

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 Mikisew Cree First Nation

August 25, 2014

Reply Submission
of the Mikisew Cree First Nation

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Introductory Comments

1. Since the Mikisew Cree First Nation (“MCFN”) filed its request for a review of the Lower Athabasca Regional Plan (“LARP”) pursuant to section 19.2 of the *Alberta Land Stewardship Act*¹ (ALSA) more than twelve months ago (the “Request”), the implementation of LARP has continued to cause further impacts to the MCFN community. Simply put, LARP remains a deficient instrument that, unless revised to incorporate the section 35 rights of aboriginal peoples in a manner consistent with the Crown’s constitutional obligations, will continue to undermine responsible decision-making and result in significant impacts on the constitutionally protected rights of aboriginal peoples.
2. Notwithstanding the growing list of decisions and actions flowing from the implementation of LARP that cause adverse impacts to the exercise of MCFN’s rights under s.35 of the *Constitution Act, 1982*, the Response Submissions of the Government of Alberta (the “Response”) asks the Panel do what Alberta has done at every stage of LARP’s development, namely exclude MCFN’s section 35 rights and interests from being considered in relation to LARP. In doing so, Alberta urges this Review Panel to ignore basic principles of transparency and accountability.
3. For the reasons set out below, MCFN respectfully submits that Alberta errs in submitting in the Response that MCFN’s concerns are either outside the jurisdiction of the Review Panel or cause no direct or adverse effect on MCFN. Alberta’s position lacks merit and would add further procedural unfairness to this review process if accepted. Accordingly, Alberta’s position should be rejected.
4. Alternatively, if the Panel finds that it does not have jurisdiction to consider the concerns raised by MCFN in the Request, MCFN respectfully submits that the Panel should not make a finding respecting whether MCFN is directly and adversely affected by LARP.

Structure of this Reply

5. This Reply is organized into the following three parts:
 - a. Part 1 outlines why Alberta’s arguments respecting the limited jurisdiction of the Review Panel should be rejected;
 - b. Part 2 outlines why Alberta’s arguments that MCFN is not adversely affected by LARP lack merit; and
 - c. Part 3 outlines an alternative argument should the Review Panel determine that it does not have jurisdiction to consider any of the issues included in the Request.

¹ ALSA, Statutes of Alberta, 2009, Chapter A-26.8 at Tab 2 of Alberta’s Response

Part 1: The Panel has the jurisdiction and obligation to consider the issues raised in MCFN's Request

6. For the reasons set out in paragraphs 7-37 below, MCFN respectfully submits that the issues raised in MCFN's Request are within the jurisdiction of the Review Panel and that Alberta's submissions respecting the jurisdiction of the Review Panel should be rejected.

Alberta's interpretation of the scope of the Panel's jurisdiction is inconsistent with a purposive interpretation of ALSA

7. In response to Alberta's narrow interpretation of the jurisdiction of the Review Panel, MCFN submits that the jurisdiction of the Review Panel must be determined in light of the purposes of ALSA. Contrary to Alberta's submission, any ambiguities and conflicts between ALSA, the ALSA Regulations and the Rules of Practice for Conducting Reviews of Regulation Plans must be resolved in favour of the legislative purpose of ALSA,² and interpretations ought to be fair, large and liberal in order to ensure that regulations achieve the goals laid out in ALSA.³

8. The purposes of ALSA are:

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

(2) The purposes of this Act are:

- a) to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;
- b) to provide a means to plan for the future, recognizing the need to manage activity to meet the *reasonably foreseeable needs* of current and future generations of Albertans, *including aboriginal peoples*;
- c) to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment;
- d) to create legislation and policy that enable sustainable development *by taking account of and responding to the cumulative effect of human endeavour* and other events.⁴

9. These purposes indicate that the Review Panel has a broad mandate to ensure that regional plans made by Alberta meet the purposes of ALSA, including meeting the needs of aboriginal peoples, consistent with the Crown's constitutional obligations. This is consistent with the way in which the Review Panel's task is described in ALSA, which is

² Rules of Practice for Conducting Reviews of Regulation Plans, Tab 1 of Alberta's Response, at Rule 49

³ Elmer A. Driedger, *The Construction of Statutes*, Toronto, Butterworths, 1983, at 87

⁴ ALSA, section 1(2). *Emphasis added.*

to conduct a “review of the regional plan” and provide “any recommendations.”⁵ The broad obligations of the Review Panel are repeated, without narrowing, in the Alberta Land Stewardship Regulation.⁶ By contrast, other review mechanisms under ALSA are very prescriptive and limit the considerations that can be taken into account, suggesting that the legislature did not intend review panels to have the same narrow focus.⁷

10. In this regard, MCFN respectfully submits that Alberta’s interpretation would narrow the scope of the review process to such a degree that the function of the reviewing body is rendered meaningless or ineffective.⁸ Excluding issues such as harms pertaining to the needs of aboriginal peoples, harms arising from cumulative effects of development and regulatory restrictions, among others, would prevent the Review Panel from taking any credible steps to ensure that LARP is consistent with these purposes. In urging the adoption of such an approach, Alberta has not provided any materials demonstrating that it was the legislature’s intent for the review process under subsection 19(2) of ALSA to be a meaningless or ineffective process.

Alberta’s interpretation of the scope of the Panel’s jurisdiction is inconsistent with principles of natural justice

11. If Alberta’s narrow interpretation of the review process is accepted, MCFN will be deprived of its expectation of having its concerns regarding impacts to its section 35 rights considered at the most accessible forum. In *Martin*, the Supreme Court of Canada held that:

Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts....This accessibility concern is particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling legislation, so that forcing litigants to refer *Charter* issues to the courts would result in costly and time-consuming bifurcation of proceedings.⁹

12. Consideration of the issues raised by MCFN in this review is consistent with the clear directives from the Supreme Court of Canada that “...it would be most convenient for aboriginal persons to seek the relief afforded by their constitutionally protected rights as early as possible within the mechanisms of the administrative and judicial apparatus.” MCFN notes that the Court went on to find that the more relaxed rules of evidence in an administrative tribunal setting may make the tribunal more conducive than a superior court to the determination of aboriginal rights claims.¹⁰

⁵ ALSA at section 19.2(1)

⁶ Alberta Land Stewardship Regulation, AR 173/2011 at section 9 (“ALSA Regulation”)

⁷ See eg, ALSA at 19.1

⁸ *Quebec (Attorney General) v. Canada (National Energy Board)* [1994] 1 SCR 159 at para 60.

⁹ *Nova Scotia (Workers’ Compensation Board) v Martin; Nova Scotia (Workers’ Compensation Board) v Laseur*, 2003 SCC 54 at para 29

¹⁰ *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55 at paras 32 and 36 (*Paul*)

13. This is certainly the case here, where LARP, as part of a scheme of land and resource management, directly engages issues which go to the crux of the Crown-aboriginal relationship.

The “directly and adversely affected” test is a threshold test and is not determinative of the scope of the Panel’s jurisdiction

14. In response to Alberta’s submission at paragraph 38 that the role of the Panel is restricted to reporting on existing or future harms relating to any “direct and adverse” impacts, MCFN respectfully submits that the “directly and adversely affected” test under ALSA serves as test for standing in the same way that the “directly and adversely affected” test plays a gatekeeper function in other Alberta legislation.
15. This interpretation is consistent with the function of other administrative bodies in Alberta, such as the Alberta Energy Regulator, that similarly have “directly and adversely affected” test in their constituting legislation. As the Alberta Court of Appeal noted when considering the role of the “directly and adversely affected” test governing the Energy Resources Conservation Board:

The right to intervene in the Act is designed to allow those with legitimate concerns to have input into the licensing of oil and gas wells that will have a recognizable impact on their rights, while screening out those who have only a generic interest in resource development (but no “right” that is engaged), and true “busybodies”. As observed in *Dene Tha’* at para. 14, that balancing is the responsibility of the Board, provided that it is done on a proper legal foundation.¹¹

16. There is nothing ALSA or the ALSA Regulations that suggests that the “directly and adversely affected” test is anything other than a test for standing. On a plain reading of ALSA, once a party has established the potential for direct and adverse impacts, as MCFN has done in its Request and supporting materials, the Review Panel is obligated to conduct a review of the regional plan. ALSA does not limit the scope of the review or the Review Panel’s authority to issue recommendations.

The *Administrative Procedures and Jurisdiction Act* does not preclude the Review Panel from considering the issues set out in MCFN’s Request

17. Alberta’s submission that the Panel is precluded from considering MCFN’s concerns because of the *Administrative Procedures and Jurisdiction Act* (“APJA”) is without merit. MCFN has not sought relief that would result in a declaration that LARP is unconstitutional thus triggering APJA. Contrary to Alberta’s submission, the issue in this review is not whether the Review Panel has the jurisdiction to determine the constitutionality of LARP. The issue is the obligation for the Review Panel to ensure that its recommendations are consistent with the constitutional framework of Canada.

¹¹ *Kelly v. Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325 at para 26

18. As the Supreme Court of Canada has repeatedly found, when exercising their statutory authority, including the authority to make recommendations, administrative bodies must take into account the Constitution as the “supreme law of the land”.¹² Accordingly, the Review Panel must consider the constitutional issues raised in the Request for the purpose of determining whether the Review Panel must issue recommendations and, if so, what the nature and content of the recommendations should be in order for them to be consistent with the Constitution. There is no bar in APJA preventing the Review Panel from considering these issues.

The procedural and substantive flaws in the creation of LARP are relevant to the Review Panel’s understanding of the harms from LARP and to the Review Panel’s formulation of effective recommendations

19. Alberta’s submission that MCFN’s concerns respecting consultation about the development of LARP is outside of the jurisdiction of this Review Panel ignores that section 5 of ALSA specifically requires Alberta to consult regarding the development of a regional plan. As a body tasked with reviewing whether a regional plan is consistent with a plan’s authorizing statute and the constitutional framework of Canada, considering whether Alberta upheld its statutory and common law obligations in the development of LARP is a critical part of the inquiry into whether LARP has had or will have adverse impacts on the MCFN.
20. In response to paragraph 56 of the Response, MCFN notes that Alberta’s failure to consult has implications for the content of LARP. Because Alberta did not consult MCFN or any other First Nation on any criteria, thresholds or measures relating to the meaningful exercise of section 35 rights now and into the future, LARP is devoid of any content relating to such criteria, thresholds or measures. As noted by the Joint Review Panel for the Shell Jackpine Mine Expansion Project in its report:

The absence of a management framework and associated thresholds for TLU makes it very difficult for Aboriginal groups, industry, and panels such as this one to evaluate the impact of individual projects on TLU. The Panel believes that to inform land use planning and allow better assessment of both project and cumulative effects on Aboriginal TLU, rights, and culture, a TLU management framework should be developed for the Lower Athabasca Region¹³

21. In response to Alberta’s submission that the Review Panel cannot consider any matters prior to the enactment of LARP, MCFN respectfully submits its concerns about the creation of LARP are necessary and relevant for the Panel to make effective recommendations to address the adverse impacts that LARP is having and may continue to have on MCFN. Specifically, the information that MCFN submitted to Alberta regarding its use and enjoyment of lands and resources, existing impacts to the health of

¹² *Paul, supra*, at para. 23 and 39

¹³ *Re Jackpine Mine Expansion*, 2013 ABAER 011, at para 36, MCFN supporting materials

MCFN members, and the steps needed to adequately incorporate the exercise of MCFN's rights and culture into LARP was submitted during the creation of LARP. Without considering how the impacts alleged in MCFN's Request came about, the Review Panel could issue recommendations that would result in the repetition of the impacts that the recommendations were meant to address. This would be irresponsible and contrary to the purpose of the review.

The effect of development and legislative restrictions on the exercise of MCFN's rights at the time LARP was enacted is relevant to understanding the harm of LARP

22. In paragraphs 65-69 and 97-114, Alberta submits that the Review Panel cannot consider existing harms from activities and legislation. In response, MCFN respectfully submits that Alberta's approach is inconsistent with the Panel's obligation to ensure that LARP is consistent with the purpose of ALSA set out in paragraph 1(2)(d) of ALSA. That paragraph describes how the existing effects of human endeavour and other events must be taken into account in provincial policies under ALSA.
23. Respectfully, if Alberta views the state of development and existing impacts to MCFN's health and rights as irrelevant to this review, then this review is more critical than ever as it suggests that Alberta developed LARP in a factual vacuum. Consideration of cumulative effects is inseparable from any review of a planning process. Here, excluding consideration of existing effects, whether from development or legislation, is similarly inconsistent with the purpose of ALSA.
24. Furthermore, it would be contrary to the Review Panel's obligation to consider whether MCFN is adversely affected by LARP (should the Panel determine it has jurisdiction to do so) to exclude consideration of cumulative effects. As noted by the British Columbia Court of Appeal in the *West Moberly* decision:

[117] 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 has gone before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners' treaty right, and the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt.¹⁴
25. In response to Alberta's submissions that the Public Lands Administration Regulation, which will govern many of the land designations under LARP, does not adversely impact MCFN's rights, MCFN notes that more than 10 First Nations, including MCFN, have challenged the Public Lands Administration Regulation as infringing their respective treaty rights.¹⁵

¹⁴ *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para 117

¹⁵ Amended Originating Application in the matter of ACFN et al v. Her Majesty the Queen in Right of Alberta et al, court file no. 1203-01106, Filed on March 23, 2012.

Future activities and the implementation of LARP are relevant to the Review Panel's understanding of the harms from LARP and to the Review Panel's formulation of effective recommendations

26. In response to Alberta's submission that the Review Panel cannot consider future harms, MCFN notes that this submission is contrary to a central purpose of ALSA, namely
- to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples;¹⁶
27. Alberta's submission also belies that the Minister has specifically directed applicants seeking a review of a regional plan to include information relating to future potential impacts in the application.¹⁷ It would be nonsensical for the Minister to require applicants to provide this information to the Review Panel only for the Review Panel to be precluded from considering the information.
28. The need for those reviewing regional plans to consider future activities only makes sense because the entire premise of regional planning is to develop forward looking documents. As such, Alberta's submission that future activities cannot be considered would again cause an absurd result that is contrary to the entire scheme of ALSA.
29. Alberta's submission that the implementation of LARP falls outside of the jurisdiction of the Review Panel similarly ignores that the implementation of a regional plan is a central part of ALSA's statutory scheme as reflected in section 9 of ALSA and therefore should be part of the Review Panel's inquiry when considering whether LARP is consistent with the purpose of ALSA. In this regard, MCFN submits that the exclusion of concerns relating to the implementation of LARP results in an arbitrary limitation on the jurisdiction of the Review Panel that has no basis in ALSA.
30. In response to Alberta's submission that future impacts cannot be considered by the Review Panel, MCFN notes that this proposition was specifically rejected in the decision of *Rio Tinto*, cited by Alberta as setting out the proper approach for determining whether a government decision or action may adversely impact section 35 rights:

As stated in *R. v. Douglas*, 2007 BCCA 265 (CanLII), 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must be 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.¹⁸

¹⁶ ALSA, supra, at subsection 1(2)(b)

¹⁷ ALSA Regulations at 7(1)

¹⁸ *Rio Tinto Alcan Inc. and British Columbia Hydro and Power Authority*, 2010 SCC 43 at para. 46; reproduced in Alberta's Response at Tab 9

31. Alberta's submission that LARP does not increase the possibility of harm to MCFN's exercise of its rights ignores the extracts of recent regulatory decisions contained in MCFN's supporting materials. These extracts demonstrate, in MCFN's submission, that LARP has already increased the harm to MCFN.¹⁹
32. In addition, Alberta's Response ignores that the Alberta Energy Regulator, the decision-maker under natural resource enactments and the main decision-maker applying LARP, has recently amended its Rules of Practice to allow it to exclude any issues from a regulatory process that, in the Regulator's view, has been dealt with through a land use planning process.²⁰

Omissions in LARP are not neutral in effect and are relevant to the Review Panel's understanding of the harms from LARP and to the Review Panel's formulation of effective recommendations

33. In response to Alberta's submission that the Review Panel lacks jurisdiction to consider whether omissions from LARP may cause adverse impacts to the exercise of MCFN's rights, MCFN notes that *ALSA* sets out elements that may be included in a regional plan. It would be inconsistent with the Review Panel's statutory obligation to "conduct a review of the regional plan" if it is precluded, as Alberta submits, from considering whether the failure to include elements specifically allowed for by *ALSA* is consistent with Alberta's constitutional obligations towards MCFN's section 35 rights.
34. Alberta's submission that omissions from LARP cannot cause impacts must be rejected as it ignores the simple reality that *ALSA* requires decision makers to follow the priority scheme and criteria set out in regional plans. If the priority scheme omits important considerations or if the thresholds for management responses omit measures relating to the conditions required for the exercise of aboriginal rights, then there is a very real chance that these considerations will not be considered in decision-making. As stated above, this was noted by the Joint Review Panel for the Shell Jackpine Mine Expansion Project in its report, wherein the JRP stated:

The absence of a management framework and associated thresholds for TLU makes it very difficult for Aboriginal groups, industry, and panels such as this one to evaluate the impact of individual projects on TLU. The Panel believes that to inform land use planning and allow better assessment of both project and cumulative effects on Aboriginal TLU, rights, and culture, a TLU management framework should be developed for the Lower Athabasca Region²¹

35. Alberta's submission that omissions do not have impacts also runs contrary to recent AER decisions. For example, the AER recently viewed itself as bound by LARP to issue

¹⁹ See MCFN's supporting materials at Tab 11

²⁰ Alberta Energy Regulator Rules of Practice, AR 99/2013 at 6.2(2)(d)

²¹ *Re Jackpine Mine Expansion*, 2013 ABAER 011 at para 36, reproduced at Tab 11 of MCFN's supporting materials

approvals even in the absence of tools and frameworks to consider and manage cumulative impacts on the exercise:

While the panel recognizes that some of the tools and frameworks contemplated under LARP for managing cumulative effects, such as disturbance limits and the biodiversity management framework, have not yet been developed or implemented, the panel does not believe that it is necessary or would be appropriate to wait until these tools have been developed and implemented before issuing the authorizations for the Corehole Program wells²²

36. In response to Alberta's submission that Alberta is barred by the constitutional division of powers from including mechanisms for managing traditional land use, MCFN notes it has not requested that the Review Panel consider issuing recommendations to amend LARP to manage traditional land use. Rather, MCFN has requested that the Review Panel find that LARP does not include mechanisms for managing industrial activities that may adversely impact MCFN's rights, health and financial wellbeing.
37. MCFN also notes that the recent Supreme Court of Canada decision in *Grassy Narrows First Nation v. Ontario (Natural Resources)* 2014 SCC 48 confirms that the province has a constitutional obligation to manage lands in a way that respects Treaty rights, regardless of the division of powers.²³ To the extent that LARP is the vehicle that Alberta has chosen to seek to discharge that obligation, then the omissions have adverse impacts and must be considered during this review.
38. For the reasons set out above, MCFN respectfully submits that the Review Panel must reject Alberta's contention that the Review Panel can only consider the two concerns identified by Alberta at paragraph 115 of its Response.

Part 2: Alberta's submissions regarding the adverse impacts of LARP on MCFN lack merit and should be rejected

LARP has had and will likely cause a greater range of adverse impacts to MCFN's rights than recognized by Alberta in its Response

39. At paragraph 43 of the Response, Alberta urges the Panel to follow the causation principles discussed by the Supreme Court of Canada in *Rio Tinto* when determining whether MCFN is directly and adversely affected by LARP. MCFN notes that the Supreme Court of Canada determined that strategic decisions meet the causation principles necessary to adversely impact the exercise of section 35 rights and trigger consultation. In this regard, MCFN brings to the Review Panel's attention the following passage from *Rio Tinto*:

²² 2013 ABAER 017: Teck Resources Limited, Application for Oil Sands Evaluation Well Licences, Undefined Field, at para 55 reproduced at Tab 11 of MCFN's supporting materials

²³ *Grassy Narrows First Nation v. Ontario (Natural Resources)* 2014 SCC 48 at para 50

[44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to “strategic, higher level decisions” that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, at paras. 37-40.

... 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. 72-73.²⁴

40. MCFN respectfully submits that the full range of the concerns it articulated in its Request meet this causation principle from *Rio Tinto* and therefore should be considered by the Review Panel.
41. In response to Alberta's submission that the Panel should narrowly construe the meaning of “direct and adverse” because the principle known as the *Nowegijick* principle ought not to apply to provincial laws, MCFN notes that, contrary to Alberta's submission, that principle has been applied to provincial matters.²⁵
42. Further, a broad and purposive interpretation of “directly and adversely affected” is required to meet the purposes of ALSA (as set out above) and the object of this Review Panel to consider whether LARP is consistent with the purposes of the Act with respect to its bearing on aboriginal peoples. A broad and purposive interpretation is also consistent with the scheme of ALSA, wherein other rights, such as private property rights, are dealt with in much greater specificity.²⁶

²⁴ *Rio Tinto*, supra, reproduced Tab 9 of Alberta's Response

²⁵ See, for e.g., *Keewatin Tribal Council Inc. v. Thompson (City)* [1989] M.J. No. 295 at pg 10.; *Musqueam Indian Band Board of Review v Musqueam Indian Band* [2013] B.C.J. No. 1672 at paras 125-126 where the BC Supreme Court refrained from applying the principle because there was no ambiguity at issue rather than because a provincial law was at issue; *Société d'histoire et d'archéologie de Mashteuiatsh c. Québec (Sous-ministre du Revenu) (direction du contentieux fiscal et civil, Revenu Québec)* [2013] J.Q. no 8709 at paras 29-36

²⁶ ALSA, supra at 19.1

43. Further, any ambiguity as to whether there should be a distinction between provincial and federal interpretative principles respecting aboriginal interest was settled in the recent Supreme Court of Canada decision in *Grassy Narrows First Nation v. Ontario (Natural Resources)* 2014 SCC 48. In that case, the Supreme Court of Canada affirmed that provinces have the very same fiduciary duties and other obligations that led to the *Nowegijick* principle being applied to federal legislation.²⁷
44. When approach to determining impacts established in *Rio Tinto* is considered together with a purposive interpretation of ALSA and the ALSA Regulations, “quiet enjoyment of property” and “health” clearly engage the exercise of MCFN’s section 35 rights and right to access Crown lands for the purpose of exercising those rights. Given that the Natural Resources Transfer Agreement codifies the right to access Crown lands for the purpose of exercising their section 35 rights, MCFN submits that “property” includes Crown lands to which MCFN members have a right of access.

Alberta has provided no evidence to support its assertion that LARP does not harm MCFN

45. In response to paragraphs 119-121 of Alberta’s Response, MCFN respectfully requests that the Review Panel take note that Alberta has:
 - a. provided no evidence of regulatory decisions that would support Alberta’s assertion that there is no prioritization of economic interests over MCFN’s constitutionally protected rights;
 - b. provided no evidence respecting the process that went into the balancing of different interests in LARP to support Alberta’s contention that LARP does not prioritize economic interests;
 - c. provided no evidence that conditions necessary to support the future exercise of constitutionally protected rights were taken into account in the measures included in LARP for the purpose of balancing outcomes for the Lower Athabasca Region;
 - d. provided no evidence that the needs of constitutionally protected rights were taken into account in any thresholds or frameworks under LARP;
 - e. provided no evidence that LARP will prevent development within conservation areas;
 - f. provided no evidence of any meaningful correlation between conservation areas in LARP and the patterns of MCFN use and occupancy;

²⁷ *Grassy Narrows First Nation v. Ontario (Natural Resources)* 2014 SCC 48 at paras 50-52

- g. provided no evidence to respond to the reports of contamination of food resources affecting the health of MCFN members;
- h. provided no evidence to establish that the future needs of MCFN members have been provided for in LARP;
- i. provided no evidence to rebut MCFN's evidence that LARP is being used by Alberta and other decision-makers to take away MCFN's right to have its concerns regarding impacts to its constitutionally protected rights considered in decision-making;
- j. provided no response to the extracts of regulatory decisions contained in MCFN's supporting materials that provide examples of regulatory decision makers explaining that they are compelled by LARP to approve industrial projects because LARP has prioritized economic considerations over environmental and social considerations. As set out in these extracts, the Alberta Energy Regulator is using LARP to justify authorizing impacts to constitutionally protected rights without considering the cumulative effects concerns articulated by First Nations.²⁸

46. MCFN submits that Alberta has provided no such evidence because there is none that Alberta could provide to support its assertion that LARP does not require decision-makers to prioritize development over the exercise of constitutionally protected rights.

47. On the other hand, the materials submitted by MCFN to support its request for a review of LARP demonstrate that LARP failed to include thresholds relating to MCFN's rights, failed to protect or conserve land in areas of importance to MCFN, allows development in areas designated for conservation, and lacks critical thresholds relating to the health of MCFN members. These materials also demonstrate that LARP has been relied upon to support unimpeded development without consideration of impacts to MCFN's rights.

Part 3: If the Review Panel determines that it does not have jurisdiction to consider any of the issues raised in the Request, the Review Panel should not speculate on whether MCFN is directly and adversely affected by LARP

48. Should the Review Panel accept Alberta's submissions that it lacks jurisdiction to consider any of the concerns raised in the Request, Mikisew respectfully submits that it would be procedurally unfair and contrary to the laws of natural justice for the Review Panel to go on to make findings regarding the severity of LARP's impacts on MCFN.

49. In this regard, MCFN notes that the Rules of Practice for Conducting Reviews of Regional Plans were established approximately 7 months after MCFN filed its Request

²⁸ MCFN supporting materials at Tab 11

with Alberta and following Alberta's repeated refusal to discuss the content or nature of the review process with MCFN.

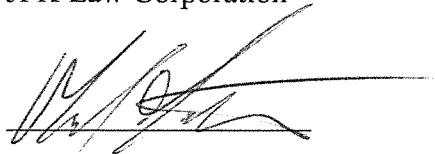
Conclusion

50. MCFN expresses its grave concern that Alberta has sought to use this review process to once again exclude MCFN's concerns regarding LARP from being considered and incorporated into the regional plan. As evidenced by MCFN's supporting materials, this is part of a course of conduct through which Alberta has systematically excluded MCFN's constitutional rights from LARP.

51. MCFN is directly and adversely affected by the prioritization of development without measures to protect MCFN's health, rights and enjoyment of Crown lands for the exercise of those rights. The Review Panel has jurisdiction to consider MCFN's concerns about LARP and to make recommendations to address those concerns. MCFN has placed its concerns in the hands of this Review Panel and remains hopeful that its concerns will be heard and integrated into the Review Panel's report and recommendations.

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

JFK Law Corporation

A handwritten signature in black ink, appearing to read 'Mark A. Gustafson', written over a horizontal line.

Mark A. Gustafson

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

Index of Reply Submissions of the Mikisew Cree Frist Nation

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	Other Material
	<i>Re Jackpine Mine Expansion, 2013 ABAER 011 [included at Tab 11 of MCFN's supporting materials]</i>
	2013 ABAER 017: Teck Resources Limited, Application for Oil Sands Evaluation Well Licences, Undefined Field [included at Tab 11 of MCFN's supporting materials]
12	Amended Originating Application in the matter of ACFN et al v. Her Majesty the Queen in Right of Alberta et al, court file no. 1203-01106, Filed on March 23, 2012