



Canadian Environmental
Assessment Agency

Agence canadienne
d'évaluation environnementale



May 25, 2018

By Email: Frontier.Review@ceaa-acee.gc.ca

Mr. Alex Bolton, Chair
Frontier Oil Sands Mine Joint Review Panel
c/o Canadian Environmental Assessment Agency
160 Elgin Street, 22nd floor
Ottawa, Ontario K1A 0H3

Dear Mr. Bolton,

The Mikisew Cree First Nation (MCFN) and the Canadian Environmental Assessment Agency (the Agency) are providing the attached methodology for assessing impacts on the exercise of Aboriginal and Treaty rights in the context of the proposed Frontier Oil Sands Mine Project (the Project) for consideration by the Joint Review Panel. The attached methodology has been collaboratively developed by the MCFN and the Agency on behalf of the federal government.

The objective of this methodology is to support the mandate of the Joint Review Panel with respect to the assessment of the potential impacts of the Project on the exercise of Aboriginal and Treaty rights. As you are aware, the Joint Review Panel is mandated to accept as part of its record and review information from Aboriginal groups, the proponent, interested parties, federal authorities or government and provincial departments/government related to the nature and scope of asserted or established Aboriginal or Treaty rights in the area of the Project. Further, the Joint Review Panel is mandated to accept information on the potential adverse environmental effects that the Project may have on asserted or established Aboriginal or Treaty rights, and information regarding any measures proposed to avoid or mitigate the potential adverse effects of the Project on asserted or established Aboriginal or Treaty rights.

This proposed methodology provides a structured approach that the Joint Review Panel may utilize to consider information and evidence related to impacts on the exercise of rights that is presented before it. It is the view of the MCFN and Agency that the Joint

Review Panel may utilize this methodology to assess information from existing submissions already on the record related to traditional uses, cultural and rights, or those forthcoming.

In addition to supporting the mandate of the Joint Review Panel in considering the potential effects of the Project on Aboriginal and Treaty Rights, the federal government's application of this methodology will assist in upholding its obligation to ensure that potential impacts from the Project on MCFN, and other Indigenous groups, are adequately and appropriately considered and accommodated where appropriate. Regardless of the Joint Review Panel's application of the methodology, the Agency, on behalf of the whole of federal government, intends to continue working with MCFN (and other Indigenous groups involved in the Project) to assess potential impacts on the exercise of rights as a result of the Project.

For clarity, we propose that the attached methodology be posted on the Canadian Environmental Assessment Registry Internet Site for the Project so that it is publicly available. The MCFN and the Agency would be happy to answer any questions from the Joint Review Panel and/or its Secretariat regarding the methodology.

Sincerely,
<Original signed by>

Melody Lepine
Mikisew Cree First Nation
<Original signed by>

Candace Anderson
Consultation Coordinator
Canadian Environmental Assessment Agency

Cc: Heather Smith, Vice President, Canadian Environmental Assessment Agency
Kurt Saunders, Director, Review Panels, Canadian Environmental Assessment Agency
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Methodology for Assessing Potential Impacts on the exercise of Aboriginal and Treaty Rights of the Proposed Frontier Oil Sands Mine Project

I. Introduction

This document presents a methodology for assessing impacts on the exercise of Aboriginal and treaty rights in the context of the proposed Frontier Oil Sands Mine Project (the Project). This methodology is a collaborative product developed by the Mikisew Cree First Nation (MCFN) and the Canadian Environmental Assessment Agency (on behalf of the federal government) for use during the environmental assessment (EA) of the Project.

This methodology can be used by the Joint Review Panel to review and consider the effects of the Project on the exercise of the rights of the MCFN pursuant to the Panel Agreement and Terms of Reference. This methodology will be used by the MCFN and the Federal Government when considering Project impacts on the exercise of the rights of the MCFN, and in considering whether consultation on the Project was adequate. Use of this methodology by any other party or for any other purpose should be undertaken in manner consistent with the note at the end of this document.

II. The Context for this Methodology for Assessing Impacts to the Exercise of Aboriginal and Treaty Rights

Since 1982, when Aboriginal and treaty rights were enshrined in section 35 of the *Constitution Act, 1982* (Aboriginal and treaty rights), Canadian courts have highlighted that a fundamental purpose of section 35 of the *Constitution Act, 1982* is reconciliation. Words used by the courts in cases involving those rights, such as “cultural security”, “continuity”, “way of life”, “continued existence”, and “Aboriginal perspective” serve to demonstrate that the protection of Aboriginal and treaty rights has great importance for the Indigenous communities that possess those rights and for advancing reconciliation.

Despite the frequent affirmation of the importance of Aboriginal and treaty rights, consideration of impacts on those rights has rarely been at the forefront of EA and regulatory processes. Where there have been attempts to consider those rights in EAs, the focus has largely been on environmental effects, with the consideration of impacts to Aboriginal and treaty rights undertaken through the lens of biophysical proxies. Such

approaches risk overlooking that the exercise of Aboriginal and treaty rights depends on a broader range of factors, and that methodologies for assessing physical or biophysical environmental effects are not well suited to fully consider the impacts of a project on Aboriginal and treaty rights. This latter point was recently confirmed by the Supreme Court of Canada in the ***Clyde River*** decision¹.

The consideration of potential adverse impacts to Aboriginal and treaty rights through a principled methodology helps improve decision-making and advance reconciliation objectives. Methods that are co-designed by Indigenous peoples and governments can improve the understanding of the potential effects of a project on Aboriginal and treaty rights and can, from the outset of their application, take into account the traditional knowledge and cultural values of an Indigenous community as well as Indigenous laws and traditions.

To date, few tools and guidance exist to assist practitioners in effectively integrating consideration of Aboriginal and treaty rights into an EA process. This document is intended to be a methodology that is rooted in jurisprudence, academic research and practical assessment experiences that can be used to assess impacts on the exercise of Aboriginal and treaty rights.

The collaborative approach leading to this jointly developed methodology is in keeping with the mandate letter of November 12, 2015 sent by the Prime Minister to the Minister of Environment and Climate Change Canada. In this letter, the Prime Minister states that Government “made a commitment to Canadians to pursue our goals with a renewed sense of collaboration” and that the Government’s work would be informed by “performance measurement, evidence, and feedback from Canadians.” It is also consistent with Canada’s Principles respecting the Government of Canada’s relationship with Indigenous peoples, which include a stated commitment to:

...look for opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together. It will ensure that Indigenous peoples and their governments have a role in public decision-making as part of Canada’s constitutional framework and ensure that Indigenous rights, interests, and aspirations are recognized in decision-making.²

Finally, there is no such thing as a “one size fits all” approach; the unique characteristics of every community of rights-holders must be acknowledged at the outset through

¹ *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40, para 45.

² Department of Justice Canada, *Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples*. <http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>

community participation and efforts to understand their historical and contemporary context.

III. Overview of the Methodology for Assessing Impacts to the Exercise of Aboriginal and Treaty Rights from the Frontier Project

Assessing impacts to Aboriginal and treaty rights requires an understanding of the Aboriginal and treaty rights of an Indigenous community that may be affected by a project. Treaty rights are understood to include the ability to maintain a community's culture and traditional way of life. As such, the term "rights" is used in this methodology to include the culture and traditional way of life of the community possessing those rights. For example, rights under Treaty 8 include a range of components that inform when, how, where and why harvesting activities take place, many of which are informed by cultural considerations and Indigenous laws.

The impact to rights assessment methodology for the Project consists of three steps:

- Step 1: Determining the context in which potential impacts on rights will occur
- Step 2: Evaluating potential project impacts to rights
- Step 3: Follow-up and validation

Steps 1 and 2 have sub-components that have been developed to assist the assessor in taking a logical and orderly approach to the analysis. The subcomponents have been ordered purposefully and should not be re-ordered as that would undermine the ability of the assessor to deliver a defensible impact assessment.

The subcomponents of step 1 are:

- a) Identifying the conditions that support the community's exercise of their rights;
- b) Understanding how historic, existing and approved activities have affected the conditions that support the community's exercise of rights; and
- c) Identifying the importance of the Project's location in relation to the exercise of a community's rights.

The subcomponents of step 2 are:

- a) Identifying the pathways for potential impacts of the Project (positive and negative) on the exercise of rights;
- b) Determining, based on step 1 and the seven guiding questions identified in step 2 (b) of this document, whether the Project will have a low, medium or high level of impact on the exercise of rights.

A table setting out collaboratively developed guidance for the determination of the severity of impacts from the Project on the exercise of Aboriginal and treaty rights is included as part of this methodology (see Table 1). The table outlines the criteria that

should be used to support the assessment of the Project's impacts on the exercise of a community's Aboriginal and treaty rights.

Recognizing that the experience of most assessors is likely to be predominantly with assessment methodologies developed for environmental or broader socio-economic effects, there is a potential for assessors to rely on such approaches when undertaking the steps in this framework³. Relying on environmental or broader socio-economic effects methodologies would likely miss the mark, and could result in a deficient assessment of impacts on rights. For that reason, the impact assessment principles set out in the following sections are an integral component of the methodology for the assessment the potential impacts of the Project on the exercise of Aboriginal and treaty rights. Adherence with these principles, co-developed by MCFN and the Canadian Environmental Assessment Agency, should be considered fundamental to a robust assessment of impacts to Aboriginal and treaty rights arising from the Project.

IV. Principles for Assessing of Impacts to the exercise of Aboriginal and Treaty Rights

In applying the principles noted below, it is important to create the space necessary for an assessment of impacts to Aboriginal and treaty rights that is aligned with Indigenous perspectives and best practices. Properly applied, these principles will enable an evaluation of potential impacts to Aboriginal and treaty rights that advances reconciliation and provides a robust basis for decision-making.

Principle 1: The assessor must consider the nature and scope of rights, as those rights are asserted, and how the rights might be impacted.

The consideration of the potential impacts to Aboriginal and treaty rights requires the assessor take a broad and generous interpretation of what constitutes an Aboriginal or treaty right, including incidental rights. Due consideration must be given to the Aboriginal and treaty rights as they are asserted by the rights-bearing community in order to successfully apply a rights-based approach.

For example, understanding the MCFN's Treaty 8 rights requires an understanding of the range of customs, practices, values and traditions that are connected to and support hunting, trapping, fishing and gathering, in the MCFN's traditional way. It is not simply the presence (or absence) of the animals that are harvested that constitute rights; it is the ability of MCFN members to continue patterns of activities in accordance with Indigenous laws and stewardship norms. Rights are intrinsically tied to the quality of

³ Miller, Bruce Granville. 2011. Oral History on Trial: Recognizing Aboriginal Narratives in the Courts. Vancouver, BC: UBC Press.

experience, such as spending time in important places while enjoying peace and quiet, and the ability to transfer knowledge and culture on the land, and access these places without difficulty or extreme cost⁴.

As another example, MCFN has a long history of hunting of bison, in particular the Ronald Lake Bison herd, and those hunting practices provide for an intergenerational continuity of practice, and sense of place that reinforces MCFN members' connection to lands and identity, especially for MCFN families connected to the area. MCFN asserts that Treaty 8 includes a right to hunt bison.

A list of guiding topics later in this document (under Principle 9) describes traditional and cultural values relating to Aboriginal and treaty rights.

Principle 2: Assessing impacts on Aboriginal and treaty rights requires more than assessing environmental effects on the current use of lands and resources for traditional purposes or on physical and cultural heritage.

There are two components to this principle. The first is the recognition that Aboriginal and treaty rights are not the same as the statutory requirements in section 5 of the *Canadian Environmental Assessment Act, 2012*. The important questions that should always guide the analysis of impacts of the Project on the exercise of Aboriginal and treaty rights are:

- How will the meaningful exercise of rights be impacted?
- How will the community's ability to practice culture in a way that reflects who they are as a people be impacted?

The second component of this principle is recognition that an adequate assessment of impacts to Aboriginal and treaty rights requires consideration of more than environmental (i.e. biophysical) effects. An assessment of impacts to Aboriginal and treaty rights must recognize that changes to a community, effects on cultural continuity and alterations to the cultural landscape can occur irrespective of the level of potential physical change to the environment. It is possible that impacts to the exercise of Aboriginal and treaty rights can occur even where it is determined that a proposed project will likely not result in residual environmental effects.

⁴Gibson, G. Culture and Rights Impact Assessment: A Survey of the Field, May 2017, p. 69.

Examples of impacts on the exercise of Aboriginal and treaty rights (that may or may not have a confirmed biophysical component) can include the diminishment of:

- the perceived quality or quantity of lands or resources needed to exercise the rights;
- the value of a place in the hearts and minds of an Indigenous culture;
- the ability to know and teach about a place or resources and the associated social and cultural values embodied therein;
- the experience of exercising rights in a family area;
- access to treaty lands or traditional territories to practice rights;
- traditional patterns of economic and cultural activities;
- preferred means or locations for exercising the rights; and
- opportunities to uphold stewardship and other societal norms.

Multi-generational limits on access to certain areas and resources will constitute an adverse impact to rights even where reclamation activities are proposed as a way to restore some level of environmental functions.

Principle 3: Assessing impacts on the exercise of Aboriginal and treaty rights requires understanding the context of historical and contemporary cumulative effects in which rights are exercised. This context needs to be evaluated before looking at Project effects on those rights. The assessor must recognize that existing environmental conditions do not tell the full story about historical and current cumulative impacts on Aboriginal and treaty rights.

This principle underscores the need to start an assessment of impacts of the Project from an understanding of the cumulative effects from past and current projects and other activities that have diminished the ability of a community to exercise its Aboriginal and treaty rights. The Project should be considered in the context of the historical and contemporary cumulative effects that have a bearing on a community's existing ability to exercise their Aboriginal and treaty rights, as well as the extent to which the exercise has already been diminished.

Efforts to understand the relevant historic and current context must be thoroughly informed by an Indigenous perspective, including consideration of how past and present social and environmental conditions, and the changes to those conditions over time, may have created constraints on the exercise of Aboriginal and treaty rights and affected culture. This context should include historical or current interferences with traditional practices, such as lands that have been previously taken up for projects or

activities (legally or in effect⁵), impacts of government regulation on traditional practices, and other historical legacies that have impacted the way of life and knowledge within the community, such as the lasting impacts from residential schools.⁶

Example: The graphic below shows how the ability of MCFN members to harvest moose and bison has dropped below desired quantities in recent decades

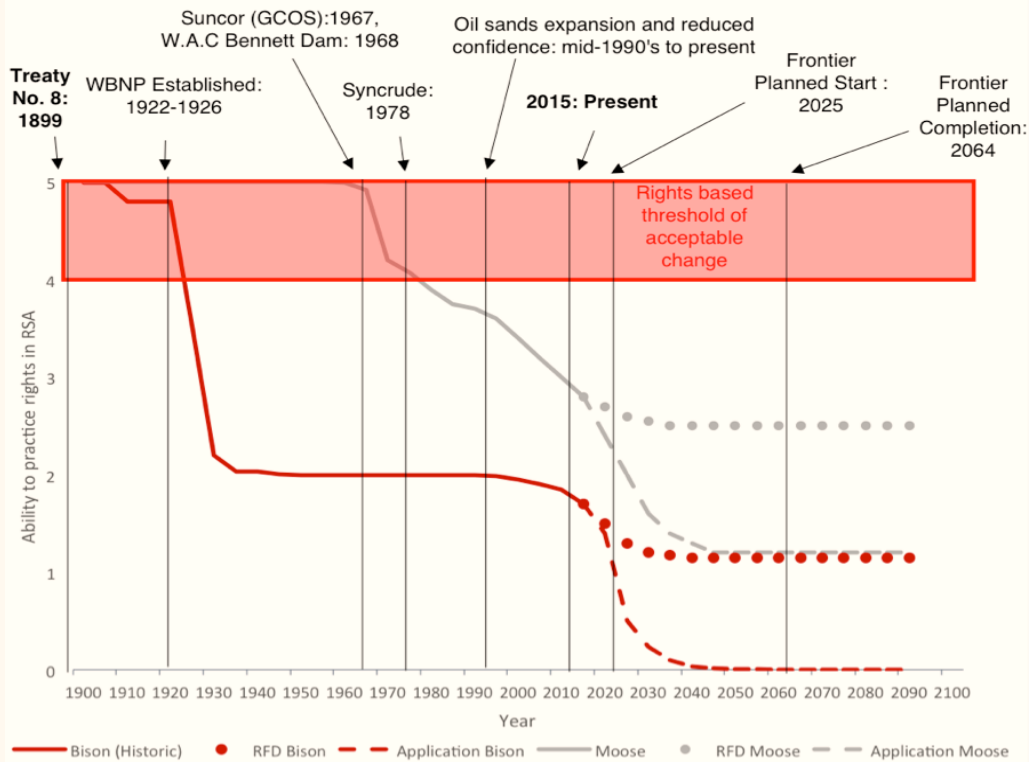


Figure 1: Ability of MCFN members to harvest moose and bison

Principle 4: The assessment should not be limited to site-specific effects, but must consider all impacts on the exercise of rights.

The impacts of the Project on the exercise of Aboriginal and treaty rights should be assessed in a broad sense, inclusive of any type of Project effect on conditions needed to support continuity of rights and way of life. It should be clearly understood that a distinction between “site-specific” and “non-site-specific” impacts is not made in section

⁵ Refers to unusable lands that are not limited to those identified for industrial use within *Public Lands Act* authorizations. This can include lands that are, in effect, deemed unusable or inaccessible by rights holders given fear of contamination or other concerns.

⁶ The Prosperity Panel Report and New Prosperity Panel Report provide examples of where a federal Panel have included a historical context as part of their report. For New Prosperity Panel Report see section 12.1 “Historical Context” under “Aboriginal Matters” in: <https://ceaa-acee.gc.ca/050/documents/p63928/95631E.pdf>

35 of the *Constitution Act, 1982* and thus an assessment of impacts to Aboriginal and treaty rights should avoid this compartmentalization.

An assessment should take into consideration factors associated with the practice of Aboriginal and treaty rights such as access, land conditions, air and water quality and quantity, location of resources, travel routes, and places to be on the land and pass down their teachings.

Examples of a broader understanding of impacts on the exercise of Aboriginal and treaty rights include:

- potential for disruption to preferred ways of continuing customs, traditions and practices;
- loss of trust in downstream resources and other downstream effects;
- changes to the wildlife population size, health, or accessibility of a traditional resource or a change to the spiritual or cultural connection with that resource; and
- cumulative environmental effects on lands, waters and other resources that support a community's way of life.

Principle 5: Utilizing an Indigenous perspective and Indigenous knowledge is an imperative.

The assessment should make every effort to understand a community's perspective and their members' views on what constitutes an impact. When considering the potential impacts of the Project on the exercise of Aboriginal and treaty rights, the approach needs to be community focused, give weight to Indigenous perspectives, and treat the rights holders as experts to add value to the quality of the impact assessment⁷.

The Indigenous perspective is a necessary input in an assessment of impact on the exercise of Aboriginal and treaty rights, and without this perspective, the assessment will lack credibility and rigour, particularly from a sustainability viewpoint.

While it is a standard approach in EAs to attempt to consider Indigenous knowledge, that knowledge has been treated narrowly, compartmentalized or applied outside of its cultural and spiritual context. Indigenous knowledge must be understood broadly to include:

- local empirical knowledge of animals, plants, soils and landscape;

⁷ O'Faircheallaigh, C. 2017. "Shaping projects, shaping impacts: Community-controlled impact assessments and negotiated agreements." *Third World Quarterly*. 38 (Issue 5): Pages 1181-1197

- resource management systems (including practices, tools, and techniques);
- traditional systems of management and their social institutions, rules, norms, and codes that apply to social relationships; and
- worldview.

Further, the assessor should recognize that Indigenous knowledge will be relevant to many aspects of an assessment, including scoping decisions, determination of context and evaluation of impacts and proposed mitigation measures.

Description of strong integration of Indigenous views and knowledge

The assessment incorporates Indigenous views of the land and the meaning of what occurs out on the land, with both qualitative and quantitative treatments, at all relevant stages of analysis. Evaluations clearly describe community values and perspectives in a way that brings forward the cultural meaning of places and the stewardship principles that a community has in relation to those places.

Principle 6: The assessor must consider Indigenous values, norms and laws, where provided by a community.

Determining the scale and scope of an assessment of impacts on Aboriginal and treaty rights should include consideration of Indigenous knowledge, spiritual practices, cultural beliefs and community laws and norms.

For the purpose of an assessment of impacts on the exercise of Aboriginal and treaty rights, the assessor does not need to determine whether Indigenous laws are enforceable at law; rather, the assessor should prioritize Indigenous perspectives and seek the Nation's views on whether the Project would be inconsistent with Indigenous laws and norms as an additional lens for evaluating the impacts of the Project on the exercise of Aboriginal and treaty rights.

Indigenous values, norms and laws respecting a particular type of traditional resource or activity are relevant to the assessment of the seriousness of a Project effect on Aboriginal and treaty rights. For example, what might appear to be a minor Project effect to a traditional resource may result in a serious impact to the exercise of Aboriginal and treaty rights if the affected resource is of high importance to the Indigenous community or if impacting that resource would be contrary to Indigenous stewardship norms for that resource.

Similarly, Indigenous values, norms and laws respecting a particular landscape within which an adverse impact may occur is also relevant for understanding Project effects on

Aboriginal and treaty rights. Generally, the more important the area or landscape is to Indigenous land users, the higher the degree of seriousness of the impact. This connection to the land can take into consideration “cultural heritage, travel routes and spaces between them (Ehrlich, 2012), the relationships between sites, and the spiritual and cultural associations that people hold with the land, often over a much larger area”.⁸

Cultural associations can also exist between Indigenous peoples and keystone species. These are culturally important species that are connected to identity and spiritual practice and therefore having bearing on the exercise of Aboriginal and treaty rights. For example, bison are a keystone species for the MCFN, and are hunted not only for subsistence but are also used in cultural and spiritual practices.

Example: The Mackenzie Valley Environmental Impact Review Board made clear in the Screech Lake Uranium Exploration Project and New Shoshoni Diamond Exploration, that “although the proposed development is physically small, the potential cultural impacts are not”⁹. In the New Shoshoni EA decision, the Mackenzie Valley Environmental Impact Review Board also distinguished clearly between physical heritage impacts and other cultural impacts and also recognized that while it may not always be possible to quantify cultural “footprint impacts” in the same way as it is for physical resources, this does not lessen their importance¹⁰. In those two assessments, the Mackenzie Valley Environmental Impact Review Board identified impact pathways and potential ultimate outcomes of impacts on culture as:

- reduction of the value of a place in the hearts and minds of the culture group;
- reduced ability to know and teach about a place between generations;
- reduced connection to the cultural landscape reducing cultural continuity overall;
- loss of a place of refuge from the “modern” world; an area where what is today (but was not generally in 2005) called “quiet enjoyment of the land”, is still possible;
- disrespect of ancestors, as a valid impact pathway, and an abrogation of responsibility by the culture holders as well as the Crown; and
- increased access to a critical cultural area contributing to culture holder alienation.¹¹

⁸ *Survey of a Field*, supra, note 4, at p. 19, citing Ehrlich, Alan, “Dealing with Culturally Sensitive Areas in Industrial Project Design.” *The International Indigenous Policy Journal* 3 (2), 2012.

⁹ Mackenzie Valley Environmental Impact Review Board. “Report of Environmental Assessment and Reasons for Decision on UR Energy Inc. Screech Lake Uranium Exploration Project (EA 0607-003)”, 2007.

¹⁰ Mackenzie Valley Environmental Impact Review Board. “Report of Environmental Assessment and Reasons for Decision on the New Shoshoni Ventures Preliminary Diamond Exploration in Drybones Bay”, 2004.

¹¹ *Ibid.*, pp 40-62.

Principle 7: An assessor must engage the rights-bearing community during an assessment. The selection of methods and indicators for assessing impacts to Aboriginal and treaty rights is to be community driven, where a community has elected to participate.

Culture and Aboriginal and treaty rights pertain to a “way of life, the system of knowledge, values, beliefs, behaviour, all of which is passed down between generations.”¹² Given the unique and context specific nature of culture, it is imperative that the design and application of an assessment incorporate input from potentially affected rights-bearing communities.

Best EA practice similarly points to the need for community-defined and community-driven processes for matters like assessments of impacts on the exercise of Aboriginal and treaty rights and culture.¹³ Community control and input in evaluating impacts ensures that there is engagement of the affected community in the design of the scale and scope of the assessment. Evidence suggests that studies designed and controlled by communities tend to ensure there is engagement of the knowledgeable people, and that these knowledgeable people are able to draw on past knowledge to identify areas of interest.¹⁴ Further, these same people will also offer an understanding of the meaning and context of the impacts that is not available to external assessors. In other words, it is not reasonable to expect to understand a life lived on the land from either a helicopter or a map without also hearing from a community in their preferred way and in their chosen places.

Examples of what goes wrong if the assessment of impact on the exercise of Aboriginal and treaty rights are not adequately community driven

Assessments that fail to involve culture holders open themselves up to three sources of uncertainty. First, they rarely have enough information about the place itself, and simply miss important cultural markers. The second source of uncertainty is the absence of context. Without the right people to assist in interpretation, or point the right way, the values, the stories, and the cultural heritage have no cultural context, resulting in incomplete assessments. Finally, assessors that evaluate impacts on the exercise of rights without active engagement and direction from communities often miss important information, are prone to ignoring Indigenous knowledge and perspectives and may misinterpret necessary community information.

Where cultural impacts are identified, it is the culture holders – the experts

¹² *Survey of a Field*, supra, note 4, at p. 8.

¹³ *Ibid.*, pp 44-46.

¹⁴ *Ibid.*, p. 35.

themselves – whose expertise should be most heavily weighted. Community knowledge holders are the people most qualified to identify the extent, depth and duration of impacts to what matters most with respect to culture and rights.

Principle 8: Thresholds and measures to understand the potential effects of a project on the exercise of Aboriginal and treaty rights and culture are to be utilized where they have been defined by the community.

The assessment of the impacts of the Project on the exercise of Aboriginal and treaty rights should not be limited to biophysical proxies or quantitative thresholds that do not reflect a community's views or way of life. To understand the potential effects of the Project on the exercise of Aboriginal and treaty rights and culture/way of life, thresholds and measures should be included where they have been qualitatively or quantitatively defined by the community. For example, a community may choose to define what impacts they are willing to absorb (a socially derived threshold of acceptable change with a more holistic perspective on the effects of the Project as a whole in the cumulative context of change to date) rather than defining a quantitative threshold for the viability of a particular species.

Examples: MCFN has identified qualitative and quantitative thresholds that link environmental effects to impacts on the exercise of their treaty rights. These thresholds include:

- thresholds related to environmental conditions: i.e. Aboriginal base flow and Aboriginal Extreme Flow;
- thresholds related to sufficiency of resources: i.e. herd size to support a traditional hunt; and
- thresholds related to environmental and sensory changes: i.e. avoidance zones, water quality, fish and wildlife deformities, reduced insects.

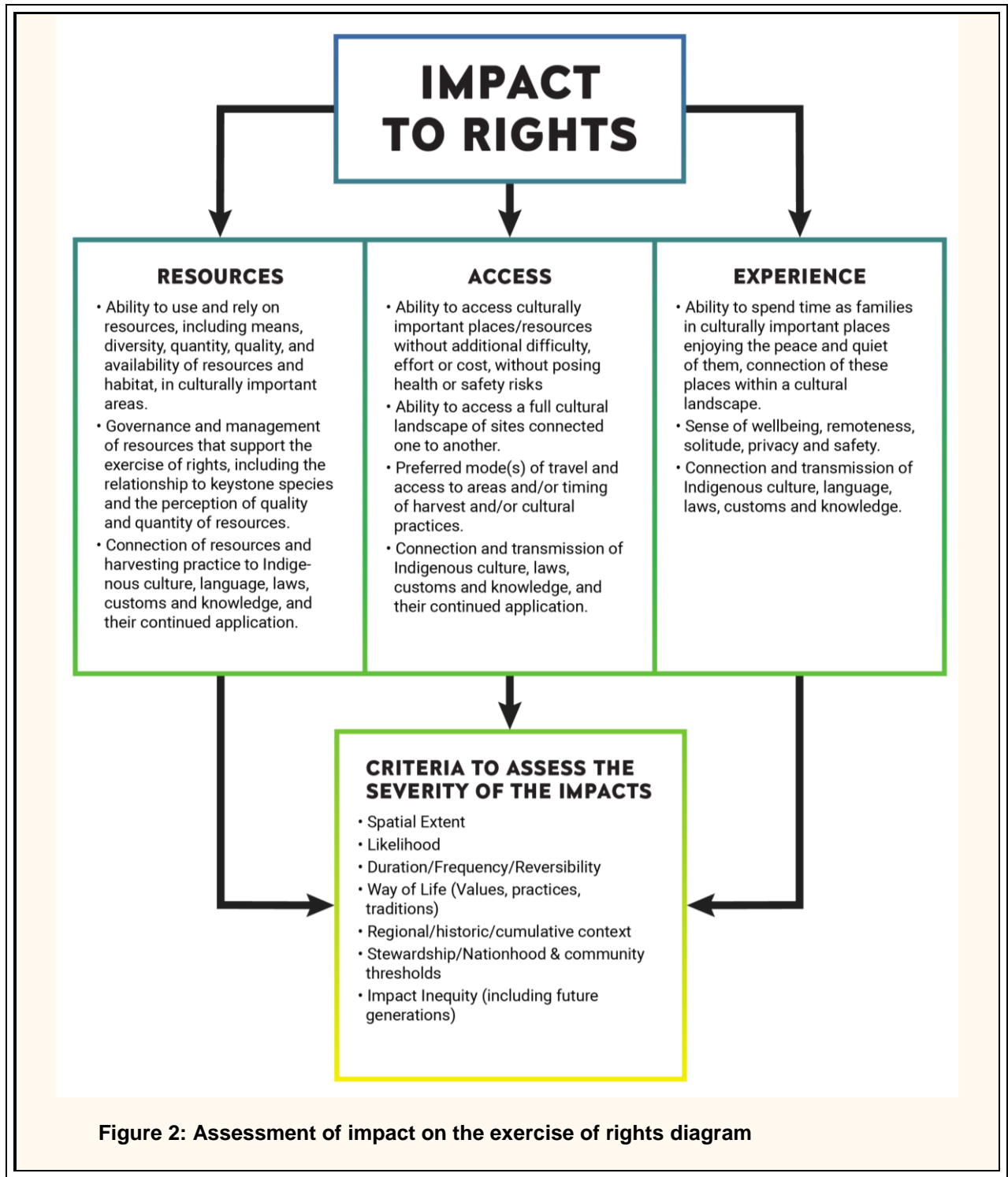
Principle 9: Assessments of impact to the exercise of Aboriginal and treaty rights should consider a project's contribution to reconciliation.

An important contextual consideration in the assessment of impacts on the exercise of Aboriginal and treaty rights, that is consistent with the federal government's recognition of Indigenous rights, is whether the Project is acceptable to a community from its perspective. Put differently, recognition of Aboriginal and treaty rights in an assessment process includes reflecting Indigenous voices and perspectives, and acknowledging that a community's desired future as a people and as rights-holders is deserving of

consideration. A community's readiness to deal with a project and other aspects of a community's "reality" (e.g. social reality, educational reality, health reality) are pertinent to how that development is viewed.

V. Steps in the Methodology

This section describes the steps that are required to undertake an assessment of impact on the exercise of rights. For all steps, organization of traditional and cultural values related to rights are described in terms of three guiding topics: resources, access, and experience (Figure 2).



Step 1: Determining the Context in which Potential Impacts of the Project on the Exercise of Rights Will Occur

Unlike traditional EA approaches that tend to look at cumulative effects at the end of an evaluation, the first step in assessing impacts on the exercise of Aboriginal and treaty rights is to develop a comprehensive understanding of the contextual factors relevant to the rights-bearing community. Broadly speaking, this entails reviewing information about the conditions necessary to allow a community to exercise its rights and how historical and current cumulative effects may already impact those conditions. It then requires an evaluation of the how the Project area and the resources in and around it relate to the exercise of a community's Aboriginal and treaty rights.

a. Identifying the conditions that support the community's exercise of their Aboriginal and treaty rights

The first step in this methodology is for the assessor to develop an understanding of the conditions and context required to support the meaningful practice of culture and rights. It is vital that there be Indigenous engagement and direction in setting the frame for the conditions that are required for practice of rights and culture.

Types of conditions that the assessor should consider include:

- a large, intact, and biodiverse land base;
- ancestral connection, a feeling of historical or spiritual connection to the area;
- confidence in and sufficiency of resources (including higher weighting for preferred places, resources and times to access them);
- data on wildlife and vegetation baseline (abundance, distribution, population health) data;
- sense of place (e.g., sense of solitude and ability to peacefully enjoy territory in preferred manner);
- customs for transfer of knowledge to future generations;
- access and patterns of occupation and cultural practice (including community constraints);
- stewardship norms and laws;
- social value of the area to practice culturally significant activities;
- cultural landscape and keystone cultural place delineation; and
- community health indicators using a social determinants of health approach.¹⁵

¹⁵ Community health indicators are often reflective of non-physical definitions of health, allowing intangibles to be included in the impact analysis. Examples of such indicators include: learning traditional stories in culturally appropriate settings, paying respect to the lands and animals, learning through observations "on the land", speaking one's native language of origin, maintaining sharing networks, community cohesion, upholding harvesting customs and rituals, and supporting ceremonial practices.

Example of MCFN conditions required for the harvesting of bison

Quality or health of bison: Animals must be perceived to be healthy, with MCFN members able to eat them with confidence. For bison, healthy means free from disease, free from real or perceived contamination and having “natural” qualities.

Quantity or abundance of bison: Population size is sufficient to make harvest effort worthwhile and sufficient habitat to support that population. Full practice of MCFN right would require at least 1 accessible bison / MCFN member / year within MCFN traditional territory.

Present and accessible in preferred hunting locations: Bison need to be available and accessible in known and preferred locations where MCFN members know the trails, terrain and behaviour of animals and where MCFN members have confidence in the quality of the water and vegetation the bison are consuming. Bison also need to be in locations where hunting can take place legally (i.e., outside WBNP).

Preferred means of harvest, including timing and seasonality: Bison must be harvestable and according to preferred means (in winter, by dog sled team, or snow machine).

Sense of place: MCFN members are unlikely to hunt bison near industrial disturbances, especially mine operations, because of increased risk of contamination through water, air or other vectors.

Stewardship values: MCFN members are unlikely to hunt bison where populations are low, where success in hunting is unlikely, or where there is concern about sustainability of the population. Conditions allow for spiritual relationships and ceremonial practices involving bison to be maintained.

Knowledge transfer: MCFN members need to be able to hunt bison in contexts where there is continuity of practice between generations. Traditional knowledge is able to be passed down.

While mapping studies are highly prevalent in EAs, it is important to recognize that dots on a map alone do not provide the types of information needed to understand the conditions required for the exercise of Aboriginal and treaty rights.

b. Understanding how historic, existing and approved activities have affected the conditions that support the community’s current exercise of rights

Once the assessor understands the types of environmental, cultural, social and economic conditions needed to support the exercise of Aboriginal and treaty rights, the next step is to evaluate how current conditions (social, environmental, legal) and

changes over time may be creating constraints on a community's ability to exercise those rights.

Determining current conditions and changes to those conditions over time will establish the state of the particular indicator, the relationship of the indicators, and the historical context of change. Establishing the context for existing cumulative impacts must be completed before the consideration of project-specific impacts occurs.

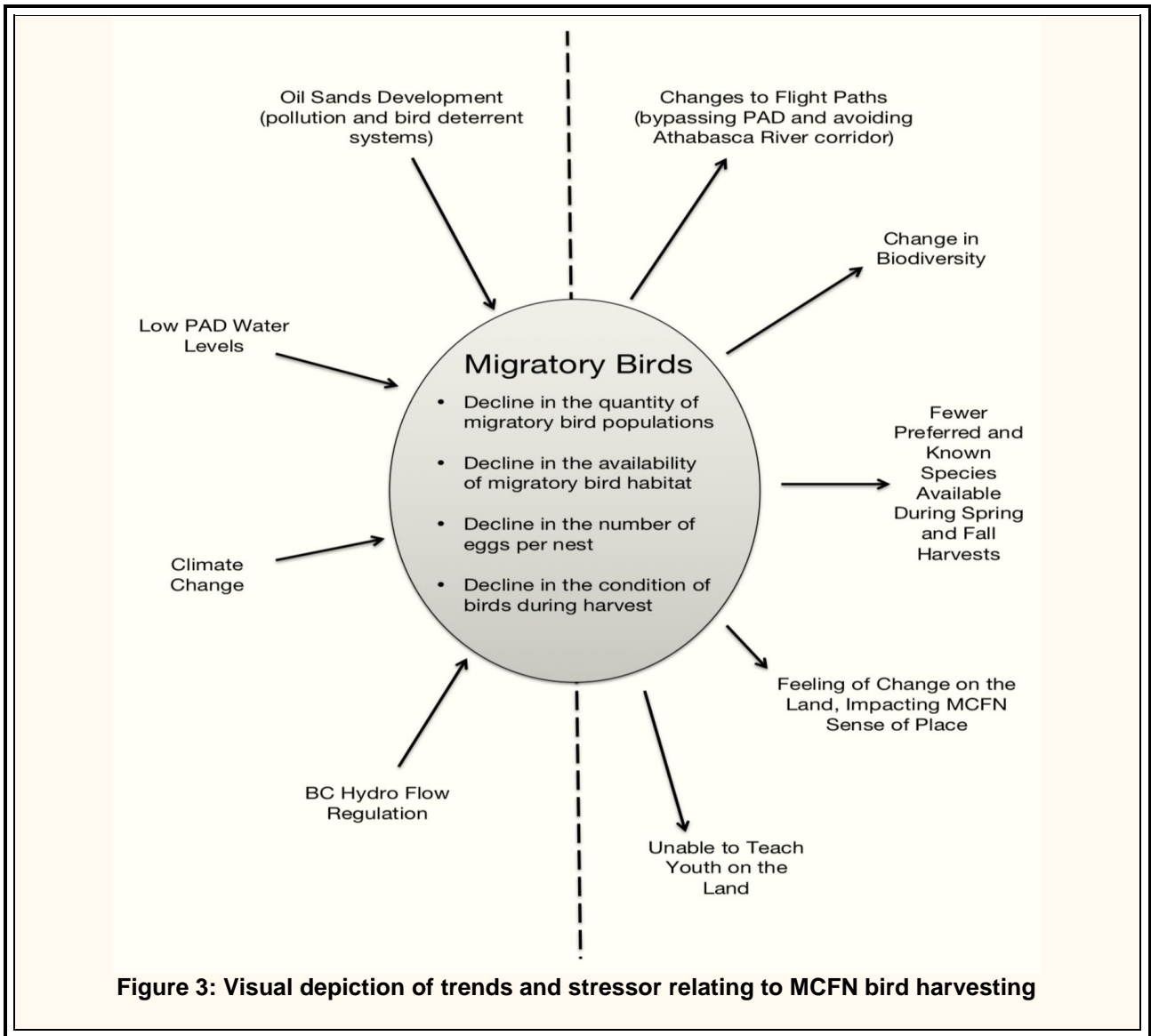
A preferred approach to evaluating this context is to obtain an understanding of a community's view of when there were good conditions for the exercise of rights (and what that looked like), and then compare current conditions for the exercise of rights with those conditions and any community defined thresholds. Community-defined thresholds can be based on social perception scales, constructed scales, existing socially defined thresholds such as land use plans or articulations of desired futures or through thresholds established through a jointly defined approach.

As outlined in Principle 8, it is essential to focus not only on what impacts rights and culture can absorb (a technically estimated threshold of manageable change), but also on what the culture holders are willing to take/endure (a socially derived threshold of acceptable change).

Examples of current trends relevant to MCFN's rights

Bird hunting: MCFN members have observed negative trends (Figure 3) in the quantity of migratory birds and the availability of quality migratory bird habitat. Additional observed trends include a declining number of eggs per nest and declining condition of migratory birds during harvest. Indigenous knowledge holders report observed changes to flight paths, including fewer birds travelling the Athabasca River corridor and more bypassing preferred harvesting areas, to avoid impacts from oil sands development. The absence of migratory birds and the decline of preferred species affects the important spring and fall harvest periods as well as MCFN member's sense of place and their ability to teach younger generations on the land.

Use of water: MCFN knowledge holders indicate there has been a negative trend in the quality of the water in harvesting areas, attributed primarily to upstream pollution from oil sands on the Athabasca River, and flow regulation on the Peace River, resulting in less frequent recharge and flushing of wetlands. MCFN land users have observed an increase in scums and films in waterbodies, decreased quality and taste or texture of fish, changes in taste and smell of water, changes in fish and animal health, including deformities, and changes in aquatic invertebrate presence. Taken together, these changes have led to an overall perception of risk and loss of confidence in the use of water and wildlife, resulting in serious impact to the way of life for many MCFN families.



c. Identifying the importance of Project location in relation to the exercise of a community's rights

Once the cumulative effects context is understood, the assessor must evaluate the importance to the Indigenous community of the areas where the exercise of Aboriginal and treaty rights may be impacted by the Project.

Key indicators to guide the assessor in identifying important cultural landscapes and species include:

- connection of the Project area to preferred areas (keystone places);
- relationship of the Project to changing or diminishing access to preferred areas;
- preferred species in and around the Project area,
- the relationship of affected habitat to the wellbeing of a particular herd (keystone species);
- relation of an affected area to community stewardship vision;
- depth of concern by the culture holder; and
- representation of Indigenous people that value the place for the range of activities and values.

The following signals may help the assessor identify the importance of a particular area to Indigenous community:

- the occurrence of many place names within the Project area;
- the intensity and frequency of traditional and cultural uses in the area;
- the diversity of traditional and cultural uses and experiences in the area;
- the uniqueness of the particular area to the culture holder;
- the role that the location holds in trade and cultural exchange; and
- the role the place holds in cultural protocol.

Example of cultural keystone species to MCFN¹⁶

Bison is a keystone cultural species to the MCFN, with the skulls used in sweat lodges, as altars, and in ceremonies in many households. The Cree language has many words and phrases that refer to the animal as whole, the meaning the animal holds, and the bush way of life that the MCFN continue. The Ronald Lake herd itself is the only herd accessible to the MCFN, and Mikisew themselves have reduced the frequency of harvest in effort to preserve the herd.

¹⁶ Garibaldi, Ann and Nancy Turner. 2004. "Cultural Keystone Species: Implications for Ecological Conservation and Restoration." *Ecology and Society* 9 (3): 1 [online].

Example of keystone place to MCFN¹⁷

The Peace-Athabasca Delta, including the watersheds that flow into it, is a keystone place for the MCFN. MCFN people explain that the Peace-Athabasca Delta, or *Ayapaskaw* in Cree, is “found in every collective breath of the Mikisew people. *Ayapaskaw* is where we are born. *Ayapaskaw* is our home. *Ayapaskaw* is our grocery store. *Ayapaskaw* is our classroom. *Ayapaskaw* is our church. *Ayapaskaw* is our highway. *Ayapaskaw* is our photo album. *Ayapaskaw* informs our thinking. How we think and how we see the world – that comes from *Ayapaskaw*. As Mikisew people, *Ayapaskaw* is the place where our happiest memories live. For us, *Ayapaskaw* is everything. Our way of life is grounded in a generations-old relationship between Mikisew people and the superlative network of wetlands, reed banks, lakes, and waterways that form *Ayapaskaw*. ”¹⁸

Step 2: Evaluating Impacts on the exercise of Rights

Once step 1 has been completed and a culturally appropriate context has been developed, the task of understanding the Project effects can be undertaken.

The objective of the evaluation step in this assessment of impact on the exercise of Aboriginal and treaty rights is twofold: to describe the pathways by which the Project may affect the exercise of Aboriginal and treaty rights, as asserted; and, to evaluate the severity of those impacts.

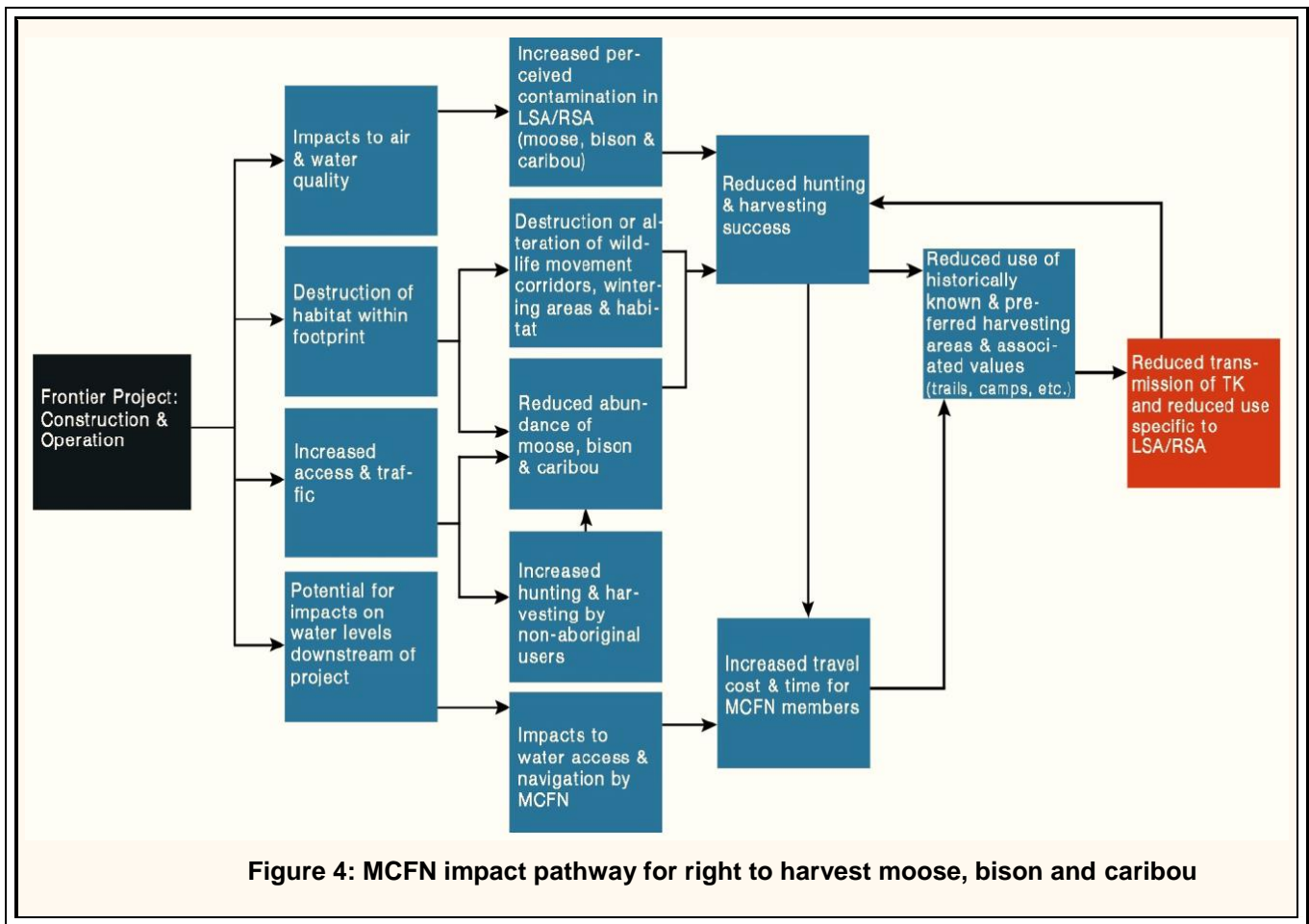
a. Listing the pathways for potential impacts the Project may have (positive and negative) on the exercise of Aboriginal and treaty rights

The assessor should consider the major impact pathways identified for the Project. This should include an initial description of changes to the environment as a result of the Project and a description of changes to the exercise of Aboriginal and treaty rights. The use of visual tools to illustrate pathways is helpful in describing and contextualizing both effects to the environment and identified impacts to the exercise of Aboriginal and treaty rights (e.g. Appendix B). For example, MCFN presented an impact pathway describing the potential impacts of the Project on bison, moose, and caribou¹⁹ (Figure 4).

¹⁷ Ibid

¹⁸ MCFN and Firelight Report, “*Water is Everything: An indigenous understanding of the Outstanding Universal Value of Wood Buffalo National Park*”, 2016, p. 4.

¹⁹ Candler et. al., “*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*”, 2015, p. 92.



When developing impact pathways, it is very important to consider both tangible values (e.g., wildlife species or traditional plants) and intangible values (e.g., quiet enjoyment of the landscape or sites used for teaching). Intangible values are often linked with spiritual, artistic, aesthetic and educational elements that are often associated with the identity of Indigenous communities.

b. Determine whether the Project will have a low, medium or high level of impacts on the exercise of Aboriginal and treaty rights

At this stage, the task of the assessor is to consider the severity of the potential impacts of the Project on the exercise of Aboriginal and treaty rights within the context established through step 1 of this methodology.

The consideration of severity must be undertaken with clear consideration of the principles set out above and should provide answers, reflective of Indigenous perspectives, to the following questions:

- Nature of Impacts: Based on step 1 and the community's perspective on impacts, what is the spatial extent, likelihood, certainty, duration/frequency and reversibility of Project impacts on the exercise of Aboriginal and treaty rights?
- Regional/Historic/Cumulative Impacts: Is there an impact from past, existing, and future projects or activities on the Indigenous community's history and connection to the landscape?
- Community Thresholds: Are there applicable community thresholds, laws or norms that have already been crossed or that will be breached by the Project?
- Cultural Landscape: Will the Project have an impact on the community's planning, management or stewardship of traditional lands and resources?
- Preferred Expression of Rights: Will the Project impact the ecosystem or cultural values that support a community's way of life and cultural health, including its practices, customs, and traditions? Is the Project consistent with, and does it support, the preferred expression of a community's Aboriginal and treaty rights?
- Distribution of Benefits/Impact Equity: Does the Project provide an acceptable level of mitigation and benefits from the community's perspective to justify the impacts on the exercise of Aboriginal and treaty rights? Are the impacts disproportionately experienced by parts of a population, such as women, elders, youth or a particular family group, or do the benefits only go to a few individuals or segment of the community?
- Present and Future Generations: Do the Project-specific mitigation measures and benefits further reconciliation and preserve the ability of future generations to benefit from their rights?

MCFN and the Canadian Environmental Assessment Agency have developed the criteria table below (Table 1) to guide the assessor in answering these questions and assessing the severity of impacts from the Project on the exercise of Aboriginal and treaty rights. The criteria should be applied by working through each of the above guiding topics and questions and considering, for each category, whether the severity is ranked as low, moderate, or high.

When considering the severity of Project's potential impacts on the exercise of Aboriginal and treaty rights at this step, the assessor may take into consideration any proposed and culturally appropriate measures that may address the impacts identified. In doing so, any measures considered in application of this methodology should take into account the views of Indigenous peoples with respect to the measures that are proposed, and their appropriateness and effectiveness. This step should consider that there is the potential for a scenario whereby no measures are available to reduce or avoid the impact on the exercise of Aboriginal and treaty rights.

Table 1: Criteria table for assessing the severity of impacts from the Project on the exercise of Aboriginal and treaty rights

Spatial Extent	Likelihood	Duration/Frequency/ Reversibility	Way of Life (values, practices, traditions)	Regional/Historic/ Cumulative context	Stewardship/Nationhood & Community Thresholds	Impact Inequity (including future generations)
<p>Definition: Spatial area over which the impact on the exercise of rights and culture/way of life is predicted to occur. Can include quantitative and qualitative scales for characterizing geographic extent of impact.</p>	<p>Definition: Prospect of an impact on rights occurring that is based on information from technical and community based experts, including those most likely to be impacted. The full life-cycle of a project's impacts, including its various stages and lifespan (meaning, at a minimum, through to the projected end of the reclamation process), should be considered in determining the likelihood of occurrence of an effect. Likelihood refers to more than just the probability of environmental effects, and also includes the prospect of diminishment of sense of place, confidence in the quality and quantity of resources, and experience of rights.</p>	<p>Definition: How often disruptions to the practice of rights may occur. Length of time that an impact to a right is experienced, from the community perspective. For example, reclamation does not mitigate impacts to rights during operation and impacts that occur at only certain times of year may be experienced as ongoing impacts if they take place on a weekly, monthly or annual basis.</p> <p>*Note: Reversibility does not include the potential to move practice of rights to another jurisdiction or area.</p>	<p>Definition: Impacts to ecosystem and cultural values that support a community's way of life and cultural health, including its practices, customs and traditions. Prospect of disruption to preferred ways of continuing customs, traditions and practices. Way of life may be linked to culturally important landscapes, species and determinants of community health identified by the impacted community.</p>	<p>Definition: Impacts of past, existing and future projects or activities. Cumulative impacts may have a regional or historic context and may extend to aspects of rights related to socio-economics, health, culture/way of life, heritage, and other matter tied to an Indigenous community's history and connection to the landscape.</p>	<p>Definition: Planning and management or stewardship of traditional lands and resources. Indigenous governance and decision-making authority may be expressed through a specific laws, norms, power, and language.</p>	<p>Definition: Impacts could be disproportionately experienced by parts of a population, such as women, elders, youth, key harvesters or a particular family group and benefits may only go to a few individuals or segment of a community. Particular consideration to be given to future generations</p>
<p>Low. The impact on the exercise of rights could occur over a small spatial area.</p>	<p>Low. A potential impact on the exercise of rights is unlikely but could occur.</p>	<p>Low. The impact lasts < 5 years (i.e., approximate duration of construction phase). The impact would be confined to one discrete period during the life of the Project. The impact may be reversed in the short term.</p>	<p>Low. No or little indication that there would be any impact to practice of rights, traditional resources or ecosystem and cultural services of the impacted group. Little to no reduction in value of culturally</p>	<p>Low. There is little development in the community's territory that has created restraints on the exercise of rights and the Project or activity would be in an area with few existing impacts. In addition, the</p>	<p>Low. There is a high level of cooperation between the proponent and impacted group. The community has formally indicated to the Crown that risks from the Project are acceptable or have been accommodated or</p>	<p>Low. Vulnerable sub-groups (such as elders, children, youth, women, specific families and/or households) are unlikely to experience impacts from the Project and are likely to maintain the exercise of rights. The</p>

Spatial Extent	Likelihood	Duration/Frequency/ Reversibility	Way of Life (values, practices, traditions)	Regional/Historic/ Cumulative context	Stewardship/Nationhood & Community Thresholds	Impact Inequity (including future generations)
			important locations or ability of group to obtain quality and quantity of resources.	Project is not likely to contribute to further cumulative effects.	the Project falls into an area already considered for industrial development in the plans of the community.	impacts allow intergenerational transfer of knowledge and exercise of right to continue into the future. Potential benefits resulting from the Project would flow between all segments of the community in a way that supports future generations from benefiting from the exercise of rights and connecting to culture/way of life. Strong benefits will be experienced by each sub-group of the population.
Moderate. The impact on the exercise of rights could occur over a moderate spatial extent.	Moderate. A potential impact to rights is likely but may not occur.	Moderate. The impact will be greater than five years but not last beyond one generation. Within that period, the impact is unlikely to be ongoing or occur on a repeated basis throughout the operation and decommissioning of the Project.	Moderate. There may be an impact to practice of rights but impacts are unlikely extend to preferred areas, preferred or scarce resources or to ecosystem and cultural services of high value to the impacted community. The impact may impede or alter access to practice cultural activities but without limiting connection to an area or sense of place. There may be some loss of habitat or availability of culturally important species. The disturbance may be of a physical or sensory nature	Moderate. There are other land uses, including proposed or existing projects, in the community's territory which impact the practice of rights.	Moderate. The impacted community has expressed concern about impacts of the Project. The community has stated that some impacts remain after mitigation and/or accommodation. The community has indicated that the Project may not be compatible with certain aspects of their land use plans or application of traditional laws.	Moderate. Transfer of knowledge between generations may be interrupted for a moderate period of time by the Project. Vulnerable sub-groups of the population are likely to experience a higher impact on the ability to exercise rights. Rights may be resumed broadly within one generation. Some benefits may accrue to sub-groups and future exercise of rights is supported. There will be moderate experience of benefits, as defined by the community, by each sub-

Spatial Extent	Likelihood	Duration/Frequency/ Reversibility	Way of Life (values, practices, traditions)	Regional/Historic/ Cumulative context	Stewardship/Nationhood & Community Thresholds	Impact Inequity (including future generations)
<p>High. The impact on the exercise of rights could occur over a large spatial extent</p>	<p>High. An impact on the exercise of rights is highly likely or certain to occur.</p>	<p>High. The impact on the exercise of rights is unlikely to be reversed, either in whole or in part, because the impact is likely to persist beyond one generation. The impact would occur constantly during, and potentially beyond, the economic life of the Project. “Constantly” can mean either that a project activity interacts with rights on an uninterrupted basis or on a sporadic but repeated basis that may coincide with rights activities that take place at certain intervals or seasons.</p>	<p>(noise, visual quality, etc.)</p> <p>High. Impacts are likely to cause an interference with the meaningful exercise rights in the preferred manner, including limited use of, or access to, preferred quality and quantity of resources and or limitations on scarce or high community value areas. Multiple impacts could occur to one area of high importance. The Project may cause effects on a species that is culturally important, that has limited availability or high sensitivity to change or that is also a federally or provincially listed species at risk. Access to practice cultural activities would likely be disrupted or limited. The disturbance may be of a spiritual, cultural, social, physical or sensory nature (noise, visual quality, etc.)</p>	<p>High. There are multiple other land uses, including proposed or existing projects, which impact the community’s practice of rights. The Project may interact with the exercise of rights in an area highly valued given cumulative context. The rights which may be impacted by the Project are not currently practiced in the preferred manner because of conservation issues, lack of access or government policy/programs.</p>	<p>High. The Project would likely prevent or restrict use of areas identified as high stewardship and nationhood priorities. Project may cause interference in traditional land management regime and values. The community has indicated that the Project is not compatible with its land use plans or application of traditional laws.</p>	<p>group of the population.</p> <p>High. One or more vulnerable sub-groups will be disproportionately impacted by the Project, and mitigations and benefits unlikely to preserve the ability of sub-groups to benefit from their rights. Intergenerational transfer of knowledge would be interrupted for an extended time period and may not be reversed either in whole or part.</p>

Step 3: Follow-up and Validation

A best practice for upholding Principle 7 of this methodology is, prior to making a final evaluation, to ensure that Indigenous communities have an opportunity to comment on the assessor's understanding of Indigenous knowledge, values, and thresholds, and the application of steps 1 and 2.

Note Regarding Use of this Methodology by Third Parties or for Purposes Other than the Evaluation of the Frontier Project

It is important to recognize that this document was co-developed between MCFN and CEAA and is the product of extensive engagement between MCFN and CEAA. MCFN and CEAA reserve the ability to review this framework and jointly update or clarify it as needed.

Consistent with the collaborative approach that led to this methodology and the principles contained herein, MCFN and CEAA strongly recommend that this methodology not be used in other contexts without prior engagement with potentially affected indigenous groups.

This methodology was prepared for the specific context of the Frontier Project and is not intended to limit any approach to or criteria for evaluating impacts of any other project, plan or policy on Aboriginal or treaty rights.

Finally, use of any content in this document that references MCFN's history, culture, preferred conditions for the exercise of rights, or otherwise relates specifically to MCFN's way of life should not be undertaken without the prior authorization of MCFN.

Appendices

Appendix A

MCFN-CEAA criteria for assessing the severity of potential impacts from the Project on the exercise of Aboriginal or treaty rights

Interpretive Notes:

- Table 1 provides the criteria jointly developed by MCFN and the Agency to support an assessment of the severity of potential impacts to the exercise of Aboriginal or treaty rights in the context of the Project.
- “Rights” are understood to include the right to maintain a community’s culture and traditional way of life. Wherever the term “rights” is used in this table, it should be understood to include the culture and traditional way of life of the community possessing those rights.
- “Impacts on the exercise of rights” is construed broadly in a manner that is not limited to biophysical effects or residual environmental effects, and should always be informed by Indigenous perspectives and knowledge.
- Further context on the legal, academic and or practitioner principles that support the application of these criteria can be found in the MCFN document “A Survey of the Field”.
- The criteria outlined in Table 1 are to be applied after consideration of context specific factors identified by the impacted Indigenous community, including consideration of any past impacts on the exercise of rights that should be factored into the assessment.

Appendix B

Examples of Potential Impacts on the exercise of MCFN's Treaty rights as identified by the Canadian Environmental Assessment Agency

- Potential for impacts on the unique cultural and ecological richness of the land as asserted by MCFN and on the MCFN's way of life and sense of place;
- Potential cumulative effects from the Project and from current and historical intensive oil sands development;
- Potential for interference with continuity of knowledge, relationships and intergenerational transmission of information and learning;
- Potential impacts on harvesting practices and culturally important resources as a result of effects on the quality and quantity of resources, in the vicinity of preferred and culturally known harvesting areas;
- Potential impacts on MCFN confidence in the utilization of traditional resources;
- Potential impacts on the culturally significant Ronald Lake bison herd. MCFN members rely on bison, both culturally and for sustenance purposes;
- Potential impacts on the ability to fish within the MCFN traditional lands that extend around Lake Athabasca over the Peace-Athabasca Delta, and south to, and including Fort McMurray;
- Potential impacts on gathering plants for cultural or medicinal purposes, and concerns regarding the quality and quantity of plants and other things gathered as result of project effects such as removal of lands and air quality (i.e. dust deposition);
- Potential impacts to wetlands, forests, muskegs, medicinal plants, and waterbodies that support the Athabasca River watershed and or have been minimally affected to date from previous development (e.g. Ronald Lake, Diana Lake, Lake Claire);
- Potential impacts on the ability of MCFN's leaders and elders to govern and be stewards of the land, provide this intergenerational knowledge and preserve these practices; and
- Potential impacts on the ability to use one of the remaining areas of relatively pristine landscape unaffected by existing oil development for reliable practice of rights through reduced access or sensory impacts (e.g. noise and light).