WITTEN LLP | *Barristers & Solicitors*

KELTIE L. LAMBERT
Direct Telephone: (780) 441-3206
In Reply Please Refer to File No.: 81,621.108/KLL
E-Mail Address: klambert@wittenlaw.com

January 23, 2015

LARP Review Panel
C/O Land-Use Secretariat
9th Floor, Centre West Building
10035 – 108 Street NW
Edmonton, AB T5J 3E1

Via E-Mail: LUF@gov.ab.ca

Dear Sir / Madam:

RE: Response to Information Request #14 RE: Legal Meaning - "Quiet Enjoyment of Property"

Attached hereto please find a copy of Cold Lake First Nations' response to Information Request #14.

Yours truly,

WITTEN LLP
Per:

KELTIE L. LAMBERT

/jkm
Encls.

Cc: Jodie Hierlmeier
Via E-mail: jodie.hierlmeier@gov.ab.ca

Cc: Will S. Randall II
Via E-mail: will.randall@gov.ab.ca

Cc: Witek Gierulski
Via E-mail: witek.gierulski@gov.ab.ca

Cc: Mark Gustafson (counsel for Mikisew Cree First Nation)
Via E-mail: mgustafson@jfklaw.ca

Cc: Jenny Biem and Melissa Daniels (counsel for Athabasca Chipewyan First Nation)
Via E-mail: jenny@woodwardandcompany.com and melissa@woodwardandcompany.com

Cc: Tarlan Razzaghi (counsel for Fort McKay First Nation and Chipewyan Prairie Dene First Nation)
Via E-mail: trazzaghi@k2blaw.ca

Cc: Client

January 23, 2015

TO: J. Gilmour, Chair, LARP Review Panel

FROM: Cold Lake First Nations ("CLFN")

RE: Reply to GOA's Response to Information Request No. 14 ("IR#14) RE: Legal Meaning - "Quiet Enjoyment of Property"

Thank you for the opportunity to respond to the Panel's information request #14 (IR #14), which asks interested First Nations Applicants to set out their views on the relationship between "quiet enjoyment of property" and the alleged effects of LARP on TLU areas.

As described in IR #14, section 36 of the *ALSA Rules* require that the Panel provide advice on whether the applicant is directly and adversely affected…by a specific provision or provisions in a regional plan. The definition of "directly and adversely affected" is found in section 5(1)(c) of the *Alberta Land Stewardship Regulations*, set out below:

Part 1
Requests for Review of
Regional Plan

Interpretation
5(1) In this Part,

(a) "applicant" means a person who has made a request for a review of a regional plan or an amendment to a regional plan under section 19.2 of the Act;

(b) "application" means a request for review of a regional plan or an amendment to a regional plan;

(c) "directly and adversely affected", in respect of a person with regard to a regional plan, means that there is a reasonable probability that a person's health, property, income or quiet enjoyment of property, or some combination of them, is being or will be more than minimally harmed by the regional plan;

(d) "panel" means a panel referred to in section 6(1)(a) or a board or other body referred to in section 6(1)(b) when it is acting as a panel under this Regulation.

> **(2)** A reference in this Part to review of a regional plan includes review of an amendment to a regional plan.

Principles of Statutory Interpretation

In the leading case, *Rizzo & Rizzo Shoes Ltd. (Re)*[1], the Supreme Court of Canada described the modern principles of statutory interpretation as follows:

> 21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Furthermore, the *Interpretation Act*,[2] states:

> **10** An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

In considering the intention of the legislature CLFN submits the appropriate approach to statutory interpretation is to look at the ordinary and plain meaning of "quiet enjoyment of property" in the context of the common law (which must be assumed to have been understood by the legislature), constitutional law (namely, that interpretations which result in constitutional compliance are preferred) and the purposes and context of the *Alberta Land Stewardship Act.*[3] In doing so, the only reasonable interpretation is that the legislature intended to include within the Panel's powers the jurisdiction to consider impacts to any and all land based rights, including Treaty and Aboriginal Rights.

---

[1] [1998] 1 SCR 27
[2] RSA 2000 c I-8
[3] SA 2009, c A-26.8 ("ALSA")

Quiet Enjoyment of Property—Common Law Foundation

The legal principle of quiet enjoyment of property is one of the most ancient found in the English common law system, dating back to the Middle Ages in England. "Quiet enjoyment" is considered to be a fundamental aspect of any bundle of land use rights. After all, the right to lease land for a specific purpose would be rendered meaningless if the landlord could interfere with the tenant's use of the land. The right to quiet enjoyment of land rights is not limited to direct, physical interference. It was described by Lord Denning in the McCall case as follows:

> "This covenant is not confined to direct physical interference by the landlord. It extends to any conduct of the landlord or his agents with interferes with the tenant's freedom of action in exercising his rights as a tenant…It covers, therefore, any acts calculated to interfere with the peace or comfort of the tenant, or his family."[4]

At common law, quiet enjoyment of property is not specifically limited to landlord/ tenant situations, but applies to all rights. For example, Black's Law dictionary defines "enjoyment" as follows:

1. Possession and use, especially of rights or property. 2. The exercise of a right.[5]

Treaty Rights are Sui Generis Land Rights

In grappling with the concepts of Indian title and Indian aboriginal land rights, Courts have often had recourse to common law principles which may not achieve an exact fit. As recognized in *Delgamuukw*, Indian land rights are *sui generis* and arise in part from the "the relationship between common law and pre-existing systems of aboriginal law."[6] Accordingly, it would be incorrect to ascribe an overly narrow interpretation to the concept of "quiet enjoyment of property" excluding enjoyment of Treaty and Aboriginal Rights simply on the basis that it is not a "perfect fit" with the common law.

By any plain understanding, Treaty and Aboriginal Rights are "rights" which First Nations are entitled to "enjoy". The basic essence of the harvesting rights under Treaty is that they are land-based access rights which were promised by the Crown. They cannot be enjoyed without access to land.[7] These rights are so strong, they are protected, recognized and affirmed by s. 35 of the *Constitution Act, 1982.* Based in

---

[4] *McCall v Abelesz*, [1976] 1 All E.R. 727, cited with approval in *Caldwell v Valiant Property Management*, 1997 CanLII 12127 (ON SC)
[5] Black's Law Dictionary, Seventh edition, 1999
[6] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at par 114
[7] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at para 48

solemn promises made with the Crown[8] (which includes the Province of Alberta[9]) Treaty and Aboriginal Rights are amongst the strongest land rights known in Canadian law.

The promises made at the time of Treaty have been described in the previous submissions made by the First Nations. At their most basic, these Treaties expressly protect the right to reserve lands and the right to hunt, fish and trap on all unoccupied Crown land. These rights include the right to engage in all activities which are necessarily incidental to the practice of Treaty and Aboriginal Rights.[10] Most importantly, at the time of treaty making the Crown promised it would interfere with the Indians way of life.[11] This express promise "not to interfere" is precisely what is captured by the phrase "quiet enjoyment of property". What good is the Crown's promise to ensure Treaty Rights may be exercised on all Crown land if those rights do not necessarily include the ability to enjoy and exercise the rights? As described by the Supreme Court, we should not adopt interpretations which leave First Nations with an "empty shell of a treaty promise."[12]

The result is that a plain reading of the phrase "quiet enjoyment of property" must include the enjoyment of land based Treaty and Aboriginal Rights.

Purposes of the Act

The inclusion of the right to exercise Treaty and Aboriginal Rights within the ambit of quiet enjoyment of property is consistent with the purposes of *ALSA*. For example, section 1 of *ALSA* specifically includes reference to the needs of current and future generations of Albertans, including aboriginal peoples:

> **Purposes of Act**
>
> **1(1)** In carrying out the purposes of this Act as specified in subsection (2), the Government must respect the property and other rights of individuals and must not infringe on those rights except with due process of law and to the extent necessary for the overall greater public interest.
>
> **(2)** The purposes of this Act are
>
> > (a) to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;

[8] *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623 at para 71
[9] *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48
[10] *R v Sundown*, [1999] 1 SCR 393 ("*Sundown*") at para 26-33
[11] *Sundown* at para 6
[12] *R v Marshall*, [1999] 3 SCR 456 at para 52

> (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.

Similarly, LARP Objective 7 is to include aboriginal peoples in land use planning. This Objective would be meaningless if it was not intended to include consideration of the land based rights of aboriginal peoples (namely Treaty and Aboriginal Rights). But for the need to give special consideration to Treaty and Aboriginal Rights (pursuant to the Honour of the Crown and the duty to consult), there would be no need for a stand-alone objective.

As has been repeatedly expressed, the most fundamental land-based needs of First Nations are those encompassed by their Treaty and Aboriginal Rights. To exclude possible impacts to Treaty and Aboriginal Rights from the LARP Review process would be entirely inconsistent with the purpose of *ALSA*, and such an interpretation should be rejected.

No Express Exclusion

Critically, the legislature must be assumed to have engaged in a thoughtful drafting process. In doing so, the legislature expressed a very broad description of "directly and adversely affected". It is not limited to title holders, landowners, lease holders, mineral rights owners, or even to individuals. It is *unlimited*. Had the legislature intended to exclude from review consideration of impacts of LARP to Treaty and Aboriginal Rights it could have expressly chosen to do so. The legislature expressly provided specific variance remedies to a limited group of "title holders" in *ALSA*, confirming the drafters understood there are different forms of interest or rights in property. It did not include in its review remedies any limitation on the types of rights or interests in property that could support a finding of "direct and adverse effect".

In the absence of an express exclusion, there is no principled reason for this Panel to impose or "read in" the exclusion of Treaty and Aboriginal Rights.

Interpretation Consistent with UN Declaration

CLFN's interpretation of "quiet enjoyment of property" is consistent with the United Nations Declaration on the Rights of Indigenous Peoples (the "UN Declaration") ratified by Canada in 2010. Article 20 states:

> *Article 20*
>
> 1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

When Canada signed the UN Declaration, the Crown recognized the importance of ensuring that Aboriginal people are able to enjoy their traditional activities, including Treaty and Aboriginal Rights. CLFN's interpretation of "quiet enjoyment of property" is not only consistent with the legislature's intent to include aboriginal peoples in land use planning and ensure the needs of present and future aboriginal people are met, but is consistent with international law principles.

Administrative Jurisdiction and Procedures Act Irrelevant

In its prior submissions, Alberta Justice has argued that this Panel does not have the jurisdiction to consider impacts to Treaty and Aboriginal Rights because it has not been granted authority to do so under the *AJPA*.[13] This is an overbroad and incorrect statement. It may be true that this Panel does not have the authority to consider "constitutional questions" as defined by the *APJA*:

> 10(d) "question of constitutional law" means
>
> (i) any challenge, by virtue of the Constitution of Canada or the *Alberta Bill of Rights*, to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or
>
> (ii) a determination of any right under the Constitution of Canada or the *Alberta Bill of Rights*.

In the materials before this Panel, there is no "question of constitutional law". Rather the First Nations Applicants have correctly limited their Review Applications and submissions to the Panel's mandate to review the reasonable probability that direct and

[13] *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3 ("*APJA*")

adverse effects will be experienced by First Nations. Accordingly, the *APJA* is not relevant to a determination of the meaning of “quiet enjoyment of property”.