



COURT FILE  
NUMBER:

2403 04563

COURT:

COURT OF KING'S BENCH ALBERTA

JUDICIAL  
CENTRE:

EDMONTON

PLAINTIFFS:

Athabasca Chipewyan First Nation  
and Chief Allan Adam on his own behalf and on behalf of all  
members of Athabasca Chipewyan First Nation

DEFENDANTS:

Alberta Energy Regulator  
and His Majesty the King in right of Alberta

DOCUMENT:

STATEMENT OF CLAIM

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**NOTICE TO DEFENDANT(S)**

You are being sued. You are a Defendant.

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## OVERVIEW

1. This claim concerns the discharge of toxic chemicals from the Kearl Oil Sands Processing Plant and Mine (the “Kearl Facility”). The Kearl Facility is located in the heart of the traditional territory of the Athabasca Chipewyan First Nation (“ACFN”), adjacent to muskeg and waterbodies feeding into the Firebag and Athabasca Rivers. The Kearl Facility is one of Canada’s largest oil and gas open-pit mining operations, producing diluted bitumen. The byproduct industrial wastewater or tailings from the operations are stored on-site in a series of tailings ponds in the lease area. The tailings are a mix of naphthenic acids, salts, heavy metals including arsenic, lead and mercury, other chemicals and residual bitumen. They are highly toxic in the concentrations existing in these tailings ponds.
2. From May 2022 to November 2023 there were three uncontrolled discharges of industrial wastewater at the Kearl Facility resulting in over 5.3 million liters of tailings and 670,000 litres of other contaminated water entering these lands and waters on which ACFN and its members rely.
3. During the nine-month period from May 2022 to February 2023, the Alberta Energy Regulator (“AER”) knew about ongoing uncontrolled discharges of tailings at the Kearl Facility. Yet it failed to inform ACFN about them or their potential impact on the lands and waters where ACFN members exercise their Treaty rights. It took no steps to notify ACFN about the ongoing contamination of their lands and waters or to consult ACFN about how best to address and mitigate the impacts on their rights and way of life. At the same time, the Province of Alberta continued to receive royalties from the Kearl Project at the rate of over \$50 million every month.
4. Throughout the operation of the Kearl Facility, the AER failed to regulate or monitor the Kearl Facility in a manner that minimized the risk of tailings seepages or spills. It failed to do so despite knowing that (a) tailings seepage was anticipated in the design of the Kearl Facility; (b) such seepage had the potential to harm ACFN and ACFN members in the exercise of their Treaty 8 rights; and (c) there were and are deficiencies in tailings management at the Kearl Facility.

5. The Defendants knew or ought to have known that ACFN would be harmed by the uncontrolled discharge of tailings flowing into lands and waterbodies feeding the Athabasca and Firebag Rivers. The AER had a duty of care to ACFN as a downstream First Nation and a duty to warn ACFN about the discharge of tailings from the Kearl Facility tailings ponds. The AER failed to carry out this duty and this breach harmed ACFN's ability to exercise their Treaty rights on their traditional territory safely. These breaches and the harms that they caused to ACFN constitute negligence, nuisance, breach of the duty to consult, breach of the honour of the Crown, breach of fiduciary duty and unjustified treaty infringement. The acts and omissions of the AER were sufficiently unlawful, negligent and reckless that they amount to bad faith.
6. The failings of the AER in relation to the Kearl Facility are also symptomatic of deficiencies in the provincial regulatory system as a whole, including its lack of consultation or consideration for how cumulative impacts affect ACFN's Aboriginal and Treaty rights. The AER's regulatory regime frustrates the meaningful consultation required by s. 35 of the *Constitution Act, 1982*, because the AER is restricted from consulting affected First Nations about the impacts of industrial projects when approving and regulating energy projects, including decisions on tailings management.
7. This regulatory regime infringes the rights of ACFN in its structure and operation, and is unconstitutional and must be declared so.

## **STATEMENT OF FACTS RELIED ON:**

### **The Parties**

#### **ACFN**

8. ACFN is a band within the meaning of the *Indian Act*, R.S.C., c. I-15, and an Aboriginal people within the meaning of s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11.
9. ACFN are Dene people and call themselves Dene K'ai Tailé Denesuline. ACFN signed Treaty 8 (the "Treaty") at Fort Chipewyan in 1899. ACFN is the successor First Nation to the Chipewyan Band that adhered to the Treaty.

10. ACFN has eight reserves on Lake Athabasca, the Athabasca Delta, and the Athabasca River. A significant number of ACFN's members reside on or near Chipewyan Indian Reserve No. 201A (the "Reserve") located on the south shore of Lake Athabasca.
11. ACFN's traditional territory is located in the Lower Athabasca Region of northeast Alberta and includes all the Delta of the Peace and Athabasca Rivers around Lake Clare and Fort Chipewyan (the "Traditional Territory" or "ACFN's Traditional Territory").
12. The Peace-Athabasca Delta along with its tributaries and the surrounding lands, forests, hills, muskeg, rivers and lakes that comprise the Traditional Territory, have long been and continue to be central to ACFN's rights, culture and way of life. ACFN's rights, culture and way of life are protected by the Treaty. An integral part of ACFN's way of life are the reciprocal obligations between ACFN and the land (encompassing the ground, as well as the trees, plants, waters, fish, animals, and air). These reciprocal obligations are legal obligations arising from Dene law.
13. Within the Traditional Territory are several homeland zones of particular cultural significance, including *k'es hochela nene* (the Poplar Point Homeland) which extends south along the Athabasca River and its tributary the Firebag River. As described further below, *k'es hochela nene* is critical to ACFN's way of life, and the exercise of its rights under the Treaty.

## **CHIEF ADAM**

14. Chief Allan Adam ("Chief Adam") is the Chief and a member of ACFN. He resides on the Reserve and is a beneficiary of the Treaty. Chief Adam brings this claim on his own behalf and as a representative on behalf of all other ACFN beneficiaries and ACFN. He is authorized to bring this action on behalf of ACFN and its members.

## **THE ALBERTA ENERGY REGULATOR**

15. The Defendant the AER is a corporation established pursuant to the *Responsible Energy Development Act*, S.A. 2012, c. R-173 ("*REDA*"). The AER exercises its powers and authorities independently as provided for in *REDA* and related statutes, regulations, and policies. The AER is a life-cycle regulator, meaning it is the sole regulatory authority and has final decision-making power responsible for many energy projects in Alberta. Its regulatory

functions apply to all stages of these projects, from applications for exploration and assessment, to construction and operation, decommissioning, closure and reclamation.

## **THE PROVINCE OF ALBERTA**

16. The Defendant His Majesty the King in right of the Province of Alberta (the “Province”) is the emanation of the Crown that holds the lands and waters material to the issues in this proceeding, subject to the interests of ACFN. The Province has the power to manage and regulate the lands and waters material to the issues in this proceeding, as well as the resources on or under those lands, pursuant to the *Constitution Act, 1867* and *The Alberta Natural Resources Act, S.C. 1930, c. 3*. The Province has created Alberta’s regulatory and industrial authorization structure and has the exclusive power to enact the legislative and regulatory framework for the AER. The Province is also responsible for upholding the Crown’s Treaty promises to ACFN and ensuring that they can continue to exercise their rights and way of life across their Traditional Territory.

## **The Way of Life of ACFN**

17. Since time immemorial ACFN’s ancestors have had a long-established Dene way of life, culture, system of laws and economy (collectively, “way of life”) in the Traditional Territory. Through this way of life, ACFN’s ancestors supported themselves in a variety of ways including hunting, fishing, trapping, gathering, and participating in trade and diplomacy with Europeans and other Indigenous groups. This way of life, is based on a relationship with the land and its resources characterized by reciprocal obligations.

18. In Dene ontology, the land is alive and the spirit of the Dene people is inextricably linked with the spirit of the land, weaving together people with place and culture. Dene law is characterized by a series of reciprocal obligations in fulfillment of which ACFN continue to be stewards of the land. Maintaining balance in the relationship between the people and the natural world is crucial to environmental and community well-being throughout the Traditional Territory. This connection with place is cultural, familial, and spiritual, and integral to ACFN members’ identity as ACFN and Denesuline.

19. At the time of the Treaty, this way of life depended on the availability of and access to lands, waters, animals and natural resources of sufficient quantity and quality to maintain ACFN's traditional seasonal harvesting and subsistence cycles and to meet their cultural needs. The Dene way of life described herein involved reciprocal obligations owed by and to ACFN and the resources on which they relied. This reciprocal relationship ensured that the Dene reliance on the lands, waters and resources was sustainable. The obligations which ACFN has to the territory are legal obligations in ACFN's Dene Law.
20. ACFN's way of life depended on the following:
- a. routes of access and transportation between traditional harvesting areas;
  - b. water quality and quantity;
  - c. healthy populations of game in preferred harvesting areas;
  - d. cultural and spiritual relationships with the land;
  - e. varied and abundant plant species for food and medicinal purposes in preferred harvesting areas;
  - f. feelings of safety and security on the land;
  - g. sociocultural institutions for sharing and reciprocity; and
  - h. access to and protection of spiritual sites and other cultural sites.
21. ACFN's way of life also depended on the ability to pass knowledge to successive generations orally and through spiritual or cultural practices including traditional hunting, fishing, trapping and gathering practices all of which depended on the continued availability of access to lands, waters, and natural resources.
22. Within ACFN's Traditional Territory are three homeland zones (Jackfish Lake Homeland, Old Fort Point Homeland, and *k'es hochela nene*, the Poplar Point Homeland) (the "Homeland Zones"). The Homeland Zones are a living part of ACFN identity. These are areas where ACFN history, culture, and livelihood are more firmly rooted and are areas of critical

importance to past, present, and future meaningful practice of ACFN's rights. ACFN has informed the Defendants that the Homeland Zones are sacred and necessary to the rights, identity, and cultural survival of ACFN.

23. *K'es hochela nene* includes the areas west of the Athabasca River to the Birch Mountains and east of the Athabasca River into Saskatchewan. East of the Athabasca River, the southern boundary of the Poplar Point Homeland is a critical use corridor extending 5km on either side of the Firebag River (the "Firebag River Corridor"). ACFN has repeatedly informed the Defendants of the significance of *K'es hochela nene* (the Poplar Point Homeland) to their way of life and the importance of continued access to this area as industrial effects continue to accumulate upstream along the Athabasca.

## **Treaty Rights and Obligations**

24. The Treaty is a treaty within the meaning of s. 35 of the *Constitution Act, 1982*. The Crown and the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country concluded the Treaty at Lesser Slave Lake on June 21, 1899. Chief Alexandre Laviolette and headmen Julien Ratfat and S. Heezell adhered to the Treaty on behalf of the Chipewyan Band, which is now known as ACFN. The Treaty was ratified by Order in Council 363 on February 20, 1900.

25. The Treaty established a set of reciprocal rights and obligations owed by the Crown to ACFN's ancestors through both oral promises of the parties and the written terms of the Treaty. The Crown required and sought the consent of ACFN's ancestors to open up the tract of land they inhabited for settlement and resource development by non-Indigenous peoples. ACFN's ancestors gave this consent in exchange for solemn promises made by the Crown that:

- a. the Treaty would not lead to forced interference with ACFN's way of life, including ACFN's traditional practices, culture and laws;
- b. the same means of earning a livelihood and patterns of economic activity would continue for ACFN members after the Treaty as had existed before it; and
- c. ACFN members would continue to be able to:

- i. undertake traditional and spiritual activities within their Traditional Territory;
- ii. travel throughout their Traditional Territory; and
- iii. manage and gather natural resources within their Traditional Territory.

26. The Treaty promises also included a promise to protect and ensure the continued existence of healthy environments used for hunting, trapping and fishing and the continuation of other cultural and spiritual practices connected with those activities.

27. The rights described in paragraphs 25 and 26 are collectively referred to in this Claim as “ACFN Treaty Rights.”

28. The Treaty also protected ACFN’s right to carry out practices and activities incidental to the exercise of the Treaty Rights, (“ACFN Incidental Rights”) including but not limited to:

- a. rights of unrestricted access to lands, waters, and ecosystems of sufficient quality and quantity necessary to support the meaningful exercise of ACFN’s Treaty Rights;
- b. rights to sufficient and culturally appropriate land and resources to support the meaningful exercise of the Treaty Rights;
- c. rights to participate in the management of natural resources in ACFN’s Traditional Territory;
- d. rights to access, gather, and use various natural resources, including plants, berries, and clean water, in the Traditional Territory;
- e. rights to establish access, and maintain infrastructure necessary to the meaningful exercise of the Treaty Rights, including trails, cabins, camps, and traps;
- f. rights to access and use adequate quantities of clean and fresh water capable of sustaining life in and around the Traditional Territory; and
- g. rights to maintain and access preferred sites at which to teach ACFN’s culture and way of life to subsequent generations.



29. ACFN Treaty Rights and ACFN Incidental Rights are together referred to in this claim as “ACFN Rights”.

30. The Province, as an emanation of the Crown has exclusive authority under the *Constitution Act, 1867* to take up provincial lands for forestry, mining, settlement and other exclusively provincial matters. However, this is not without limit and must only be exercised by lawful means. The Treaty further established a fiduciary relationship with ACFN to ensure the meaningful exercise of ACFN Rights, and the continuation of ACFN’s way of life.

### **The Kearl Facility**

31. The Kearl Facility is located on the southern border of *K'es hochela nene* (the Poplar Point Homeland) in the Firebag River Corridor, approximately 200 kilometers upstream of the Reserve and Fort Chipewyan, Alberta. The lease area for the Kearl Facility is located south of the Firebag River, and the Muskeg River borders and flows through the southern half of the lease area.

32. The Kearl Facility extracts bitumen from the ground through open-pit mining and stores the tailings produced as a byproduct of the mining process in a series of tailings ponds in the lease area.

33. The Kearl Facility is operated by Imperial Oil Resources Limited (“Imperial Oil”). The Province has discretionary control over oil and gas developments including the Kearl Facility through the AER as the single regulator of energy development in Alberta. The AER was created and is empowered by provincial legislation.

### **AUTHORIZATION AND MANAGEMENT OF THE KEARL FACILITY**

34. The AER’s predecessors, the Energy Utilities Board (the “EUB”) and Alberta Environment (“AENV”) approved and issued licenses for the Kearl Facility in 2007 (the “Initial Authorization”) following Joint Review Panel (“JRP”) environmental assessment and public hearings. The EUB and AENV approved the Kearl Facility with the knowledge that seepage of tailings from the lease area was anticipated in Imperial Oil’s original design, which would

have adverse impacts on the surrounding lands and waters and ACFN's exercise of ACFN Rights. The JRP had found that tailings seepage from the lease area of the Kearsley Facility to the surrounding environment was anticipated and recommended a number of measures on approval to reflect this including monitoring and seepage mitigation.

35. In the approval process for the Initial Authorization of the Kearsley Facility, the EUB and AENV failed to adequately consider or address cumulative effects at a landscape level of multiple energy project authorizations on ACFN Rights.
36. Since the Initial Authorization, the AER has failed in the management of the Kearsley Facility to meaningfully engage with and respond to the concerns which were raised by ACFN about how the project has impacted and continues to impact their Traditional Territory and ACFN Rights.
37. Despite the AER's knowledge of potential impacts to ACFN Rights, and its willful blindness to the Kearsley Facility's contribution to cumulative impacts, following the Initial Authorization, the AER failed to diligently regulate and monitor the Kearsley Facility. The AER's failures included failures to:
  - a. enforce conditions related to operations and management at the Kearsley Facility;
  - b. enforce the conditions placed on Imperial Oil for the Initial Authorization of the Kearsley Facility;
  - c. address or engage with ACFN's ongoing concerns about the Kearsley Facility, including failing to meaningfully address multiple years of correspondence from ACFN raising concerns about impacts to ACFN Rights;
  - d. adequately engage with ACFN in considering applications for expansion projects or project amendments at the Kearsley Facility;
  - e. investigate and adequately address reports of tailings seepage at the Kearsley Facility;
  - f. investigate and adequately address reports of tailings seepage from the Kearsley Facility into lands and waters outside the lease area; and

g. ensure that adequate or proper steps had been taken to ensure any contamination was contained to the Kearn Facility lease area.

38. The AER was aware for multiple years of deficiencies in tailings management at the Kearn Facility and of ongoing seepage of tailings into groundwater in the lease area. The AER failed to regulate the Kearn Facility in a manner that adequately responded to these seepage events or reduced the risk of further seepage of wastewater from occurring.

39. The AER is required to act in the public interest. In doing so, the AER is required to act in a manner consistent with the Honour of the Crown and the Crown's obligations under s. 35 of the *Constitution Act, 1982*. The AER further has a duty to consider potential adverse impacts of energy applications on the rights of Aboriginal peoples protected by s. 35 of the *Constitution Act, 1982*. The AER failed to uphold its obligations to act in the public interest, in a manner consistent with the Honour of the Crown, and to protect and not infringe ACFN Rights.

## **THE TAILINGS DISCHARGES**

40. Between May 2022 and November 2023, three large-scale and uncontrolled discharges of tailings and other contaminated water occurred at the Kearn Facility ("the Uncontrolled Discharges").

## **THE FIRST UNCONTROLLED DISCHARGE**

41. In May 2022 the AER received a report from Imperial Oil about discoloured surface water in and around the Kearn Facility. The AER investigated the affected site and confirmed the presence of discoloured water in muskeg areas and on public lands near a fish-bearing waterbody and tributaries to the Firebag and Muskeg Rivers. Imperial Oil conducted further analysis and testing of the discoloured water and reported to the AER that the discoloured water was a tailings seepage along the northeastern lease boundary of the Kearn Facility (the "First Uncontrolled Discharge").

42. In August 2022 AER subject matter experts determined that the First Uncontrolled Discharge had originated from the Kearn Facility. The AER issued a notice of non-compliance to Imperial Oil and triaged the First Uncontrolled Discharge to the AER Major Investigations Team. The

AER did not inform ACFN about the First Uncontrolled Discharge, the findings related to its origin, or the notice of non-compliance. The AER also failed to warn ACFN about the potential effects of the First Uncontrolled Discharge on their Traditional Territory and ACFN Rights.

43. The total volume of the First Uncontrolled Discharge is unknown to ACFN and neither the Defendants nor Imperial Oil have confirmed the total volume of the First Uncontrolled Discharge.

44. The AER has not informed ACFN whether the First Uncontrolled Discharge has been contained or whether the release of tailings is still ongoing at the Kearl Facility.

## **THE SECOND UNCONTROLLED DISCHARGE**

45. In February 2023, Imperial Oil reported to the AER a second release of tailings from the Kearl Facility (the “Second Uncontrolled Discharge”). The AER inspected the site and noted that the volume of the Second Uncontrolled Discharge was larger than Imperial Oil had reported and involved surface flow from a drainage pond to the north of the lease area.

46. The Second Uncontrolled Discharge released at least 5.3 million liters of tailings into ACFN’s Traditional Territory, including into muskeg that feeds into streams and river systems in *K’es hochela nene* (the Poplar Point Homeland).

47. The AER failed to warn ACFN about the potential effects of the Second Uncontrolled Discharge on their Traditional Territory or ACFN Rights.

## **ENVIRONMENTAL PROTECTION ORDER**

48. On February 6, 2023 the AER issued an Environmental Protection Order for both the First Uncontrolled Discharge and the Second Uncontrolled Discharge. The AER failed to notify ACFN of the issuance of the Environmental Protection Order. ACFN discovered the Environmental Protection Order (and as a result, the First and Second Uncontrolled Discharges) upon the public circulation of the Environmental Protection Order.

49. During the nine-month period between the First Uncontrolled Discharge and the Second Uncontrolled Discharge, the AER made and maintained the decision to not inform ACFN. In

doing so, the AER failed to warn ACFN about the potential risks associated with the First Uncontrolled Discharge as downstream resource users on their Traditional Territory with the knowledge that the First Uncontrolled Discharge affected a Homeland Zone of great significance to ACFN and that ACFN members continued to exercise their ACFN Rights in that area.

50. On November 13, 2023, a Third Uncontrolled Discharge occurred at the Kearl Facility in which approximately 670,000 liters of contaminated water flowed directly into the Muskeg River from a sedimentation pond in the lease area.

51. The First Uncontrolled Discharge, Second Uncontrolled Discharge and Third Uncontrolled Discharge are collectively referred to as the “Uncontrolled Discharges”. The AER’s acts and omissions leading to and during these Uncontrolled Discharges, described in the paragraphs above, were sufficiently unlawful, negligent and reckless to constitute bad faith.

## **IMPACTS ON TERRITORY AND EXERCISE OF ACFN RIGHTS**

52. The Uncontrolled Discharges impacted lands, waters and resources outside the Kearl Facility lease area, including groundwater. Following the Environmental Protection Order, ACFN members were fearful of the extent of the contamination and warned resource users to stop using the lands and waters downstream of the Kearl Facility to exercise their rights.

53. The Uncontrolled Discharges released significant amounts of highly toxic compounds into the Poplar Point Homeland and Firebag River Corridor, which are some of the most important parts of ACFN’s Traditional Territory. These contaminants will have long-lasting effects on the plants and wildlife upon which ACFN depends for its ACFN Rights and way of life.

54. In addition to the physical impacts of the Uncontrolled Discharges on the health and safety of the environment and resources on which ACFN rely for the practice of ACFN Rights, the Uncontrolled Discharges caused psychological, social and cultural harms to ACFN and its members which further interfered with the exercise of ACFN Rights. The Uncontrolled Discharges have caused serious harms to ACFN, ACFN members, and ACFN’s Treaty-protected way of life, including:

- a. ACFN members have been unable to safely exercise their ACFN Rights including hunting, fishing, and gathering in their Traditional Territory adjacent or downstream from the Kearn Facility;
- b. ACFN members have stopped drinking water from the land and bring bottled water with them when exercising their ACFN Rights in their Traditional Territory;
- c. fear and anxiety experienced by ACFN members and mistrust of the water sources, prompting ACFN members to stop drinking water in areas downstream of the Kearn Facility until ACFN conducted independent water quality testing;
- d. injury to *K'es hochela nene* (the Poplar Point Homeland), which is an area of specific cultural importance to ACFN;
- e. loss or diminishment of ACFN's preferred means of exercising ACFN Rights in *K'es hochela nene* (the Poplar Point Homeland); and
- f. interference with ACFN's ability to properly uphold their Dene Law, including by:
  - i. ensuring the health of the land and environment;
  - ii. accessing the land for the purpose of transmitting cultural knowledge;
  - iii. travelling over the land to carry out their reciprocal obligations to animals;
  - iv. protecting access to healthy food and water;
  - v. properly managing culturally significant species;
  - vi. respecting the kinship relationship between the Dene people and the land;
  - vii. ensuring that the water is treated with respect; and
  - viii. actively engaging in environmental stewardship.

(all of which are the "Direct Adverse Effects")

55. ACFN and its members are entitled to compensation for these impacts on their rights and way of life, disgorgement of the royalties earned by the Province therefrom, and active remediation of the ongoing contamination.

## **THE TAILINGS MANAGEMENT REGIME IS UNCONSTITUTIONAL**

56. The Uncontrolled Discharges at the Kearl Facility are not isolated incidents, but rather symptoms of broader deficiencies in Alberta's legislative and regulatory regime for tailings management and other energy project approvals. These deficiencies include, among other things:

- a. the unconstitutional siloing of project approvals and First Nation consultation with respect to those projects; and
- b. significant and unjustifiable restrictions on which projects and operations First Nations are consulted about as set out in the series of legislation, policy documents, directives, Ministerial Orders, and other regulatory instruments that govern Alberta's consultation and project approval framework, including:
  - i. *REDA*;
  - ii. *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;
  - iii. *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7;
  - iv. *Lower Athabasca Region –Tailings Management Framework for the Mineable Athabasca Oil Sands*;
  - v. *Directive 085: Fluid Tailings Management for Oil Sands Mining Projects*;
  - vi. *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management, July 28, 2014*;
  - vii. *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013*;

viii. *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities, October 31, 2018; and*

ix. *Energy Ministerial Order 105/2014; Environment and Sustainable Resource Development Ministerial Order 53/2014.*

57. The adverse effects described at paragraphs 61-63 are a direct result of this unconstitutional regulatory regime.

58. Under this system, no notice to or consultation with ACFN was required for tailings management decisions at the Kearl Facility other than the Initial Authorization. After the Initial Authorization, major decisions about tailings management at the Kearl Facility were not subject to consultation or any input from ACFN or other potentially affected First Nations. As a result of this unconstitutional regulatory regime, the AER provides no meaningful opportunity to ACFN to raise concerns about potential adverse impacts to ACFN Rights arising from tailings management. Indeed, the AER's decision-making and regulatory regime with respect to tailings management gives no consideration whatsoever to the right or interests of ACFN, and its decisions are made in spite of, rather than with regards to, the rights and interests of ACFN.

59. Given the foregoing, ACFN pleads that the AER's regime with respect to tailing management is inconsistent with s. 35 of the *Constitution Act, 1982*, and the duties owed to ACFN, and infringes ACFN Rights. It is therefore unconstitutional and of no force and effect to the extent of this inconsistency.

## **Cumulative Impacts**

60. The outcome of this unconstitutional regime for ACFN's Traditional Territory, ACFN Rights and way of life have been far-reaching. The Province has authorized and continues to authorize extensive industrial uses of the lands, waters, and natural resources in ACFN's Traditional Territory and in the surrounding area for activities, developments, and projects related to oil and gas, (collectively the "Oil and Gas Authorizations"). The Oil and Gas Authorizations have caused significant and long-lasting changes to the lands, waters, and natural resources in ACFN's Traditional Territory, including access to those lands, waters, and natural resources



by ACFN members and the ability of ACFN and its members to honour their reciprocal legal obligations to the lands required by Dene Law.

61. The Oil and Gas Authorizations have, individually and collectively, resulted in the following adverse effects in ACFN's Traditional Territory:

- a. destruction and loss of access to territory;
- b. harm to wildlife
- c. harm to fish;
- d. harm to plants; and
- e. damage to water, land and air.

62. The Defendants have authorized the Oil and Gas Authorizations – including the Kearn Facility – without regard for the potential cumulative effects, and corresponding adverse cumulative impacts of these Oil and Gas Authorizations on ACFN's continued meaningful exercise of ACFN Rights. Among other things, the Province has failed to:

- a. act in a manner consistent with the Honour of the Crown;
- b. diligently implement the Crown's Treaty promises;
- c. make meaningful efforts to ensure that sufficient lands, waters, and natural resources in ACFN's Traditional Territory remain available for the meaningful exercise of ACFN Rights;
- d. obtain sufficient information concerning:
  - i. the nature and extent of ACFN Rights, including the conditions necessary for the meaningful and sustainable exercise of those rights;
  - ii. the potential cumulative impacts of the Oil and Gas Authorizations in ACFN's Traditional Territory and the surrounding area; and

- iii. the potential cumulative impacts of the Oil and Gas Authorizations in the Traditional Territory and the surrounding area on the continued meaningful exercise of ACFN Rights;
- e. assess, monitor, and manage the cumulative impacts of the Oil and Gas Authorizations in ACFN's Traditional Territory and the surrounding area;
- f. manage the pace, scale, location, nature, and number of activities, projects, and developments in the Traditional Territory and the surrounding area;
- g. establish thresholds for permissible impacts to lands, waters, wildlife, fish, plants, and ecosystems in ACFN's Traditional Territory and the surrounding area, such that the impacts would not interfere with or significantly diminish the continued meaningful exercise of ACFN Rights, and ACFN's way of life, and ensure that the cumulative impacts of the Oil and Gas Authorizations do not or will not exceed those thresholds;
- h. make meaningful efforts to minimize the impacts, including the cumulative impacts, of the Oil and Gas Authorizations on ACFN Rights; and
- i. fulfill its obligation to manage and protect ACFN's Traditional Territory and surrounding areas, including waters and ecosystems, in such a way as to:
  - i. minimize impacts on ACFN Rights;
  - ii. diligently implement the Crown's Treaty promises; and
  - iii. protect and promote the continued meaningful exercise of ACFN Rights.

63. The cumulative impacts of the Oil and Gas Authorizations have caused serious harms to ACFN and ACFN's Treaty-protected way of life, including:

- a. loss of ACFN's use and enjoyment of lands and waters within their Traditional Territory;
- b. injury to the remaining lands and waters;

- c. displacement of ACFN from areas used or affected by, or both, the Oil and Gas Authorizations;
- d. curtailment of the continuity of ACFN's traditional patterns of economic activity;
- e. loss of ACFN's preferred means of exercising ACFN Rights;
- f. forcible interference with ACFN's way of life restraining ACFN's means of earning a livelihood; and
- g. significant and meaningful diminishment of ACFN's ability to exercise their ACFN Rights.

(paragraphs 61-63 being "the Cumulative Adverse Effects")

## **THE DEFENDANTS' KNOWLEDGE OF CUMULATIVE EFFECTS**

64. The Defendants knew or ought to have known about the Cumulative Adverse Effects of multiple project approvals on ACFN Rights.

65. ACFN has made its concerns regarding the Cumulative Adverse Effects and the resulting diminishment and infringement of ACFN Rights and way of life known to the Defendants. ACFN has further informed the Defendants that its way of life depends on access to key areas of cultural significance in ACFN's Traditional Territory including access to and protection of the Homeland Zones.

## **CAUSES OF ACTION:**

66. At the time the Crown asserted sovereignty over what is today called Alberta, ACFN used and exclusively occupied sites in their Traditional Territory for fishing, hunting, trapping, and otherwise exercising their way of life. These rights are *sui generis* and constitute a special interest in land analogous to a *profit à prendre*. As interests in land, compensation for harms to them is recoverable in the common law tort actions of negligence and nuisance, which are pleaded against the AER at paragraphs 67-76 and 77-78 below.

67. ACFN's Rights also have a constitutional dimension, as they are provided for in Treaty 8 and protected under s. 35 of the *Constitution Act, 1982*. Violations of the constitutional dimensions of ACFN's rights –breach of the duty to consult, breach of the honour of the Crown, breach of fiduciary duty and Treaty infringement – entitle ACFN to declaratory relief and compensation from the Province. These causes of action are pleaded at paragraphs 79-81, 822-84, 855-87 and 88-89 below.

## **Negligence**

68. The AER owed a duty of care to the Plaintiffs to regulate the Kearl Facility in a manner which:
- a. minimizes the risk of Uncontrolled Discharges and other unforeseen events;
  - b. minimizes the harm caused by Uncontrolled Discharges and other unforeseen events when such events could not be reasonably avoided; and
  - c. minimizes the risk of exposure by likely affected communities to harmful environmental contaminants caused by Uncontrolled Discharges and other unforeseen events.
69. The legislative, regulatory and policy scheme for tailings management, the interactions between the AER and ACFN about the Kearl Facility, the AER's real and constructive knowledge of ACFN's vulnerability to the AER and the Kearl Facility's operations, as well as the known hazards to ACFN posed by the design of the Kearl Facility, give rise to a relationship of proximity sufficient to establish a duty of care and duty to warn owed by the AER to ACFN. This duty of care is consistent with, and not in conflict with, the AER's statutory duties to the public at large.
70. The AER's decisions in how to regulate the Facility, and particularly its decision not to warn ACFN of the Uncontrolled Discharges into the surrounding environment, fell significantly below the applicable standard of care and the AER breached its duty to ACFN.
71. The AER's acts and omissions were clearly negligent and reckless, and inconsistent with its duty to act in the public interest, so as to constitute bad faith, such that the AER is not immune from suit under s. 27 of *REDA*.

72. Prior to, during, and after the Uncontrolled Discharges, ACFN had informed the AER of the possibility of, and later the fact of, the Direct Adverse Effects (paragraph 54 herein) and the Cumulative Adverse Effects (paragraphs 61-63 herein). The AER knew or ought to have known that its failures to regulate the Kearl Facility to the standard of a reasonably competent regulator would cause harm to ACFN.
73. The AER knew or ought to have known that the Uncontrolled Discharges posed a clear, present and significant danger to ACFN and ACFN members.
74. The AER did not notify ACFN of the First Uncontrolled Discharge until nine months after it began, despite being aware throughout that period about the Direct Adverse Effects and the Cumulative Adverse Effects. During those nine months the AER failed to respond with reasonable care and diligence to the First Uncontrolled Discharge or to take effective measures to fully contain it, or to regulate the Kearl Facility in a manner that would prevent further Uncontrolled Discharges from occurring. These regulatory failures allowed for Uncontrolled Discharges to continue, unbeknownst to ACFN.
75. The harms to ACFN and its members in the exercise of ACFN Rights and way of life were a foreseeable consequence of this breach of duty. The AER's breaches of its duty of care led directly to, or in the alternative, materially increased the risk to ACFN of, the Direct Adverse Effects and the Cumulative Adverse Effects.
76. The AER's conduct in regulating and failing to regulate the Kearl Facility, failed to meet the standard of a reasonably competent regulatory agency in the circumstances.

## **Nuisance**

77. The Uncontrolled Discharges have adversely impacted the lands around the Facility where ACFN members exercise their constitutionally protected rights. ACFN members have therefore experienced:
- a. the loss of use and enjoyment of those lands;
  - b. the loss of the ability to hunt, fish and trap on those lands;
  - c. interference with the cultural connections to those lands; and

- d. interference with their cultural and spiritual connections with the water, which has been contaminated.

78. The Uncontrolled Discharges at the Kearn Facility have unreasonably interfered with ACFN's special interest in its Traditional Territory. This interference constitutes a private and/or public nuisance caused or contributed to by the AER for which ACFN seeks abatement, remediation and damages.

### **Breach of the Duty to Consult**

79. After learning of the First Uncontrolled Discharge, the AER and Province knew or ought to have known that the rights and interests of ACFN and its members in the area may be impacted, and that the steps that the AER would choose to take – or not take – to address the First Uncontrolled Discharge could impact those rights and interests.

80. The Honour of the Crown was therefore engaged and the Duty to Consult was triggered. The Province – through the AER or otherwise – had a duty to:

- a. notify ACFN of the First Uncontrolled Discharge;
- b. engage in meaningful two-way dialogue with ACFN to ensure that the Crown understood ACFN's concerns and potential impacts to ACFN's rights resulting from the Crown's contemplated conduct with respect to the First Uncontrolled Discharge;
- c. consult with ACFN about how those concerns could be meaningfully addressed; and
- d. meaningfully address ACFN's concerns.

81. The Crown breached its Duty to Consult and ACFN's right to be consulted by failing to take any of the steps described in paragraph 80 herein. The duty to consult was therefore not discharged and ACFN seeks damages for this breach.

## **Breach of the Honour of the Crown**

82. The Defendants have failed to act in a manner consistent with their obligations to uphold the Honour of the Crown. The Honour of the Crown was engaged when the Crown entered into the Treaty with ACFN and is engaged by the Crown's performance of its Treaty obligations. The Honour of the Crown demands that the Crown act in a manner that upholds its promises under the Treaty, including the promise that ACFN's right to hunt, fish, and trap, and their way of life will not be interfered with.
83. The AER's broad and discretionary administrative regime has the potential to lead to Crown conduct, or is structured in such a way as to avoid Crown conduct but nevertheless permit activities to proceed, which have the potential to adversely affect ACFN Rights. The AER's public interest mandate requires that in such circumstances, the AER must act in a manner consistent with the Honour of the Crown. It has failed to do so.
84. The Province has failed to comply with its honourable obligations under the Treaty. The Province had reasonable and credible notice that the manner in which it was regulating energy development and tailings management in Alberta put it in potential breach of Treaty 8, by failing to monitor cumulative impacts from the Oil and Gas Authorizations, and by continuing to authorize further Oil and Gas Authorizations. The Province has failed to diligently implement the Treaty promise to ACFN to protect ACFN Rights which have contributed to the meaningful diminishment of the ACFN Rights. ACFN seeks damages and/or declaratory relief for this breach.

## **Treaty Infringement**

85. The Uncontrolled Discharges at the Kearl Facility have reduced the area in which ACFN members can exercise ACFN Rights and way of life, and the quality and integrity of those lands and waters remaining for such exercises. These impacts are amplified by ACFN's already heavily impacted territory, which has been the subject of extensive cumulative impacts from oil and gas development. The steps that the AER took under its regulations and policies in the authorization and maintenance of the Kearl Facility, and its ultimate response to the Uncontrolled Discharges, caused and contributed to these impacts on ACFN Rights.

86. The Uncontrolled Discharges adversely impact the ability of ACFN members to safely hunt, fish and gather in the immediately affected area and beyond, including but not limited to the Direct Adverse Effects and Cumulative Adverse Effects. The impacts will have a lasting presence on the waterways, the soil, the food-chain and the plants and animals that ACFN members rely on for ACFN Rights and way of life.
87. These harms amount to a meaningful diminution of ACFN Rights and way of life under Treaty 8. They constitute a significant interference in ACFN's members' ability to exercise their Rights in their preferred manner and location. They were not a lawful "taking up" of land contemplated by the Treaty, and amount to an unjustified infringement of ACFN Rights under it. ACFN seeks damages and declaratory relief for this infringement.

### **Breach of Fiduciary Duty**

88. The Treaty further gave rise to a fiduciary relationship between the Crown, including Alberta, and ACFN, given the discretionary control that the Province assumed over ACFN's lands and interests. At all material times, Alberta was under a non-delegable fiduciary duty to ACFN to ensure the continued meaningful exercise of ACFN Rights.
89. By failing to take reasonable measures to protect the exercise of ACFN Rights from the impacts of the Uncontrolled Discharges, the Crown has breached its fiduciary duty to ACFN. ACFN seeks damages for this breach.

### **Unconstitutionality of the Tailings Management Regime**

90. Alberta's regulatory regime for tailings management is inconsistent with the Crown's duties under Treaty 8 and has allowed the infringement of ACFN Rights:
- a. the regulations, policies, and directives concerning the AER's decisions over tailings management do not require consultation with First Nations when considering conduct that may adversely impact their rights;
  - b. the AER's regulations and policies for approving oil and gas projects and their tailings facilities do not meaningfully account for cumulative impacts at a landscape



level on ACFN Rights in determining potential adverse impacts or accounting for the overall hazards of the facilities;

- c. the AER's regulations and policies for the monitoring and regulation of existing tailings facilities do not adequately account for cumulative impacts on ACFN Rights at a landscape level when determining potential impacts of operational decisions; and
- d. the AER's regulations and policies fail to provide any other effective means to acknowledge and accommodate ACFN Rights and potential impacts on them.

91. The Province, through these regulations and policies, has not taken sufficient steps to:

- a. prevent the breaches of the Treaty and impacts on Treaty Rights that are caused by tailings facilities;
- b. address the infringement of the Treaty; or
- c. identify and ameliorate the impacts of tailings facilities on the continued meaningful exercise of the Treaty Rights.

92. The Province continues to undertake, approve, and otherwise permit activities, projects, and their tailings facilities in ACFN's Traditional Territory contrary to the Province's obligations under the Treaty.

### **Remedies Sought:**

93. The Plaintiffs seek:

- a. a declaration that the regulatory and policy framework for the authorization and regulation of tailings facilities is inconsistent with s. 35 of the *Constitution Act, 1982* and unconstitutional, and of no force or effect to the extent of that inconsistency;
- b. a declaration that the Crown has unjustifiably infringed the ACFN Rights;

- c. a declaration that the Crown has caused, contributed to, and allowed, the substantial diminution of ACFN's traditional way of life;
- d. a declaration that the Crown has failed to discharge its honourable obligations under Treaty 8;
- e. an order directing the Crown to disgorge all or part of the royalties or equivalent payments received by it in relation to the Kearl Project during the time of the Uncontrolled Discharges from May 2022 to November 2023, and to pay said royalties to ACFN;
- f. general, special, punitive and aggravated damages to the Plaintiffs for its negligence, nuisance, breach of fiduciary duty, breach of the duty to consult and treaty infringement, in the amount of \$500 million;
- g. an order that the AER take all reasonable and necessary steps to abate and remediate the Uncontrolled Discharges, and to prevent further Uncontrolled Discharges;
- h. costs of this proceeding; and
- i. such further and other relief as counsel may advise and this Court may direct.

**NOTICE TO DEFENDANTS**

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of King's Bench at Edmonton, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's address for service.

**WARNING**

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiffs against you.