WOODWARD & CO.
LAWYERS LLP

REPLY TO: JENNY BIEM
Victoria Office
email: jenny@woodwardandcompany.com

ASSISTANT: BARBARA BARBER
bbarber@woodwardandcompany.com

File No. 4733

January 24, 2015

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

VIA EMAIL: LUF@gov.ab.ca

Dear LARP Review Panel:

Re: Review of the Lower Athabasca Regional Plan
ACFN response to Information Request #14

We write on behalf of the Athabasca Chipewyan First Nation. On January 13, 2015, the Lower Athabasca Region Plan (LARP) Review Panel issued Information Request No. 14 to the First Nation applicants. This brief addresses the relationship between the "quiet enjoyment of property" and the alleged effects of LARP on TLU areas.

"Quiet Enjoyment of Property"

1) The phrase "quiet enjoyment of property" has been given substantive meaning in several different common law contexts.

2) In the context of landlord tenant law the following explanations have been given.

> The covenant for quiet enjoyment is an assurance against . . . any substantial interference by the covenantor or those claiming under him, with the enjoyment of the premises for all usual purposes. [1]

> With respect to the concept of quiet enjoyment, clearly any act by a landlord which is an interference with the tenant's ability to use the premises for the intended purposes could constitute a breach of the right to quiet enjoyment. However, not every interference with

[1] *Williams & Rhodes Canadian Law of Landlord and Tenant*, looseleaf, 6th ed.(Toronto: Carswell, 1988) at para. 9:1.

> a tenant's lawful and intended use of his premises would breach the right to quiet enjoyment. An interference which is of a brief or trifling nature will not be a breach, whereas substantial and permanent interference will almost certainly constitute a breach.[2]

3) The phrase has also received consideration in the context of the law of nuisance. In the case of *Lafferty v. Brindley*, the court found that the use of equipment to prevent the plaintiff from accessing his right of way, the stopping of the plaintiff's guests and the mere threat to erect a gate constituted a nuisance in light of the nature of the locality (rural and recreational), the severity of the harm, the sensitivity of the plaintiff and the utility of the defendant's conduct. [3] In particular the Court said:

> On these facts, applying the factors in reverse order, I find the defendant's actions were without useful purpose, the plaintiffs were not overly sensitive and their use of their properties was substantially interfered with in a location where quiet enjoyment of property was the expected norm. [4]

4) In the case of *White City (Town) v. Cattell*, 5 the Court of Appeal noted the Court of Appeal noted that while the occasional golf ball straying onto adjacent residential properties was to be expected, no issue was taken with the trial judge's finding that a barrage of misdirected golf balls, or the "persistent and prolonged invasion of golf balls" emanating from the ninth hole of the Emerald Park Golf Course was nuisance. The Court explained the indicator for interference with quiet enjoyment, and the appropriate legal approach to same.

> [22] As eminent authors on the subject, including Fleming, have taken pains to note, legal intervention is warranted only when an excessive use of property causes inconvenience *beyond what other occupiers in the vicinity can be expected to bear*, having regard to the prevailing standard of comfort of the time and place. The challenge in the law of nuisance is to moderate the conflicting claims of landowners, each desiring the maximum enjoyment of their property, and to accomplish this without unduly subordinating the interests of one owner to the comfort of the other. Reconciliation has to be achieved by compromise, and the compromise must reflect reasonable use.

5) Finally, the phrase has been given meaning in its role as a component of Nova Scotia's Liquor Licensing Regulations, as observed by Fort McKay:

> Over the years the Board has deliberately avoided subjecting the phrase "quiet enjoyment" to a narrow interpretation. The right to be reasonably free from the disturbance and noise emanating from drinking establishments is not limited to actual assaults or break-ins, but rather is taken to

---

[2] *523448 Alberta Ltd. v. 739429 Alberta Ltd***.** (1998), 214 AR 150 (QB), at para 117.

[3] 2001 CanLII 2578 (ON SC), <http://canlii.ca/t/78v5> at paras. 70-72.

[4] Ibid. at para. 73.

[5] 2008 SKCA 71 (CanLII), <http://canlii.ca/t/1xmgw>

include any "offensive or disturbing activity connected with a bar that significantly limits the use and enjoyment of a person's property".[6].

in **Sternwheeler**, the Nova Scotia Liquor Licence Board, in deciding ultimately to terminate adult entertainment in the licensed premises which was the subject of that proceeding, focussed almost exclusively (see pp. 28-36) upon disturbing incidents of various kinds which had "left residents uncomfortable in their homes and uneasy in their neighbourhood." [7]

The Board has previously stated in some of its past decisions residents living near a commercial or business area cannot expect the same degree of quiet enjoyment as persons living in a completely residential neighbourhood. . . .[8]

6) The common principle animating the analysis in each of these situations is the right-holder's right to be reasonably free from substantial interference with the exercise of the right, with reference to reasonable expectations and intended use of the land. We do not suggest that ACFN's quiet enjoyment and LARP's effects are analogous to any of the above situations. Courts and other western legal analysts "must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights."[9] While the relationship of ACFN's Aboriginal and Treaty Rights to the effects of LARP do not fit squarely into any of the common law concepts listed above, we do suggest that the underlying principle described above can be appropriately applied to the effects of LARP on ACFN's quiet enjoyment of its Rights and traditional lands.

ACFN's Intended Use of its Traditional Lands

7) ACFN adhered to Treaty 8 in 1899 under the leadership of Chief LaViolette. An analysis of Treaty 8 , the intended use of ACFN's traditional lands, and ACFN's reasonable expectations – and ultimately what constitutes reasonable and unreasonable interference with ACFN's Rights - must be understood from the aboriginal perspective.

8) In *R. v. Mitchell,* the Supreme Court of Canada explained:

. . . that aboriginal understanding of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical constructions. This concern with aboriginal perspective, albeit in a different context, let a majority of this Court in Guerin, supra. . . to speak of the Indian interest in land as a sui generis interest, the nature of which cannot be totally captured by a lexicon derived from European legal systems. [10]

---

[6] *Whiskey's Lounge Ltd. V. Nova Scotia Utility and Review Board,* 2007 NSCA 95 at para. 28
[7] (para 174) *Roberts, Re,* 2006 NSUARB 46 (CanLII), <http://canlii.ca/t/1n9bc>
[8] (para 168) *Roberts, Re,* 2006 NSUARB 46 (CanLII), <http://canlii.ca/t/1n9bc>
[9] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (CanLII), http://canlii.ca/t/g7mt9 at para. 32.
[10] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33at para 108

9) Dene laws governing decision-making required that the land be left for future generations in as good condition as it was received from thir ancestors. They refused to give up their ecological harvesting economy for reserve life. [11]

10) The negotiation of Treaty 8 at Fort Chipewyan has been described under oath by ACFN Elder Rene Bruno, whose mother was an eyewitness to the signing of the Treaty at Fort Chipewyan:

> And what was said in terms of what was on there, with relation to land, how we would help each other and work with each other, cooperate, live side-by-side, the land itself is not going to be taken away from you, and as long as the land is here, we will not do anything to take it away from you. As long as the water, the lake is here, as long as the sun shines, and the grass grows, our word is not going to be ever broken This is what I say is on behalf of the Queen. And I am instructed by the Queen to deliver this message. The land, you are responsible for your own lands, And I am in charge of my side as well. And we are equal. That's what was said. And anything on your land, you will never be restricted from carrying on with your traditional vocations. And that's what we were told. . . . And we believe that, you know, it is still our land. [12]

11) The diaries of the Catholic mission reported that during the negotiation of Treaty 8, the Chipewyan Chief at Fort Chipewyan demanded complete freedom to fish, complete freedom to hunt, and complete freedom to trap. [13]

12) The Treaty Commissioners promised ACFN that there would be no forced interference with their mode of life. As Bishop Breynat deposed in his affidavit in the case of *Paulette*, [14]

> . . . As the text of Treaty No. 8 & 11, which had been brought from Ottawa was not explicit enough to give satisfaction to the Indians, who were afraid to be treated as the Indians in teh Prairies had been treated. . . the following promises were made to the Indians by the Royal Commissioner, in the name of the Crown:
>
> a) They were promised that nothing would be done or allowed to interfere with their way of living, as they were accustomed to and as their antecedents had done. . .
> c) They were guaranteed that they would be protected, especially in their way of living as hunters and trappers, from white competition, they would not be prevented from hunting and fishing as they had done, so as to enable them to earn their won living and maintain their existence.[15]

---

[11] James Youngblood Henderson at 277.

[12] Transcript of the proceedings of the Joint Review Panel re Jackpine Mine Expansion, November 7, 2012 Volume 9, Lines 24 page 1995 – line 15, page 1996) (line 2 - line 12 page 1997. Online: http://www.ceaa-acee.gc.ca/050/documents/p59540/83440E.pdf

[13] Fumoleau, Rene. As Long as this Land shall Last: A History of Treaty 8 and Treaty 11, 1870-1939. Toronto: McClelland and Stewart Ltd., 1975. Excerpt attached.

[14] *Paulette v. Canada (Registrar of Titles) (No. 2)* [1973] 6 W.W.R. 97
Paulette (Re), 63 DLR (3d) 1, [1976] 2 WWR 193, *Paulette et al. v. The Queen*, [1977] 2 SCR 628, 1976 CanLII 200 (SCC), <http://canlii.ca/t/1z69x>

13) The Dene expectation was that the treaties allowed British subjects to move peacefully on Dene lands to seek minerals, providing their work did not interfere with the Dene right to peace and good order.[16]

14) ACFN entered into the Treaty No. 8 (the "**Treaty**") at Fort Chipewyan in 1899 as a Sharing Agreement with the Crown. This Sharing Agreement guaranteed ACFN's hunting, fishing and trapping rights in support of sustaining our traditional livelihood, in return for which ACFN promised to share the land and resources with the Crown. In entering into this Sharing Agreement, ACFN was assured that its way of life would not be changed and that it would be protected, *in perpetuity*.

15) 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:

> 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.[17]

16) The oral promises made when the Treaty was agreed to are as much a part of the Treaty as the written words.[18] 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

---

[15] Affidavit of Catholic Bishop Breynat (27 November 1937, Exhibit No. 56, as cited in James Youngblood Henderson at 278-279.

[16] James Youngblood Henderson, Treaty Rights in the Constitution of Canada. 2007: Toronto Thomson Canada Limited at page 279.

[17] See *e.g. Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [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].

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

> 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.[19]

17) See also:

> 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.[20]

18) 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".[21]

19) The BC Court of Appeal has provided useful guidance for understanding Treaty 8 taking up clause, which references other uses of land "from time to time".

> [130] The Treaty 8 right to hunt is not merely a right to hunt for food. The Crown's promises included representations that:
>
> (a) the same means of earning a livelihood would continue after the Treaty as existed before it, and that the Indians would be expected to continue to make use of them;
>
> (b) they would be as free to hunt and fish after the Treaty as they would be if they never entered into it; and
>
> (c) the Treaty would not lead to "forced interference with their mode of life" (see *R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771 at para. 39).
>
> [131] These promises have been affirmed in previous Treaty 8 cases.
>
> [132] In *Badger*, the Supreme Court of Canada held at para. 52 that treaties relating to indigenous peoples should be construed liberally, "... and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians ... the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid, modern rules of construction".

---

[19] *R. v. Badger*, [1996] 1 S.C.R. 771, para. 39 [underscore added]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, para. 26; see also: *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, para. 54.
[20] *R. v. Badger*, [1996] 1 S.C.R. 771, para. 55 [underscore added].
[21] *R. v. Badger*, [1996] 1 S.C.R. 771, para. 39.

[134] Just as the right to hunt must be understood as the treaty makers would have understood it, so too must "taking up" and "mining" be understood in the same way. As the Supreme Court of Canada said in *Badger* at para. 55:

> 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. For example, one commissioner, cited in René Fumoleau, O.M.I., *As Long as this Land Shall Last*, at p. 90, stated:
>
> We are just making peace between Whites and Indians - - for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone.
>
> [Emphasis added.]
>
> [135] I interject to point out that "some white prospectors [who] might stake claims", to the understanding of those making the Treaty, would have been prospectors using pack animals and working with hand tools. That understanding of mining bears no resemblance whatever to the Exploration and Bulk Sampling Projects at issue here, involving as they do road building, excavations, tunnelling, and the use of large vehicles, equipment and structures.

20) In other words, while some very limited use of lands for mining and other purposes was contemplated, it was conditional upon the continued complete freedom of ACFN to exercise traditional lifestyles within the traditional lands. The pace and scale of current development and recreational use of ACFN's traditional use area was not in the contemplation of either party at the time of the signing of Treaty 8.

21) As was discussed in ACFN's September 1, 2013 Supplement to Request for a Review, ACFN's beneficial ownership of its reserve lands arose specifically out of Treaty 8, and were intended to support ACFN's way of life, including income, livelihood, health and culture, by serving as a base for the exercise of section 35 rights over broad areas of surrounding lands. Reserves were promised to Indian Bands in relation to livelihood, which was a mixed economy in which hunting, fishing, trapping and gathering were important aspects. The Reserves were never expected to provide all the land that the Indians required.[22] ACFN's right to earn livelihood and to obtain sustenance from harvesting activities is analogous to and indivisible from the right to earn an income. In

[22] See Dr. McCormack testimony at Dover in its entirety, and specifically at page 412.

fact, it has always been explicitly understood by the signatories to the Treaty to be so.[23] It was specifically contemplated that the normal enjoyment of Reserve lands included the ability to hunt, fish, trap, and gather in surrounding lands and waters.

LARP Substantially Interferes with ACFN's Peaceful Enjoyment of its Rights and Lands

22) ACFN has listed in detail the effects already suffered by LARP and those expected to be suffered. In summary, by setting out a framework which prioritizes industrial and non-aboriginal recreational uses of ACFN traditional use areas over the continued ability of ACFN members to live their way of life, LARP sets the stage for hundreds of years to come in terms of loss of access to preferred harvesting grounds, blocked access routes, lost access to vast harvesting areas due to low water levels in the Athabasca, noise, odours, light, garbage, trespass on reserve, loss of species such as woodland caribou, woodland bison, and lynx, significant reductions in moose populations, contamination of medicine and food plants etc. . . Oil sands extraction operations are typically planned to be in operation for decades, and there is no proven method of reclamation. Increased use of parks and promotion of non-aboriginal use of "protected" areas under LARP results in a decreased ability of ACFN members to actually exercise their rights in those areas. The loss of harvesting areas for more than a generation can result in a permanent loss of use as place specific traditional knowledge cannot be transferred. An alarming proportion of ACFN's lands are being lost every year. Regulators are not even able to say no to developments within key harvesting areas, due to LARP designation of lands. These are substantial interferences with the way of life that was promised to ACFN by the Crown, and ostensibly protected by the *Constitution Act, 1982*.

23) The problem with LARP as it exists is precisely that there is no balance, no compromise between Alberta's industrial and recreational aspirations, and ACFN's ability to quietly enjoy its traditional lands, including reserve lands, for their intended purpose – the continuation of the ability to hunt, fish, gather and trap, to enjoy a traditional lifestyle, in perpetuity.

24) As in *White City (Town) v. Cattell*, the occasional golf ball was acceptable: the continous barrage and invasion of golf balls represented a substantive interference with peaceful use and enjoyment. On a much more serious level than golf balls, the occasional packhorse and hand tool mining operation was expected by the Aboriginal signatories of Treaty 8. The constant barrage and invasion of non-aboriginal recreational users, garbage, heavy equipment, pipes, bridges, lights, noise, smells, permanent pits and other scars on the landscape, roads, gates, etc. . . . of industrial development in ACFN homelands represents a substantive interference with ACFN's intended use of its lands for the exercise of the Rights guaranteed to it under the *Constitution Act, 1982*.

25) It bears repeating that 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. ACFN clearly communicated to Alberta throughout the LARP process that indeed,

[23] See the excerpt of Dr. McCormack's Ethnohistory appended, as well as the excerpt of Dr. McCormack's testimony at the Dover hearing, also appended, for a review of how the ability to meaningfully exercise Treaty Rights is and has always been understood to be part of the income and livelihood for signatory First Nations.

'prospecting' and other non-aboriginal uses of ACFN lands have already seriously impacted ACFN's hunting and other rights.

26) It is reasonable for ACFN members to expect that they and their children, and their great great great great great grandchildren will be able to exercise traditional patterns of activity - hunting, fishing, trapping, gathering, and rights incidental theret - in peace within their traditional use areas. It is a reasonable expectation that members can exercise those rights comfortably and safely, in the harvesting areas known and accessible to them. That was the clear intention of Treaty 8. LARP sanctions a large scale, forced intrusion into that way of life, and substantial interference with the usual purposes to which those lands have been put by ACFN's ancestors for millennia. The effects sanctioned by LARP on ACFN's traditional use areas go far beyond what ACFN can be expected to bear.

All of which is respectfully submitted this 23 day of January, 2015
WOODWARD & COMPANY

Jenny Biem
JB/bb

Cc: ACFN
Witek Gierulski: counsel to the government of Alberta
Keltie Lambert: counsel to Cold Lake First Nation
Mark Gustafson: counsel to Mikisew Cree First Nation
Tarlan Razzaghi: Counsel to Fort McKay First Nation and Chipewyan Prairie First Nation
Will Randell, counsel to Alberta
Jodie Hierlmeir, counsel to Alberta
Melissa Daniels: counsel to ACFN