

Athabasca Chipewyan First Nation (ACFN) is asking the Federal Court to review Canada's decision to authorize Shell's Jackpine Mine Expansion (the "**Project**"). The decision (the "**Decision**") is the first of its kind made under the controversial Canadian Environmental Assessment Act, 2012 S.C. 2012 c. 19, s. 52 ("**CEAA 2012**").

The Decision was issued on December 6, 2013.

The Project is within ACFN's traditional lands. As such, ACFN participated in various processes relating to the Project over the course of six years, including lengthy regulatory hearings before a Joint Review Panel (the "**Panel**"). At all times ACFN consistently and repeatedly raised its concerns about the Project with Canada and sought meaningful protection for its Treaty 8 rights, as promised by section 35 of the Constitution Act, 1982 (the "**Treaty Rights**").

Canada claimed that the Panel process would form a crucial part of the consultation process and deferred substantive consultation with ACFN until after the Panel issued its decision. Canada told ACFN, the Panel, and the Courts that its consultation process would be informed by the Panel's report and its recommendations.

After the Panel decision, Canada unilaterally set an abbreviated timeline for consultation with ACFN. Consultations by Canada have not resulted in meaningful protection of ACFN's Treaty Rights. This was despite representations by Canada, including the Honourable Minister of Natural Resources Joe Oliver, who advised Canadians on May 2, 2012 that enhanced aboriginal consultation was one of four pillars of Bill C-38, which enacted CEAA 2012.

In its case filed before the Federal Court, ACFN alleges that Canada breached its duties to consult and accommodate ACFN with respect to the Project and the manner in which the Project will impact ACFN's constitutionally protected section 35 rights. ACFN further alleges that the process, and mitigation offered, was inconsistent with the Species at Risk Act, the Migratory Birds Convention Act, as well as several international agreements and conventions to which Canada is a signatory.

The Panel released its report on July 9, 2013 and made 88 recommendations. The Panel found,

*inter alia*, Project-specific significant, adverse, and in some cases irreversible impacts upon:

- a) wetlands;
- b) traditional plant potential areas;
- c) wetland-reliant species at risk;
- d) migratory birds that are wetland-reliant or species at risk;
- e) the capacity of the natural landscape for use by Aboriginal people (including ACFN) for solitude, cultural practice and spirituality; and
- f) biodiversity.

The Panel identified several other Project-specific adverse impacts including but not limited to:

- a) aboriginal traditional land use, rights and culture (including by ACFN);
- b) old-growth;
- c) moose;
- d) woodland caribou; and
- g) Ronald Lake Bison herd.

The Panel identified significant adverse cumulative, and in some cases irreversible, impacts that would follow the Project upon:

- a) old-growth forests;
- b) wetland-reliant species at risk;
- c) migratory birds;
- d) wetlands;
- e) traditional plant potential areas;

- f) old-growth forest reliant species at risk;
- g) caribou, including the “catastrophic loss” of habitat;
- h) biodiversity; and
- i) aboriginal traditional land use, rights and culture (including by ACFN).

The Panel found that the Project will likely result in significant adverse effects at the local level on several terrestrial resources of importance to ACFN including wetlands, traditional plant potential, biodiversity, and wetland-dependant migratory birds and species at risk. The Panel went on to find that other resources important for the practice of Aboriginal traditional land use, rights and culture have been or will be subject to significant adverse cumulative effects, and the long term and possibly irreversible nature of these effects has significant implications for the sustainability of traditional ecological knowledge, traditional land use practices, Aboriginal and treaty rights and culture.

Further, the Panel found that the mitigation measures proposed by Shell for Project effects on Aboriginal users and loss of traditional land use did not provide adequate mitigation, and that there was a lack of mitigation measures proven to be effective for several impacts of oil sands mining in general.

Canada did not implement many central recommendations of the Panel, and with very limited exceptions did not implement ACFN’s proposals either. Canada did not provide concrete and equivalent alternative accommodation to address the serious impacts of the Project.

Finally, Cabinet decided that the Project was justified in circumstances, yet provided no reasons nor explanation at all for why the significant adverse impacts of the Project were justified.