appropriate regulatory authorities require the proponent to adhere to the conditions that Mikisew has jointly developed with the Teck;
 - c. the Panel should incorporate the proposed conditions in your decision as the AER; and
 - d. the Panel should recommend that the Governments of Alberta and Canada commit, prior to issuing final authorizations for the Project, to implement the measures proposed by Mikisew in this submission to justify the adverse effects of the Project on Mikisew's Aboriginal and treaty rights.²⁰²
240. Mr. Chair, you have heard that this Project creates real fear and real risk for the Mikisew community and their most cherished area. But you have also heard that this proponent has, through collaborative discussions with Mikisew, made project-related commitments in the form of jointly developed regulatory conditions, to do what is in its power to reduce those risks.
241. You've also heard that Mikisew requires that governments take further actions to reduce risks associated with certain outstanding issues, such as effects on bison, water quantity, the OUV of Wood Buffalo National Park and Mikisew's Treaty rights and culture. “

²⁰² See also CEAA Registry #497 at document page 3.

242. Mr. Chair, in your final question to the ACFN witness panel in Fort Chipewyan, you asked how the Panel can reconcile ACFN's request for recommendations to government with ACFN's testimony that governments ignore recommendations. While Mikisew wasn't asked a similar question, the question is germane to Mikisew. That is why I urge you to look very closely at how Mikisew worded the recommendations in slide presentation for the Nikechinahonan Framework. You'll see in the wording of Mikisew's recommendations that they have clear timelines that are tied, not to your decision, but to the decisions that both the federal and provincial governments will be making after your decision.
243. That is a major lesson from previous hearings where recommendations have languished. Your recommendations to government relating to effects on Mikisew's rights and culture must be closely tied to the issuing of final Project approvals. And the wording of your recommendations must clarify that implementation is needed to justify the outstanding adverse effects to Mikisew's Treaty rights as Mikisew requested in paragraph 16 of its written submission. That will allow Mikisew to do what it can to ensure there is real accountability on government before final approvals are granted.
244. Again, Mikisew's non-objection to the Panel deciding to approve the Project under its authority as the AER does not let the governments of Alberta and Canada off the hook for fully discharging their duties to take real steps to protect the OUV of WBNP and further mitigate effects on Mikisew's Treaty rights before issuing their approvals.
245. In this regard, I'll end by clarifying Mikisew's position on the issue of free prior and informed consent in this proceeding. Mikisew agrees that Teck has undertaken significant efforts to work towards obtaining Mikisew's consent for the Project through the collaborative work it has done with Mikisew. The Participation Agreement and the joint conditions are laudable products of those efforts. Mikisew values the relationship it has built with Teck and the efforts by Teck to

listen to the community and commit to real actions within its power to help resolve community concerns within its power to address.

246. But Mikisew has not yet provided its full consent for the Project. Mikisew's consent can only be provided if all parties that have the power to mitigate and accommodate Mikisew's concerns, including governments, have made commitments to do so. It would be a truly bizarre twist for Alberta and Canada to be in the position of not gaining the consent of the Mikisew over an industrial development over which the proponent and Indigenous nation have agreed. Both industry and the Crown have separate responsibilities to seek out and receive Mikisew consent; one aspect of consent does not make the other inevitable.
247. The governments of Canada and Alberta are integral to those efforts given their ability to mitigate Mikisew's outstanding concerns. Put differently, the path to Mikisew's consent is and has always been through the Nikechinahonan Framework. While Mikisew sees some positive signs from both governments on components of the Nikechinahonan Framework, the Crown needs another push from this Panel to make good on its constitutional duties
248. With that, I'd like to end with a quote from Ms. Lepine: "we, meaning Teck, Mikisew and yourselves as decision-makers have a real opportunity to do something positive here for the land users you heard and for our future generations that you also heard so much about. We know that governments are listening and we know that our ancestors are listening too. A business as usual approach to managing development will leave us with more uncertainties and unbearable conditions in the future."²⁰³
249. Thank you.

²⁰³ Transcript, October 18, p 2601.