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August 25, 2014

Via Email to LUF.gov.ab.ca

The Honourable Robin Campbell
Stewardship Minister
c/o Land Use Secretariat
9th Floor, Centre West Building
10035 – 108 Street
Edmonton, AB T5J 3E1

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

Dear Sirs/Madams:

RE: Request for Review of Lower Athabasca Regional Plan ("LARP")
Reply Submissions of Cold Lake First Nations ("Reply")

We represent Cold Lake First Nations ("Cold Lake" or the "Nation") and write to you upon their express direction and behalf. We write in reply to the Response Submissions of the Government of Alberta ("Alberta"), dated June 25, 2014.

In its response, Alberta attempts to avoid and obfuscate the real issues raised in Cold Lake's Request for Review of LARP, dated August 30, 2013, by describing irrelevant information (for example, paras. 18-27), confusing the issues raised by the Nation and engaging in legal gymnastics. Cold Lake will respond to four key areas in this Reply:

1) Contrary to Alberta's response, the Panel has jurisdiction to consider omissions from LARP;

2) Contrary to Alberta's response, the LARP's "inclusion of Aboriginal peoples in land-use planning" is not effective or meaningful;

3) Contrary to Alberta's response, the Panel must consider principles of constitutional law and has jurisdiction to consider any constitutional issue raised

by the Review [Note: No questions of constitutional law under the *Administrative Procedures and Jurisdiction Act*[1] were raised by Cold Lake]; and

4) Alberta's statements of fact throughout its response are not supported by evidence.

Cold Lake respectfully submits this Panel has both the jurisdiction and responsibility to engage in this Review and requests that it does so as the Nation has demonstrated "a reasonable probability" that the Nation's health, property and enjoyment of property will be harmed by the LARP.[2]

1. Panel has jurisdiction to consider omissions from LARP

(a) Harms can be caused by failure to act

Alberta argues the Panel has no ability to consider omissions from the LARP and in doing so attempts to artificially separate harms caused by the express provisions of the LARP from harms caused by silence in the LARP.

Contrary to Alberta's suggestion, LARP's silence on the issues raised by Cold Lake is not simply maintenance of the *status quo*. When LARP purports to do something, but is silent on how that thing will be done, this does not maintain the *status quo*. It is a failure of the LARP to plan for or achieve its objectives. It is the failure of the plan to address and achieve its objectives (by omission) that causes probable harm to Cold Lake.

It is a long standing principle of negligence law that when a party has an obligation it can cause harm through omission – or the failure to fulfill its duty.[3] Recent case law also supports this Panel's jurisdiction to consider omissions. In *Daniels*[4], the Federal Court found even if it did not have the ability to compel Canada to pass specific legislation vis-à-vis Métis or non-Status Indians, there was a practical effect in declaring that Canada had the constitutional authority to do so. The Court rejected Canada's arguments that only its legislative actions could be challenged as opposed to legislative inactions.

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[1] RSA 2000, c A-3 ("*APJA*").
[2] *Alberta Land Stewardship Regulation*, Alta. Reg. 179/2011, s. 5(1)(c).
[3] *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 SCR 1186, paras. 17-24.
[4] *Daniels v. Canada*, 2013 FC 6; upheld in part, 2014 FCA 101; leave to appeal sought, [2014] SCCA No. 272.

The principles of statutory interpretation require one to avoid an absurd result.[5] If LARP could only be challenged based on what it includes rather than what it omits, then the entire Plan would be immune from Review due to poor planning. What if, for instance, the entire Lower Athabasca region was designated for industrial development? In this example, no Albertan could complain that there were no conservation areas. This is exactly what Alberta argues here – i.e. because Alberta did not include areas or thresholds to protect the exercise of Treaty and Aboriginal Rights, First Nations have no ability to seek a Review. This absurd result could not be what was intended by the Legislature. There is no point in legislating a public review mechanism if the Panel interprets its jurisdiction so narrowly as to prevent any reviews from occurring.

Cold Lake submits that the omissions described in its Request for Review are the very failures which create a reasonable probability of harm. Accordingly, harm caused by omissions must be considered by the Panel in conducting its review of the LARP.

(b) Alberta's ability to legislate regarding aboriginal interests

Alberta also suggests that the LARP cannot explicitly include mechanisms for managing traditional land use or access for the exercise of Treaty Rights because Alberta's jurisdiction to do so is limited by the federal-provincial division of powers in the *Constitution Act, 1867*. Alberta goes on to suggest that it cannot legislate such that Indians are singled out for special treatment and, accordingly, that LARP cannot define somebody as being "Indian" or not or define lands to which "Indians" have a right of access. Alberta incorrectly cites these principles to suggest that LARP cannot include mechanisms for managing traditional land use or access for the exercise of Treaty Rights.

This is absurd. Alberta's conclusion flies in the face of its own recognized constitutional obligations, misinterprets established case law and ignores current legislation in Alberta and other provinces. For example:

- Alberta is constitutionally required to honourably implement Treaty 6.[6] The *Natural Resources Transfer Agreement*, Alberta's sole source of authority to utilize resources within provincial boundaries, obligates Alberta to ensure First Nations have the ability to exercise their Treaty and Aboriginal Rights on unoccupied Crown land.[7] Now Alberta says that it does not have the jurisdiction to fulfill these obligations! Alberta's jurisdiction and responsibility to First Nations

[5] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, para. 27.
[6] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, paras. 19 and 35; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, para. 33.
[7] *Natural Resources Transfer Agreement, 1930* (Alberta) (Schedule of *Constitution Act, 1930*, RSC 1985, App. II, No. 26, para. 12 ("*NRTA*").

arises from exactly the same source of its perceived power to infringe Treaty Rights – the "taking up" clause and the *NRTA*. Alberta cannot claim the benefit and deny the responsibilities.

- Provincial regulation and prioritization of resources in support of s. 35 of the *Constitution Act, 1982* is well recognized in Canada. See *R. v. Sparrow*.[8]

- Alberta's First Nations Gaming Policy – A policy developed by the Province of Alberta in respect of on-reserve casinos deals specifically with "Indians" and their "special treatment".

- Similarly, in *Lovelace v. Ontario*, the Supreme Court of Canada held that an Ontario casino program using the definition of "band" in the *Indian Act* did not encroach on federal legislation because it didn't impair status of appellants as aboriginal persons.[9]

Cold Lake submits that Alberta can enact legislation that protects traditional land uses and improves access for the exercise of Treaty Rights by prioritizing interests. LARP should have recognized and prioritized First Nation Treaty and Aboriginal Rights, but failed to do so. Despite Alberta's position to the contrary, LARP must address these issues in a meaningful way in order to achieve its objectives.

LARP does not prioritize, recognize or protect First Nation Treaty and Aboriginal Rights. This represents a complete failure of LARP – which Alberta is now trying to obscure and avoid with unfounded legal wrangling.

(c) Cold Lake Air Weapons Range ("CLAWR")

Alberta suggests that the LARP cannot identify any plan for the CLAWR because the CLAWR is designated as a military reserve. Alberta's submissions imply that it does not have any obligations in this area.

Alberta has the jurisdiction and authority to regulate natural resources development (including timber and oil sands), environment and wildlife within the CLAWR. Alberta is not prevented from including a plan for the CLAWR within the LARP – it has simply failed to do so. Cold Lake believes this was an error made by those involved in developing the Plan who did not understand the Lease Agreement between Canada and Alberta. Omission of this large area from the LARP should be reviewed.

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[8] *R. v. Sparrow*, [1990] 1 SCR 1075.
[9] *Lovelace v. Ontario*, 2000 SCC 37, paras. 109-111.

2. LARP's "inclusion of Aboriginal peoples in land-use planning" is not effective or meaningful

Alberta incorrectly frames this issue as whether or not the Panel has jurisdiction to consider the adequacy of consultation during LARP creation or implementation. Cold Lake's actual complaint is not just that consultation was inadequate (which it was) but that the effect of inadequate consultation was that Alberta created an inadequate land use plan.

The objective of Outcome 7 of LARP is to "encourage aboriginal peoples' participation in land use planning and input to decision making." A number of specific strategies are then described for implementing the outcome. Alberta suggests that harms related to these specific provisions of the LARP are not within the Panel's jurisdiction to consider because they are not harms caused by the content of LARP. This argument is illogical. The offending contents of LARP are the strategies for inclusion of aboriginal peoples' participation. Cold Lake submits these strategies are ineffective to address traditional land uses. It is the ineffectiveness of the strategies within the LARP which leads to a reasonable probability that there will be a direct and adverse impact on the ability of its members to practice Treaty and Aboriginal Rights.

Cold Lake submits that the Panel must have the jurisdiction to consider the strategies described in the LARP and the efficacy thereof. After all, LARP is a plan. It is intended to guide future action. The Review period runs 12 months from the date of implementation.[10] It is therefore clear the Legislature intended the Panel have jurisdiction to consider the effectiveness of the LARP as it is implemented in the future. Cold Lake submits the current LARP will not be effective in the future based on the weak language of Outcome 7 and Alberta's demonstrable failures to incorporate what it learned in consultation with First Nations into the existing LARP.

Because the strategies have not yet been implemented, promises of ongoing involvement can only be measured by past actions. While Alberta says it included aboriginal peoples in LARP land-use planning processes, Alberta provides no evidence in its response as to how feedback from aboriginal peoples was actually considered or incorporated in the LARP.

Alberta goes onto suggest that LARP provides for effective and meaningful engagement and consultation by citing a number of references in the LARP to Alberta's continuing commitment to consult with aboriginal peoples. However, notably absent from these references from the LARP are any evidence or indication as to how and when these commitments will be met. We note that this is the same question posed by the Panel in

[10] *Alberta Land Stewardship Act*, SA 2009, c A-26.8, s. 19.2(1).

its information request and refused by Alberta. Cold Lake submits that omissions and vague promises from Alberta are not sufficient to ensure future engagement is effective or meaningful.

3. Panel must consider principles of constitutional law and has jurisdiction to consider any constitutional issue

Alberta sets up a straw-man by arguing that the Panel may not determine questions of constitutional law and may not make a determination that LARP infringes Cold Lake members' Treaty or Aboriginal Rights. Cold Lake did not ask the Panel to determine any questions of constitutional law.

A "question of constitutional law" is defined in the *APJA* as i) any challenge to the applicability or validity of federal or provincial legislation, or ii) a determination of any constitutional right.[11] Cold Lake does not ask the Panel to consider either of these questions in its Review. The fact is, as acknowledged by Alberta, Cold Lake has constitutionally protected Treaty and Aboriginal Rights which are impacted by Alberta's land use planning. Those Rights exist and need not be determined by the Panel.

We note that the Panel most certainly is permitted to consider constitutional principles in conducting its Review. The Supreme Court of Canada has held that a tribunal may consider constitutional principles even where it is expressly prohibited from considering questions of constitutional law.[12]

Cold Lake submits that the Panel is required to consider a number of factors in determining whether there is a reasonable probability that Cold Lake's "health, property, income or quiet enjoyment of property...is being or will be more than minimally harmed by the regional plan." In making this determination, the Panel can – and must – consider constitutional principles such as the honour of the Crown and the Crown's fiduciary obligation to uphold and fulfill its Treaty promises. The real question that Alberta is trying to avoid with its legal gymnastics is whether LARP adequately fulfills the Crown's obligations and whether the glaring omissions from LARP may create a reasonable probability of harm to First Nations.

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[11] *APJA*, s. 10(d).
[12] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, paras. 68-73.

4. Alberta's statements of fact are not supported by any evidence

Throughout its response, Alberta makes a number of bold statements of fact without providing any evidence. For example:

- At para. 58 and as described above, Alberta makes a number of references to Alberta's "commitment" to engage with and consult aboriginal peoples. However, Alberta provides no information as to how and when these commitments will be implemented or met. First Nations have consistently expressed frustration and disappointment with Alberta continually paying "lip service" to these principles without ever demonstrating any real commitment to fulfillment.

- At para. 63, Alberta suggests that the "reduction in land disturbance by the creation of conservation areas is expected to enhance opportunities for the exercise of Treaty Rights and traditional uses" but provides no evidence as to where or how this will happen. Alberta makes a similar suggestion at para. 86 by describing the size of the planned conservation areas, but provides no evidence that these areas will be sufficient to support traditional land use by Cold Lake members or the many other First Nations within the LARP area. Cold Lake would like to know whether Alberta prepared even a single study or report which examined the amount of land and wildlife resources necessary to support the continuing exercise of Treaty Rights by First Nations in the LARP area and, if so, what are the results of that study?

- At para. 73, Alberta argues that LARP does not increase the potential for harms related to multiple uses within conservation areas or industrial or tourist development to be located near or abutting reserve lands, but rather that LARP reduces the likelihood that these harms will occur. Alberta provides no evidence to support this statement. Again, Cold Lake would like to know if Alberta prepared any studies to assess the effectiveness of its assumption.

- At para. 88, Alberta concludes that because triggers and limits within the Air Quality Management Framework are based on human health and environmental health, those triggers and limits are supportive of traditional land use. This conclusion is another untested assumption. To Cold Lake's knowledge, Alberta has never researched or developed air quality standards which reflect the unique circumstances of traditional land users. Cold Lake's own food studies show that traditional land users tend to ingest higher quantities of environment toxins than persons not engaged in those practices. Can Alberta demonstrate any consideration of the unique health impacts of pollution on traditional land users?

- At paras. 119 and 122, Alberta suggests that Cold Lake "will not be adversely affected by LARP's designation of Clyde Lake and Winifred Lake as provincial recreation areas and will, in fact, benefit from increased regulation of recreational activity in the area" and that designation of these areas will "support the exercise of traditional activities on the landscape." Alberta provides no evidence on which these conclusions are based. Cold Lake, however, has provided a significant amount of evidence in its Request for Review as to how increased tourism and recreation will directly and adversely affect the exercise of members' Treaty and Aboriginal Rights (see pages 11-12 of Request for Review).

In conclusion, Cold Lake respectfully submits that contrary to Alberta's Response, this Panel has both the jurisdiction and responsibility to engage in this Review and requests that it does so as the Nation has demonstrated "a reasonable probability" that the Nation's health, property and enjoyment of property will be harmed by the LARP. Cold Lake restates its request for relief as stated at page 16 of its Request for Review.

Yours truly,

WITTEN LLP

Per:

KELTIE L. LAMBERT

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cc: Cold Lake First Nation, Chief and Council