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LARP Review Panel
c/o Land Use Secretariat
9th Floor, Centre West Building
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VIA EMAIL: LUF@gov.ab.ca

Dear LARP Review Panel:

Re: Review of Lower Athabasca Regional Panel
Information Request #14 Directed to the Applicants

We write on behalf of Fort McKay First Nation ("Fort McKay") in response to the Panel's Information Request No.14.

Introduction

The Panel has asked Fort McKay to provide its views on the relationship between the "quiet enjoyment of property" found in section 5(1)(c) of the *Alberta Land Stewardship Regulation*, Alta. Reg. 179/2011 ("ALSR"), and the effects of LARP on Fort McKay's exercise of treaty and aboriginal rights in its traditional territory, referred to by the Panel as "TLU areas."

The answer to this question requires the Panel to interpret s. 5(1)(c) applying a purposive and contextual analysis. The correct interpretation of s. 5(1)(c) must meet the objectives of the *Alberta Land Stewardship Act*, S.A. 2009, c.A-26.8 ("ALSA") and be consistent with the constitutional protection of Fort McKay's treaty and aboriginal rights guaranteed by s.35 of the *Constitution Act*, 1982.

Section 5(1)(c) refers to property interests and non-property interests, i.e. it contemplates a broad set of interests that may be affected by LARP. Property is commonly understood as a "bundle of rights": "property is not in fact a thing, but rather a right, or better, a collection of rights (over things) enforceable against others" (B. Ziff, Principles of Property Law (4th ed.) at p.2 (**Tab 1**)). When the word "property" is found in legislation, the task of the decision-maker is not to determine whether the claimed interest is "property" but whether the "bundle of rights" held are sufficient to qualify the holder to "possess property for the purposes of the statute" (*Saulnier v. Royal Bank of Canada*, [2008] 3 SCR 166 at para. 43 (**Tab 2**)).

The complication to the application of s.5(1)(c) in Fort McKay's case, is that Fort McKay's treaty and aboriginal rights are by definition *sui generis*; and therefore common law concepts of property do not apply. Fort McKay clearly has constitutional rights to use the lands in its territory for the exercise of treaty and aboriginal rights, and take possession of the public resources available on those lands. Section 35 of the *Constitution Act, 1982* effectively guarantees Fort McKay the enjoyment of its treaty and aboriginal rights. These rights are founded in ancient property rights that are rooted in Fort McKay's historical occupation and possession of its ancestral lands. Therefore, these rights are granted the protection of use and enjoyment provided by the common law, including to be exercised without disturbance, interference and annoyance.

Broad and Liberal Interpretation of *Alberta Land Stewardship Act*

Section 5(1)(c) of ALSR requires a broad and liberal interpretation. Fort McKay has requested a review of the Lower Athabasca Regional Plan ("LARP") pursuant to s. 19.2 of the *Alberta Land Stewardship Act*, S.A. 2009, c.A-26.8 ("ALSA"). Pursuant to s.19.2, a person "directly and adversely affected by a regional plan" may make an application for a review of the plan within 12 months of it coming into force. Pursuant to s.5(1)(c) of *Alberta Land Stewardship Regulation*, Alta. Reg. 179/2011 ("ALSR"), "directly and adversely affected" is defined as "in respect of a person with regard to a regional plan, means that there is a reasonable probability that a person's health, property, income or quiet enjoyment of property, or some combination of them, is being or will be more than minimally harmed by the regional plan." Therefore, to trigger a review of LARP, Fort McKay is required to overcome the preliminary hurdle of showing that its "health, property, income or quiet enjoyment of property, or combination of them" suffers harm by LARP. Beyond *de minimis* to any one of these interests suffices to establish standing for a review of LARP.

The relevant question for the Panel is whether Fort McKay's treaty and aboriginal rights, including to hunt, fist, trap and gather within *its* traditional territory, which by definition are *sui generis* and therefore cannot fall within the western legal thinking, can satisfy the statutory definition of "directly and adversely affected" as defined in ALSR, purposefully interpreted.

To determine if Fort McKay's rights satisfy the definition of s.5(1)(c), the words of the provision must be read in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature. The object of ALSA and intention of the legislature may be derived from the purposes and nature of the Act. This modern rule of statutory interpretation applies to the interpretation of the regulations with the additional requirement that regulations be read in the context of the Act, having regard to its language and purpose (*Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 260 (**Tab 3**)); *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54 at para. 10 (**Tab 4**)).

The purposes of ALSA are set out in section1(1) which states:

1(1) In carrying out the purposes of this Act as specified in subsection (2), the Government must respect the property and other rights of individuals and must not infringe on those rights except with due process of law and to the extent necessary for the overall greater public interest.

(2) The purposes of this Act are

(a) to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;

(b) to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples;

(c) to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment;

(d) to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.

From these purposes of ALSA we know that ALSA is *public interest* legislation that is concerned with societal matters, including the protection of the *environment* and First Nations' constitutional rights to use public land. Therefore, not only must ALSA be interpreted broadly and liberally (*Interpretation Act*, R.S.A. c-I-8, s. 10), but it must be interpreted to contemplate aboriginal land use, which is recognized and affirmed by s.35 of the *Constitution Act, 1982*. Indeed, LARP regulates Fort McKay's exercise of treaty and aboriginal rights within the regional plan area by its designation of where those rights may be exercised (LARP at Schedule F). ALSA's engagement of the special relationship between the Crown and aboriginal peoples also means that the Act requires a generous and liberal interpretation in favour of aboriginal peoples as confirmed by the Supreme Court of Canada in the case of *R v. Van Der Peet*, [1996] 2 S.C.R. 507 at paras. 23-24 (**Tab 5**). With respect to any legislation that "that bears upon treaty the courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown." (*United States v. Powers*, 305 U.S. 527 (1939), at p. 533 cited by LaForest, J in *Mitchell v. Peguis Indian Band*), [1990] 2 S.C.R. 85 at page 143 (**Tab 6**)).

The statutory scheme of ALSA confirms that the definition of "directly and adversely affected" is to be interpreted broadly. To achieve the purposes set out in ASLA, the scheme:

- Requires Alberta to make; implement; amend; if necessary; and review regional plans every 10 years (ss.3-11);
- Provides opportunities to a "title holder" to have "any restriction, limitation or requirement" of LARP considered for variation by the Stewardship Minister (s.15.1).

ALSA defines "title-holder" as (i) in respect of land other than settlement patented land: (A) a person registered in the land titles office as the owner of an estate in fee simple in the land; (B) a person who is shown by the records of the land titles office as having an estate or interest in the land; (C) any other person who is in possession or occupation of the land, or; (D) in the case of Crown land, a person shown on the records of the department administering the land as having an estate or interest in the land."

- Provides a right to a "registered owner" who has suffered "diminution or abrogation of a property right, title, or interest" as a result of the regional plan within 12 months of it coming into force (section 19.1 of ALSA). ALSA defines a "registered owner" as "the person registered in the land titles office as the owner of an estate in fee simple in private land or freehold minerals."
- Provides an opportunity to those "directly and adversely affected" by a regional plan to request a review of the regional plan within 12 months of it coming into force (s. 19.2).

While private and exclusive property interests may also be affected by a regional plan to trigger a review pursuant to section 19.2., those interests cannot be the only interests that could be "directly and adversely affected", given the absence of the legislature's use the terms of "title holders" and "registered-owners" as found elsewhere in ALSA. Therefore, to meet the broad public interest objectives of the Act, the request for a review of a regional plan must provide for a broad set of rights and interests.

In particular, the phrases "property" or the "quiet enjoyment of property" ought to be interpreted to include Fort McKay's constitutional rights to hunt, fish and trap on lands to which they have access pursuant to Treaty 8 and their rights to hunt and fish during all seasons of the year on public lands pursuant to Article 12 of the *Natural Resources Transfer Agreement*; the use and occupation of their Reserves, which were provided pursuant to Treaty 8 which the federal Crown holds in trust for Fort McKay's exclusive use and benefit; and the right to take ownership of terrestrial resources available on public lands.

The Panel's mandate in conducting the review LARP is also broad, which informs the broad interpretation of s.5(1)(c). Section 19.2(1) provides an opportunity to those who are "directly and adversely affected by a regional plan" to request a review of the "regional plan" by an independent panel within 12 months of the regional plan coming into force (s.19.2 of ALSA). This opportunity only occurs once and within a short time frame after Alberta makes the plan. LARP manages a variety of activities, including aboriginal land use, and recreational land use, and sets objectives for societal interests that are much broader than exclusive property rights. No limitations are placed on the review as they are placed for variances pursuant to s.15.1 which are limited to "any restriction, limitation or requirement regarding a land area or subsisting land use, or both, under a regional plan as it affects the title holder." The Panel is to "conduct a review of the regional plan" and "report the results of the review and any recommendations" (section 19.2(2) of the Act). In

other words, no restrictions are imposed on the Panel by the legislature respecting the substance of a review of a regional plan. This demonstrates the mandate of the Panel is to review the regional plan and assist Alberta determine if the plan meets the purposes and objectives of ALSA and if not, how it could be improved.

ALSA does not define "directly and adversely affected" as it does for "title owner" and "registered owner." Rather regulations made under ALSA define the phrase to mean "in respect of a person with regard to a regional plan, means that there is a reasonable probability that a person's health, property, income or quiet enjoyment of property, or some combination of them, is being or will be more than minimally harmed by the regional plan." Section 5(1) of ALSR does not limit "property" to real property, therefore personal property is contemplated, which would include captured wildlife (See, *Wildlife Act*, RSA 2000, c W-10 at s.8). Neither ALSA or the ALSR define "quiet enjoyment of property."

However, we know that Fort McKay's rights and interests (beyond its rights to its reserve land) must be included in the definition of "directly and adversely affected" or else it would mean that aboriginal people's treaty rights to hunt, fish and trap in their traditional territories could never trigger a review of LARP. This interpretation is to be rejected not only because it would be inconsistent with the Crown's constitutional obligations to aboriginal peoples found in s.35 of the Constitution Act to guarantee their enjoyment of those rights, but would also be contrary to the declared purpose of ALSA.

The Constitution is the supreme law of Canada and Alberta's legislative powers are constrained by the Constitution. The Panel should interpret ALSA with the presumption that Alberta intended to enact ALSA to be consistent and give effect to the constitution, including s. 35 of the Constitution Act, 1982 (*Charlebois v. Saint John (City)*, 2005 SCC 74 (**Tab 7**); *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (**Tab 8**)).

Sui Generis Treaty and Aboriginal Rights

Rights in common law are of little or no help in understanding the rights of aboriginal peoples, recognized and affirmed by s.35 of *Constitution Act, 1982* (*R. v. Sparrow*, [1990] 1 SCR 1075 (**Tab 9**)). The Supreme Court in *Van Der Peet,* [1996] 2 SCR 507 (**Tab 5**) held that the constitution seeks the "reconciliation" of two legal systems while affirming that one system has "sovereignty" over the other. Reconciliation requires judges to weigh "the aboriginal perspective" against "the perspective of the common law." True reconciliation "will equally, place weight on each."

The Supreme Court of Canada in *Van Der Peet* relied on the Australian case of *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1, which highlighted the content of Aboriginal rights protected by British common law as that which already exists. He emphasized that if the courts found that only those existing rights, which were the same as or which approximated those under English law, could comprise legal rights, such an approach would defeat the purpose of recognition and protection of *sui generis* rights.

In *Delgamuukw* v. *British Columbia*, [1997] 3 SCR 1010 (**Tab 10**), the Supreme Court of Canada realized a standard Canadian legal analysis with its recurrent doctrinal categories and distinctions was not appropriate for understanding the constitutional rights of aboriginal peoples. The Court affirmed a *sui generis* constitutional analysis that respects aboriginal perspectives on law and land. An appropriate analysis could not cling to the predetermined British system of rules, categories and rights to analyze aboriginal rights. Aboriginal constitutional rights are neither derived nor delegated from the British sovereign or law.

Section 35 of the *Constitution Act, 1982*, guarantees Fort McKay's treaty and aboriginal rights to hunt, fish, trap, and gather on those tracts of lands where those activities have been historically been carried out, and therefore guarantees the effective enjoyment of these rights, which is a just recognition of ancient their property rights under aboriginal law (*R. v. Van der Peet,* [1996] 2 SCR 507). Any beyond minimal interference, disturbance or annoyance to these rights qualifies Fort McKay as directly and adversely affected by LARP.

While Fort McKay may not have exclusive possession of Crown lands for the exercise of its treaty and aboriginal rights, this is irrelevant. The fact that Fort McKay's rights are directly and adversely affected every time land is taken up for oil sands development i.e. Fort McKay is excluded from those lands, means Fort McKay has some kind of "property" interest that falls within the definition s.5(1)(c) of ALSR (*Mikisew Cree First Nation v. Canada*, 2005 SCC 69(**Tab 11**)). In any event, its registered traplines, which correspond with Fort McKay's historical possession of the lands are exclusive trapping rights to the line.

"Quiet Enjoyment of Property" in Similar Legislation

ALSR is unique in its use of the phrase "quiet enjoyment of property" in legislation. The only other regulation with similar language is found in the *Liquor Licensing Regulations*, N.S. Reg. 365/2007 which relates to the issuance of liquor licences in Nova Scotia and seeks to prevent licenced premises from interfering with the "quiet enjoyment of neighbouring properties" (s.6). The Nova Scotia Court of Appeal has held that the Nova Scotia Utility and Review Board's broad interpretation of the phrase in that regulation is reasonable stating: "Over the years the Board has deliberately avoided subjecting the phrase "quiet enjoyment" to a narrow interpretation. The right to be reasonably free from the disturbances and noise emanating from drinking establishments is not limited to actual assaults or break-ins, but rather is taken to include any "offensive or disturbing activity connected with a bar that significantly limits the use and enjoyment of a person's property." (*Whiskey's Lounge Ltd. v. Nova Scotia Utility and Review Board*, 2007 NSCA 95 (**Tab 12**)).

Quiet Enjoyment of Property in the Law of Leases

The phrase "quiet enjoyment" has a specific meaning in the law of leaseholds. Under a lease, a tenant is conferred a right to "quiet enjoyment" of the demised property. A review of the common law indicates that this covenant protects more than the tenant's right to

exclusive possession of the property, but protects the right of the tenant to use the premises free from interference. In *McCall v. Abelesz*, [1976] Q.B. 585 at p. 594 (C.A.), where Lord Denning M.R. said:

> "This covenant ... is not confined to direct physical interference by the landlord. It extends to any conduct of the landlord or his agents which interferes with the tenant's freedom of action in exercising his rights as a tenant ... It covers, therefore, any acts calculated to interfere with the place or comfort of the tenant, or his family."

Noise and air quality, including dust and odour, emanating from neighboring properties that cause interference with the tenant's use of the property have been found to constitute breach of the covenant of "quiet enjoyment." (*MNT Holdings Ltd. v. Bellano Ceramic Tile Company*, 2002 BCBC 81 (**Tab 13**); *Mary Enterprises Ltd. v. Conway Richmond Ltd*, 2001 BCPC 172 (**Tab 14**)).

Profits-a-Prendre

A profit-a-prendre is a property right that enables the holder to enter onto the land of another to extract some part of the natural produce, such wildlife or game birds (*Saulnier v. Royal Bank of Canada*, [2008] 3 SCR 166 at para. 28). These rights need not be exclusive rights (B. Ziff, Principles of Property Law (4th ed.) at p.369). Fishing licences and registered traplines are analogous to *profits a prendre* (*Saulnier v. Royal Bank of Canada,* supra (**Tab 2**); *Bolton v. Forest Pest Management Institute*, 1985 CanLII 579 (**Tab 15**)). Treaty and aboriginal rights including, aboriginal harvesting rights to timber within a defined traditional territory have been found to be akin to a *profit a prendre* (*Tolko Industries Ltd. v. Okanagan Indian Band*, 2010 BCSC 24 (**Tab 16**); B. Ziff at Principles of Property Law (4th ed.) at 370 (**Tab 1**)).

A *profit-a-prendre* can ground claims in trespass and nuisance (*Tolko Industries Ltd. v. Okanagan Indian Band*, 2010 BCSC 24 (**Tab 16**)). The action of trespass of land arises when the property holder suffers an intrusion or interference with the possession of real or personal property (Clerk & Lindell on Torts (15th ed.) (**Tab 17**)). For example, in *Tolko Industries Ltd. v. Okanagan Indian Band*, 2010 BCSC 24 (**Tab 16**) the Court held the logging of timber also harvested by an aboriginal group with a claimed aboriginal right to do so on those lands, could constitute trespass based on the aboriginal interest akin to *profit a prendre*.

Additionally, a *profit-a-prendre* interest can also ground a claim in nuisance which arises when "interference with, disturbance, or annoyance to a person in the exercise of enjoyment of (a) a right belonging to him as member of the public, when it is a public nuisance, or (b) his ownership or occupation of land or of some easement, profit, or other right used or enjoyed in connection with land, when it is a private nuisance" (Clerk & Lindell on Torts (15th ed.) (**Tab 17**)).

As cited, by the Supreme Court of Canada in *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 SCR 906 (**Tab 18**) the interests protected by the law of nuisance are broad:

> The notion of nuisance is a broad and comprehensive one which has been held to encompass a wide variety of interferences considered harmful and actionable because of their infringement upon or diminution of an occupier's interest in the undisturbed enjoyment of his property. I can see no warrant for refinements in approach which would preclude from protection the interest in TV reception even assuming it to be a recreational amenity. In this day and age it is simply one of the benefits and pleasures commonly derived from domestic occupancy of property; its social value and utility to a community, perhaps even more so to a remote community such as the one in this case, cannot be doubted. The category of interests covered by the tort of nuisance ought not to be and need not be closed, in my opinion, to new or changing developments associated from time to time with normal usage and enjoyment of land. Accordingly I would reject the defendant's submission and hold that television reception is an interest worthy of protection and entitled to vindication in law.

Conclusion

In sum, the law on *profit-a-prendre* and leaseholds confirm that the common law concepts of property are intended to protect the enjoyment of property of another that a person has a particular right to use and possess. In other words, the words "property" and "quiet enjoyment of property" in s.5(1)(c) are to engage the right of enjoyment to the use lands and the property available on those lands such as terrestrial resources free from interference, disturbance and annoyance. In addition to its beneficial rights to its reserve lands, Fort McKay has a constitutional right to use the lands in the area of LARP for the enjoyment of its treaty and aboriginal rights, and has right to take possession of the terrestrial resources available on those lands. These rights are *sui generis* and cannot be confined to common law concepts of property. However, they are protected by s.35 of the Constitution Act, 1982, which recognizes Fort McKay's ongoing rights to use its ancestral lands. These rights fall within the definition of "directly and adversely affected" as confirmed by the purposes of ALSA to meet the future needs of aboriginal peoples, the regulation of LARP of these rights and Alberta's constitutional obligation to guarantee s.35 rights.

Sincerely,

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