*RESOURCES CONSERVATION ACT*
R.S.A. 2000 c. E-10

AND THE *OIL SANDS CONSERVATION ACT*, R.S.A. 2000, C. 0-7

*AND IN THE MATTER OF THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT*, S.C. 1992 C. 37

AND IN THE MATTER OF A JOINT PANEL REVIEW BY THE ALBERTA ENERGY RESOURCES CONSERVATION PANEL AND THE GOVERNMENT OF CANADA

AND IN THE MATTER OF ERCB APPLICATION NO. 1554388 AND CEAR NO. 59540, JACKPINE MINE EXPANSION, FORT MCKAY, ALBERTA

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# SUBMISSIONS OF THE MINISTER OF JUSTICE AND THE ATTORNEY GENERAL OF ALBERTA

AS REPRESENTED BY ALBERTA JUSTICE AND SOLICITOR GENERAL, ABORIGINAL LAW FOR THE HEARING SCHEDULED TO COMMENCE OCTOBER 23, 2012 IN FORT MCMURRAY, ALBERTA

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## I. INTRODUCTION

1. The following submissions of the Attorney General of Alberta ("Alberta") are in response to the Panel's invitation to make submissions dated October 12, 2012 in relation to the Notices of Question of Constitutional Law ("NQCLs") filed by the following:

1) Athabasca Chipewyan First Nation ("ACFN");
2) Métis Nation of Alberta Region 1 ("MNA"); and
3) Fort McMurray #468 First Nation ("FMFN").

2. Alberta has addressed the matters set out in the Panel's correspondence dated October 12, 2012. However, Alberta wishes to note that it has concerns regarding the standing of the MNA to raise the issue of consultation and it wishes to reserve the right to make submissions on that topic if necessary. Alberta also, if necessary, reserves the right to make submissions regarding the merits of the matters raised in the NQCLs.

3. The NQCL filers raise the following issues:

(i) ACFN raises one question relative to Alberta:

1. Has the Crown in right of Alberta discharged the duty to consult and accommodate ACFN with respect to the potential adverse effects of the Project on ACFN's Treaty Rights, as mandated by the Treaty and s. 35 of the *Constitution Act, 1982*?

(ii) MNA raises one issue relative to Alberta:

1. The assertion that the Government of Alberta has not upheld its duty to consult with the Métis people whose rights will be impacted by this project. These rights exist and are and have been asserted by the MNA Region 1 throughout this process. These submissions herein provide the Notice of Question of Constitutional Law and associated information required in accordance with Schedule 2 of the *Administrative Procedures and Jurisdiction Act, Designation of Constitutional Decision Makers*

*Regulation* A.R. 69/2006 including the "aboriginal right to be determined."

(iii) FMFN raises two issues relative to Alberta:

1. Did the Crown fail to adequately consult with and accommodate the Fort McMurray # 468 First Nation ("FMFN") with respect to the impacts of the development of the Shell Canada Ltd.'s Jackpine Mine Expansion Project on FMFN harvesting rights?

2. Does the Application infringe the treaty rights of FMFN?

4. Alberta's response to these issues is set out below.

## II. ARGUMENT

### A. Adequacy of Notices Under APJA

#### (i) The NQCL of ACFN

5. Alberta has no submissions regarding the adequacy of ACFN's NQCL.

#### (ii) The NQCL of MNA Region 1

6. In Alberta's view the Written Submissions of the Métis Nation of Alberta Region 1 are inadequate to meet the requirements of the *Administrative Procedures and Jurisdiction Act* ("*APJA*") and the *Designation of Constitutional Decision Makers Regulation* ("*DCDMR*").

7. The Written Submissions do not clearly state any question of constitutional law. MNA Region 1 state that their submissions were filed: (1) to submit that the application is not complete; and (2) to assert that Alberta has not upheld its duty to consult.[1] No legislation is being challenged as being unconstitutional. No question of constitutional law is stated anywhere in the submissions. In Alberta's view, a Notice of Question of Constitutional Law must clearly ask a question of constitutional law. The Crown should

[1]Written Submissions of The Métis Nation of Alberta Region 1, para 7

not be left to speculate as to exactly what question of constitutional law they are responding to.

8. Additionally, the assertion that Alberta has not upheld its duty to consult "with the Métis people whose rights will be impacted by this project" is overly broad and difficult to properly respond to.

9. In *Komoyue Heritage Society v. British Columbia (Attorney General)*, the Court dismissed a judicial review application by a society claiming to represent the "descendants of the signatories of the Queackar-Douglas Treaty". The Court held that this group was not clearly defined and, in any event, the Society could not have status to bring the application because aboriginal and treaty rights are collective rights held by particular aboriginal communities and cannot be assigned or transferred to an entity such as the Komoyue Heritage Society[2].

10. Where it arises, the duty to consult exists in relation to specific rights-bearing aboriginal collectives. The duty is not owed to aboriginals at-large (i.e. no duty is owed to "the Métis people" generally; however there may be a duty to consult in relation to a specific Métis community). Where, as here, no specific rights-bearing collective has been identified, it is not possible to assess whether: (i) that particular collective is owed a duty to consult in the circumstances; and (ii) if that particular collective has been adequately consulted. MNA Region 1's assertion cannot be properly considered in the way it has been posed, other than to conclude that no duty is owed to "the Métis people" generally.

11. The NQCL also fails to provide both a list of witnesses that the MNA Region 1 intends to call and the <u>substance</u> of each of these witnesses proposed testimony. Both elements are required by the *Designation of Constitutional Decision Makers Regulation.*[3]

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[2] *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517 at paras 35, 37-46, and 54 (**TAB 1**); See also: *Soldier v. Alberta*, Court of Queen's Bench of Alberta, Action No. 0701 05400, case unreported, at p. 7 and 8, where the Court held that the duty to consult was a First Nation's right to assert, and could not be asserted by an individual on his own behalf and on behalf of others. (**TAB 2**)

[3] *Designation of Constitutional Decision Makers Regulation,* Alta Reg 69/2006, Schedule 2

12. The NQCL lists 21 witnesses that the MNA Region 1 intend to call as witnesses; however, will-say statements have only been provided for 11 of these witnesses[4]. The Written Submissions provide a general list of topics to be addressed by 2 other witnesses, and indicate that 1 witness will speak to a report that they prepared. No information is provided regarding the substance of the remaining 7 witnesses proposed testimony. (See Appendix A)

13. There are brief descriptions in the body of the NQCL regarding topics that 2 of the witnesses will testify to; however the substance of their testimony has not been provided.

14. For example, the NQCL states that Audrey Poitras will explain:

(a) "The governance structure of the MNA and the Regional and Local arms of the MNA";

(b) "That the MNA has a vigorous process of identifying its members";

(c) "That the Government of Alberta has not consulted with the Métis Nation of Alberta with respect to this Application"; and

(d) "The pressing and immediate need for the Government of Alberta t implement a Métis Consultation Policy".

15. Listing topics in this way provides Alberta with no information about the substance of what Ms. Poitras intends to say about these topics.

16. The notice requirements in the *APJA* are designed to ensure that all affected parties are able to make well-prepared, cogent submissions on the constitutional issues being raised.

17. Notice regarding the substance of the testimony of witnesses is required to allow Alberta to properly prepare and respond to issues a party wishes to address in a hearing. A failure to provide the substance of the testimony of witnesses, including any documents or materials to be relied on by that witness, is not consistent with either the requirements or the objectives of the *APJA*.

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[4]Tabs 1 and 3 to the Written Submissions of the Metis Nation of Alberta Region 1

18. Returning to the example of Ms. Poitras, Alberta does not accept that the MNA Region 1 has the standing to bring these proceedings, either on its own behalf or on behalf of other parties. The MNA Region 1 submissions indicate that Ms. Poitras will say something about: (i) the governance structure of the MNA and the Regional and Local arms of the MNA; and (ii) the membership requirements for the MNA Region 1.

19. Without any advance notice as to what Ms. Poitras will say about these topics, it is not possible for Alberta to adequately prepare to make submissions on the standing of the MNA Region 1. The lack of notice regarding the substance of her proposed testimony is not only contrary to the statutory requirements established by the *APJA*, it is also significantly prejudicial to Alberta's ability to respond.

20. Jurisprudence indicates that the failure of a party wishing to raise a constitutional issue to provide adequate notice prevents a Court from taking jurisdiction over the constitutional issue.[5] Courts have consistently held that the requirement for notice of constitutional issues is mandatory. Strict adherence to notice provisions is required. Failure to give such notice precludes a Court from considering the constitutional issue.[6]

21. The ERCB and its predecessor Board have consistently declined to hear from entities that failed to comply with section 12 of the *APJA*.[7]

22. Alberta submits that the Panel should refuse to hear or determine the constitutional issues contained in the NQCL of the MNA Region 1. The NQCL is defective and inadequate and cannot be considered.

23. That the requirements of the *APJA* apply to this Panel is made clear by section 6.4 of the Agreement establishing this Panel, which states that the Panel remains subject to the requirements of Part 2 of the *APJA*, in which section 12 is found.

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[5] *Gitxsan Treaty Society v. Hospital Employees' Union*, 1999 CarswellNat 1488 at para 10 (**TAB 3**); citing *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *R. v. Morrow*, 1999 CarswellAlta 542 (C.A.) at paras 12 and 13 [leave to appeal dismissed at [1999] S.C.C. No. 380] (**TAB 4**)

[6] *Ibid.* (**TAB 4**)

[7] *Suncor Energy Inc., Voyageur Application, EUB Decision 2006-112* at p. 3 (**TAB 5**); *Petro Canada Oil Sands Inc, ERCB Decision 2009-02* at p. 3 and 97 (**TAB 6**)

### (iii) The NQCL of FMFN

24. Alberta received a NQCL from FMFN on October 9, 2012 via e-mail at approximately 5:00 p.m.

25. The NQCL was not directed to the Minister of Justice and Attorney General of Alberta as required by the *Designation of Constitutional Decision Makers Regulation.*

26. It was not clear to Alberta which "Crown" FMFN was directing its NQCL to. Additionally, the NQCL did not set out a list of witnesses to be called, nor did it provide a summary of their proposed testimony as is required by the *DCDMR.*

27. Alberta raised these issues with the Panel in written correspondence on October 11, 2012[8].

28. Counsel for FMFN, by way of correspondence dated October 12, 2012, advised Alberta that the NQCL was intended to be directed to Alberta and provided a list of witnesses and directed Alberta to the CEAA website to obtain affidavits for two witnesses and a report regarding cumulative impacts that some of the other witnesses would speak to. Directing Alberta to locate and obtain the documents does not constitute service.

29. Alberta notes that the Notice of Hearing for this matter specifically noted that the *APJA* was to be complied with. It is unclear why FMFN waited until the last day and then served Alberta after business hours with an incomplete NQCL that does not comply with the applicable legislation.

30. Alberta is now aware that the notice is directed to Alberta; however, the NQCL remains deficient with respect to the proposed testimony of the witnesses. Alberta should have received a complete NQCL prior to the close of business on October 9, 2012.

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[8] Letter dated October 11, 2012 **(TAB 7)**

31. Alberta relies upon its submissions at paragraphs 16 to 23 of this brief regarding the necessity of complying with the requirements of the *APJA* and the reasons why compliance is required.

32. Alberta submits that the FMFN failed to comply with the requirements. Alberta submits the Panel should refuse to hear or determine the issues contained in the FMFN NQCL.

## B. Jurisdiction of Panel to Consider Adequacy of Crown Consultation

33. With respect to this issue Alberta will primarily rely upon its submissions in its correspondence dated October 9, 2012 addressed to the Panel. Paragraphs 25-29 supplement Alberta's October 9, 2012 correspondence.

34. Alberta notes that Shell Canada Energy ("Shell") applied to the Alberta Energy Resources Conservation Board for the amendment and renewal of approvals that Shell requires to expand the Jackpine Mine (ERCB Application No. 1554388). This Joint Review Panel stands in the place of the ERCB regarding this ERCB Application.

35. The Shell Jackpine Project also requires federal approvals pursuant to the *Canadian Environmental Assessment Act* (the *CEAA*). This federal aspect of the Panel's jurisdiction is not relevant to assessing whether the Panel has the jurisdiction to assess the adequacy of Alberta's consultations.

36. *CEAA* establishes a federal agency, created by an Act of Parliament, which acts solely within the realm of federal legislative jurisdiction. The federal *CEAA* agency derives none of its powers from Alberta, and Alberta exercises no control over the agency. Alberta does not owe any duty to consult regarding any decisions made pursuant to *CEAA* as those decisions are not provincial Crown actions that could trigger a duty for Alberta to consult[9].

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[9] *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, 2010 FC 948 [aff'd at 2012 FCA 73] at paras 230-231 **(TAB 8)**

37. While Alberta may owe a duty to consult with respect to provincial decisions associated with the Shell Project, Alberta is in no way responsible for decisions made pursuant to *CEAA*'s powers. The federal *CEAA* does not and cannot grant this Panel any jurisdiction over Alberta and its consultations[10].

38. Any jurisdiction over Alberta must be found in provincial legislation[11]. The Legislature of Alberta has not granted the Panel the jurisdiction to consider and assess Alberta's consultations as part of Shell's Project application process.

39. Alberta submits that this Panel does not have the jurisdiction to consider the adequacy of Alberta's consultation.

## C. Necessity of Panel to Make Determination on Issue of Crown Consultation

40. Alberta addresses this topic as an alternative argument given its position that the Panel does not possess jurisdiction to consider this issue.

41. When an aboriginal group may be adversely affected by a proposed activity/undertaking that Alberta is considering, Alberta consults pursuant to "The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development" (the Policy) and "Alberta's First Nations Consultation Guidelines on Land Management and Resource Development" (the Guidelines).

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[10] Note: In the matter of *The Sweetgrass First Nation and the Moosomin First Nation v. The National Energy Board et al* [Federal Court File No. 08-A-30], the applicant First Nations sought leave to appeal decisions of the National Energy Board (NEB) that granted approvals required for 3 interprovincial pipeline projects. The First Nations argued that the decisions should be set aside on the basis of inadequate consultation. Alberta and Saskatchewan were named as respondents in the leave to appeal application. Alberta and Saskatchewan both argued that no duty to consult arose vis-à-vis either provincial government because the National Energy Board was a federal agency created by an Act of the federal Parliament, and acted within the realm of federal legislative jurisdiction. The NEB derived none of its powers from the provincial Crowns, and the provinces exercised no control over the NEB or its decisions. Those decisions were not provincial Crown decisions that could trigger a duty for the provinces to consult. These submissions were accepted by the Federal Court of Appeal, which ordered that Alberta and Saskatchewan would not be named as respondents in the appeal [Order of Justices Sharlow, Pelletier, and Ryer J.A., dated September 19, 2008].

[11] *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, 2010 FC 948 at paras 230-231 [aff'd at 2012 FCA 73] **(TAB 8)**; *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308 at para 42 [leave to appeal denied by SCC at 413 N.R. 398 (note) and 413 N.R. 399 (note)] **(TAB 9)**

42. In its Policy and Guidelines, Alberta states that it will require project proponents to conduct the procedural aspects of project-specific consultations with aboriginal groups, but that Alberta will retain responsibility to determine whether consultation has been adequate. This approach accords with the finding of the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)* that the Crown may delegate procedural aspects of consultation to industry proponents.[12]

43. This Panel's hearing forms just one component of a broader provincial consultation process. The Panel and its hearing process help facilitate Crown consultation by providing aboriginal groups with an opportunity to learn more about a project, have their concerns addressed at a public hearing, and propose solutions. The Panel then has the ability to grant an approval or recommend approval on any terms and conditions it considers necessary to give effect to its statutory purposes. This authority provides a valuable mechanism for implementing mitigation and accommodation measures where those are appropriate.[13]

44. While the Panel process plays an essential role in the ongoing consultation process, there will be further opportunities for consultation as the Shell Project proceeds through other provincial review processes. This Panel provides just one of the approvals necessary for the Project to proceed. It is possible that the Panel may not approve/recommend the project.

45. As the Alberta Court of Appeal noted in *Dene Tha'*, a party wishing to drill an oil or gas well in Alberta will need much more than the approval which is the subject of these proceedings.[14]In addition to ERCB approval, Shell's proposed Project requires approvals from Alberta under the Alberta *Environmental Protection and Enhancement Act*, *Water Act*, and *Public Lands Act*. This Panel has no decision-making authority regarding these other required Project approvals.

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[12] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 at para 53 **(TAB 10)**

[13] *Oil Sands Conservation Act*, , RSA 2000, C.0-7 at s. 6

[14] *Dene Tha' First Nation v. Alberta (Energy & Utilities Board)*, 2005 ABCA 68 at para 28 [leave to appeal to SCC dismissed] at paras 30-31 **(TAB 11)**

46. Given that these further approvals will be required and those approval processes will also form part of the consultation process, it would be premature for this Panel to make a determination of the adequacy of Alberta's consultations when deciding whether to grant Shell's application under the *Energy Resources Conservation Act* ("*ERCA*") and the *Oil Sands Conservation Act* ("*OSCA*").

47. In *Tsuu Tina Nation v. Alberta (Environment)*, the Alberta Court of Appeal confirmed that the Crown may rely on opportunities for aboriginal consultation that are available within existing regulatory and environmental review processes, subject to the Crown's overriding duty to consider their adequacy in any particular situation.[15]

48. Each of the regulatory review processes that Shell must undertake before proceeding with their project form part of the ongoing consultation process and will inform Alberta's ultimate determination as to the adequacy of its consultations. This Panel's process forms part of the consultation process – but it is not the last step in this process.

49. In the Osum Taiga proceedings, the ERCB concluded that the Board's process was just one component of a much broader consultation process. In the Board's view, the public interest cannot be determined by an assessment of the adequacy of matters to be completed in the future by a stranger to the application to the ERCB Application, the Crown, over which the Board has no power to supervise. In Alberta's view, this recent ERCB decision is good and binding law, and this Panel should reach the same conclusion[16].

50. In conclusion, it is not necessary for the Panel to make a determination on the adequacy of Crown consultation at the outset or conclusion of the hearing as it would be premature and unnecessary.

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[15] *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 ABCA 137, (2010), 482 AR 198 at para 104; quoting affirmatively from the decision of Justice Barnes in *Brokenhead Ojibway Nation v. Canada (AG)*, 2009 FC 484, (2009) 345 FTR 119 at para 25 (**TAB 12**)

[16] Osum Oil Sands Corp. Taiga Project, ERCB Application No. 1636580, Reasons for July 17, 2012 Decision on Notice of Question of Constitutional Law (issued August 24, 2012) at pages 6-9 (**TAB 13**)

## D. Jurisdiction to Consider Infringement

51. The FMFN raises the issue of infringement of their treaty rights.

52. In *R. v. Sparrow*, the Supreme Court of Canada set out the test for proof of an infringement of a treaty or aboriginal right. The party claiming an infringement has the onus of demonstrating the existence of an aboriginal or treaty right and, as well, must demonstrate that the Crown's action amounts to a *prima facie* infringement. This is a substantive review of Crown conduct.[17]

53. Aboriginal groups have a procedural right to be consulted about proposed projects or initiatives that could adversely impact on the exercise of their aboriginal or treaty rights. Once an administrative act is implemented, its validity may be tested regarding whether or not it properly respects aboriginal rights.[18]

54. Where a project is proposed, it is not correct to move to a *Sparrow* analysis. The actual impact of the government action is purely speculative.[19] *R. v. Sparrow* considered completed government action (i.e. an existing fishing regulation) – there was no need for speculation and the court could actually assess the outcome of the government's actions.[20]

55. In the present case, FMFN asks the Panel assess whether the Project will unjustifiably infringe their rights to hunt, fish and trap. The Project is proposed and any *Sparrow* analysis would be speculative. The *Sparrow* analysis applies to completed actions. Claims of an infringement must relate to present adverse impacts– damages that may occur in the future are not properly the subject of judicial consideration. Relief will not be granted on the presumption that alleged wrongs will be committed.[21] A bar to raising such a claim arises whether the infringement argument is raised before the Panel or before the courts.

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[17] *R. v. Sparrow,* [1990] 1 S.C.R. 1075 (**TAB 14**)
[18] *R. v. Lefthand,* 2007 ABCA 206, at para. 49 (**TAB 15**)
[19] *R. v. Lefthand, supra,* at paras. 163-165 (**TAB 15**)
[20] *R v. Lefthand, supra* at para. 166 (**TAB 15**)
[21] *Walton International Group Inv. v. Rocky View Municipal District No. 44),* 2007 ABCA 21 at para. 13 (**TAB 16**) and *Canada v. Ahenakew*, 2003 FCT at 306 at para. 22 (**TAB 17**)

56. At this point in the regulatory process (i.e. before the Project is approved), the remedy available to the FMFN is to raise the procedural duty to consult in the appropriate forum (i.e. the courts). Consultation is conducted in advance of a potential interference with existing treaty or aboriginal rights. Through consultation, the Crown may be able to address some of the concerns raised by aboriginal groups.[22] As set out above, the FMFN may also raise their concerns about the proposed project, and its potential impacts on the exercise of their rights, through the Panel process. Through that process, the Panel may impose conditions to address potential impacts.

57. As part of its assessment of effects from the Project, the Panel may assess effects (including cumulative effects) of the Project itself on established Aboriginal rights and treaty rights.

58. FMFN's NQCL references impacts of all projects in the FMFN traditional territory and whether the impacts globally amount to an infringement.[23] Determination of these questions would require the Panel to assess Crown justification of its land and resource management on a regional basis. The Panel is not provided the jurisdiction to assess or balance the relative priority of the provincial Crown's rights to take up, manage and develop Crown land and resources, and the treaty harvesting rights of First Nations. These are fundamental legal and policy issues that can only be addressed by the Crown and resolved, if necessary, through the courts.

59. Alberta fully supports the participation of the aboriginal interveners in these proceedings. However, the interveners should not be permitted to request that the Panel make far-reaching and complex findings of fact regarding their ability to exercise constitutionally protected rights on a regional scale. A claim that regional development, including the Project, has infringed constitutionally protected rights, can only be resolved by way of a civil claim filed in superior court. This was specifically contemplated by the Supreme Court of Canada in *Mikisew*.[24]

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[22] *Mikisew Cree First Nation v. Canada Heritage,* 2005 SCC 69 at paras. 3, 57-59 and 66 **(TAB 18)**
[23] See paragraph 10d of FMFN NQCL
[24] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), supra* at para. 48 **(TAB 18)**

60. In the context of a civil claim alleging cumulative infringement of constitutionally protected rights on a regional basis, the parties and the court would benefit from procedures designed to facilitate a determination of broad and complex allegations of fact. These procedures and rules cover all stages and aspects of litigation, including pleadings, discovery, evidence, case management, and trial. Also, a superior court has inherent jurisdiction, is not bound by a statutory mandate, and has at its disposal the full scope of constitutional remedies. Issues of cumulative infringement can only be properly addressed through a civil claim.

61. This Panel has a mandate to review consultations carried out by Shell to determine whether they meet statutory and regulatory requirements. However, the NQCL issues related to infringement can only be dealt with by a civil claim files in court.

## E. Referral to Queen's Bench

62. The referral process under s.13 of the APJA contemplates discrete questions of constitutional law that, once referred, must be determined by the Court before Panel proceedings related to those questions can continue. In Alberta's submission, because the Panel has no supervisory jurisdiction or statutory mandate to determine the issues raised in the NQCLs, it is unnecessary and would be inappropriate to refer the issues to Queen's Bench or direct the interveners to apply to Court to have the issues determined under the APJA.[25]

63. In the event the Panel decides it has jurisdiction and requires a determination on any of the Notice issues relating to Crown consultation, Alberta submits the Panel should determine those issues. If the Panel determines that it must consider the adequacy of Crown consultation, Alberta may wish to call evidence regarding the consultation and provide submissions regarding the same.

64. In the event the Panel decides it requires a determination on the Notice issues relating to infringement, Alberta submits the Panel should direct FMFN to file an

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[25] *APJA*, s. 13(1)

independent civil action and proceed to consider Shell's application. Alberta notes the following reasons in support of this submission:

(a) It would be impractical for the Panel to expend the time and resources necessary to determine those specific Notice issues, given that the Panel can only deny the approval, and cannot issue declarations or any other constitutional remedy; and

(b) It is simply not appropriate for the Panel to review the actions of non-parties (i.e. the Crown) or launch into extended fact-finding regarding the interveners' ability to exercise their constitutionally-protected rights on a regional basis. The courts are better suited to determining these issues.

## III. CONCLUSION

### A. Adequacy of Notices

#### i. ACFN

65. Alberta has no submissions regarding the adequacy of ACFN's NQCL.

#### ii. MNA Region 1

66. Alberta submits that the MNA Region 1's NQCL is deficient and should not be considered.

#### iii. FMFN

67. Alberta submits that the FMFN's NQCL is deficient and should not be considered.

### B. Consultation

68. Alberta submits that the Panel does not possess jurisdiction to consider Crown consultation and therefore should decline to consider it. Moreover, in Alberta's view, the hearing process (including the Panel's ability to consider impacts and impose conditions)

## C. Necessity to Consider Crown Consultation

69. Alberta submits that it is unnecessary for the Panel to make a determination of the adequacy of the Crown at the beginning or end of the hearing.

## D. Infringement of Treaty/Aboriginal Rights

70. With respect to allegations of infringement of treaty rights, Alberta submits that it would be premature for the Panel to consider this allegation given that the project is only proposed. At this point in the regulatory process, engaging in a *Sparrow* analysis would be speculative and unwarranted. Moreover, the Panel does not have jurisdiction to consider infringement claims raised in relation to the cumulative impacts of all projects in the region.

## E. Referral to Queen's Bench

71. Should the Panel determine that it has jurisdiction to consider Crown consultation, it should consider the matter itself. With respect to infringement, the FMFN should be directed to file a stand alone civil claim and the hearing should proceed as scheduled.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 15th day of October, 2012.

Thomas G. Rothwell,
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Attorney General of Alberta

Jamie R. Speer,
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## IV: AUTHORITIES

| Tab # | Case |
|---|---|
| 1. | *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517 |
| 2. | *Soldier v. Alberta*, Court of Queen's Bench of Alberta, Action No. 0701 05400, case unreported |
| 3. | *Gitxsan Treaty Society v. Hospital Employees' Union*, 1999 CarswellNat 1488 |
| 4. | *R. v. Morrow*, 1999 CarswellAlta 542 (C.A.) [leave to appeal dismissed at [1999] S.C.C. No. 380] |
| 5. | *Suncor Energy Inc., Voyageur Application, EUB Decision 2006-112* |
| 6. | *Petro Canada Oil Sands Inc, ERCB Decision 2009-02* |
| 7. | Letter from Thomas G. Rothwell to Jim Dilay at the CEAA dated October 11, 2012 |
| 8. | *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, 2010 FC 948 [aff'd at 2012 FCA 73] |
| 9. | *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308 |
| 10. | *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 |
| 11. | *Dene Tha' First Nation v. Alberta (Energy & Utilities Board)*, 2005 ABCA 68 |
| 12. | *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 ABCA 137, (2010), 482 AR 198 |
| 13. | Osum Oil Sands Corp. Taiga Project, ERCB Application No. 1636580, Reasons for July 17, 2012 Decision on Notice of Question of Constitutional Law (issued August 24, 2012) |
| 14. | *R. v. Sparrow*, [1990] 1 S.C.R. 1075 |
| 15. | *R. v. Lefthand*, 2007 ABCA 206 |
| 16. | *Walton International Group Inv. v. Rocky View Municipal District No. 44)*, 2007 ABCA 21 |
| 17. | *Canada v. Ahenakew*, 2003 FCT at 306 |
| 18. | *Mikisew Cree First Nation v. Canada Heritage*, 2005 SCC 69 |

# APPENDIX "A"

# Appendix A – Metis Nation of Alberta Region 1 Witness Chart

| WITNESS | INFORMATION PROVIDED |
|---|---|
| **Clem Chartier** | List of Topics Only (Paragraph 44 of Submissions) |
| **Audrey Poitras** | List of Topics Only (Paragraph 44 of Submissions) |
| **William Landstrom** | Will Say Statement (Tab 1) |
| **Diane Schoville** | Will Say Statement (Tab 1) |
| **Bill Loutitt** | Will Say Statement (Tab 1) |
| **Frank LaCaille** | Will Say Statement (Tab 1) |
| **Harvey Sykes** | Will Say Statement(Tab 1) |
| **John Grant** | Will Say Statement(Tab 1) |
| **Edward Cooper** | Will Say Statement(Tab 1) |
| **Mike Guertin** | Will Say Statement(Tab 1) |
| **Joe Hamelin** | Will Say Statement(Tab 1) |
| **Kurtis Gerard** | Will Say Statement(Tab 1) |
| **Fred (Jumbo) Fraser** | No Information Provided |
| **Barb Hermensen** | No Information Provided |
| **Ray Ladaouceur** | No Information Provided |
| **Gabriel Bourke** | No Information Provided |
| **Ernest Thacker** | No Information Provided |
| **Guy Thacker** | No Information Provided |
| **Peter Fortna** | Will Say Statement (Tab 3) |
| **Teresa Maillie** | General Notice That She Will Speak To A Report That She Prepared (Paragraph 46 of Submissions) – No Will Say Statement Provided |
| **Jonathan Aniuk** | No Information Provided |