IN THE MATTER OF

Request for Review of the Lower Athabasca Regional Plan
Pursuant to s. 19.2 of the Alberta Land Stewardship Act
Submitted by the Athabasca Chipewyan First Nation

August 25, 2014

# REPLY SUMBISSIONS OF ATHABASCA CHIPEWYAN FIRST NATION

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## I. Overview

1. On August 19, 2013 and August 31, 2013 ACFN provided a request for review of the Lower Athabasca Regional Plan, pursuant to section 19.2 of the *Alberta Land Stewardship Act* ("*ALSA*", or the "Act") and the *Alberta Land Stewardship Regulation* (the "Regulation")("ACFN's Request"). In March 2014, the Stewardship Minister established *Rules of Practice for Conducting Reviews of Regional Plans* (the "Rules"). On June 27, ACFN was served with Alberta's Response to ACFN's Request. [1]

2. Alberta's Response indicates misapprehension regarding the settled law in relation to the nature, scope and content of Treaty Rights. Claims such as those made at paragraph 44 of Alberta's Response highlight the need for the Review of LARP by an independent and impartial body who will make considered, informed recommendations to the Minister regarding the manner in which LARP could be amended to remedy the harms that flow and will flow to ACFN from LARP in its current form.

3. Alberta's Response urges this Panel to refrain from considering the bulk of ACFN's Request for Review, on the basis of some creative but legally unsound argument regarding the Panel's role and jurisdiction in the context of ALSA and LARP.

4. Alberta further urges this Panel to find that ACFN has not established direct and adverse effect.

5. ACFN has provided ample information to establish direct and adverse effects on its Treaty Rights and the interconnected impacts on the health, income and beneficially owned property of its members. ACFN agrees with Alberta that LARP cannot and does not change Canada's Constitution. We agree that Treaty Rights exist regardless of what Alberta legislates.[2] ACFN does not concur that constitutional protection remains intact regardless of what Alberta legislates. While in theory that is the case , and Alberta has assumed the duties fiduciary duties that lie on the Crown in dealing with Aboriginal interests and should ensure that meaningful protection exists,[3] in practice in Alberta's legislation regarding natural resource development has tended to steamroll over ACFN's rights, health, and property interests.

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[1] Legal submissions received electronically after business hours at 6:06 MT, June 26, 2014: **ACFN Document Tab D10**. The remainder of the Response material, including documents in support were received via courier on June 27, 2014.

[2] Response at 30.

[3] Grassy Narrows 2014 SCC 48 at paras 50-52, **Tab 7A**.

## II. Alberta's Abuse of the Review Panel Process

6. At the outset, ACFN wishes to note specific aspects of Alberta's submissions that in our view, constitute abuse of this Panel's process.

7. First, ACFN directs the Panel's attention to Alberta's assertion that under LARP, the Applicant's ability to raise concerns with project-specific regulatory decision-makers about the impacts of specific projects on treaty rights remains intact. [4]Alberta misleads the Panel with this submission.

a. Rule 6.2(2)(d) of the Alberta Energy Regulator's Rules of Practice allow for the Regulator to disregard concerns related to a policy of the Province. LARP is a manifestation of Alberta policy. [5]

b. When ACFN has tried to raise concerns about the specific impacts of projects on its ability to exercise its treaty rights, Alberta's Aboriginal Consultation Office, charged with determining the level of impact experienced by ACFN and whether consultation has been adequate, advises that concerns are 'out of scope' and best dealt with under LARP. For example, in an April 22 letter, the ACO advised that ACFN's concerns about bitumen exploration program located within one of ACFN's critical use areas, homeland zones, and caribou and bison protection zone – location specific concerns to ACFN but regional concerns to Alberta - which would impact the ability to exercise rights in the area, was to be dealt with under LARP. [6]

c. The Regulator recently denied ACFN the opportunity to raise specific concerns about the impacts of a winter drilling Projects on the exercise of its Treaty Rights in a particular location, with reference to a previous decision that found that such matters are best dealt with under LARP. [7]

8. Second, Alberta has taken inconsistent positions on whether impact at a specific location can adversely impact Treaty Rights. In its Response, in the first instance under the heading "Panel has no Jurisdiction to consider Allegations of Harm Related to the Implementation of LARP" Alberta advances the position that there is no adverse impact to ACFN because a changing landscape may change the exercise of Treaty Rights

[4] Response at para. 31.
[5] *Re Teck Resources* 2013 ABAER 017 at para. 63. **Tab 20**
[6] Letter ACO to ACFN April 22, 2014, **Tab D15**.
[7] Letter, AER to ACFN July 18, 2014 **Tab D3**; *Re Teck Resources*, 2013 ABAER 017 at paras. 53-55, 62-63. **Tab 20**.

without harming such rights. [8] According to Alberta, the LARP review is the wrong place to raise landscape level changes.

9. This is a fundamentally inconsistent position than that espoused by Alberta in its Consultation Guidelines, which insist that First Nations provide "site-specific" concerns, in order to trigger an acknowledgement by Alberta of the potential for adverse impacts:

> The scope of consultation is related to. . . potential impacts on Treaty rights and traditional uses at that location. . . the [consultation] framework will be enhanced over time with geographically referenced information that captures areas of known use and areas of significance identified by First Nations. Factors that may determine the sensitivity of a location include history of use and level of contemporary use, the presence of ceremonial sites, or other values to indicate the importance of the site for Treaty rights and traditional uses.[9]

10. Third, ACFN takes issue with Alberta's assertion that ACFN has raised questions of constitutional law,[10] and that these are outside of the Panel's jurisdiction to decide due to the operation of the *Administrative Procedures and Jurisdiction Act*. ACFN submits that there is a clear distinction between this Panel considering constitutional rights in the course of its duties, and determining questions of the applicability or constitutionality of legislation, or making a determination of rights.

11. Alberta and the Crown's submission that the Panel is a "decision-maker" to which the *Administrative Procedures and Jurisdiction Act* ("*APJA*") [11] is incorrect as the applicable legislation, and regulations state otherwise. The Panel's role is merely to provide non-binding recommendations to the Minister. [12] As such, it is outside the Panel's jurisdiction to "decide matters" and "grant a statutory consent". As such, the Panel is not a "decision-maker" as defined in *ALSA*[13] or a "decision-maker" as defined in *APJA.*[14] Therefore, the APJA does not apply to the Panel in any event. Alberta attempts to mislead the Panel with reference to the *Siksika* case, where the chambers judge clearly found that the Environmental

[8] Response at paras.76 and 114.
[9] The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management, July 28, 2014 at pages 13-14, **Tab 36**.
[10] Response at paras. 4, 40, 48,.
[11] Response para 49.
[12] ALSA at 19.2.(2) and Regulation at 18(1)(3).
[13] ALSA at s. 2(e). The Panel does not grant a consent.
[14] APJA at s. 10(b) The Panel does not decide any matter under any act. **Alberta's Tab 8**.

Appeals Board could issue orders (thereby bringing it within the APJA definition of authority). [15]

*12.* ACFN is not requesting that the Panel to determine "a question of constitutional law" or find "that LARP somehow infringes the Applicant's members' treaty rights or Aboriginal rights [16] as noted in Alberta and the Crown's respective submissions. [17] ACFN is not requesting that the Panel determine whether consultation is sufficient. ACFN it is not asking the Panel to determine by virtue of the Constitution of Canada, the applicability and validity of the LARP, nor is seeking Panel determinations of its rights. ACFN is merely requesting that based on the information provided in its Application, Supplementary Submission, and this Reply that the Panel find specific provisions of LARP, or LARP in its entirety, directly and adversely impacts its Treaty rights and recommend to the Minister that those said provisions be amended.

13. This does not mean that the Panel cannot consider ACFN's Rights. Based on the purposes and objectives of ALSA, and in particular section 1(1) , ACFN submits that the exclusion of the bulk of ACFN's application based on its constitutionally protected rights was not intent of the *ALSA* and is contrary to the purposes as defined in the Act. ACFN is of the view that "and other rights of Individuals" surely includes constitutional rights and thus, Aboriginal and Treaty rights. As such, ACFN is merely requesting that the Panel consider ACFN's rights along with the rights of other persons as noted in s. 1(1).

14. ACFN notes *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management* (the "*Guidelines*")[18] to assist in clarifying the difference of constitutional issues and questions of constitutional law. The *Guidelines* state that "Ministries with statutory and regulatory responsibilities related to Crown land and natural resource management in Alberta are responsible for ensuring that First Nations are consulted if there is potential for adverse impact on the exercise of Treaty rights and traditional uses".[19] Similarly to the Panel, the Alberta Consultation Office (the "ACO") is without jurisdiction to decide questions of constitutional law.[20] Despite being without said jurisdiction, the ACO's responsibilities include:

    a. Assessing if the duty to consult is triggered;

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[15] Siksika First Nation v. Alberta (Director, southern Region, Environment) 2007 ABCA 130 at para.7, **Tab 23**; and see *EPEA* at sections 90-95, **Tab 31**.
[16] Response Submissions at para. 52.
[17] Response Submissions at paras. 53 and 52, respectively.
[18] July 28, 2014. [*Guidelines*].
[19] *Guidelines* at page 3.
[20] *Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006

b. Assessing which First Nations should be consulted;

c. Assessing the level of scope of consultation;

d. Providing proponents with advice and appropriate information regarding potential adverse impacts to the exercise of Treaty rights and traditional uses;

e. Advising First Nations and proponents of consultation requirements;

f. Reviewing and approving consultation plans as appropriate;

g. Directing proponents to provide First Nations with early and adequate notification;

h. Monitoring proponent activities;

i. Evaluating consultation records;

j. Providing adequacy decisions for AER approvals and providing adequacy assessments with recommendations for all others; and

k. Notifying First Nations and Proponents about ACO adequacy decisions for AER approvals.[21]

15. ACFN also notes all applicants in this review are First Nations. Had the Minister been of the opinion the Panel did not have proper jurisdiction to decide whether ACFN's Treaty rights are directly and adversely affected by LARP, the Minister surely would have exercised its discretion under section 6 of the ALSA and referred the matter to a board of competent jurisdiction:

> 6(1) On receiving an application, the Stewardship Minister may, for the purpose of the conducting of a review of a regional plan in accordance with section 9,
>
> (a) appoint members to a panel, or
>
> (b) refer the request for review to a board or other body established under another enactment if the Stewardship Minister considers that the board or other body has suitable expertise and resources.

[21] *Guidelines* at page 8.

16. Finally, we note that in other proceedings, Alberta has taken the position that strict compliance with the APJA, its regulations, and associated form, is required of an Aboriginal Group before a question of constitutional law can be considered to be raised.[22]

17. ACFN submits that the contrary and inconsistent positions taken by Alberta on these issues interferes with the integrity of the administration of justice, and constitutes an abuse of process. We direct the Panel's attention to the case of *Chevron v. Canada (Executive Director of Indian Oil and Gas Canada)*.

18. In that case, the court found that as between two proceedings the bands had adopted inconsistent positions with respect to identical issues. Duplicative and contrary allegations were stayed with the Court finding that it would be "vexatious and an abuse of the court's process to require the duplicative and contrary allegations against the Crown to continue at this time." [23]

19. In the case of *Mystsar Holdings Ltd. V. 247057 Alberta Ltd*. the Court found that once a party files an action or proceeding where a given factual or legal position is made, this constitutes an irrevocable election. A party is not free to deliberately argue diametrically inconsistent facts in various actions, thus knowingly advancing irreconcilable positions which are not articulated as alternative claims. The Court adopted *Chevron*, stating that in certain circumstances, taking contrary positions on the same issue in separate proceedings may constitute an abuse of process. [24]

## III. Alberta's Mischaracterization of ACFN's Treaty Rights

20. Alberta always has notice of the contents of ACFN's rights under Treaty 8. [25] Alberta has been aware of the incidental rights claimed by ACFN since XXX [date of original larp submission] and has never disputed their characterization before June 26, 2014. Despite a wealth of jurisprudence supporting

21. The Government of Alberta ("Alberta") and the Crown have asserted that:

[22] i.e. *Re Imperial Oil* 2007 Carswell Alta 704 at paras. 41-43, **Tab 5**; Submissions of Alberta to the Joint Review Panel for the Jackpine Mine Expansion at paras. 6-8, 11-17, **Tab D4**.
[23] 2005 ABQB 2 at paras. 37-41, 46, 49, 60 and 61-63.
[24] 2009 ABQB 480 at paras. 14, 17-30; 53, 54, 62.
[25] Mikisew Cree, infra

Alberta does not necessarily agree with any or all of the Applicant's characterization of its members' rights, activities and land use.[26]

22. We ask that Alberta and the Crown to reconsider this position and for the Panel to disregard Alberta and the Crown's current position, based in particular on the Supreme Court of Canada decisions of *Simon v. The Queen,*[27] *R. v. Sundown,*[28] *Mikisew Cree First Nation v. Canada*,[29] and *Dene Tha' First Nation v. Canada.*[30]

*23.* In *Mikisew* the Supreme Court of Canada noted "In the case of a treaty the Crown, as a party, will always have notice of its contents".[31] *Mikisew* also confirmed that Treaty 8 secured for First Nations a core entitlement to the "meaningful" exercise of their Treaty Rights *in perpetuity* and relied on The Report of Commissioners who negotiated Treaty 8 for its assertion:

The Commissioners wrote:

> There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges. . . .
>
> We pointed out . . . that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them....
>
> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals

[26] Response Submissions of the Government of Alberta and the Crown, June 25, 2014 at para. 7. [*The Response Submissions*].
[27] [1985] 2 S.C.R. 387 at para. 31.
[28] [1999] 1 S.C.R. 393 at para. 30.
[29] 2005 SCC 69 at paras. 34 and 47-48.
[30] 2006 FC 1354.
[31] 2005 SCC 69 at para. 34.

would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it. [Emphasis added.] [32]

24. *Dene Tha'* confirms that Treaty 8 harvesting rights include the right to gather plants.[33] *Simon, Sundown*, and *Mikisew Cree First Nation* clearly establish that treaty harvesting rights do not simply protect the bare rights to hunt, trap, fish and gather somewhere in a defined territory, without anything more. Rather, they protect "that which is reasonably incidental" to harvesting:

That which is reasonably incidental is something which allows the claimant to exercise the right in the manner that his or her ancestors did, taking into account acceptable modern developments or unforeseen alterations in the right … The inquiry is largely a factual and historical one. Its focus is not upon the abstract question of whether a particular activity is "essential" in order for hunting to be possible but rather upon the concrete question of whether the activity was understood in the past and is understood today as significantly connected to hunting. Incidental activities are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked.[34]

25. In *West Moberly First Nations*, the B.C. Court of Appeal confirmed:

… [W]hile specific species and locations of hunting are not enumerated in Treaty 8, it guarantees a "continuity in traditional patterns of economic activity" and respect for "traditional patterns of activity and occupation". The focus of the analysis then is those traditional patterns.

…

The chambers judge did not err in considering the specific location and species of the petitioners' hunting practices.[35]

26. In our submission, all of the matters identified above are integral aspects of ACFN's traditional hunting, trapping, fishing and gathering activities and required to support the "meaningful" exercise of these rights.

27. Of course, the duty to consult extends not only to established rights, but also those reasonably asserted by a First Nation. Therefore, even if Alberta maintains the view that the above matters are not aspects of ACFN's Treaty 8 rights, Alberta has a legal duty to consult about the potential impacts of the any interference with ACFN's activities and

[32] 2005 SCC 69 at paras. 47-48.
[33] 2006 FC 1354 at para. 11.
[34] *R. v. Sundown*, [1999] 1 S.C.R. 393 at para. 30.
[35] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, paras. 137, 140.

values. Alberta also has a legal duty to propose reasonable accommodations for adverse impacts from the Projects on those activities and values.

*28.* Although Treaty 8 contemplates and provides for the taking up of land, such "taking up" directly and adversely affects Treaty beneficiaries of the ability to meaningfully exercise their harvesting rights.[36]

29. It is ACFN's view that the matters listed above are dimensions of ACFN's Treaty 8 rights as characterized in its August 19, 2013 submission and August 31, 2013 supplemental submissions ("ACFN's Submissions").

30. Lastly, it should be noted that Alberta in its own capacity or that of the Crown has not taken issue with the characterization of ACFN's Treaty and Aboriginal rights throughout "the LARP land-use planning processes and decisions at the strategic level during LARP creation".[37] As such, it is in ACFN's view Alberta should be precluded from doing so now. In any event, on the basis of the above, it is in ACFN's view its characterization of rights in line with jurisprudence with the respect to the same.

**a. Alberta's Characterization of the Contemporary Practice of ACFN's Treaty Rights]**

31. ACFN's application included concerns speaking to the direct and adverse affects the LARP's designation of public land use areas for recreation and tourism ("PLART") would have on its Aboriginal and Treaty rights. ACFN also identified specific concerns with the Richardson Conservation area and mine development in the adjacent Richardson PLART. In response to ACFN's above noted concerns, Alberta and the Crown submit that "a changing landscape may change the exercise of treaty rights, without "harming" such rights"[38] on the basis:

> that treaty rights, while constitutionally recognized and affirmed, are not unlimited. Specifically the treaty right to hunt, trap and fish for food is not site-specific; it is the activity which is protected. Further, the Supreme of Court of Canada has found for the exercise of treaty rights

[36] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, para. 48.
[37] The *Response Submissions* at para. 56, Response *to Aboriginal Consultation on the Draft Alberta Land-Use Framework* 2008, printed September 2009, ISBN. 978-0-7785-8710-1, available on the Land Use Secretariat website at https:landuse.alberta.ca/Governance/AboriginalPeoples/Pages/default.aspx and also R*esponse to Aboriginal Consultation on the Lower Athabasca Regional Plan*, ISBN. 978-1-4601-0456-9 (Online Version), available on the Land Use Secretariat website at https://landuse.alberta.ca/LandUse%20Documents/Response%20to%20Aboriginal%20Consultation%20on%20the%20Lower%20Athabasca%20Regional20Plan%20-%202103-06.pdf
[38] The Response Submissions at paras. 76 and 114.

that changes in method do not change the essential character of the practice nor diminish the rights. Accordingly a First Nation's exercise of a treaty right in a manner different from that previously used does not necessarily diminish the exercise of the treaty right.[39]

32. Alberta and the Crown have also alleged "that the regulation of motorized access is intended to ultimately support the Applicant's exercise of treaty rights".[40] However, this is contrary to Alberta and the Crown's stated position that "these new PLARTs were created to provide recreation and tourism opportunities, with the continuation of industrial development managed to reduce the impact on recreation and tourism features".[41]

33. ACFN believes the correct approach to PLART's demand the Crown act honourably and relies on the following passage in *Mikisew* to support the same:

> Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably.[42]

34. Alberta and the Crown rely on *R. v. Lefthand* to support its allegations that "the treaty right to hunt, trap and fish for food are not site specific".[43] ACFN submits Alberta and the Crown's statement, in the context of Treaty 8, is over inclusive and thus incorrect. ACFN notes *R. v. Lefthand* was a determination made in regard to Treaty 7 and further, the activity at issue was fishing.[44] As such, ACFN believes this case is little value in the current context. It is in ACFN's view that *R. v. Badger* is of better analogy. In *R. v. Badger*, the Supreme Court of Canada had the opportunity to define the geographical limitations on Treaty 8 hunting rights in the context of huge swaths of land similar, to the provisions of LARP, and unlike the determinations of on restricted fishing access points as noted in *R. v. Lefthand*.[45] ACFN also submits the comments of the Court of *R. v. Hamelin,* to further distinguish *R. v. Lefthand* and support its assertions with respect to *R. v. Badger*:

> Slatter J.A. distinguished the test developed by the Supreme Court in ***Badger*** and ***Marshall***, on the basis that ***Badger*** involved a provincial regulation and a treaty modified by the *NRTA*, while in ***Lefthand*** federal regulations and the express wording of

[39] The Response Submissions at para. 76.
[40] The Response Submissions at para. 109.
[41] The Response Submission at para. 75.
[42] [2005] 3 SCR 388 at para. 33.
[43] The Response Submissions at para. 76.
[44] *R. v. Lefthand*, 2007 ABCA 2006, at paras 3 and 4.
[45] [1996] 1 R.C.S. at para. 20. 59 and 66.

the treaty itself were involved (the *Alberta Fisheries Regulations* having been passed under the Federal *Fisheries Act*). The wording of the *NRTA* was inapplicable to the ***Lefthand*** analysis as Federal legislation was impugned, negating the need to analyse section 12 of the *NRTA* (which allows provincial conservation laws to apply to treaty rights holders).[46]

***Lefthand*** and ***Eagle Child*** are both Treaty 7 cases. For the purposes of this appeal, the provisions of Treaty 7 and Treaty 8 are not materially different. Slatter J.A. noted one significance difference between the holders of Treaty 8 rights from the holders of Treaty 7 rights. As found in ***Badger***, the Treaty 8 Indians were guaranteed that they "shall have the right to pursue their usual vocations of hunting, trapping and fishing".[47]

35. The Court then went on to find:

I struggle trying to reconcile ***Lefthand*** with ***Badger.*** The distinguishing feature appears to be that the hunting restrictions in ***Badger*** were found in Provincial regulations that were passed under the *NRTA* while the fishing restrictions in ***Lefthand*** were passed under Federal legislation. Slatter J.A. appears to be holding that the Federal regulatory reservation in Treaty 7 is stronger or less assailable than Provincial conservation regulatory powers under the NRTA.[48]

While there are technical differences between ***Badger*** and ***Lefthand***, the differences do not in my view support a deviation from the analysis enunciated in the Supreme Court's jurisprudence on the infringement of treaty rights. Whether the express regulation clause is contained in the words of the treaty itself or in the *NRTA* should make no difference to the analysis; the underpinnings are the same. Cory J. stated in ***Badger***, supra at paras. 83-84:

> It will be remembered that the *NRTA* modified the Treaty right to hunt. It did so by eliminating the right to hunt commercially but enlarged the geographical areas in which the Indian people might hunt in all seasons. The area was to include all unoccupied Crown land in the province together with any other lands to which the Indians may have a right of access. Lastly, the province was authorized to make laws for conservation...
>
> The *NRTA* only modifies the Treaty No. 8 right. Treaty No. 8 represents a solemn promise of the Crown. For the reasons set out earlier, it can only be modified or altered to the extent that the *NRTA* clearly intended to modify or alter those rights. The Federal government, as it was empowered to do, unilaterally enacted the *NRTA*. It is unlikely that it would proceed in that manner today. The manner in which the *NRTA* was unilaterally enacted strengthens the conclusion that the right

[46] 2010 ABQB 529 at para. 52. [*Hamelin*].
[47] *Hamelin* at para. 53.
[48] *Hamelin* at para. 56.

> to hunt which it provides should be construed in light of the provisions of Treaty No. 8. [Emphasis added].[49]

Both a treaty itself and a treaty as modified by the *NRTA* are agreements delineating the rights of aboriginal peoples. For the purposes of an inquiry into whether or not a treaty right has been unjustifiably infringed, there appears to be no distinction between them. As well, whether the source of the legislation is provincial or federal, the honour of the Crown is equally at stake.[50]

36. Based on the foregoing ACFN submits *R. v. Lefthand* finds little authority in the context of Treaty 8 and submits *R v. Badger* to be of better analogy and of correct law in the context of Treaty 8. To further rebut Alberta and the Crown's allegations with respect to rights being site specific [51] ACFN relies on the binding authority in Supreme Court of Canada in *Mikisew* :

> More significantly for aboriginal people, as for non-aboriginal people, location is important. Twenty-three square kilometres alone is serious if it includes the claimants' hunting ground or trapline. While the Mikisew may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area, it makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and traplines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf (a suggestion that would have been all the more impractical in 1899). The Chipewyan negotiators in 1899 were intensely practical people, as the Treaty 8 Commissioners noted in their report (at p. 5):
>
> > The Chipewyans confined themselves to asking questions and making brief arguments. They appeared to be more adept at cross-examination than at speech-making, and the Chief at Fort Chipewyan displayed considerable keenness of intellect and much practical sense in pressing the claims of his band.
>
> *Badger* recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines.[52]

[49] *Hamelin* at para. 57.
[50] *Hamelin* at para. 58.
[51] The Response Submissions at para. 76.
[52] [2005] 3 SCR 388 at para. 47.

37. ACFN agrees with Alberta and the Crown's suggestion that Aboriginal and Treaty rights are not frozen.[53] As such, ACFN believes the use of motorized vehicles in hunting is the modern evolution of its Aboriginal and Treaty right to hunt and further, motorized vehicles are a necessity when hunting for larger game. ACFN believes the restrictions on motorized access to, around, and on its traditional territory directly and adversely affects ACFN's ability to exercise its Treaty and Aboriginal rights. In response to Alberta and the Crown's submission with respect to imposing restrictions on motorized access[54]ACFN's view that imposing restrictions on motorized access results in undue hardship to ACFN and denies ACFN's its preferred means of exercising its Aboriginal and Treaty rights. ACFN cites once again to the Supreme Court of Canada to support its assertion:

> This Court has held on numerous occasions there can be no limitation on the method, timing and extent of Indian hunting under a Treaty....*Horseman*, *supra*, clearly indicated that such restrictions conflicted with the treaty right.[55]

38. In any event, ACFN points to the Government of Alberta's own *Guidelines* which explicitly notes the significance of location with and has implemented a framework it expects "will be enhanced over time with geographically referenced information that captures areas of known use and areas of significance identified by First Nations".[56] The *Guidelines* state that "Factors that may determine the sensitivity of a location include history of use and level of contemporary use, the presence of ceremonial sites, or other values to indicate the importance of the site for treaty rights and traditional uses".[57] Additionally, "if the First Nation provided site-specific concerns about how the proposed project may adversely impact their Treaty rights and traditional uses," it must be determines whether "reasonable attempts to avoid and/or mitigate those potential impacts" has occurred.[58]

39. ACFN has concerns with Alberta and the Crown's findings that "any impacts to the Applicant are reasonable and will be minimal". [59] It is in ACFN's view that both Alberta and the Crown have incorrectly interpreted the jurisdiction of Alberta and the LARP with respect to its determinations on the evolution of ACFN's Treaty and Aboriginal rights and consequently, the LARPs imposition of restrictions based on the same. Further,

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[53] Response Submissions at para. 76 and 114.
[54] Response Submissions at paras 96, 109, 111, 113 and 130.
[55] *R. v. Badger* [1996] 1 S.C.R. at para 90.
[56] *Guidelines* at page 14.
[57] *Guidelines* at page 14.
[58] *Guidelines* at page 17.
[59] The Response Submissions at paras. 119.

ACFN submits it exceeds both Alberta and the Crown's jurisdiction to determine whether the LARP's direct and adverse impacts on ACFN's Aboriginal and Treaty rights are reasonable and minimal.

40. Perhaps it is Alberta's misapprehensions regarding the content and scope of ACFN's Treaty Rights that have contributed to its flawed understanding of the jurisdiction of the Panel to consider direct and adverse impacts on same, and the overlapping direct and adverse impacts on ACFN member's health, income, property, and quiet enjoyment of property.

## IV. The Scope of the Review Panel's Jurisdiction

### a. Relevant Principles of Statutory Interpretation

41. Alberta suggests that this Panel's jurisdiction is limited, to the point of absurdity. Alberta's submissions are not based upon, nor do they even reference, generally accepted principles of statutory interpretation. As discussed below, when legal norms are applied to the question of the scope of the Panel's jurisdiction, it is clear that the Panel has the ability to consider the matters raised in ACFN's Request.

42. ACFN submits that the following principles of statutory interpretation are relevant to an analysis of the Panel's jurisdiction.

43. The *Interpretation Act* in general, and Sections 10, 25(2) and 28(2) in particular apply to the Act:

> **10** An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.[60]
>
> Ancillary powers
>
> **25(2)** If in an enactment power is given to a person to do or enforce the doing of any act or thing, all other powers that are necessary to enable the person to do or enforce the doing of the act or thing are deemed to be given also.[61]
>
> **28(2)** In an enactment,

[60] See also Rizzo Shoes at para. 22, citing to a provision analogous to section 10 of the Interpretation Act.
[61] Interpretation Act, RSA 2000 c. I-8.

(c) "may" shall be construed as permissive and empowering;
(d) "must" is to be construed as imperative;
(f) "shall" is to be construed as imperative.

44. The legislature does not intend to produce absurd consequences. [62]

45. In the event of any conflict or ambiguity between the Rules of Practice for Conducting Reviews of Regional Plans (the "Rules"), and ALSA or the Regulations, the Act or Regulations prevail over the Rules, and the Act prevails over the Regulations.[63] In general, regulations must be read in the context of their enabling act, having regard to the language and purpose of the Act.[64] Any suggestion that the Rules prevent the Panel from considering matters that are clearly within the purposes and scheme of the act as it relates to legislative plans, is inconsistent with this principle of statutory interpretation, and with the Rules themselves.

46. Statutory bodies obtain their jurisdiction from two sources: express grants of jurisdiction under statute, and (2) by application of the common law doctrine of jurisdiction by necessary implication. [65]

47. In order to appreciate the scope of the Panel's express jurisdiction, the words of the *Alberta Land Stewardship Act (ALSA,* or the "Act") are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the Intention of Parliament. [66]

48. The doctrine of jurisdiction by necessary implication may be applied in the following circumstances; and these circumstances are present in relation to the question of the Panel's jurisdiction:

a. When the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Panel fulfilling its mandate;

b. [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;

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62 Rizzo Shoes, and "Sullivan on the Construction of Statutes", 5th ed. at Chapter 9 generally, and in particular see pages 299-301.
63 Rule 49. See also "Sullivan on the Construction of Statutes", 5th ed. at 318-319
64 Sullivan, supra at 368.
65 *Balancing Pool v TransAlta Corporation*, 2013 ABCA 409 ("Balancing Pool") at para. 18, citing to *ATCO Gas v AEUB*, 2006 SCC 4 at para. 38.
66 *Balancing Pool*, *supra* at para. 17 citing to E.A Driedger, *Construction of Statutes*, 2nd Ed (Butterworths: Toronto, 1983) at 87; see for example: *Re Rizzo and Rizzo Shoes Ltd*, 1 [1998] SCR 27, 154 DLR (4th) 193; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 (CanLII), 2002 SCC 42, [2002] 2 SCR 559; *ATCO Gas & Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2006 SCC 4 (CanLII), 2006 SCC 4, 263 DLR (4th) 193 at para 37.

c. [when] the mandate of the Panel is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;

d. [when] the jurisdiction sought must not be one which the Panel has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and

e. [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Panel.[67]

49. These principles will be discussed below in response to each of Alberta's submissions regarding the jurisdiction of the Panel.

**b. The Objects and Legislative Scheme of ALSA**

50. Direct and authoritative evidence regarding the objects of *ALSA* is found in section 1(2). Particularly relevant to Alberta's submissions are that the purposes include to provide a means to plan for the future to manage activity to meet the needs of current and future generations of aboriginal people, to provide for coordination of decisions by decision-makers, and to create legislation and policy responding to the cumulative effect of human endeavour and other events. [68]

51. Section 1(1) is is clear that in carrying out the purposes of the Act, Alberta must respect the property and other rights of individuals, and must not infringe upon those rights except to the extent necessary for the overall greater public interest.

52. Alberta's submissions on the limited jurisdiction of the Panel are based upon a myopic focus upon sections 5(1)(c) and 7(1) of the Regulation, and Rules 36-39, without attention to the legislative scheme as a whole, and without fulsome analysis of the relation of those sections to the general object intended to be secured by the Act, the importance of the sections, the whole scope of the Act and the real intention of the enacting body. [69]

53. The legislative scheme of ALSA was described succinctly by Justice Hunt McDonald:

> On June 4, 2009, the Legislature enacted *the Alberta Land Stewardship Act*, S.A. 2009, c.A-26.8 ("ALSA"). ALSA, which was proclaimed in force on October 1, 2009, establishes a legal framework for increased Provincial oversight of land use planning and development. It provides for the development, by the Province of regional plans,

[67] *ATCO Gas & Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2006 SCC 4 (CanLII), 2006 SCC 4 at para. 73.
[68] Sullivan at 270.
[69] Sullivan, supra at 364.

described at s.13 as "expressions of the public policy of the Government" and binding upon municipalities, that would address planning and development in seven planning regions within the Province.. . . In short, ALSA taken as a whole implements a scheme whereby the Province assumes a greater role in local planning and the power to determine whether there has been compliance with the Act and with Provincial dictates as expressed in regional plans.[70]

54. Decision makers are expressly bound by regional plans[71] and each of the acts administered by the Alberta Energy Regulator in relation to bitumen development within ACFN's traditional lands; including the *Responsible Energy Development Act*, *Public Lands Act*, the *Environmental Protection and Enhancement Act*, and the *Water Act*. [72] Under ALSA's legislative scheme, decision makers such as the Alberta Energy Regulator (the "Regulator") are prohibited from making decisions that are inconsistent with *ALSA*. In fact, the Regulator's Rules of Practice allow the Regulator to disregard a concern, and thus potentially deny standing to the filer of a statement of concern, if in the Regulators opinion the concern relates to a matter beyond the scope of the application (i.e. cumulative effect), or relates to a policy decision of the Government.[73] In the event of a conflict between a regional plan and a regulation or a regulatory instrument, the regional plan prevails. If there is an inconsistency or conflict between ALSA and any other enactment, ALSA prevails. [74]

55. Contrary to Alberta's submissions, LARP is not merely an "additional consideration" for decision makers that "simply adds a layer" to the existing regulatory regime.[75] Rather it represents a new and substantial constraint on the discretion of decision makers operating under existing legislation, which LARP itself describes as "a new approach" to managing cumulative effects at the regional level. [76]

56. Alberta alleges that LARP does not take away from the Crown's duty to consult

57. Within the legislative framework of ALSA is evidence of clear legislative intention to protect existing rights. This intention is manifest in section 1(1), "the Government must respect the. . . 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"; section 5 (consultation

[70] *Keller v. Municipal District of Bighorn No. 8*, 2010 ABQB 362 At paras. 48 and 52.
[71] ALSA at s. 15.
[72] *Public Lands Act* at ss. ; *Responsible Energy Development Act* at s. 20; *Public Lands Act* at section 9(m), 11, 15, 18, 20(3), 20(5), 26(d); *Environmental Protection and Enhancement Act* at section 3.1; *Water Act* at section 4.1.
[73] Rules of Practice, Alta Reg 99 2013 at Rule 6.2(2)(b)(d).
[74] ALSA at s. 17.
[75] Response at paras. 18, 20, 25, 27, 84.
[76] LARP at p. 27; see also LARP at p. 1 " Alberta's Land-Use Framework. . . sets out a new approach to managing our province's lands and natural reosources".

required); section 11 (2)(Notice re affected statutory consents); section 19.1 (compensation); section 19.2 (review), and in the Regulation, which also addresses compensation, review, amendment, and variance. [77]

58. The legislative scheme is forward looking: planning for the needs of future generations and enabling sustainable development will occur by setting a vision and objectives, and taking account of and responding to cumulative effects.[78] The Act provides various tools for implementing regional plans, and measuring progress towards and enforcing their objectives. [79]

59. It is with reference to the objects and legislative scheme of ALSA that the jurisdiction of the Panel must be understood.

**c. The Panel has Jurisdiction to Consider Consultation**

60. Consultation was a required precursor to LARP under the Act.[80] Consultation is included in the content of LARP, with both reference to consultation in the development of LARP,[81] and reference to Alberta's claim that it will continue to consult with Aboriginal people. [82]

61. In any event, ACFN's request challenges the content substance of LARP as having direct and adverse impact, rather the procedure under which it came into force. ACFN has provided the materials it submitted during consultation in the hopes that they contribute to an informed and well considered review of LARP.

62. The portions of ACFN's request identified in Alberta's response at paragraph 56 were meant illustrate that procedural promises are distinct from management actions that could be taken under section 8(2) of LARP, and in particular under section 8(2)(h) to manage direct and adverse impacts to ACFN.

**d. The Panel has jurisdiction to conduct a review of LARP in its entirety.**

63. Alberta suggests the Panel cannot consider ACFN's Request because the relief sought is a review of LARP in its entirety. While ACFN has requested a review of LARP in its entirety,[83] the specific relief sought by ACFN was that "the Minister amend the provisions of the Lower Athabasca Regional Plan identified in Part 1A herein, to be consistent with the exercise of

[77] Regulation at Parts 1, 2, and 3.
[78] ALSA at section 1(2); Section 8(1).
[79] i.e. see ALSA sections 6, 8-10, 20, 21 and Part 3.
[80] ALSA section 5.
[81] LARP at page 2.
[82] LARP at page 5; Strategic Paln at pages 23, 34, 63 and 69.
[83] August 19 letter, at page 4

ACFN's Treaty and Aboriginal rights and traditional land use *in perpetuity*, in order to diminish or eliminate the adverse effects identified in part 1B and 1C of this request."[84]

64. The Panel's jurisdiction to review the entire plan is supported by by ALSA section 13(3):

> The meaning of a regional plan is to be ascertained from its text, in light of the objectives of the regional plan, and in the context in which the provision to be interpreted or applied appears."

This is contrary to an approach that requires a myopic, provision by provision approach as suggested by Alberta.

65. In any event, the Panel does have the jurisdiction to review the vision and objectives of LARP, which ACFN raised as specific provisions requiring review. Pursuant to ALSA section 8(2) the other elements which may be included in a regional plan, all go towards achieving the objectives, which are a required provision of LARP.[85] A review of the objectives then necessarily involves a review of the other elements of LARP that have been put into place for the purpose of achieving those objectives.

**e. LARP and Federal Lands**

66. Alberta cites the federal division of power as a reason for LARP's failure to consider and avoid directly and adversely impact ACFN's property and quiet enjoyment of property.[86] The LARP Terms of Reference were presumably set pursuant to the consultation required by Section 5 of the Act. It is within the Panel's jurisdiction to consider whether LARP is meeting the objects of the act, which includes not infringing property and other rights, and is consistent with the statutory scheme – which evidences clear intent to minimize harm to rights. The fact is that LARP purports to manage the air, water, and animals that do not recognize the invisible boundary between provincial Crown and ACFN reserve lands. Further, LARP in its current iteration would allow the lands adjacent to ACFN's Poplar Point reserve lands on all sides being turned in to bitumen strip mines, and rendered completely unsuitable for quiet enjoyment.

67. The fact that ACFN's reserve lands are under federal jurisdiction does not render them inferior property rights. The Alberta Court has already found that section 1(1) of ALSA imposes a positive obligation on Alberta to minimize interference with property rights when carrying out the purposes of ALSA:

[84] August 19 letter at page 14.
[85] See in particular *ALSA* section 8(2)(a-g).
[86] Response at para. 63.

The wording on minimizing infringement of private property rights in subsection 1(1) is an obligation upon the Government of Alberta when carrying out the purposes of the *ALSA*.[87]

### f. The Panel has Jurisdiction to Consider Past and Future Activities and Associated Harms

68. Alberta's Response submissions at paragraphs 65-78 invite this Panel to endorse absurdity.

69. One of the clear objects and purposes of LARP is to respond to the cumulative effects from past developments, [88] ALSA specifically allowed for changes to statutory consents, such as those ACFN has noted in its submissions. [89] LARP is intended to represent a more effective and efficient management system that considers the cumulative effects of all activities and improves integration across the economic, environmental, and social pillars. [90]

70. Regional Plans are meant to be forward looking, they are based on visions and objectives to be achieved in future. [91]Another clear object of ALSA is to plan for the needs of future generations, including Aboriginal peoples. [92] LARP purports to do so by establishing a long-term vision for the region that uses cumulative effects management and provides guidance for decision makers regarindg land use management for the region. [93]

71. To understand the level of impact that current and future activities could have, it is imperative to consider the existing state of affairs. [94]

72. Alberta provides no statutory authority for the proposition that the Panel has no jurisdiction to consider past and future activities and associated harms. It is simply not a tenable interpretation of this Panel's jurisdiction to preclude the consideration of existing cumulative, and future impacts from this Review. In the words of Justice Lamer as he then was, statutory construction should not allow the law to become what Dickens' Mr. Bumble said it

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[87] *Nature Conservancy of Canada v Waterton Land Trust Ltd*, 2014 ABQB 303 at para. 399. **Tab 8**.
[88] ALSA at 1(2)(d).
[89] ALSA at section 11(1).
[90] LARP at 3.
[91] ALSA at s. 8. See also LARP at 2.
[92] ALSA at 1(2)(b)
[93] LARP at 2 and 3.
[94] *West Moberly, supra.* **Tab 25**.

sometimes could be, “a ass, a idiot” (Dickens, *Oliver Twist*).[95] The legislature is assumed to produce just and logical results.

73. If there is any ambiguity as to whether or not this Panel has the jurisdiction to consider the harms experienced by ACFN on the basis that they are connected to the past and future activities that LARP is meant to address, such ambiguity should be resolved by interpreting the Panel’s jurisdiction in a manner consistent with the spirit, purpose and intention of the ALSA.[96]

74. Legislative schemes are supposed to be coherent and operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme may appropriately be labeled absurd. It would be an inefficient use of ACFN, the Panel’s and Alberta’s resources to exclude a consideration of past and future activity in the context of a review of a regional land use plan intended to manage cumulative impacts now and into the future.[97]

75. In further reply to Alberta and the Crown’s submissions that concerns related to the following are outside the jurisdiction of the Panel:

- Harms related to potential future activities.[98]
- Items or measures alleged to be missing from LARP.[99]
- Past harms and further, they cannot be said to be caused by current government action.[100]

ACFN makes the following points.

76. However, these above noted submissions are incorrect. ACFN submits Alberta and the Crown are narrowly restricting the interpretation of LARP and not considering the purpose of the *ALSA* when arriving at its conclusions.

77. The Rules state:

> 39. The Panel may, in its report to the Minister, include recommendations specific to the provision(s) identified in section 38(a) of the Rules that may mitigate the adverse

[95] Sullivan, supra at page., **Tab 37**, Citing to *Paul v. The Queen*, [1982] 1 SCR 621
[96] “Sullivan on the Construction of Statutes”, 5th ed. at 318-319, **Tab 37**.

[97] “Sullivan on the Construction of Statutes” 5th ed. at page 313, **Tab 37**.

[98] Response Submissions as para. 72.
[99] Response Submissions at para. 99.
[100] Response Submission at para. 42.

effects identified in section 38(b) of the Rules. Any recommendations made by the Panel must have regard to the purposes of the Act.

78. ACFN points once again to the purpose provisions found in the *ALSA*:

> Purposes of Act
>
> 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 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.

79. Had Alberta and the Crown reflected upon the *ALSA* it may have arrived at the conclusion that foreseeable impacts must surely be in the Panel's jurisdiction to provide advice and recommendations on. As noted above, the LARP must be determined in accordance with the *ALSA*, the *ALSA* states it must address the foreseeable needs current and future generations, including Aboriginal peoples. ACFN the Panel is bound by the *ALSA* and must consider the foreseeable impacts as noted in its Application and Supplementary Submission.

80. In the event, the Panel does not agree with ACFN's interpretation of the above, ACFN provides jurisprudence below in support of its position.

81. Alberta and the Crown's Response Submissions cite to the Supreme Court of Canada's decision in Rio *Tinto Alcan Inc. v. Carrier Sekani Tribal Council ("Rio Tinto")*[101] in support of its proposition that "past harms cannot be said to be caused by current government action" and

[101] 2010 SCC 43. [*Rio Tinto*]; TAB 25

"the harm must be more than speculative to count as an adverse impact".[102] ACFN agrees with the principles of causation as determined in *Rio Tinto* however, this decision does not state that "past harms cannot be said to be caused by current government action", nor has it been interpretated in such a restrictive manner. ACFN points *West Moberly First Nations v. British Columbia (Chief Inspector of Mines*) ("*West Moberly*"), a case where the Court had to determine whether governmental approval of a drilling program on Treaty 8 Territory constituted a breach of the Crown's duties to consult and accommodate in so far as the approval decision failed to consider both the West Moberly First Nations Treaty 8 right to hunt and the cumulative impacts to the Burnt Pine caribou herd prior to authorizing approvals.[103] The Court in this case was bound by *Rio Tinto* and provided additional insight on the same:

> I do not understand Rio Tinto to be authority for saying that when the "current decision under consideration" will have an adverse impact on a First Nations right, as in this case, that what had gone before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners' treaty right, and the historical contest is essential to a proper understanding of the seriousness of the potential impacts on the petitioner's treaty right to hunt.[104]

82. The Court then went on to state,

> to take those matters into consideration as within the scope of the duty to consult is not an attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the exploration programs.[105]

83. The Attorney General for Alberta was in intervener in West Moberly and the Court made specific reference to the following provisions in its factum as reproduced below:

> 33. The Justice erred in finding that it is not sufficient for a statutory decision maker to focus on mitigation efforts that are within his or her statutory authority. Is not dishonourable for a statutory decision maker to decline to address concerns that are "out of scope" or beyond the decision maker's statutory mandate. His approach effectively requires a Crown decision maker to enlist other Crown ministries and decision makers if the concerns of the First nation are beyond his or her statutory authority and power to consider or address. This approach is contrary to Carrier Sekani, and to administrative principles generally.

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[102] Response Submissions at para. 42.
[103] *West Moberly* at paras. 1 and 2; TAB 25
[104] 2001 BCCA 247 at para. 117.[*Rio Tinto*]; TAB 21
[105] *West Moberly* at para. 119.; TAB 25

> 37. Statutory decision makers have no inherent jurisdiction. When broad concerns are raised, that require remedial powers that fall outside the confines of their statutory authorities and jurisdiction, they are simply not the proper forum for such concerns to be raised or concerned. In this case, the Ministries charged with making the challenged decisions were not the proper forum to raise broad wildlife management concerns related to overall caribou management policy. [106]

84. With respect to Alberta's above noted position the Court determined:

> I do not consider this position to be tenable. MEMPR was not limited by its statutory mandate, so far as its duty and power to consult were concerned. It is a well established principle that statutory decision makers are required to respect legal and constitutional limits. The Crown's duty to consult lies upstream of the statutory mandate of decision makers: See Beckman at para. 48 and Halfway River First Nation v. British Columbia, 1999 BCCA 470, 64 B.C.L.R. (3d) 206 at para. 177.
>
> In other words, in exercising its powers in this case, MEMPR was bound by, and had to take cognizance of, Treaty 8 and its true interpretation. B.C. says that such a view of the decision maker's position is unreasonable. With respect, I disagree. There is nothing in the legislation creating and government MMPR that would prevent that body from consulting whatever resources were required in order to make a properly informed decision.[107]

85. Based on the above, it is clear that Alberta and the Crown has failed to interpret the principles in the cases it provided and relied on throughout its Response Submissions correctly. The reproduced discussion in *West Moberly* confirms past governmental conduct must be considered in the context of assessing adverse impacts on Treaty and Aboriginal rights.

86. Further, ACFN relies on *Rio Tinto* to support its assertion that foreseeable adverse impacts on Treaty and Aboriginal rights must be considered. The relevant portion of the Supreme Court of Canada's discussion of the same is provided below:

> As stated in *R. v. Douglas*, 2007 BCCA 265 (CanLII), 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.[108]

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[106] *West Moberly* at para. 104, citing the Attorney General for Alberta's Factum.; TAB 25
[107] *West Moberly* at para. 107.; TAB 25
[108] *Rio Tinto* at para. 46.; TAB 21

> Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.[109]

87. *West Moberly* also confirms ACFN's assertion that foreseeable adverse impacts upon Treaty and Aboriginal rights must be considered:

> [T]he whole thrust of the petitioners' position was forward looking. It wanted to preserve not only those few animals remaining in the Burnt Pine caribou herd, but to augment and restore the herd to a condition in which it might once aging be hunted. If that position were to be given meaningful consideration in the consultation process, I do not see how one could ignore at least the possibility of a full mining operation, it were shown to be justified by the exploration programs. That was the whole object of the Bulk Sampling advanced Exploration Programs.[110]
>
> I am therefore respectfully of the view that to the extent the chambers judge considered future impacts, beyond the immediate consequences of the exploration permits, as coming within the scope of the duty to consult, he committed no error. And, to the extent that MEMPR failed to consider the impact of a full mining operation in the area of concern, it failed to provide meaningful consultation**.**[111]

88. Based on the above noted jurisprudence and stated purposes of the *ALSA*, it is plainly obvious that Alberta and the Crown's assertion that past harms and harms are outside the

[109] *Rio Tinto* at para. 47.; TAB 21
[110] West Moberly at para. 123.;TAB 25
[111] West Moberly at para. 125.; TAB 25.

jurisdiction of the Panel is incorrect in the context of Treaty and Aboriginal rights. ACFN submits the Panel must consider the said impacts.

### g. The Panel has Jurisdiction to Consider the Implementation of LARP

89. Alberta's submissions at paragraphs 79-82 fly in the face of accepted interpretive norms.

90. LARP's content includes an Implementation Plan. The majority of the provisions of ALSA go to the effective implementation of LARP. There is a clear legislative intent, evidenced by those sections of the *Responsible Energy Development Act*, the *Water Act*, the *Environmental Protection and Enhancement Act,* and the *Public Lands Act*, and ALSA itself, that LARP will be interpreted, applied, implemented and complied with by regulatory decision-makers.

91. Alberta submits that LARP does not give priority to any one of economic, environmental or social considerations.[112] As three decisions of the Regulator have cited LARP's prioritization of bitumen development as key reasons for its approval of projects in areas ACFN says are key to the continued exercise of its Treaty Rights and traditional land uses,[113] amendments are required in order to honour Alberta's statement that economics are not prioritized over environmental considerations. Section 1(1) of ALSA imposes a positive duty on Alberta to minimize interference with rights in carrying out the purposes of ALSA.

92. Furthermore, it is inconsistent for Alberta to argue on one hand, that the Panel has no power to consider the implementation of LARP, but on the other rely on the implementation of management tools under LARP to argue that the exercise of treaty rights and traditional land use will be supported. [114]

### h. The Panel has Jurisdiction to Consider Omissions from LARP.

93. The Panel has the power to consider the direct and adverse impacts of LARP on ACFN, and to make recommendations consistent with the purposes of the Act. Under both section 25(2) of the *Interpretation Act*, and under the common law doctrine of jurisdiction by necessary implication, the Panel has the power to consider omissions from the act, in order to allow it to make recommendations that could remedy the harms that flow to ACFN.

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[112] Response at para. 13.
[113] Re Dover, **Tab 18** at paras 44-46; Re: Teck Resources **Tab 20** Re Jackpine Mine Expansion, paras 8, 18 **Tab 19**
[114] Response at paras. 87-88, 90, 91.

94. In this instance, the jurisdiction to consider what was omitted from LARP, but which may in fact remedy the harms that flow to ACFN, is necessary to accomplish objective 1(1) and 1(2)(b) of ALSA. ALSA did not explicitly grant any specific powers constraining a review of a regional plan under section 19.2 ALSA, the mandate of the Panel is sufficiently broad (provide recommendations with regard to the purposes of the Act), and there is no evidence that the Legislature turned its mind to this matter and decided against conferring this power on the Panel.

95. Alberta relies on a pre-Constitution Act, 1982 case (Sutherland) for the principle that enactments cannot single out Indians for special treatment. This issue has since been decided conclusively by the Supreme Court of Canada in *R. v. Kapp*, which supports the proposition that a distinction based upon an enumerated or analogous ground for the purposes of ameliorating or remediating harm, is allowable.[115]

## V. Directly and Adversely Affected

### a. Meaning

96. ACFN notes the principle that the Regulation, and term "directly and adversely affected" must be interpreted in light of the overarching purposes and objectives of the Act. A view to the purposes of the Act- to minimize interference with rights, and to plan for the needs of Aboriginal peoples- supports an interpretation that allows a Review based on the interconnected nature of direct and adverse impacts to ACFN's Treaty Rights, health, income, property, and quiet enjoyment of property.

### b. Health

97. Below ACFN has provided an analysis of the meaning of directly and adversely affected in the context of the health of its members and the relationship of same to their Treaty Rights.

98. Section 5(1) of the Regulations provides the following relevant definitions:

> In this Part,
>
> (c) "directly and adversely affected", 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

[115] R. v. Kapp at paras. 57-61. **Tab 17A**.

combination of them, is being or will be more than minimally harmed by the regional plan

(h) "effect" includes

(i) any effect on the economy, the environment, a community, human health or safety, a species or an objective in a regional plan, regardless of the scale, nature, intensity, duration, frequency, probability or potential of the effect, and

(ii) a cumulative effect that arises over time or in combination with other effects;

(ff) "threshold" has the meaning given to it in a regional plan and may include a limit, target, trigger, range, measure, index or unit of measurement.

In ACFN's Application dated August 19, 2014 ACFN requested a review of and amendement to the LARP in its entirety, as the plan as a whole failed to address or protect ACFN's Treaty rights, traditional land uses, peaceful land uses and occupation of its reserve lands, and its culture.[116] Specific provisions identified to be affected the physical health of ACFN members include (but are not limited to):

- Regulatory Details Plan Part 1 General: Section 1(e) - exclusion of a Regulatory Details Plan Part for Traditional Land Use and Treaty rights, including limits, triggers and thresholds. Sections 4-7 to the extent that the Plan is intended to guide, inform, or bind the Crown, decision makers, local government bodies and all other persons in the absence of measures that are protective of ACFN's Treaty and Aboriginal rights, traditional land uses, and culture; and section 10(2) to the extent that it requires decision making bodies to make changes or implement new initiatives to comply with LARP in the absence of measures that are protective of ACFN's Treaty and Aboriginal rights.[117]

- Regulatory Details Plan Part 4 Air Quality: sections 22, 24, 25-26 to the extent that these sections incorporate by reference the Air Quality Management Framework. See Schedule A. Air Quality triggers and limits had not been set with reference to the health of ACFN members, with regard to their ability to use and enjoy their property, or with regard to the need to maintain certain areas for the exercise of Treaty rights and traditional uses.[118]

[116] ACFN's Application, dated August 19, 2013 at page 4.
[117] ACFN's Application, dated August 19, 2013 at page 4
[118] ACFN's Application, dated August 19, 2013 at page 5.

- Regulatory Details Plan, Part 5 Surface Water Quality: section 29(a) (e) and section 30-34 to the extent that these sections incorporate the Surface Water Quality Framework. See also Tables B-1 and B-2 and Schedules B and C.[119]

- Regulatory Detail Plan Part 6 Groundwater: sections 36(a) and 37-38 to the extent that incorporate the Groundwater Management Framework.[120]

99. In ACFNs Application and Supplemental Submission it was identified the above noted provisions directly and adversely affect the physical health of its members and the ability to meaningfully exercise its Treaty and Aboriginal rights due to:

- water contamination;
- loss of food security
- increased risks and perceived risks, associated with consumption of traditional foods;
- health impacts linked to changes in diet from traditional to store-bought foods, as well as the contamination of country foods;
- increase in acidifying emissions;
- loss of ability to utilize the Athabasca River as a navigation corridor;
- loss of ability to access fishing, hunting and trapping areas due to water quantity issues in the Athabasca River and the Peace Athabasca Delta;
- declines in the availability of suitability of those traditional resources due to contamination concerns;
- contamination of a fishing reserve set aside specifically to exercise Treaty and Aboriginal rights;
- decline in water;
- concerns over quality of safe drinking water and other health concerns related to water quality for ACFN's reserves and ACFN members who live downstream in Fort Chipewyan;

[119] ACFN's Application, dated August 19, 2013 at page 5.
[120] ACFN's Application, dated August 19, 2013 at page 5.

- impacts to diet and nutrition stemming from loss of access to nutrient dense lower fat foods with high quality proteins, mineral and vitamins;

- loss of exercise due to inability to exercise its Treaty and Aboriginal rights which generally involves significant physical exertion;

- less access to country foods and limited disposable income of led to the purchase of cheaper and less health food alternatives and thus increasing the prevalence of diabetes, obesity, heart disease and other chronic disease; and

- distress and depression associated with decreased foot security.

100. Alberta and the Crown in its Response Submissions allege the following:

- That since "LARP states that the biodiversity management framework and landscape plan are to have several measures that will support systemic, regional management of wildlife habitat and populations and should, in turn, support of the exercise of treaty and traditional land use".[121]

- The triggers and limits framework of LARP "were set based on human health and environmental health and therefore supportive of traditional land use".[122]

- LARP enhances the use of AAAQOs by the above referenced triggers, thus "allowing for sufficient time to plan and react to manage air quality so as to avoid reaching that limit".[123]

- "The triggers and limits in the Surface Water Quality Framework adopt the most stringent of the provincially-accepted guidelines depending on the use which is at issue".[124]

[121] Response Submissions at para. 86.
[122] Response Submissions at para. 90.
[123] Response Submissions at para. 92.
[124] Response Submissions at para 93.

- "Maintenance of the status quo is not an adverse effect by LARP" with respect to where LARP is silent on a particular topic.[125]

ACFN has requested review of and amendment to sections 22, 24, 25-26 of LARP's Regulatory Details Plan, Part 4 Air Quality.[126]

**ACFN's Treaty and Aboriginal Rights**

101. ACFN's submits the context of its Treaty and Aboriginal rights need to be considered in order to speak to the above noted points in Alberta and the Crown's Response Submissions. Athabascan speaking Dene people called Dené sułine ("people of the land"). For thousands of years, and continuously to the present day, ancestors and present members of ACFN have lived and sustained themselves, their families and their community in the traditional territory of ACFN in northern Alberta by hunting, trapping, fishing and gathering, carrying out their distinctive way of life, and passing down their culture for countless generations.

102. *ACFN's* traditional lands radiate north, east, west and south from the Peace-Athabasca Delta, including the Lower Athabasca River and lands to the south of Lake Athabasca, extending to the lands around Fort McMurray and Fort MacKay. ACFN has eight reserves set aside for the use and benefit of its members: Chipewyan No. 201 and 201A-201G inclusive, all of which are located downstream of the Athabasca oil sands development.

103. ACFN asserts the constitutionally protected right pursuant to Section 35 of the *Constitution Act, 1982* and pursuant to the terms of Treaty 8 to practice its traditional lifestyle, including by hunting, gathering, trapping and fishing. ACFN entered into the Treaty No. 8 (the "Treaty") at Fort Chipewyan in 1899 as a Sharing Agreement with the Crown. The Treaty guaranteed ACFN's hunting, gathering fishing and trapping rights in support of sustaining its traditional livelihood, in return for which ACFN promised to share the land and resources with the Crown. In entering into the Treaty, ACFN was assured that its way of life would not be changed and that it would be protected. Chief Laviolette told the Commissioners how important it was for ACFN members to be able to freely exercise their way of life. [127]

104. This understanding of the Treaty is firmly entrenched in Canadian law. Pursuant to the Treaty, the Crown promised reserves and other benefits including, most importantly, the following rights of hunting, trapping, and fishing:

[125] Response Submissions at para. 96.
[126] ACFN's Application at page 5.
[127] ACFN's Supplementary Application at page 4, 6, 16.

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[128]
>
> The oral promises made when the Treaty was agreed to are as much a part of the Treaty as the written words.[129] In a number of decisions, the Supreme Court of Canada has quoted from the Commissioners' reports of the Treaty negotiations, and has relied on the following excerpts (among others) as capturing the oral promises made to Treaty signatories:
>
> There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges. We pointed out…that the same means of earning a livelihood would continue after the Treaty as existed before it, and that the Indians would be expected to make use of them.
>
> . . . Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed … [W]e had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.
>
> We assured them that the treaty would not lead to any forced interference with their mode of life.[130]

105. Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true**.** Indians who take treaty will be just as free to hunt and fish all over as they now are now.[131]

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[128] See *e.g. Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,;TAB 7[2005] 3 S.C.R. 388, 2005 SCC 69, para. 2, quoting from the *Report of Commissioners for Treaty No. 8* (1899), at p. 12 [underscore added].

[129] *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59, para. 24;TAB 15; *R. v. Badger*, [1996] 1 S.C.R. 771, paras. 52, 55; TAB 11; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, para. 29; TAB 7.

[130] *R. v. Badger*, [1996] 1 S.C.R. 771, para. 39 [underscore added];TAB 11; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, para. 26; TAB 7; see also: *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, para. 54; TAB 25.

[131] *R. v. Badger*, [1996] 1 S.C.R. 771, para. 55 [underscore added]; TAB 11.

106. The rights secured under the Treaty, as modified by the *Natural Resources Transfer Agreement*,[132] were elevated to constitutional status with the enactment of s. 35 of the *Constitution Act, 1982.*

107. In balancing the Crown's "taking up" powers with Treaty rights, it is important to recognize the expectations of the Crown and Aboriginal signatories to the Treaty. As described by the Supreme Court of Canada in *R. v. Badger*:

> Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area. The Commissioners, cited in Daniel, at p. 81, indicated that "it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap." The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights.

108. The oral promises made by the Treaty Commissioners leave no doubt that "the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties".[133] *Dene Tha' First Nation v. Canada* confirms that Treaty 8 harvesting rights include the right to gather plants.[134]

109. Similarly, based on its comprehensive research into the history of First Nations' treaties in Canada, the Royal Commission on Aboriginal Peoples concluded that:

> First Nations would not consider making a treaty unless their way of life was protected and preserved. This meant the continuing use of their lands and natural resources. In most, if not all the treaties, the Crown promised not to interfere with their way of life, including their hunting, fishing, trapping and gathering practices ... First Nations [shared their lands] on the condition that they would retain adequate land and resources to ensure the well-being of their nations.[135]

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[132] *Natural Resources Transfer Agreement, 1930* [Alberta], Schedule of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26, para. 12; TAB 33.
[133] *R. v. Badger*, [1996] 1 S.C.R. 771, para. 39; TAB 11.
[134] 2006 FC 1354 at para. 11; TAB 3.
[135] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back,* Vol. 1. (Ottawa, Supply and Services Canada, 1996) at 161 [emphasis added]; TAB D19.

110. The Supreme Court of Canada has confirmed on many occasions that the principal emphasis of Treaty 8 was on the preservation of the Indians' traditional way of life.[136] *Mikisew* confirms that Treaty 8 secured for First Nations a core entitlement to the "meaningful" exercise of their Treaty Rights *in perpetuity*.[137]

111. In *West Moberly First Nations*, the B.C. Court of Appeal confirmed:

> …[W]hile specific species and locations of hunting are not enumerated in Treaty 8, it guarantees a "continuity in traditional patterns of economic activity" and respect for "traditional patterns of activity and occupation". The focus of the analysis then is those traditional patterns. [138]

112. The Supreme Court of Canada decisions of *Simon v. The Queen,*[139] *R. v. Sundown,*[140] *Mikisew Cree First Nation v. Canada*,[141] clearly establish that treaty harvesting rights do not simply protect the bare rights to hunt, trap, fish and gather somewhere in a defined territory, without anything more. Rather, they protect "that which is reasonably incidental" to harvesting:

> That which is reasonably incidental is something which allows the claimant to exercise the right in the manner that his or her ancestors did, taking into account acceptable modern developments or unforeseen alterations in the right … The inquiry is largely a factual and historical one. Its focus is not upon the abstract question of whether a particular activity is "essential" in order for hunting to be possible but rather upon the concrete question of whether the activity was understood in the past and is understood today as significantly connected to hunting. Incidental activities are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked.[142]

113. ACFN asserts the following activities as Treaty Rights for the purpose of the Project:

- Routes of access and transportation;
- Sufficient water quality and quantity;
- Sufficient quality and quantity of resources in preferred harvesting areas;

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[136] *R. v. Horseman*, [1990] 1 S.C.R. 901 at paras. 12 & 28 (*per* Wilson J., dissenting on other points) and at paras. 47-49 (*per* Cory J.); TAB 23; *R. v. Badger*, [1996] 1 S.C.R. 771, para. 39; TAB 11; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, para. 26.;TAB 7

[137] 2005 SCC 69 at paras. 47-48.; TAB 7.

[138] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, paras. 137, 140.; TAB 25.

[139] [1985] 2 S.C.R. 387 at para. 31.; TAB 16.

[140] [1999] 1 S.C.R. 393 at para. 30.;TAB 17.

[141] 2005 SCC 69 at paras. 47-48.; TAB 7.

[142] *R. v. Sundown*, [1999] 1 S.C.R. 393 at para. 30; TAB 17.

- Cultural and spiritual relationships with the land;
- Abundant berry crops in preferred harvesting areas;
- Traditional medicines in preferred harvesting areas;
- The experience of remoteness and solitude on the land;
- Use of timber to live on the land while hunting, trapping, gathering and/or fishing;
- Lands and resources accessible within constraints of time and cost;
- Construction of shelters on the land to facilitate hunting, trapping and/or fishing (e.g. to build shelters and fires);
- The right to instruct younger generations on the land
- Access to safe lands within which to practice rights;
- The right to feel sand and secure in conduct of such practices and activities;
- Lands and resources accessible within constraints of time and cots;
- Socio-cultural institutions for sharing and reciprocity; and
- Spiritual sites and associated practices.[143]

114. As noted above ACFN is concerned with Alberta and the Crown's mischaracterization of ACFN's Treaty and Aboriginal rights. As such, ACFN further asserts the following rights of incidental to the practice of its said rights.

- Healthy populations of uncontaminated or 'safe' fish in preferred harvesting locations;
- Healthy populations of uncontaminated or 'safe' game in preferred harvesting areas;
- Healthy populations of uncontaminated or 'safe' medicines, berries and other plant foods in preferred harvesting areas;
- Feelings of safety and security;

115. Further to ACFN's application dated August 19, 2013 and supplemental submission dated, August 31, 2013, ACFN submits all of the matters identified above are integral aspects of ACFN's traditional hunting, trapping, fishing and gathering activities and required to support the "meaningful" exercise of these rights.

116. ACFN wishes to highlight the clear direction of the jurisprudence: traditional patterns of use and occupancy must be respected. Thus the analysis of the LARPs direct and adverse impacts to ACFN's Treaty Rights should not be limited to consideration of specific sites. The analysis in this case must include impacts to ACFN's incidental Treaty Right to travel unimpeded on the Athabasca River, as well as those integral aspects of the LARP purport to managing air and water quality. As described below, these aspects of the LARP have direct and adverse impacts on ACFN's ability to navigate and travel on the Athabasca River in the vicinity of its

[143] ACFN's Application, dated August 19, 2013, at pages 2 and3.

traditional lands and downstream, as well as on ACFN's ability to exercise their rights, in particular the exercise of rights in and around area lakes.

117. ACFN's members continue to exercise their constitutional Treaty Rights in the vicinity of and downstream of the oil sands and these rights are directly and adversely impacted by the LARP. ACFN is concerned with the implications of the LARPs provisions and how they will result in increased use of water from the Athabasca River, and increased air emissions including acidifying emissions, mercury, napthenic acids and PAH's.

118. The Athabasca River is the most proximate waterway/water body to the Project. ACFN uses and occupies the Athabasca River both within the vicinity of the Project and downstream of the Project. [144] The significance of the Athabasca River was noted in ACFNs Application, and identified as being the" lifeblood of ACFN Traditional Lands".[145]

119. ACFN relies upon boat travel through the Athabasca River and Delta in order to access its reserve lands and exercise its rights. "Even where road access is possible, water-based access by boat is the preferred mode of practicing aboriginal and Treaty rights, including hunting, trapping, and fishing."[146] Boating on the Athabasca River allows for ACFN members to hunt for Moose as this game tends to stay close to the water during the summer months. [147] Additionally navigating the Athabasca River also allows for ACFN members to "access territories without disturbance from industrial traffic associated with many of the roads closer to Fort McMurray and the oil sands development." [148]

120. ACFN faces increasing constraints on its ability to exercise its Treaty Rights within its traditional lands due to a decreasing ability to navigate the River in general. In particular, ACFN use has already been compromised due to a loss of access and use of traditional lands associated with the lower quantity and quality of water in the vicinity and downstream of the oil sands development. [149]

121. Water levels in the River and Delta are already too low to consistently support the exercise of Treaty Rights.[150] High flows are required to support Treaty Rights by providing

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[144] Dr. Craig Candler, Rachel Olson, Steven DeRoy and the Fireflight Research Cooperative, *As Long As the Rivers Flow,* generally, and at pages 10 and 23.[*As Long as the Rivers Flow*], provided in Applicant's Supplementary Submission, dated August 31, 2013.
[145] ACFN's Application, dated August 19th, 2013 at page 3.
[146] *As Long as the Rivers Flow* at 12, provided in Applicants Supplementary Submission, dated August 31, 2013.
[147] *As Long as the Rivers Flow* at 13, provided in Applicants Supplementary Submission, dated August 31, 2013.
[148] *As Long as the Rivers* Flow at 13, provided in Applicants Supplementary Submission, dated August 31,2013.
[149] As *Long as the Rivers Flow* at 25, provided in Applicants Supplementary Submission, dated August 31, 2013.
[150] Bruce Maclean, Community Based Monitoring power point; Transcript Excerpt Volume 10, Jackpine Mine Expansion hearing, evidence of Jonathon Bruno at text pages 2067-2073. Online: http://www.ceaa.gc.ca/050/documents/p59540/83451E.pdf.; TAB D5.

channel maintenance and recharge to deltaic environments relied on by ACFN downstream of the oil sands. [151] The Athabasca River is under pressure already, flows are lower than historic flows and current withdrawal rules are not protective of the River nor ACFN's ability to exercise its Treaty Rights. [152] ACFN's evidence is that its Rights are already impaired by low flows in the Athabasca River, and that further withdrawals will result in direct and adverse impact to its Rights.

122. In summary, it is ACFN's submission the LARP will have direct and adverse impacts on its ability to exercise its Treaty Rights by further compromising the ability to travel by boat on the Athabasca River and in the Athabasca Delta in order to exercise those Rights.

**123.** Further contamination of the airshed will directly and adversely impact ACFN's rights by:

a) Resulting in a loss of ability or loss of enjoyment in exercising those rights;
b) Adversely impacting vegetation within ACFN's traditional lands; and
c) Further contamination of the watershed, particularly lakes relied upon for fishing.

124. There can be no controversy that air emissions from the oil sands may directly and adversely impact ACFN's Rights.

125. Besides the direct health risk posed to ACFN members exercising their rights from emissions,[153] such as particulate matter, the acidifying emissions have the potential to directly and adversely impact ACFN's ability to exercise its rights over a large portion of the Traditional Lands through acidification of lakes and water bodies.

126. Air pollution can impact the quality and safety of traditional plants, reducing the ability to harvest.[154] Members observe that pollution from oil sands development is affecting the quality of habitat for migratory birds, as well as their health, which reduces some members' confidence in that particular traditional resource. [155]

127. There is mounting scientific evidence that pollution from the oil sands, including acidifying emissions and PAH, are adversely impacting some of the lakes within ACFN's traditional lands.

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[151] JME Carver Presentation, November 7, 2012 at pdf 24, slide titled "Importance of Lower Athabasca Flows". See also Extract Volume 10, Jackpine Mine Expansion hearing at text page 2333, lines 14-20 – Evidence of Dr. Martin Carver.; TAB D13.
[152] JME Carver Presentation; slides 22-30 and Extract Volume 10, Jackpine Mine Expansion hearing at text pages 2232-2239.; TAB D13.
[153] The Health Study at page 17.; TAB D11
[154] Health Study at page 17.; TAB D11
[155] Health Study at page 18.; TAB D11.

128. A 2012 study conducted jointly by Environment Canada and Queens University, which measured PAH deposition to lakes within the Athabasca oil sands region (the "Kurek Study") found that a lake in close proximity to the Mildred Lake Upgrader- near the confluence of the Muskeg and Athabasca Rivers had PAH levels 23 times higher than background levels and attributed this to the disposition of airborne contaminants produced by Upgraders like those at Mildred Lake.[156] The same study also found that PAH was travelling much farther than previously expected, as evidenced by PAH levels at 2.3 times background levels as far away as Namur Lake.[157] Since the Project is intended to support increased production at the Mildred Lake Upgrader, it can be expected the increased production will result in increased air and water pollution by PAH. This is of great concern to ACFN given the association science makes between PAH and cancer, [158] and the community's long standing concerns regarding pollution from oil sands, elevated cancer levels in the community, and the contamination of country foods, particularly wide ranging ungulates such as moose.[159] Syncrude has not provided the Commission with sufficient information to allow a defensible assessment of the extent to which such emissions will directly and adversely impact ACFN's rights, and whether such impacts are in the public interest.

129. The bioaccumulation of methylmercury has been identified as being a consequence of oil sands development in region.[160] Kirk et al. study focused on atmospheric dispersial patterns of mercury and methylmercury, analyzing snow packed samples at varying distances from Athabasca oil sands development.[161] The study "suggests that oil sands developments a direct source of MeHg to local landscapes and water bodies".[162] The researchers noted "areas of maximum THg and MeHg located primarily between the Muskeg and Steepbank rivers".[163] Further, the concentrations of THg and MeHg found in the samples were correlated "with numerous parameters, including total suspended solids (TSS), metals known to be emitted in high quantities from the upgraders (vanadium, nickel, and zinc) and crustal elements (aluminum, iron, and lanthanum), which were also elevated in this region".[164] As such, based on these findings it is believed "that at snowmelt, a complex mixture of chemicals enters aquatic ecosystems that could impact biological communities of the oil sands region".[165]

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[156] Kurek et al., *Legacy of a half century of Athabasca oil sands development recorded by lake ecosystems*. Proceedings of the National Academy of Science, January 29, 2013, vol. 110, no.5. at 1763 [*Kurek Study*].; TAB D14.
[157] *Kurek Study* at 1763.; TAB D14.
[158] *Kurek Study* at 1763.;TAB D14
[159] *As Long as the Rivers Flow* at 25, provided in Applicant's Supplementary Submission, dated August 31, 2013.
[160] Kirk et al., Landscapes and Waterbodies of the Athabasca Oil Sands Region. Journal of Environmental Science and Technology, Just Accepted Manuscript, May 29, 2014. [Kirk Study].; TAB D17.
[161] Kirk Study at page 2.; TAB D17.
[162] Kirk Study at page 2.; TAB D17.
[163] Kirk Study at page 2.; TAB D17.
[164] Kirk Study at page 2.; TAB D17.
[165] Kirk Study at page 2.; TAB D17.

Methylmercury is a potent neurotoxin that bioaccumulates and poses a significant threat to the health ACFN members. ACFN has constitutionally protected rights to hunt, trap, and fish. The bioaccumulation of methylmercury in the foods they consume directly and adversely affects the health of its members.

130. Further, since ACFN's Application and Supplementary Submission, "Water is a Living thing" Environmental and Human Health Implications of the Athabasca Oil Sands for the Mikisew Cree First Nation and Athabasca Chipewyan First Nation in Northern Alberta (the "Health Study") has been released.[166] The Health Study was funded by National First Nations Environmental Contaminants Program, Health Canada, SSHRC, Mikisew Cree First Nation and Athabasca Chipewyan First Nation. The objectives of the study included: evaluating contaminant levels by testing the environment and culturally important wildlife; identifying potential exposure of community members to contaminants by documenting the consumption of wild-caught foods; exploring implications of these changes for community health and wellbeing; and facilitating effective cross-cultural risk communication that incorporates both western science and TEK in sharing the sharing of information.[167] The Health Study analyzed wildlife samples "collected from across the traditional territories of both MCFN and ACFN in order to conduct health assessment though veterinary analysis and to test for environmental contaminants".[168] The Health Study found that:

> Indigenous People, including members of both the Miksew Cree First Nation (MCFN) and the Athabasca Chipewyan First Nation (ACFN), live downstream from these industrial activities on the Athabasca River, activities that continue to escalate in scale and impact. These and other downstream Indigenous communities are especially vulnerable to these impacts, in part because their traditional livelihoods, cultures, and wellbeing are so closely linked to the environment.[169]

131. The Health Study acknowledged the intent "was not to describe the health of any of the regional populations of these wildlife species but to asses to what degree these animals exhibited health problems, whether and to what degree these problems might be related to environmental contaminants, and whether these and other animals that were harvested as food might represent a risk to humans".[170]

132. The most notable finding from Health Study was that "Cancer occurrence is positively associated with employment in the Oil Sands as well as the consumption of frequency of

[166] Prepared by Dr. Stephane McLachlan. Phase Two Report: July 7, 2014.[the Health Study].; TAB D11.
[167] The Health Study at page 10.; TAB D11.
[168] The Health Study at page. 25.; TAB D11.
[169] The Health Study at page 10.; TAB D11
[170] The Health Study at page 48.

traditional foods and more specifically locally caught fish".[171] ACFN submits the Health Study in its entirety for the Panel's review to not only rebut Alberta and the Crown's unfounded allegations as noted above but also to utilize in its recommendations for remedy as it speaks directly to thresholds which impacts the health of ACFN's member and the practice of ACFN's Treaty and Aboriginal rights.

**Current Management**

133. The LARP has not taken action to implement thresholds and limits that are protective of ACFN's Treaty Rights and this remains an outstanding issue between ACFN and the Government of Alberta. The LARP purports to be managing the precursors of acid rain however, this remains to be seen. ACFN is concerned about the adverse effects of both nitrous and sulphur compounds and does not believe the LARP is managing the precursors to acid rain effectively. ACFN concerns stem from the recently released *Lower Athabasca Region, Status of Management Response for Environmental Management Frameworks* ("LARP Report"). While the LARP Report indicates in 2012 "no limits were exceeded for air and surface water quality indicators, some triggers were exceeded leading to required management responses".[172] ACFN notes the report was only released in August 2014 and is extremely concerned it has taken some 18 months to advise of the breach in trigger thresholds. ACFN questions whether 18 months is the sufficient time that Alberta and the Crown referred to above. In any event, ACFN believes disclosure and development of a management plan taking almost two years to complete is unreasonable. ACFN is concerned if LARP continues on without temporal limits the adverse impacts on ACFN Treaty and Aboriginal rights will worsen.

134. ACFN has yet to hear of a management response that addresses and protects ACFN's Treaty and Aboriginal rights. As such, ACFN is rightfully concerned with the acidification of waterways in the area surrounding and the resultant adverse impacts upon its members' ability to exercise their Treaty and Aboriginal rights. The acidification of water bodies impacts ACFN's Treaty and Aboriginal rights because the resulting change in pH of a watershed has profound effects on its surrounding environment.[173] "Acid rain causes a cascade of effects that harm or kill individual fish, reduce fish population numbers, completely eliminate fish species from a water body, and decrease biodiversity".[174] When acidification occurs it causes the release of aluminum from the soils in and around bodies of water.[175] Aluminum is very toxic to fish and most aquatic plants.[176] The change in water pH results in fish of smaller size and weight. A

[171] The Health Study at page 212.

[173] *Effects of Acid Rain.; TAB D9.*
[174] *Effects of Acid Rain*.; TAB D9.
[175] *Effects of Acid Rain*.; TAB D9.
[176] *Effects of Acid Rain*.; TAB D9.

decreased pH may prevent fish eggs from hatching. ACFN is particularly concerned with incidents of 'episodic acidification" which occurs when there is a rapid change in a body of water caused by the run off of melting snow and downpour. Episodic acidification has been linked to fish kills which have the potential to leave a water body without any surviving fish.[177]

135. Further, a 2012 study (the "Kurek Study") conducted jointly by Environment Canada and Queens University, measured PAH deposition within the Athabasca oil sands region found that a lake in close proximity to the Mildred Lake Upgrader- near the confluence of the Muskeg and Athabasca Rivers had PAH levels 23 times higher than background levels and attributed this to the disposition of airborne contaminants produced by Upgraders like those at Mildred Lake.[178] The same study also found that PAH was travelling much farther than previously expected, as evidenced by PAH levels at 2.3 times background levels as far away as Namur Lake.[179] This is of great concern to ACFN given the association science makes between PAH and cancer, [180] and the community's long standing concerns regarding pollution from oil sands, elevated cancer levels in the community, and the contamination of country foods, particularly wide ranging ungulates such as moose.[181]

136. ACFN notes the LARP has largely ignored implementing key recommendations as provided in the *Government of Canada Response to Alberta's Draft Lower Athabasca Regional Plan, ("*Canada's Recommendations*").*[182] ACFN submits this report in its entirety to rebut Alberta and the Crown's allegations with respect to the content of LARP as being protective or balancing interests. The LARP has even failed to implement Canada's Recommendations as noted below despite Canada acknowledging that they could not even rely on the LARPs management frameworks. As such, ACFN is of the view that it is in the jurisdiction of the Panel to consider Canada's Recommendations on LARP and to accept the same as further recommendations of remedy put forth by ACFN. Canada has significant interests in the application of LARP as discussed bellow. In any event, it is ACFN's view that in order for LARP to reduce the likelihood of prospective future harms and decrease the possibility of such future harms the consideration of Canada's Recommendations surely must have included. ACFN has provided Canada's concerns and recommendations on the LARP below:

137. <u>Comments on the Surface Water Quality Management Framework</u>

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[177] *Effects of Acid Rain*.; TAB D9.
[178] Kurek et al., *Legacy of a half century of Athabasca oil sands development recorded by lake ecosystems*. Proceedings of the National Academy of Science, January 29, 2013, vol. 110, no.5. at 1763 [*Kurek Study*].; TAB D14.
[179] *Kurek Study* at 1763.; TAB D14.
[180] *Kurek Study* at 1763.;TAB D14.
[181] *As Long as the Rivers Flow* at 25, provided in Applicant's Supplementary Submission, Dated August 31, 2013.
[182] (June 6, 2011). [*Canada's Recommendations*].;TAB D12.

- The inclusion of biological parameters, such as changes in the relative abundance of aquatic invertebrates, bioaccumulation of toxic substances in key invertebrate or fish species, or fish health assessments. Because changes in these parameters are affected by all environmental stressors, they are useful tools for determining the full range of cumulative effects.[183] The inclusion of biological parameters would also take into account interactions between contaminants. Because mixtures of contaminants can interact with each other or the target organism to generate new effects, measuring biological endpoints (e.g. fish health) can reveal effects that might not be predicted from the properties of each of the constituent substances in isolation.[184]

- Although the Surface Water Quality Management Framework includes baselines, triggers and limits regarding acceptable contaminant levels, an enhanced understanding of the mechanisms underlying the spatial and temporal distribution of these contaminants would help to better manage the environmental impacts of the development of the oil sands. For example, the fluxes of contaminants, especially between surface and groundwater, and the atmosphere and surface water, have important implications for the distribution of contaminant loads throughout the ecosystem. Where the contaminants end up affects which part of the ecosystem they impact. Similarly, the frequency (how often), duration (how long), geographic extent (how broad), and season (fish spawning season) can change the impacts of the same amount of contamination. As an illustrative example, many adsorption processes and ecological consequences of oil sands effluents may be pronounced during the ice-cover period and particularly in the late fall/winter and early spring. By taking into account the considerations mentioned above, monitoring can be fine-tuned to efficiently measure factors that could have the most impact on the health of the ecosystem, including the resident biota.[185]

- the Framework could be strengthened through the inclusion of additional indicators that are high profile and important substances specific to the oil sands industry. Two notable groups would be oil sands acids (i.e. naphthenic acids) and polycyclic aromatic hydrocarbons (PAHs). Their addition would allow evaluation of monitoring data that is pertinent to the concerns raised regarding the oil sands' impact on water quality.[186]

[183] *Canada's Recommendations* at page 4.; TAB D12.
[184] *Canada's Recommendations* at page 5.; TAB D12.
[185] *Canada's Recommendations* at page. 5.; TAB D12
[186] *Canada's Recommendations* at page 5.; TAB D12.

- There are insufficient data available to support the proposed statistical approach (based on an "inverse t-test") and therefore the inclusion of some important indicators (e.g. PAHs and napthenic acids) in the Framework.[187] However, other statistical techniques exist that could be used (e.g. some based on presence/absence observations) for which current data would be sufficient. Alternative statistical methodologies would allow inclusion of key oil sands parameters in the Framework.[188]

- Additionally, there would be benefits to expanding the proposed geographic scope of the monitoring that supports the Surface Water Quality Framework. The risk in the approach proposed in the Framework is that evaluating a single monitoring location on the main stem of the Athabasca River could result in the omission of upstream localized exceedances of limits, especially in environmentally important tributaries. An increased spatial coverage would address this challenge and also allow monitoring to identify any problematic locations within the region. If there prove to be any localized points of concern, monitoring could be focussed on these areas, and management or protective actions taken if necessary.[189]

- Additionally, the Old Fort monitoring site would not provide an evaluation of ecological consequences, should there be any, of oil sands operations on the downstream receiving waters, including Lake Athabasca, the Peace-Athabasca Delta and the Slave River.[190]

- It is noted that most of Alberta's proposed water quality limits reference currently accepted standards. However, there are some limits that, in their present form, would not be appropriate for use by the federal government in its assessment and regulatory functions.[191]

- For both the groundwater and surface water quality management frameworks, some of the water quality limits cited would benefit from being re-examined and focussed on the most ecologically pertinent endpoint (e.g. the limits for Cr, Fe, Se).[192] For example,

[187] *Canada's Recommendations* at pages 5 and 6.; TAB D12.
[188] *Canada's Recommendations* at page 6.; TAB D12.
[189] *Canada's Recommendations* at page 6.; TAB D12
[190] *Canada's Recommendations* at page 6.TAB D12
[191] *Canada's Recommendations* at page 6.; TAB D12.
[192] *Canada's Recommendations* at page 6.; TAB D12.

the selenium water quality limit could be based on fish tissue units instead of water concentration, as new scientific evidence shows that the tissue concentration is more informative regarding the effects of contamination.[193]

- Another group of limits (e.g. Sb, Ba, Be, B, Ca, Cl, Co, Li, Mn, Mo, $SO_4$) is protective of receptors that are not aquatic organisms (e.g. livestock or drinking water), and therefore does not necessarily provide adequate protection of aquatic ecosystem health. Shifting the values of these limits to those recommended for the protection of aquatic ecosystems would improve the consistency of, and strengthen, the *Framework*.[194]

- It would also be important to include limits for the concentrations of the dissolved or bioavailable fractions of many of the metals, for which there are currently only "trigger" concentrations. Because the bioavailable fraction has the most direct impact on living organisms, this measurement is of significance to the ecosystem impacts of the metal contamination.[195]

- Some of the water quality limits that were derived from existing national standards are frequently surpassed in water quality readings from the Athabasca River. For example, Alberta Environment measured Canadian Council of Ministers of the Environment (CCME) guideline exceedances for each of iron, aluminum, cadmium and copper at a frequency of greater than 40% of samples taken; other relevant parameters (e.g., phosphorous, nitrogen, dissolved solids) are also consistently exceeded.[196]

- Because the river has considerable sediment and flows over bitumen deposits, it is unknown whether these exceedances are due to natural or human causes. Therefore, it is unknown whether they are exceedances that require action to manage, or are natural characteristics of the river, which require site- or region-specific limits.[197]

[193] *Canada's Recommendations* at page 6 and 7.; TAB D12.
[194] *Canada's Recommendations* at page 7.; TAB D12.
[195] *Canada's Recommendations* at page 7.; TAB D12.
[196] *Canada's Recommendations* at page 7.; TAB D12.
[197] *Canada's Recommendations* at page 7.; TAB D12.

- The development of site-specific guidelines would provide important context for these compounds.[198]

- Although trigger values are identified in the *Surface Water Quality Framework* as long-term mean values, it is also stated that a statistical evaluation of the method to determine triggers is required and that a method is needed to detect if a trigger value has been reached. The natural variation of the data is large and therefore limits the ability to measure increases. Understanding the statistical power to detect change for each water quality parameter is important.[199]

- A power analysis of a subset of Athabasca River water quality parameters revealed that the existing monthly sampling is likely insufficient to detect a 20% increase in effect size (an effect size often used) as many water quality indicators had low power. This was especially true for indicators of particular interest, including nutrients and metals (see Table 1 below). In Table 1, the Sample Size is the necessary number of annual samples to measure a 20% Effect Size Increase.[200] Stated otherwise, it is the number of annual samples necessary to measure a 20% increase or decrease in the mean. Low statistical power because of natural variability is an inherent challenge in water quality monitoring. Biological cumulative effects monitoring, detailed above, is a commonly used technique that complements chemical monitoring and aids in monitoring data interpretation, especially when inherent data variability makes collecting a sufficient number of chemical samples difficult.

<u>Comments on the Groundwater Management Framework</u>

- As noted in the *Framework*, the Lower Athabasca has a very complex hydrogeology. There are environmentally important ground-surface water interactions or exchanges in the oil sands region. Existing surface water contamination (from the natural oil sand deposits) is largely related to the groundwater flow (level and quantity) and groundwater contaminant flux to the rivers. An improved focus on these groundwater-surface water interactions would strengthen the *Groundwater Management Framework*.[201]

[198] *Canada's Recommendations* at page 7.; TAB D12.
[199] *Canada's Recommendations* at page 7.; TAB D12.
[200] *Canada's Recommendations* at page.7 and 8.; TAB D12.
[201] *Canada's Recommendations* at page 9.; TAB D12.

- Such an undertaking would require a network of monitoring wells and drive points proximal to groundwater discharge points near surface waters. Seepage meters installed in surface waters could also be a useful tool. Finally, integrated modelling of groundwater and surface water could also be helpful in delineating groundwater-surface water relationships.[202]

- The justification to divide the groundwater quality parameters into multiple tiers is not clear. There may be good justification and, if so, it is recommended that this justification be included in the *Framework*. To best understand groundwater quality, a broad suite of physical and chemical parameters could initially be consistently measured. Surrogate parameters (e.g. Total Dissolved Solids (TDS)) could replace individual analytes once their reliability has been demonstrated. Alternatively, the sets of indicators within the *Framework's* "primary" and "secondary" tiers could be considered to be of equal importance, and could both be monitored to ensure adequate groundwater quality.[203]

- The *Framework* could also be strengthened by providing justification for the differences between the proposed water quality parameters for mining versus in situ operations.[204]

- The establishment of indicators, limits and triggers is an effective approach to detect changes to groundwater quality and quantity. However, certain parameters in specific aquifers are highly variable (e.g. TDS in the Basal McMurray aquifer), therefore a single trigger value may not be applicable and spatially explicit limits would likely need to be developed.[205]

- Also, as mentioned above, some of the limits cited are protective of receptors that are not aquatic organisms. It is recommended that the use of drinking water guidelines be used in the context of drinking water, and not used to determine the extent of protection of aquatic life.[206]

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[202] *Canada's Recommendations* at page 9.; TAB D12.
[203] *Canada's Recommendations* at page 9.; TAB D12.
[204] *Canada's Recommendations* at page 9.; TAB D12.
[205] *Canada's Recommendations* at page 9.; TAB D12.
[206] *Canada's Recommendations* at page 10.; TAB D12.

- While a regional monitoring and evaluation system is certainly necessary, the use of regional triggers to serve as early warnings of a negative change in condition from natural variability may be hampered by the slow rate of groundwater flow in much of the region. Accordingly, it is possible that effects of site-specific projects may not be observed at the regional scale or at surface water receptors until decades or centuries later.[207]

- Examination of the data generated by routine site-specific monitoring, instead of that from regional monitoring, would provide better "early warning" of possible groundwater problems. The proximity of monitoring wells to potential sources of contamination and closer spacing of monitoring locations could make the site-specific locations more effective than the regional system. Again, the establishment of indicators, limits and triggers for these site-specific locations should apply.[208]

- In order to manage the impacts of development, it is usual practice to determine the natural background levels so that the total anthropogenic releases can be quantified and monitored. The *Groundwater Management Framework* outlines a plan to supplement the existing data set through the collection of additional data for the three regional monitoring networks, either recently established, or still being planned.[209]

- The determination of accurate baseline conditions for groundwater quality may prove challenging, as there is already considerable development activities in the region. Additional measures, such as isotopic fingerprinting methods may be the only means to understand pre-development conditions.[210]

- The *Groundwater Management Framework* identifies the three groundwater management areas. The study area boundary for the North Athabasca Oil Sands (NAOS) could be strengthened by including oil sands projects where there is a reasonable potential for environmental impacts and cumulative effects to groundwater. In particular, all proposed oil sands mines and lease areas immediately south of Wood

[207] *Canada's Recommendations* at page 10.; TAB D12.
[208] *Canada's Recommendations* at page 10.; TAB D12.
[209] *Canada's Recommendations* at page 10.; TAB D12.
[210] *Canada's Recommendations* at page 10.; TAB D12.

Buffalo National Park should be completely included within the study area boundary for the NAOS.[211]

- There are some activities specific to oil sands development that may have impacts on fish, fish habitat and navigation that deserve consideration. One impact to surface water that is not well-understood results from activities associated with in situ projects such as Steam Assisted Gravity Drainage developments. With this type of oil extraction, pressurized steam is pumped underground. This can cause heave and subsidence of the landscape overlaying the reservoir, which, in turn, can have an effect on groundwater and surface water flows and potentially impact wetlands, fish habitat, and navigation. Another consideration is the potential for the depressurization of groundwater due to oil sands mine development, which could result in a de-watering of surface water streams and tributaries, with subsequent impacts on fish habitat and navigation. Further research on these activities, their impacts and their potential management through limits and triggers, would help the LARP to achieve its sustainable development goals.[212]

Comments on the Air Quality Management Framework

- Although the *Framework* addresses $SO_2$ and $NO_2$, there are other important air pollutants that are relevant to the oil sands and have negative human and ecosystem health impacts, specifically particulate matter, ozone, volatile organic compounds, metals and toxics.[213]

- Describing the relationships between the LARP and other frameworks, such as the *Clean Air Strategic Alliance Particulate Matter and Ozone Management Framework*, and the *Air Quality Management System*, could help demonstrate the extent to which it conveys Alberta's comprehensive approach to air quality management.[214]

- The geographic scope of the *Air Quality Management Framework* would not enable it to address transboundary air quality concerns (e.g. acid-sensitive lakes outside the Lower Athabasca region). By definition, this is difficult to do within a regional planning regime such as the LARP.[215]

[211] *Canada's Recommendations* at page 10.; TAB D12.
[212] *Canada's Recommendations* at page 11.; TAB D12.
[213] *Canada's Recommendations* at page 11.; TAB D12.
[214] *Canada's Recommendations* at page 11.; TAB D12.
[215] *Canada's Recommendations* at page 11.; TAB D12.

- Although intergovernmental discussions on ambient air quality standards will continue, it is worth noting that there are a variety of potential human and/or ecosystem health endpoints. Two examples are the World Health Organization's health-based guideline for both $NO_2$ and $SO_2$.[216]

- Similarly, there are areas in the measurement methodology and analysis aspects of the *Air Quality Management Framework* that could be strengthened to increase its effectiveness at protecting health and the environment. For example, conventional ambient $NO_2$ measurements do not measure $NO_2$ directly, but through a chemical conversion process that can result in artificially inflated values for $NO_2$. This is especially the case in non-urban settings. By taking challenges like these into account, the *Framework* could be better able to manage air quality.[217]

- The proposed calculation method for air quality limits uses the 99th percentile value as the metric representative of the upper tail of the concentration frequency distribution. This means that 87 hours (or roughly 3 and a half days) of highest concentration values could be lost when representing the peak data. Further, the proposed method calculates annual ratios of the 99th percentile to the maximum value and then averages the ratio over several sites. This method reduces the influence of the highest concentration values through the use of the 99th percentile, the application of the average ratio from all sites to adjust the trigger criteria, and the combination of urban, industrial and background site data to calculate the average ratio for $NO_2$.[218]
- Another possible approach for applying the trigger concept could be to follow the Canada Wide Standards approach for ozone, namely, to use the 4th highest hourly concentration values instead of a percentile value and base the trigger levels on the original AAAQO values (i.e., with no adjustment by the average of the 99th percentile to maximum ratios). This could provide a more direct measure of peak air quality and allow the detection of the presence and impact of high values.[219]
- By including "secondary pollutants" (i.e., the reaction products of $SO_2$ and $NO_2$ with other airborne compounds), the scope of the *Framework* would be more comprehensive and protective of human and ecosystem health.[220]

[216] *Canada's Recommendations* at page 12.; TAB D12.
[217] *Canada's Recommendations* at page 12.; TAB D12.
[218] *Canada's Recommendations* at page 12.; TAB D12.
[219] *Canada's Recommendations* at page 12.; TAB D12.
[220] *Canada Recommendations* at page 13.; TAB D12.

## VI. **Comments on Biodiversity Protection**

- From a Government of Canada perspective, protected land designation should ensure the adequate representation of all the ecosystem types in the region, including the boreal plains. Consideration should also be given to ensuring connectivity among protected areas, including National Parks. By so doing, the representative biodiversity of northeastern Alberta is more likely to be conserved.[221]

- As the Government of Alberta advances with its *Biodiversity Management Framework*, it will be important to ensure a prominent focus on threatened and endangered species whose critical habitat lies within the region. The Lower Athabasca Region contains habitat for a number of endangered and threatened species (e.g. boreal caribou) whose critical habitat will be identified in the near future.[222]

- One strategy for protecting biodiversity, including species at risk, could be the use of land-use offsets for those areas impacted by industrial development, as was proposed by the Lower Athabasca Regional Advisory Council. “Offset” lands would be designated to compensate for ecological values (e.g. old growth forest biodiversity or peat bogs) that are impaired or lost through economic activities.[223]

- One strategy for protecting biodiversity, including species at risk, could be the use of land-use offsets for those areas impacted by industrial development, as was proposed by the Lower Athabasca Regional Advisory Council. “Offset” lands would be designated to compensate for ecological values (e.g. old growth forest biodiversity or peat bogs) that are impaired or lost through economic activities.[224]

- The Government of Canada acknowledges the Government of Alberta for highlighting the importance of Aboriginal engagement as one of the key implementation outcomes in the LARP. Accordingly, the Government of Alberta is encouraged to incorporate Aboriginal Traditional Knowledge in the development of the *Biodiversity Management Framework* and in the setting of limits and targets.

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[221] *Canada's Recommendations* at page 13.; TAB D12.
[222] *Canada's Recommendations* at page 13.; TAB D12.
[223] *Canada's Recommendations* at page 13.; TAB D12.
[224] *Canada's Recommendations* at page 14; TAB D12.

Canada's General Comments on LARP

- When considering water quantity limits under the forthcoming *Surface Water Quantity Management Framework*, it is recommended that the impacts of these limits on navigation, and Aboriginal treaty rights to navigation, be taken into account.[225]

- Wood Buffalo National Park, a United Nations Environmental, Scientific and Cultural Organization (UNESCO) World Heritage Site, is located adjacent to the Lower Athabasca Region, forming part of its north-western border. The Peace-Athabasca Delta, a wetland of global significance, is both within the park and downstream of oil sands development. In order to understand and manage downstream environmental impacts due to development within the Lower Athabasca Region, it is suggested that monitoring, especially within the Peace-Athabasca Delta, also be carried out.[226]

- It would be useful to clarify two elements of Alberta's biodiversity framework moving forward. The first is regarding whether newly-established provincial recreation areas will include a restriction that prohibits hydroelectric facilities and transmission-related infrastructure on the Slave River, particularly in the Provincial Recreation Area containing Slave River, Cassette, Mountain and Pelican Rapids, as these potential developments could also impact the Delta. Secondly, there is uncertainty on the location of the Athabasca River Corridor adjacent to Wood Buffalo National Park, management intent, and potential intersection with protected land designation.[227]
- The Government of Canada recognizes that the Government of Alberta has acknowledged the importance of working with Aboriginal peoples on the implementation of the LARP. It is recommended that the Government of Alberta continue working with parties downstream of the oil sands development, including the Government of the Northwest Territories and affected Aboriginal communities, to ensure they receive adequate supplies of clean fresh water.[228]

138. In summary, it is ACFN's is of the view the provisions of LARP may have direct and adverse impacts on its ability to exercise its Treaty Rights by further compromising the ability to travel by boat on the Athabasca River and in the Athabasca Delta in order to exercise those Rights. ACFN has also raised issues with respect to health that are directly linked to LARP and the exercise of its rights. As such, ACFN reiterates its request for amended of LARP insofar directly and adversely affects ACFN's ability to exercise its Treaty and Aboriginal Rights, which consequently affects the health of it members. ACFN requests for its submissions with respect

[225] *Canada's Recommendations* at page 14.; TAB D12.
[226] *Canada's Recommendations* at page 14.; TAB D12.
[227] *Canada's Recommendations* at page 14.; TAB D12
[228] *Canada's Recommendations* at page 14.; TAB D12.

to what Alberta considers to be "omissions from LARP" to be considered as its recommendations for remedy.

All of which is respectfully submitted this 25 day of August, 2014

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Per Jenny Biem and Melissa Daniels

Counsel for the Athabasca Chipewyan First Nation