

October 17, 2014

LARP Review Panel
c/o Land Use Secretariat
9th Floor, Centre West Building
10035 – 108 Street N.W.
Edmonton, AB T5J 3E1

VIA EMAIL: LUF@gov.ab.ca

Dear LARP Review Panel:

**Re: Review of Lower Athabasca Regional Panel
Information Request #1 Directed to the Crown**

We write on behalf of Fort McKay First Nation. On July 30, 2014, the Review Panel established to conduct a review of the Lower Athabasca Regional Plan Review Panel (the “**Panel**”) issued Information Request #1 to the Crown (“**IR #1**”). On August 19, 2014, the Crown advised the Panel that it would not be responding to IR #1 as the information request a) was premature; and b) largely relates to concerns raised by the Applicants’ regarding LARP’s implementation; future activities and future consultations all of which the Crown claims are outside of the Panel’s jurisdiction. Pursuant to the email of Carolyn Tralnberg of October 9, 2014, this letter is to respond to Crown’s response to IR#1 of August 19, 2014. Fort McKay also relies on its correspondence of August 20, 2014 and September 23, 2014.

Introduction

The Crown’s response to IR #1 adopts a similar narrow interpretation of and uncooperative approach in responding to the Panel’s Information Request #2 on September 18, 2014. Fort McKay submits that both information requests seek valuable information “necessary to permit a full and satisfactory understanding of the matters in the review” and are “relevant to the proceeding” in accordance with Rules 28 & 29 of the *Rules of Practice for Conducting Reviews of Regional Plans (March 2014)*, including determining how Fort McKay is directly and adversely by LARP and whether the regional plan meets the purposes and objectives of *Alberta Land Stewardship Act*, S.A. 2009 c.A-26.8 (the “*Act*”) as required.

Information Request is not Premature

As submitted in our letter of August 20, 2014, the Crown has taken a technical interpretation of the Panel's issuance of IR#1, which would require the interpretation of word the "review" in IR#1 to mean "having read." As previously submitted, the reasonable interpretation of "review" in IR#1 means a completion of the review process provided by the *Act* and commenced by the Applicants' applications. This interpretation is reasonable and preferred given the Panel is presumed to know the *Rules of Practice for Conducting Reviews of Regional Plans (March 2014)* and the information requested indicates the Panel is aware of the issues raised by Fort McKay's application i.e. the incomplete nature of LARP on the mechanisms LARP states are to protect Fort McKay's exercise of its treaty and aboriginal rights, and the Crown's response to Application that relies on the Crown's future implementation of LARP to address Fort McKay's concerns (see for example para. 29 & 87 of Crown's Response Submissions).

In any event, the Panel is not prevented from re-issuing IR #1 now that it is abundantly clear that the Panel has received and reviewed the written submissions.

Necessary for a Full and Satisfactory Understanding of the Matters in Review

As an alternative argument, the Crown refuses to respond to IR#1 because the "vast majority" of the information request relates to matters raised by the Applicants that the Crown considers outside of the Panel's jurisdiction (note, the Crown does not identify this vast majority). In other words, the Crown refuses to respond to IR#1 because in *its view* the information is not "necessary to permit a full and satisfactory understanding" of *its view* of the "matters in the review" (Rule 28) and in *its view* are "not relevant to the proceeding" (Rule 29). However, the Crown is not the decision-maker in this of Review of LARP i.e. the Crown is not the independent panel established under the *Act* to conduct a review of LARP, including issuing information requests, and receiving responses to information requests. Therefore, while *the Crown's views* on the issue may helpful to the Panel, they are not dispositive of the Panel's jurisdiction in conducting the Review. This means that until such time as the Panel makes a decision on the Panel's jurisdiction, the Crown should be required to respond to IR#1.

As detailed in Fort McKay's Reply Submissions of August 25, 2014, the Panel has a broad public interest mandate to ensure regional plans made by Alberta meet the broad public purposes of the *Act*, including ensuring the future needs of aboriginal peoples, consistent with the Crown's constitutional obligations. To discharge its mandate, the Panel must adopt a generous and liberal interpretation of its jurisdiction and reject the Crown's narrow interpretation of the Panel's authority and the scope of the Review as Alberta's interpretation would effectively defeat the legislative intent of the *Act* in providing an opportunity to review a regional plan within one year of it coming into force. As provided in Fort McKay's Reply submissions of August 25, 2014, the Crown's slicing and dicing of Fort McKay's concerns into categories of "future activities," "future consultation" and "implementation" are either a mischaracterization of Fort McKay's concerns or do fall within the Panel's jurisdiction. Therefore, the dispute between Fort McKay and the Crown

on whether the concerns fall within the Panel's jurisdiction is sufficient to make the information requests "necessary to permit a full and satisfactory understanding of the matters in the review" (Rule 28) and "relevant to the proceeding" (Rule 29), and the Panel's decision to make such a request in fulfilling the requirements of *Rules of Practice* should be respected and afforded deference. The Crown should avoid pre-empting the Panel's decision-making process by refusing to respond to the Panel. How will the Crown remedy its failure to respond to IR#1 if the Panel does decide the concerns fall within the Panel's jurisdiction at the end of the Review?

This is consistent with the principles of administrative law, which generally, afford decision-makers deference in interpreting its governing statute which confers upon it its jurisdiction (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61); and defers a determination of an allegation that a decision-maker has no jurisdiction, until the decision-maker completes the administrative process. This is done so that the reviewing court has the benefit of the complete record before the Panel and the decision-makers' reasons in determining the reasonableness of the decision. (Brown D.J.M. & Evans J.M., (1998), *Judicial Review of Administrative Action in Canada*: Toronto: Canvasback Publishing at 3-67;). If the court prefers to avoid making assumptions about the Panel's decision on jurisdiction so should the Crown and participate in providing the Panel with the record it considers necessary How will the Crown remedy its failure to respond to IR#1 if at the end of the day the Panel does decide the concerns fall within the Panel's jurisdiction?

Even if the Crown is correct in its interpretation of the Panel's narrow jurisdiction, which Fort McKay rejects, IR#1 is necessary to permit a full and satisfactory understanding of whether specific provisions of the Plan directly and adversely affect Fort McKay. IR#1 references specific commitments made in LARP that the Crown relies on to address aboriginal peoples concerns and form the "content of LARP". Words on a page can never cause direct and adverse effects on persons but rather the impacts of the implementation of the words must be considered by the Panel. Therefore, the status of implementation of specific provisions of LARP "is necessary to permit a full and satisfactory understanding" of whether specific provisions directly and adversely affect the Applicants.

Concerns of Procedural Fairness

Pursuant to Rule 32 of the Rules of Practice, Fort McKay is granted a right to respond to the substance of the Crown's response to IR#1. This forms part of its procedural rights in having its request for a review of LARP considered by the Panel. The Crown's refusal to respond to the information request because of its own narrow view on the substance of the Review, deprives Fort McKay its procedural rights in the Panel's consideration of its Application. Rather the Crown response to IR#1 undermines the review process of LARP triggered by Fort McKay's Application.

Purpose of Public Hearing Process

Fort McKay agrees with the Panel that the Crown is the party in possession of the information requested and the appropriate party to provide the responses not only to address Fort McKay's concerns raised by its application, but to fulfill the public purpose of the review process. The Crown should be mindful that this review of LARP is in effect a public hearing (*Act*, s.19.2(4)). As stated by the Court of Appeal the "openness...and effectiveness of the hearing process is an end unto itself" "Since one of the primary purposes of public hearings is to allow public input into development..... The process of the hearing is an end of itself" (*Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19 at paras. 31 & 34).

Frustration of the Panel's Duties

Pursuant to Rule 17 of the *Rules of Practice*, the duties of the Chair of the Panel include issuing information requests **and receiving responses to information requests**. As held by the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para. 51: "the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature." Rule 17 of the *Rules of Practice* acknowledges the Panel's duty to receive responses to information requests as powers and duties granted to it by the Act, and therefore, the Panel must have all necessary powers to ensure it can accomplish that duty. The Crown should not frustrate the Panel's duties by taking unreasonable interpretations of IR#1.

Update on LARP

As stated above Fort McKay submits that the Crown should respond to IR#1, but in an effort to assist the Panel, Fort McKay provides the following information in response to IR#1.

3C : Part I Status Report from GoA - LARP 2012-2022 Initiatives

Unless expressly stated otherwise, Fort McKay can advise the Panel that it has not been contacted or approached by the Crown on the specific initiative listed in 3C and accordingly has no information to provide the Panel regarding the same.

Joint Canada - Alberta implementation plan for Oil sands monitoring (JOSM) 2011 - Phased implementation over 3 years:

We attach the following:

- The Joint Canada/Alberta Implementation Plan for Oil Sands Monitoring: First Annual Report 2012-2013 (Attachment A);
- The Implementation Plan - Second Annual Report: 2013-2014 (Attachment B); and
- Report of the Auditor General of Alberta – October 2014 at pp. 23-32 (Attachment C).

We emphasize that the Auditor General of Alberta's Report on JOSM found among other things that:

- The First Annual Report lacked information on the status of implementation of JOSM; status of key commitments and individual projects was not clear; key information was missing; was incomplete and contained inaccuracies; and
- JOSM projects lacked plans such as clearly defined deliverables and timelines; there was insufficient evidence that Alberta monitored progress of projects and stakeholder input and there was insufficient evidence to support reported project status.

The Auditor General concluded by stating that without the implementation of recommendations made "the governments of Alberta and Canada could fail to carry out their plan for monitoring the environmental impacts of oil sands development. This may jeopardize AMERA's ability to monitor cumulative effects of oil sands development and report to Albertans on the conditions of Alberta's environment in the oil sands and when impacts on the environment exceed accepted limits" (p.32).

As reported in the attached news article as Attachment D, in 2013, Fort McKay withdrew its participation in JOSM for reasons including being denied direct participation in the early scoping of JOSM and instead being relegated to a sub-table for aboriginal people that was poorly attended by the Crown. Fort McKay understands that all other First Nations have now withdrawn from JOSM.

Letter of Intent – GOA/Fort McKay September 26, 2011

Fort McKay can advise that Alberta's commitment to work collaboratively with Fort McKay to design and implement a community health assessment in Fort McKay has not progressed and has effectively been abandoned due to Crown delay. As reported in the attached news article as Attachment E, Fort McKay has commenced taking steps to undertake its own health study due to lack of cooperation from Alberta contrary to the Letter of Intent.

Tailings Management Framework

As of the date of this letter, Fort McKay can advise the Panel that the tailings management framework is at its very early stages of development. We attach a letter from Alberta dated June 18, 2014, Attachment F, indicating that at time the Crown was still deciding whether it will consult with First Nations on the framework. Fort McKay intends to provide Alberta with its submissions on the framework in the before the end of 2014.

Management Frameworks

As of the date of this letter, Fort McKay can advise the Panel that the biodiversity management framework has not yet been completed by Alberta, consultation has not yet begun, and a consultation plan for First Nation participation has not yet been developed.

We attach a letter dated June 6, 2014, Attachment G, from Alberta stating that a draft framework will be ready for feedback in October 2014, but Fort McKay has not been provided with it yet.

Fort McKay advises that the groundwater quality management framework remains an interim framework. The surface water quantity framework is also incomplete and engagement on the framework was occurring as recently as the summer of 2014 (See Attachment F, Letter from Alberta dated June 18, 2014).

With respect to the air and surface water quality frameworks, we attach LARP Annual reporting on air and surface water quality released in August 2014 indicating some triggers and limits were exceeded 2012 (Attachment H).

Regional Landscape Management Plan:

As of the date of this letter, Fort McKay can advise the Panel that Landscape Management Plan has not yet been completed by Alberta, consultation has not yet begun, and a consultation plan for First Nation participation has not yet been developed.

3D - Part II Status Report From GoA LARP Commitments to Aboriginal Peoples

Unless expressly stated otherwise below, Fort McKay can advise the Panel that the Crown has not contacted or approached Fort McKay on the specific commitments listed in 3D and is accordingly not in a position to provide the Panel any information regarding the same.

LARP page 29: "In developing a biodiversity management framework and a landscape management plan, the GOA will work with First Nations to consider how First Nations' exercise of constitutionally protected rights to hunt, fish and trap for food can continue to occur within reasonable proximity of First Nations' main population centers."

Fort McKay submits that this commitment made in LARP will not be fulfilled. Fort McKay met with Environment and Sustainable Resource Development on September 19, 2014, and was advised that the staff leading the development of the biodiversity management framework do not have a mandate to incorporate traditional land use objectives/requirements into the framework. For example, by, *inter alia*, setting thresholds for population levels of cultural keystone species that will support a harvestable supply for Fort McKay or any First Nation or establishing locations where traditional land use may occur in reasonable proximity to aboriginal communities (See Terms of Reference for LARP for this requirement at page 18). Alberta advised that the biodiversity framework is targeted for completion in 2014. If this is still the intention, there is insufficient time left in 2014 for the development and implementation of an aboriginal consultation plan. On June 6, 2013, Alberta advised Fort McKay that is no intention of considering a traditional land use management framework under LARP (Attachment G).

As stated above, as of the date of this letter, Fort McKay can advise the Panel that Landscape Management Plan has not yet been completed by Alberta, consultation has not

yet begun, and a consultation plan for First Nation participation has not yet been developed.

LARP page 29: Engagement with aboriginal communities is desired as air, water, land and biodiversity strategies and plans are developed.

Fort McKay provided Alberta with submissions and comments on its desires on the air quality, surface water quality frameworks and groundwater frameworks before the effective date of LARP, but much of these comments and desires were not included in the frameworks as they exist today, and the groundwater quality framework is still an interim form.

Fort McKay has made submissions to Alberta on the surface water quantity framework in the summer of 2014 and intends to provide its submissions on the biodiversity framework, landscape management plan and tailings management framework at the appropriate time as determined by Alberta. However, Fort McKay's experience with Alberta on the engagement of the frameworks in LARP has been a frustrating process due to long delays in scheduling and cancellation of engagement meetings by Alberta. Fort McKay understands that such delays and cancellations have not generally occurred for industry and other non-aboriginal stakeholders on engagement on the frameworks. Further Fort McKay has found it challenging to keep a consistent understanding of the engagement process as Alberta regularly provides incomplete or conflicting information on which department branch is responsible for the strategies found in LARP and the engagement process that will be undertaken. We refer the Panel to attached letter dated May 20, 2014, Attachment I, which further outlines Fort McKay's concerns with the engagement process.

Outcome 7-Inclusion of Aboriginal Peoples in Land Use Planning Strategies (a-f):

- a) Meaningful consultation: Fort McKay submits that Alberta does not engage in meaningful consultation with Fort McKay when it makes decisions that adversely affect Fort McKay. Consultation in the existing regulatory system relies on project proponents to undertake procedural and project-specific consultation, and Alberta relies on LARP to address concerns that Alberta considers are not project-specific, for example concerns relating to the rapid declining wildlife populations, even though LARP currently contains no tool to address this concern.
- b) Lower Athabasca Regional Trail System Plan: Alberta has not approached or contacted Fort McKay on Lower Athabasca Regional Trail System Plan.
- c) Surface water quantity Management Framework for the Lower Athabasca River: Fort McKay was asked by and made submissions to Alberta on the draft framework in the summer of 2014.
- d) Tourism development: Fort McKay has not been approached or contacted by Alberta on this matter.

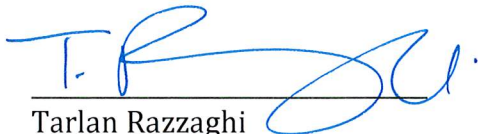
- e) Richardson Backcountry Stewardship Initiative: Fort McKay has recently been advised this initiative is moving forward, but has little to no information of the details, if any.
- f) Biodiversity Management Framework and Landscape Management Plan: No consultation has begun on this Framework and Plan.

Note 6 - Hunting, Fishing, and Trapping (Including Aboriginal Peoples): Fort McKay can advise that Alberta has not yet resolved the land use conflict between oil sands development and traditional land use, both permitted uses in mixed-use lands of LARP. Fort McKay can also advise that projects continue to be approved in the mixed-use area despite the incompatibility of these two permitted uses on the basis that development is a permitted use under LARP (See AER Decision on Dover Commercial Project, 2013 ABAER 014 at para.46). In Alberta's letter attached from June 6, 2014, Attachment G, Alberta states in reference to Note 6 regarding conservation areas that such activities will continue in accordance with existing provincial laws. However, these existing laws have thus far been inadequate in protecting treaty and aboriginal rights, and Alberta has not taken any analysis to determine the extent of traditional land use in LARP conservation areas.

Conclusion

To conclude, Fort McKay submits that IR#1 is not premature and is necessary for the full and satisfactory understanding of the matters raised in the review, which is clearly evident on the issues raised by Fort McKay's application i.e. the incomplete nature of LARP. The Crown should not be permitted to rely on its narrow interpretations to undermine the review process triggered by Fort McKay's application by depriving the Panel with the information it considers relevant to the proceeding and for discharging its mandate.

Sincerely,



Tarlan Razzaghi
Barrister and Solicitor

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