



July 20, 2016

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**Re: Review of environmental assessment processes  
Request for consultation with Mikisew Cree First Nation**

Mikisew Cree First Nation ("Mikisew") writes in connection with the review of federal environmental assessment processes. In the first part of this submission we outline why, in our view, the honour of the Crown requires that Canada directly consult with Mikisew regarding the review. In the second part, we provide our comments on the Expert Panel (the "Panel") Terms of Reference ("ToR") for that review.

### **Direct Consultation with Mikisew is Required**

Mikisew has constitutionally protected rights, including rights under Treaty 8. The Federal Government has been on notice of Mikisew's claims to Aboriginal and Treaty Rights for many years through Mikisew submissions in many forums, including the litigation involving the previous government's decision to change federal environmental assessment ("EA") processes and other environmental legislation.

The Federal Government has also been on notice of the unique circumstances facing the exercise of Mikisew's Treaty Rights that arise from the scale at which Mikisew's traditional territory, including areas within Wood Buffalo National Park, and way of life are being adversely impacted by direct, indirect and cumulative effects of industrial development. To elaborate briefly, hydroelectric projects on the Peace River have contributed to large parts of the Peace Athabasca Delta drying up, with resulting adverse impacts to:

- Mikisew's ability to navigate waterways;
- federally recognized species-at-risk;
- the environmental health of a UNESCO recognized national park; and
- Mikisew's ability to continue practicing its way of life.



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Oil sands development has caused adverse impacts such as:

- massive landscape fragmentation;
- destruction of millions of metres of fish habitat;
- impediments to the navigability of many waterways;
- degradation of water quality in and around a National Park and Indian Reserves causing Mikisew members to be fearful of contamination of the natural resources that underpin their Treaty Rights; and
- industrial projects that will add these impacts continue to be proposed.

Given this context, decisions relating to federal environmental assessment processes may have profound and unique impacts on Mikisew's Treaty Rights and the Outstanding Universal Value of Wood Buffalo National Park. As Mikisew has previously explained to the Federal Government, EA processes, and any changes to them, have implications for the ability of Mikisew and the Federal Government to learn about the impacts of oil sands and other developments on Mikisew's Treaty Rights. They also have implications for how the Federal Government discharges its consultation obligations when making decisions under environmental legislation that may impact Mikisew's rights. Critically, EAs can play an important role in promoting reconciliation when conducted appropriately and can equally undermine reconciliation when not triggered or scoped properly.

The changes to federal EA processes and other environmental laws by the previous government are instructive in this regard. The passage of the *Canadian Environmental Assessment Act, 2012* ("CEAA 2012") was particularly damaging to Mikisew. CEAA 2012 drastically narrowed the range of projects that would trigger an EA, excluding, for example, heavy oil and oil sands processing facilities. Projects below a prescribed size no longer trigger an EA, preventing decision-makers from assessing the cumulative effect of development in Mikisew's traditional territory. CEAA 2012 narrowed the set of considerations that decision-makers could take into account when assessing projects. The Federal Court in *Courtoreille v Canada* (Aboriginal Affairs and Northern Development), 2014 FC 1244 concluded that the changes to federal EAs had "the effect of reducing the number of projects that could trigger an environmental assessment," and allowed for "approval of projects with reduced environmental oversight," which "could have a cumulative effect on the ecosystem which the Mikisew relies upon."

**For these reasons, Mikisew is of the view that Canada must, as a matter of law, consult with it directly regarding the review of federal environmental assessment processes and the development of any amendments to CEAA 2012 and other environmental legislation.**

Working together collaboratively regarding the design of Canada's EA processes is a necessary step in advancing reconciliation. In addition to any legal obligations, Mikisew's extensive experience with EAs means that there also are practical advantages to Canada consulting with Mikisew directly. We would be happy to meet with representatives of the Federal Government to discuss what this consultation process could look like and how it can be coordinated with the broader public engagement process.



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**Please confirm, as soon as possible, that Canada will consult with Mikisew bilaterally regarding the review of federal environmental assessment processes and any potential decisions arising from that review.**

#### **Submissions on the Expert Panel Draft Terms of Reference ("ToR")**

In advance of receiving Canada's response to our request for a bilateral consultation process, we provide the following comments on the draft ToR.

##### **Context**

The section under the heading "Context" explains to the Panel that EAs inform government decision-making and sustainable development. This does not provide sufficient context to the Panel regarding the unique ways in which EAs intersect with indigenous-specific issues, such as Crown Consultation and incorporation of indigenous knowledge.

**Mikisew requests that this description be expanded to explain to the Panel that EAs are also currently relied upon by government decision-makers to inform Crown consultation respecting impacts to the rights, cultures and socio-economic conditions of Indigenous communities.**

Recognizing the potential for EAs to intersect with reconciliation objectives would also be useful in providing the Panel with a more thorough appreciation of the context of this review.

##### **Mandate**

Mikisew is concerned that the actual wording of the mandate is too focused on CEAA, 2012 rather than the Prime Minister's instruction to look at EA processes more broadly.

**Mikisew requests that the Panel mandate be revised to more clearly state that the Panel is to review a broad range of possible arrangements for the execution of EAs, EA decision-making, and follow-up (monitoring and enforcement) in a manner that is consistent with these Terms of Reference**

The ToR state that "[t]he Panel shall submit its report to the Minister, and on request of the Minister, clarify any of the conclusions and recommendations set out in its report."

**Mikisew requests that this section be amended to clarify that the Panel must also reconsider issues or consider issues that the Panel failed to address at the direction of the Minister.**

**Mikisew requests that an opportunity be provided for Mikisew to make submissions to the Minister if they believe that the Panel has failed to consider an issue or has made an error.**



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**Mikisew requests greater clarity from the Federal Government regarding how it will consult with Mikisew about the Panel report before the Federal Government finalizes the ToR.**

#### Complementary Mandates

The ToR state that “[t]he Panel shall focus on those relevant matters that intersect with environmental assessment.” The example given relates to the role of experts from other departments in supporting CEAA. Mikisew is concerned that, as currently drafted, the draft ToR does not provide sufficient clarity that the Panel must consider the relationship between EAs and other federal legislation such as how activities trigger EAs and how EAs intersect with permitting decisions.

**Given our concerns, Mikisew requests that the ToR be amended to state that the Panel will consider all potential intersections with EAs, including whether authorizations under other federal Acts should trigger an EA.**

#### Scope of Review

Mikisew is concerned that the phrasing of matter #5 could lead the Panel to primarily focus on the capacity of Indigenous groups. Certainly the capacity of Indigenous groups to participate in EAs (which can cost hundreds of millions of dollars and which routinely shift information gathering and assessment burdens onto Indigenous groups) is a critical issue for this review. However, this review must also focus on how EA processes, triggers, and methodologies address Aboriginal and Treaty Rights and Indigenous knowledge. In Mikisew’s experience, Mikisew’s worldview or way of knowing is often considered illegitimate and consideration of impacts to our rights is routinely considered irrelevant or “out of scope” whenever such concerns are raised in any forum relating to EAs. If that were to happen here, this review would fall short of the Minister’s mandate letter and the commitments of this government.

**For this reason, Mikisew requests that matter #5 be revised to be more inclusive of the range of Indigenous-specific issues that intersect with EAs.**

In the “Scope of Review” section, the draft ToR state that “the Panel shall consider the relationship between environmental assessment processes and the Aboriginal and Treaty Rights of Indigenous peoples and reflect the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples.”

Mikisew requests that the ToR be more specific in describing the scope of the review as it relates to these items by including:

- 1) What changes to EA legislation are necessary to remedy the changes that occurred under CEAA 2012 including:



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- a. Changing from the law list of environmental assessment triggers to the designated project list approach (s. 13), specifically by:
    - i. Narrowing the scope of what types of project trigger an EA, and
    - ii. Reducing the ability of EAs to assess cumulative effects
  - b. Narrowing the scope of environmental effects that EAs must consider (s. 5)
  - c. Facilitating the transfer of the EA's responsibility to the provinces (ss. 32-37)
  - d. Limiting public participation in the EA process (ss. 9(c), 27, 38, 41(1)(c))
- 2) What changes to EA legislation are necessary to ensure that EAs assess potential adverse effects on Aboriginal and Treaty Rights in a manner that:
- a. Incorporates Indigenous perspectives and worldviews
  - b. Incorporates Indigenous knowledge in a manner that avoids the dismissive approach to Indigenous knowledge currently used in EAs
  - c. Mandates an assessment of potential direct, indirect and cumulative effects on Aboriginal and Treaty Rights, culture and socio-economic conditions
  - d. Requires appropriate methodologies, including Indigenous-led reporting, for assessing the potential project effects described above
- 3) What changes to EA legislation are necessary to more transparently address the intersection of the duty to consult and EAs where Canada proposes to rely on the EA process for fulfilling aspects of that duty
- 4) What changes to the CEAA are necessary to bring it into compliance with the United Nations Declaration on the Rights of Indigenous Peoples, including how it will integrate free, prior and informed consent into the decision-making process during EAs
- 5) What changes to EAs are necessary to establish confidence of Indigenous groups in EAs and to align EAs with reconciliation objectives



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### The Review Process: The Panel

This section of the draft ToR sets out that the Panel must have knowledge or experience relevant to EA processes. In Mikisew's experience, unless the draft ToR has a specific requirement for the Panel to have knowledge and/or experience relevant to Aboriginal and Treaty Rights as well as the incorporation of Indigenous Knowledge, submissions relating to these matters will not be properly assessed by the Panel.

**Mikisew requests that the ToR require the Panel to have knowledge and experience relevant to Aboriginal and Treaty Rights as well as the incorporation of Indigenous knowledge.**

### Conduct of the Review: Timeline

The draft ToR state that "[t]he Panel shall complete its review and provide its report with recommendations to the Minister by January 31, 2017." These timelines need to be given serious thought, given that the deadline for submitting comments on the draft ToR is July 20th, and that the Panel has not been formally established. While Mikisew is of the view that Canada's EA legislation needs to be revised urgently, it would be unfortunate for timelines to turn the Panel's work into a hollow exercise rather than a meaningful opportunity for Mikisew to be heard.

**Given these timeline concerns, Mikisew request that Canada confirm, as soon as possible, that it will consult directly with Mikisew regarding changes to Canada's EA and environmental protection regimes.**

### Conduct of the Review: Indigenous Engagement and Consultation

As described above, Canada has a duty to consult Mikisew directly regarding amendments to Canada's EA processes. There are likely opportunities to coordinate Canada's direct engagement with Mikisew and this public review process, but that conversation needs to occur as soon as possible. Based on Canada's response to Mikisew's request for direct consultation with Canada, we may have additional comments on how the Panel is mandated to engage with Indigenous communities.

Given the importance of the Indigenous Engagement Plan to how the Panel will conduct Indigenous consultation activities, it is critical that the Panel consult with interested communities on that plan (not just national organizations). Mikisew asks that the ToR be revised to reflect this broader consultation on the Indigenous Engagement Plan and to require that the Panel obtain the Minister's approval of the Indigenous Engagement Plan before it is finalized.

The draft ToR state that the Panel shall "directly engage and consult with Indigenous organizations, groups, communities and individuals during its review in order to gain an understanding of issues and opportunities related to federal environmental assessment processes." The draft ToR further state that "[t]he Panel shall, where practicable, hold Indigenous in-person consultation activities in



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regions or communities where project environmental assessments have been recently conducted or where communities have expressed interest in the review.”

**As it is presently unclear how the Panel process relates to the Crown’s duty to consult on potential changes to federal EA processes and other environmental laws, Mikisew requests that the ToR be revised to require, at a minimum, that the Panel hold in-person consultation activities with First Nations located in the oil sands region. If Canada intends to delegate some or all aspects of consultation to the Panel, Canada must more clearly articulate what aspects of consultation it is delegating and provide an opportunity for Mikisew to comment.**

This section of the draft ToR appears to be primarily aimed at ensuring that the Panel “hears” from Indigenous communities. It is equally important that the Panel actively engage with Indigenous communities and is responsive to the issues they raise such as by providing feedback and opportunities for dialogue and two-way information sharing.

#### Conduct of the Review: Multi-Interest Advisory Committee

Mikisew notes that there are unique issues pertaining to the oil sands region, the Aboriginal perspective and World Heritage Properties. In addition to a broad ranging multi-interest advisory committee, Mikisew suggests that the Minister consider whether to also create regional-focused advisory committees or issue-specific committees such as a World Heritage Property committee.

#### Conduct of the Review: Participant Funding

The draft ToR state that “[t]he Canadian Environmental Assessment Agency will offer participant funding to Indigenous organizations, groups, communities and individuals to support their participation in the review.” The draft ToR do not specify how much funding will be available or how it will be allocated.

In Mikisew’s experience, funding provided by the Canadian Environmental Assessment Agency falls well short of the level Mikisew requires to meaningfully participate in regulatory processes. Here, Mikisew will require the assistance of legal counsel and experts in the field of EAs.

**Mikisew requests that sufficient funding will be provided to enable it to participate fully in the review process. Given the review’s short timeframe, Canada must make funding available immediately so that Mikisew can begin to prepare.**

We look forward to the review,

Melody Lepine - MCFN GIR Director

cc: MCFN Chief and Council



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