Request For Review Of The Lower Athabasca Regional Plan Pursuant to Section 19.2. of the *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8

Written Reply on behalf of Chipewyan Prairie Dene First Nation Pursuant to Rule 26 of the Rules of Practice for Conducting Regional Plans

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Submitted To:

LARP Review Panel
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A. Introduction

i. Overview of Reply

1. Alberta errs in submitting that CPDFN's concerns are either outside of the Panel's jurisdiction, or are within the Panel's jurisdiction, but cause no direct or adverse effects on CPDFN. Alberta's position arises from an incorrect interpretation of: the Panel's jurisdiction; the relevant facts necessary for the Review; CPDFN's concerns with LARP; and LARP itself.

See, Crown Response at para. 4-5.

2. The Panel has a broad public interest mandate to ensure regional plans made by Alberta meet the broad public purposes of the Act, including ensuring the future needs of aboriginal peoples, consistent with the Crown's constitutional obligations. To discharge its mandate, the Panel must adopt a generous and liberal interpretation of its jurisdiction and LARP and reject the Crown's narrow interpretation of the Panel's authority and the scope of the Review as Alberta's interpretation would effectively defeat the legislative intent of the Act in providing an opportunity to review a regional plan within one year of it coming into force.

3. LARP, as it exists today, creates dangers as it purports to be a plan and system for managing the impacts of cumulative development but does not deliver on its intentions. The management system provided contains worthy concepts and goals; but it is skeletal and conceptual and includes no mechanism to address and protect CPDFN's Constitutional Rights. It lacks the detail necessary for an effective cumulative effects management system. This failure is of greatest concern to CPDFN, as the Plan in its current state enables cumulative effects, in the form of continued rapid industrial development in the region, but contains no effective provisions for managing the negative impacts of this development or for stewarding to other values such as protection of ecological and cultural integrity. The danger is confirmed by giving legal effect to the Plan as direction to decision makers before it is complete, and key elements needed to protect Constitutional Rights, missing. Another danger is that LARP is being coupled with a streamlined, faster regulatory system to "fast track" approvals, which relies on an underdeveloped system to manage cumulative effects to rationalize intensive development. Regulators and industry rely on the Plan to justify further development on the assumption that impacts are or will be managed but they are not managed by the Plan and may not be in the future. This results in very significant impacts on the constitutionally protected rights of the longest-term land users in the region, aboriginal peoples.

ii. Terminology

4. In this reply, the following terms are used:

"**Act**" means the *Alberta Land Stewardship Act,* S.A. 2009, c. A-26.8.

"**AER**" means Alberta Energy Regulator.

"**Alberta**" or "the **Crown**" means the Government of Alberta.

"**Application**" means the written submissions and all attachments submitted by CPDFN to request the Review and deemed complete by the Stewardship Minister on April 2, 2014.

"**CPDFN**" means Chipewyan Prairie Dene First Nation.

"**Constitutional Rights**" are collectively held rights protected by section 35 of the *Constitution Act*, *1982* consisting of the following:

a. Treaty rights; as guaranteed by the text of Treaty 8 (1899) and the oral assurances made on behalf of the Crown at the time the Treaty was negotiated. These treaty rights include the right to hunt, trap and harvest natural resources within their traditional territory, to their way of life, to the use, enjoyment and control of their Reserve lands and the right to a livelihood. While Alberta has the ability to "take up" lands for mining and other purposes pursuant to Treaty 8, this right is limited by CPDFN's right to sufficient lands, and access to them, within their traditional territory, of a quality and nature sufficient to support the meaningful exercise of their treaty rights;

b. Aboriginal rights; which are the practices, traditions and customs integral to the aboriginal group and arising from their prior occupation of the lands now comprising Canada. These include harvesting rights. Some aboriginal rights are confirmed by Treaty 8; others include the right to self-government, culture and religion;

c. The right to hunt for food pursuant to the *Natural Resources Transfer Agreement* [Alberta] (being schedule 2 of the Constitution Act, 1930) : "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence …… that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access";

d. The right to be consulted and accommodated with respect to potential adverse effects on their rights and the interests secured by their Constitutional Rights; and

e. The right to have their treaty and aboriginal rights protected and not unjustifiably restricted. Any infringement of CPDFN's treaty and aboriginal rights must be justified by the provincial and federal Crowns by demonstrating a) a compelling and valid legislative objective; b) that priority was given to the rights; c) the means of achieving the objective infringed the right, including the preferred means of exercising it, as little as possible; d) the aboriginal group was consulted; and (e) appropriate accommodation of the rights made.

R v. Horseman, [1990] 1 S.C.R. 901 [**Tab 1**].
R v. Badger, [1996] 1 S.C.R. 771 [**Tab 2**].
R. v. Van Der Peet, [1996] 2 S.C.R. 507 [**Tab 3**].
Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69 [**Tab 4**].
R. v. Sparrow, [1990] 1 S.C.R. 1075 [**Tab 5**].
Constitution Act, 1930, 20-21 George V (U.K.), section 1; and Schedule 2, *Alberta Natural Resources Transfer Agreement*, paragraphs 10 & 12 [**Tab 6**].

"**Crown Response**" means the Government of Alberta's written response submissions to the Application dated June 25, 2014.

"**ESRD**" means Environment and Sustainable Resource Development.

"**LARP**" or "the **Plan**" means the Lower Athabasca Regional Plan.

"**Regulations**" means the *Alberta Land Stewardship Regulation*, Alta. Reg. 179/2011.

"**Review**" the Panel's conduct of a review of LARP, a regional plan as defined in s.2(v) of the Act, as initiated by the Application pursuant to section 19.2(2) of the Act.

"**Rules of Practice**" means *Alberta Land Stewardship Act - Rules of Practice for Conducting Reviews of Regional Plans (March 2014)* made by the Stewardship Minister.

B. Scope of the Panel's Jurisdiction

5. The Panel's jurisdiction is granted to it by its constituent legislation, the Act. The Panel's jurisdiction with respect to the Review is presumed to serve a legislative purpose that can be adequately reconstructed through statutory interpretation. Interpretations that are consistent with or promote the legislative purpose of the enabling act are to be adopted while those that defeat or undermine such purpose, avoided.

R. v. Conway, [2010] 1 S.C.R. 765 [**Tab 7**].
Sullivan, R., *Sullivan on the Construction of Statutes (5th ed)*, (LexisNexis Canada Inc., 2008) at p. 255.

6. A textual, contextual and purposive interpretation of the Panel's jurisdiction requires the words of the Act to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature. This modern rule of statutory interpretation applies to the interpretation of the Regulations with the additional requirement that the Regulations be read in the context of the Act, having regard to its language and purpose.

See, Canada Trustco Mortgage Co. v Canada, 2005 SCC 54 at para. 10 [**Tab 8**].
Bristol-Myers Squibb Co. v. Canada (Attorney General), 2005 SCC 26 [**Tab 9**].

7. The nature and declared purposes of the Act indicate the Panel has a broad public interest mandate. It is evident from a review of the Act as a whole that the Panel's statutory mandate is to assist the Crown in ensuring regional plans meet the broad public purposes of the Act.

8. The purposes of the Act and therefore the purposes that the Review is intended to achieve are set out in section 1:

> **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.

Act at s.1.

9. Subsection 1(2) indicates that the Act seeks to achieve broad public interest concerns: including meeting the needs of future generations, including aboriginal peoples, an effective regulatory process, and the protection of the environment. To achieve these broad objectives, the Act requires regard for private property and other rights as outlined in subsection 1(1).

10. The Review was initiated by the Application submitted pursuant to section 19.2(1) of the Act. Section 19.2(1) provides an opportunity to those who are "directly and adversely affected by a regional plan" to request a review of the "regional plan" in accordance with regulations. Upon receipt of the Application, the Stewardship Minister was required to establish a panel to "conduct a review of the regional plan" and "report the results of the review and any recommendations to the Stewardship Minister" (section 19.2(2) of the Act). The Stewardship Minister must then provide the Panel's results of review and recommendations to Cabinet in accordance with section 19.2(3). This all makes it evident that the Act contemplates that the "regional plan" as a whole would have direct and adverse effects on persons, and the regional plan in its entirety would be the subject of review and recommendations.

Act at s.19.2.

11. The Act requires the request for review and the Panel's report to be made publicly available in their entirety (s.19.2(4)). This requirement speaks to the broad public interest role of the Panel and the Review. As confirmed by the Court of Appeal in the context of public hearings of the now dissolved Energy Resource Conservation Board, public hearings are an important aspect of public interest legislation.

Act at 19.2(4).
Kelly v Alberta (Energy Resources Conservation Board), 2012 ABCA 19 at paras. 32-34 [**Tab 10**].

12. The breadth of the Panel's public interest mandate is evident in its ability to make "any recommendations" to the Stewardship Minister. In other words, no restrictions are imposed on the Panel by the legislature respecting the substance of a review of a regional plan.

Act at 19.2(2).
Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), 2001 SCC 37 at para. 40 [**Tab 11**].

13. Cabinet made the Regulations pursuant to section 19.2(5) of the Act, which authorizes Cabinet to make regulations respecting the establishment of the Panel, including regulations respecting the Panel's "powers" and "duties" (s.19.2(5)).

Act at s.19.2(5).

14. Section 5(1)(c) of the Regulations defines "directly and adversely affected" as meaning "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."

Regulations at s.5(1)(c).

15. Section 7 of the Regulations provides the information necessary to be included in the Application such as the “adverse effects the applicant *is suffering or expected to suffer* as a result” of specific provisions of the regional plan. This confirms that existing and future impacts are relevant considerations in the Review.

Regulations at s.7.

16. Section 7 makes reference to “adverse effects.” Section 2(1)(h) of the Act defines “effect” broadly as:

> (i) any effect on the economy, the environment, a community, human health or safety, a species or an objective in a regional plan, regardless of the scale, nature, intensity, duration, frequency, probability or potential of the effect, and
>
> (ii) a cumulative effect that arises over time or in combination with other effects;

Act at s.2(1)(h).

17. Section 9 of the Regulations requires the Stewardship Minister to forward the Application to the Panel to conduct the “required review of the regional plan” and to “report the results of the review and any recommendations.” This is consistent with the requirements set out in the Act. In other words, the Regulations do not limit the Panel’s jurisdiction to only determining whether CPDFN is directly and adversely affected, but in keeping with the Act contemplate that the Panel will undertake a review of the “regional plan” and make recommendations to meet the purposes of the Act.

Regulations at s.9.

18. Section 10 authorizes the Stewardship Minister to establish rules regarding the "conduct of a review” including rules respecting content of reports and any recommendations. This indicates that Stewardship Minister may establish procedural rules, but the Stewardship Minister cannot, pursuant to the Regulations, alter the substance of the Panel’s jurisdiction as conferred by the legislature in the Act.

Regulations at s.10.

19. Sections 7-9 of the Act outline the “content” of a regional plan which must include a “vision” and one or more “objectives” and may include, among other things:

    a. Relevant history of the planning region; its demographics; and social characteristics;

    b. A description of the state of the planning region describing matters of particular importance; trends, opportunities and challenges, including environmental and social opportunities;

c. Actions to be taken when adverse effects occur; and

d. Provisions necessary to advance or implement the purposes of the Act.

Act at ss.7-9.

20. As sections 7-9 of the Act outline the content of a "regional plan," the matters set out fall within the Panel's jurisdiction in the Review of the regional plan irrespective of whether Alberta considered and excluded them from LARP as it currently exists.

Act at ss.7-9.

21. Section 11 of the Act acknowledges that past decisions may be affected by the Plan for the purpose of achieving the purposes of the Plan by amending or rescinding "statutory consents." This indicates that impacts caused by past activities are relevant in the Review as LARP could have and did affect activities that pre-dated LARP.

Act at s.11.

22. This all indicates that existing, past and future effects and events are relevant to the Panel's jurisdiction because the Act contemplates such effects and events as being part of the content of LARP and therefore relevant in meeting the purposes of the Act. Specifically, the purpose of the Plan is to address future development in the context of existing development. For example, the Plan is supposed to describe actions to be taken "when" adverse effects occur. And to address cumulative effects, which by definition, originate in the past and extend into the future. With respect to adverse effects, s. 7 of the Regulations indicates existing and future effects on persons can be the subject to a review, because of the use of the phrase "*is suffering or expected to suffer"* and because subsection 5(1)(c) refers to the "reasonable probability" of that effects will occur. Probabilities, by definition, refer to future events.

23. Section 15.1. of the Act contemplates requests by "title holders" for a variance in respect of a "restriction, limitation, or requirement" under a "regional plan as it affects the title holder." This provision indicates two things. That a separate provision is contemplated for private interests affected by the Plan which would make the Review solely for these interests unnecessary. The reference to a "regional plan" in the context of a review pursuant to s.19.2 indicates the legislature intended the Panel to review the Plan in its entirety as it did not limit the extent of the Review in the same manner as it did for variances.

Act at s.15.1.

24. Section 19.1. of the Act provides for compensation to those private landowners and freehold mineral owners affected by the regional plan within 12 months of the regional plan or amendment coming into force. Again, this indicates that the review process of s.19.2 is intended to address broader public interests of the Act as set out in section 1 of the Act and interests of

affected persons, beyond land takings and adverse effects on title holders, because the legislature included specific procedures (variances and compensation) for land owners whose land is affected by a specific provision of a regional plan.

Act at s.19.1.

C. Broad and Liberal Interpretation of the Panel's Jurisdiction is Required

25. The Panel is required to adopt a generous, broad and liberal interpretation of its mandate. This is due to the *remedial* nature of LARP. It is a land use plan developed to meet the purposes and provisions of the Act which is in the nature of a *public interest* legislation that is concerned with societal matters, including the protection of the *environment* and First Nations' constitutional rights to use public land.

26. Section 10 of the *Interpretation Act* applies to the *Act*:

> 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.

Interpretation Act, R.S.A. c-I-8, s. 10.

27. Legal measures to protect the environment "relate to a public purpose of superordinate importance." Modern planning instruments are enacted to protect communities as a whole and should be construed liberally. Impacts on health are included in the definition of "directly and adversely affected" in the Regulations. There is an "undeniable importance of the public interest in health."

R. v. Hydro-Québec, [1997] 3 S.C.R. 213, at para. 85 [**Tab 12**]
RJR -- MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at p. 316 [**Tab 13**].
R. v. Brown Camps Ltd., [1970] 1 O.R. 388 cited in
Bayshore Shopping Centre v. Nepean (Township), [1972] SCR 755 at p.764 [**Tab 14**].

28. Because of Alberta's constitutional duty to manage lands in light of the rights of aboriginal peoples (which is recognized in the Act, the Land Use Framework (2008) and LARP), LARP engages the special relationship between the Crown and aboriginal peoples that requires a generous and liberal interpretation in favour of aboriginal peoples as confirmed by the Supreme Court of Canada in the case of *R. v. Van Der Peet*:

> *General Principles Applicable to Legal Disputes Between Aboriginal Peoples and the Crown*
>
> 23. Before turning to a purposive analysis of s. 35(1) , however, it should be noted that such analysis must take place in light of the general principles which apply to the legal relationship between the Crown and aboriginal peoples. In *Sparrow*, supra, this Court held at p. 1106 that s. 35(1) should

> be given a generous and liberal interpretation in favour of aboriginal peoples:
>
> When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. [Emphasis added].
>
> 24. This interpretive principle, articulated first in the context of treaty rights -- Simon v. The Queen, [1985] 2 S.C.R. 387, at p. 402; Nowegijick v. The Queen, [1983] 1 S.C.R. 29, at p. 36; R. v. Horseman, [1990] 1 S.C.R. 901, at p. 907; R. v. Sioui, [1990] 1 S.C.R. 1025, at p. 1066 -- arises from the nature of the relationship between the Crown and aboriginal peoples. The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1) , and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation: R. v. George, [1966] S.C.R. 267, at p. 279. This general principle must inform the Court's analysis of the purposes underlying s. 35(1) , and of that provision's definition and scope.

R v. Van Der Peet, *supra* at paras. 23-24 [**Tab 3**].

29. With respect to any legislation that "that bears upon treaty <u>the courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown."</u>

United States v. Powers, 305 U.S. 527 (1939), at p. 533 cited by LaForest, J in *Mitchell v. Peguis Indian Band*), [1990] 2 S.C.R. 85 at page 143 [**Tab 15**].

30. Recently, the Supreme Court of Canada confirmed that the provincial and federal governments' constitutional obligations to aboriginal peoples are the same. Therefore, any suggestion that the Crown makes that a liberal and generous interpretation only applies to laws made under federal jurisdiction is not supported by the case law.

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44 at para.139 [**Tab 16**].
Grassy Narrows First Nation v. Ontario (Natural Resources), 2014 SCC 48 at para.53 [**Tab 17**].

D. The Meaning of "Directly and Adversely Affected" in this Context

31. In interpreting "directly and adversely affected" the Crown relies on the case of *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*. However, the case does not support the Crown's point for which it is cited. The Supreme Court decided that a tribunal, even acting in the public interest,

does not itself have a duty to consult. However, the Court held that whether the crown consulted adequately is normally a matter that could be considered by the tribunal, in part because it was not in the public interest to make decisions contrary to the Constitutional Rights of First Nations. The decision before the tribunal – a proposal by BC Hydro to enter into an electricity purchase agreement, could not potentially cause impacts to lands and resources and therefore based on the facts of the case, there was no duty to consult. The case does not change that the law that there is a duty to consult with respect to decisions about management of land nor the Crown's duty to respect Constitutional Rights and avoid infringing them.

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43 [**Tab 18**].

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32. LARP was made pursuant to section 4 of the Act, and required public consultation in making the Plan pursuant to section 5. This indicates a broad view of who could be "directly and adversely affected" by a regional plan.

Act at ss.4-5.

33. Alberta Courts have confirmed the following principles in defining similar terms as "directly and adversely affected". The following principles were applied to the interpretation of section 91(1)(a) of the *Environmental Protection and Enhancement Act*, which states those persons who are "directly affected by the Director's decision" may file an appeal:

    a. The person need not prove with certainty that its rights will be affected but only a potential effect on a balance of probabilities or a reasonable probability;

    b. Effects on a person's use of a natural resource meets the requirements of directly affected;

    c. Close proximity between the location of the person's use and the project meets the requirements of directly affected; and

    d. The person need not show a preponderance of evidence of a direct effect but rather a prima facie showing of potential harm.

Environmental Protection and Enhancement Act, R.S.A. 2000 E-12 at s.91(1)(a).
Court v. Alberta Environmental Appeal Board,
2003 ABQB 456 at paras. 69-72 [**Tab 19**].

34. Section 19.2(1) grants a right of review to persons "directly and adversely affected by a regional plan". The former *Energy Resources Conservation Act* gave a right to intervene in applications for energy approvals "if it appears to the Board that its decision on an application may *directly and adversely affect the rights* of a person*"* – a more stringent requirement than the Act's

requirement. The Court of Appeal held (in 2 separate cases) the following principles applied to determining who could intervene:

a. The risk of harm need not be certain or likely; the Court held it is sufficient "that events *could* arise which *could* prejudice the Appellants is enough; those events do not have to be occurring at the very moment" the application is considered by the Board;

b. Where there is evidence of an ongoing health and safety risk, that is enough to establish a potential adverse effect;

c. The fact the Appellants were consulted about the application did not negate their right to participate in the hearing or the fact that they may be adversly affected.; and

d. There is no legal requirement that a person establish that it may affected in a different way or to a greater degree than members of the general public.

Energy Resources Conservation Act,
R.S.A. 2000, c.E-10 at ss.26 & 28 (repealed)
Kelly v. Alberta (ERCB), 2009 ABCA 349 at paras. 32, 37-38 [**Tab 20**].
Kelly v. Alberta (ERCB), 2011 ABCA 325 at para.26 [**Tab 21**].

35. In a further case involving the same appellants as the cases cited above, the Court of Appeal considered the principles applicable to the wording in another section of the *Energy Resources Conservation Act*, dealing with eligibility for costs, which required, that a person have "an interest in" or "is in actual occupation of or is entitled to occupy land that is or may be directly and adversely affected." The Court held these additional requirements :

a. The general purpose of the regulatory process is to ensure that resource development takes place in ways that will prevent or reduce the risk of physical damage to anything, including land;

b. A person need only show a reasonable belief that the evidence may disclose that its rights could be affected or could prejudice the person, these facts need not be present at the time the application is considered;

c. Effects on the value and use of land, as well as physical damage, meet the requirements of directly affected;

d. The person need only be in occupancy of land that is directly affected; there is no requirement that the person own an interest in land; and

e. There is no legal requirement that a person establish that it may affected in a different way or to a greater degree than members of the general public.

Energy Resources Conservation Act,
R.S.A. 2000, c.E-10 at ss.26 & 28 (repealed).
Kelly v. Alberta (ERCB), 2012 ABCA 19 at paras. 26, 27, 32 – 33 [**Tab 10**].

36. While the Regulations define the term "directly and adversely affected" the definition must be interpreted broadly to meet the purposes of the Act, which includes the management of activities to meet the foreseeable needs of future generations, including aboriginal peoples and to protect the environment. The term must also be read consistently with the term "effect" as defined in the Act which contemplates a variety of types of adverse effects of a regional plan including a combination of existing and potential effects.

Act at s.2(h).
Regulations at s. 5(1).

37. It is evident from the scheme of the Act that those "directly and adversely affected" are broader than those with property interests affected by the regional plan. While private property interests may also be affected by a regional plan to qualify to request a review pursuant to section 19.2, those interests cannot be the only interests that are "directly and adversely affected" by regional plan to request a review. This is evident from the Act that provides "title holders" including landowners an opportunity to request a variance of the Plan directly from the Stewardship Minister and provides "Registered owners" who suffer a "diminution or abrogation of property rights or interests" to be compensated pursuant to s.19.1 of the Act. Therefore, to meet the broader public interests engaged by the Act, the request for a review of a regional plan must provide for a broader subset of concerns than those who have property rights that are affected by regional plan as the Crown's interpretation of the Panel's jurisdiction suggests.

38. In particular, the phrase "quiet enjoyment of property" ought to be interpreted to include CPDFN's constitutional rights to hunt, fish and trap on lands to which they have access pursuant to Treaty 8 and their rights to hunt and fish during all seasons of the year on public lands pursuant to Article 12 of the *Natural Resources Transfer Agreement*. And "property" ought to include their Reserves, which were provided pursuant to Treaty 8 and which the federal Crown holds in trust for CPDFN's exclusive use and benefit.

Indian Act, R.S.C. 1985 C.I-5 as amended, s.18.
Constitution Act, 1930, 20-21 George V (U.K.), section 1; and Schedule 2,
Alberta Natural Resources Transfer Agreement, paragraphs 10 & 12 [**Tab 6**].

39. This interpretation is keeping with the purposive approach to interpreting the legislative and policy scheme as a whole in light of its purposes, as the Court of Appeal did in the *Kelly* cases. And it is in keeping with the Act, specifically:

1 (1) In carrying out the purposes of this Act, 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:
…
(b) recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, *including aboriginal peoples*;

Act at s. 1.

E. The Content of LARP

40. The Crown says that LARP's content may only be reviewed and therefore the content of LARP must directly and adversely affect CPDFN to engage the Panel's jurisdiction. Alberta then says that LARP balances interests, which is unreviewable. However, CPDFN's point is that its interests are not incorporated in any tangible way and therefore not "balanced" in LARP. Specific provisions of LARP say that Alberta will consult First Nations if their rights may be adversely affected by decisions. The Crown's response to the Application paradoxically says First Nations are not affected by LARP. The Panel, as well as the Stewardship Minister, must comply with the intent and provisions of the Act, and respect the rights of CPDFN as a First Nation and as a community directly and adversely affected by the Plan and the effects of land use that the Plan is intended to ameliorate. The Review is intended to serve the broader public interests of the Act and the Panel's role is to advise the Minister if the Plan does or will likely adversely affect the rights of CPDFN and to make recommendations to improve the Plan to avoid such effects.

Crown Response at para. 4, 9-17.
LARP at pp.5 & 35.

41. The fact that LARP engages aboriginal interests is evident from the following:

    a. In the Introduction at page 5, LARP recognizes First Nations hold Constitutional Rights and Crown decisions can affect these rights;

    b. In the Strategic Plan at page 15, LARP recognizes that aboriginal peoples are residents of the region and are engaged in economic activities in the region;

    c. In the Strategic Plan at page 22, LARP recognizes that First Nations have "traditional-use locations of cultural and spiritual significance" in the region;

    d. In the Strategic Plan at page 29, LARP recognizes that cumulative effects on air, waste, land and biodiversity affect First Nations' Constitutional Rights;

    e. In the Strategic Plan at page 29, LARP indicates that Alberta will consider, in developing the biodiversity management framework and the landscape management plan how First

Nations Constitutional Rights can occur within reasonable proximity to First Nations' main population centres;

f. In the Strategic Plan at page 30, LARP indicates conservation areas, in part, are intended to support the exercise of Constitutional Rights; and

g. In the Strategic Plan at page 34, LARP indicates that aboriginal peoples will be included in land-use planning decisions because of their unique relationship with the lands in the region.

42. The fact that LARP excludes CPDFN's interests is evident from the following:

a. In the Implementation Plan at pages 92-93, LARP designates conservation areas within the periphery of CPDFN's traditional territory where it exercises its Constitutional Rights and the includes only a small portion of the periphery of the Kai' Kos' Deseh/Christina River watershed, which CPDFN identified as essential to be set aside as a conservation area for the protection of Constitutional Rights; Alberta has not published any data to show the conservation areas are in fact used or useable by CPDFN or that they contain or will contain wildlife and other resources necessary to support Constitutional Rights;

Application, Appendix 7: CPDFN Planning Considerations for LARP.

a. Schedule F of LARP designates 65% of the Region for development as of the effective date of the Plan but the biodiversity management framework and landscape management plan was not created as of the effective date and which are now long passed their due dates of 2013 as set out in the Implementation Plan at page 71;

b. No setbacks or buffers between development and CPDFN Reserves are included in the Plan although leases border these Reserves as does the designated development zone;

c. No thresholds for odours or air pollutants apart from NO2 and SO2 are included in the Plan;

d. No surface water quality or quantity thresholds are established for any surface water other than the Athabasca River (and then only at one location – far upstream from CPDFN), including the Gordon, Cowper and Winefred lakes which are in close proximity to CPDFN's Reserves and settlement areas and are important areas for the exercise of Constitutional Rights; and

Application at Map "LARP Fig8 TT Waterbodies".

e. Alberta submits that the nature of CPDFN's interests do not trigger a request of a review of LARP.

43. This all indicates that while the Plan was intended to meet the purposes of the Act, it does not, which means LARP as it exists is not sufficient to protect the health and other rights of CPDFN

and recommendations are necessary so that LARP can meet the purposes of the Act. The Panel is tasked with assisting the Crown do so.

F. The Gap in Addressing Cumulative Effects in the Existing Regulatory Regime

44. Alberta may believe that LARP cannot directly and adversely affect CPDFN because it simply adds a "layer to the existing regulatory structure." However, this is incorrect for two reasons: a) LARP was created because of Alberta's recognition that the current regulatory process is ineffective in addressing existing and rising cumulative effects; and b) LARP is being used by decision-makers to justify authorizing further impacts on CPDFN while also acknowledging LARP tools needed to protect Constitutional Rights are not in place. This indicates a flaw in the content of LARP and how it is being used.

See, Crown Response at para. 68.

45. The ineffectiveness of the existing regulatory system to manage regional impacts is admitted by Alberta in the Land Use Framework created by Alberta in 2008 to guide the development of regional plans:

> "Our current land management system, which served us well historically, risks being overwhelmed by the scope and pace of activity. What worked for us when our population was only one or two million will not get the job done with four, and soon five million. We have reached a tipping point, where sticking with the old rules will not produce the quality of life we have come to expect" (page 6)
>
> ….
>
> "We have reached a tipping point. What worked before will not work for our future. The time for change is now" (page 13)
>
> …..
>
> "Alberta's current regulatory system is based on a project-by-project approval and mitigation of the adverse effects of each project. Until now, the approach has been to control the impact of each project. While this may be acceptable for low levels of development, it does not adequately address the cumulative effects of all activities under the current pace of development" (page 31)

Government of Alberta, Land Use Framework (2008) [**Tab A**].

46. The Joint Review Panel in its decision respecting the *Shell Jackpine Mine Expansion Project*, also recognized the ineffectiveness of the existing regulatory process in addressing cumulative

effects that harm CPDFN's Constitutional Rights and the inability of an incomplete LARP to address the gap in the regulatory system:

> [9] The Panel finds that the Project would likely have significant adverse environmental effects on wetlands, traditional plant potential areas, wetland-reliant species at risk, migratory birds that are wetland-reliant or species at risk, and biodiversity. *There is also a lack of proposed mitigation measures that have been proven to be effective*. The Panel also concludes that the Project, in combination with other existing, approved, and planned projects, would likely have significant adverse cumulative environmental effects on wetlands; traditional plant potential areas; old-growth forests; wetland-reliant species at risk and migratory birds; old-growth forest reliant species at risk and migratory birds; caribou; biodiversity; *and Aboriginal traditional land use (TLU), rights, and culture*. *Further, there is a lack of proposed mitigation measures that have proven to be effective with respect to identified significant adverse cumulative environmental effects.*
>
> [36] It is apparent to the Panel that the mitigations being proposed by individual project proponents are not effective at avoiding significant adverse cumulative effects on TLU in the Project region. The Panel acknowledges that the intent of the *LARP* is to take more of a cumulative-effects-based approach to managing environmental effects in the Lower Athabasca Region, but notes that the *LARP* does not specifically address TLU issues. Instead, the *LARP* provides for continued consultation and engagement with Aboriginal peoples to help inform land and natural resource planning in the region. Several of the Aboriginal groups expressed concern that the *LARP* does not address their concerns and does nothing to ensure ongoing traditional use of the land or to protect their Aboriginal or treaty rights. 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 Region.
>
> …..
>
> [1025] The Panel acknowledges the potential role of *LARP* and the pending biodiversity management framework in providing a more regional approach to managing cumulative effects in the oil sands region. The Panel recognizes that cumulative effects in the oil sands region cannot be managed on an individual project basis and that they require collaboration and strategic planning across government, industry, Aboriginal peoples, and nongovernmental organizations.
>
> …..
>
> [1806] While the *LARP* is an essential first step, its value will be fully realized only when all of its frameworks and thresholds are in place. The Panel encourages the Government of Alberta to continue the processes associated with implementation of the *LARP* on an urgent basis.

…..

[1825] The Panel acknowledges that the *LARP* and other Alberta regulations and policies do not currently mandate the use of conservation offsets in the oil sands region. While the use of conservation offsets is contemplated under division 4 of part 3 of *ALSA*, the biodiversity management framework under the *LARP* and the new wetlands policy have not been finalized and the implementation date for these initiatives is uncertain.

Shell Jackpine Mine Expansion Project, 2013 ABAER 011 at paras. 9, 36, 1025, 1806 & 1825 [**Tab B**].

47. As recently as 2014, the Crown has acknowledged the ineffectiveness of the regulatory process in addressing CPDFN's concerns with the inability of the existing regulatory process to address the impacts of development on Constitutional Rights and the community's health and wellbeing: "Currently in Alberta, development that requires provincial approval is generally reviewed on a case-by-case basis. While this has allowed regulators to understand individual impacts, over time this approach has become inefficient and less responsive to place-based challenges."

Environment Sustainable Resource Development Website (accessed August 21, 2014, from: http://esrd.alberta.ca/focus/cumulative-effects/default.aspx) [**Tab C**].

48. Decision-makers are using LARP to justify authorizing further impacts on Constitutional Rights despite the inadequate and incomplete nature of LARP. This indicates a flaw in the content of LARP. As demonstrated in the decision regarding *Dover Operating Corp.* The AER stated:

[43] The Panel accepts that broad-scale land use decisions are directed by LARP. While LARP is still a work in progress, the Panel believes that through mechanisms being developed—such as the proposed biodiversity management framework and the Alberta wetlands policy—LARP is the appropriate mechanism for identifying and addressing the regional cumulative effects of resource development activities.

[44] In addition to considering social, economic, and environmental factors and the public interest in making its determination on the subject application, the AER must also act in accordance with LARP as it exists today. The Panel heard evidence that Fort McKay had requested a protected buffer area around its reserves during development of LARP. The Panel notes that such an area was not included in LARP, reflecting the province's overall land-use intent for the lands where the Project is located. The Panel notes that proper application of LARP is based on regional limits, not project-specific effects. It is expected that as subregional plans and management frameworks continue to be developed they will influence project-specific land use decisions.

[45] The Panel accepts Dover's submission that the Project is located in an area that is designated for oil sands development under LARP, and that developing its subsurface rights under the terms of its leases issued by the province of Alberta is not contrary to LARP.

[46] The Panel notes that Dover's Project is not in, and does not overlap, any of the conservation areas to be established under LARP, and that development of oil sands resources is permitted in the Project area. The Panel finds that Dover's application is compliant with LARP.

Dover Operating Corp., 2013 ABAER 014 at paras. 43-46 [**Tab D**].

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49. The content of LARP is a direct cause of this approach by the AER. For example, the AER in *Teck Resources Ltd.* relied on section 7(3) of the Regulatory Details Plan to approve the project despite the incompleteness of LARP specifically that no the biodiversity management framework and landscape management plan are developed:

    The panel acknowledges that there is no requirement under the *Environmental Protection and Enhancement Act (EPEA)* or the AER's rules to conduct an EIA or cumulative effects assessment for exploration programs such as those proposed in the Corehole Program applications. The panel also believes that a formal EIA or cumulative effects assessment for each exploration program would not be practical and that LARP is a more appropriate mechanism for establishing disturbance limits and managing regional cumulative effects. 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 wells. Section 7(3) of the Regulatory Details Plan in LARP states that

    > a decision-maker or local government body must not adjourn, defer, deny, refuse, or reject any application, proceeding or decision-making process before it by reason only of the Crown's non-compliance with a provision of either the LARP Strategic Plan or LARP Implementation Plan, or the incompletion by the Crown or any body of any direction or commitment made in a provision of either the LARP Strategic Plan or LARP Implementation Plan.

    Teck Resources Ltd., 2013 ABAER 017 at para.55 [**Tab E**].

50. Under the existing regulatory regime many activities that cause impacts to CPDFN do not undergo impact assessments or consultation, or consideration and mitigation of all of the impacts on CPDFN and its Constitutional Rights. Generally activities are also quickly approved without adequate time for the consideration of impacts on CPDFN by the decision-maker:

    a. SAGD projects that produce less than 2000 cubic metres of bitumen per day are not required to an undergo an environmental impact assessment; proponents generally submit large project applications in phases, some or none of which trigger an environmental impact assessment;

b. Oil sands exploration projects are not required to undergo environmental impact assessments despite their extensive impacts on the landscape;

c. AER approves activities that fall under the Enhanced Approval Process (EAP) Manual prior to receiving and considering statements of concerns of those directly and adversely affected by the activity;

d. The new *Responsible Energy Development Act* and regulations have removed the requirement to hold public hearings to review applications for new projects (it is now discretionary);

e. AER has and plans to establish tight timelines for issuing approvals to be adhered to;

f. AER is narrowly interpreting who obtains standing and dismissing those concerns that it considers are not site-specific such as impacts on hunting, fishing and trapping rights due to wildlife population declines;

g. Alberta is no longer consulting First Nations on energy enactment approvals and authorizations and are exempt from considering adequacy of consultation; and

h. Alberta and the AER are not addressing in their consultation with First Nations or in the regulatory review process: 1) the contribution of a project or development on cumulative effects; 2) whether a project needs to be delayed or denied to enable mitigation to be put into effect; and 3) the impacts on harvesting rights, the cumulative effects that will occur from further development on the environmental conditions.

Environmental Assessment (Mandatory and Exempted Activities) Regulation, Alta Reg 111/1993.
Alberta Energy Regulator Rules of Practice, Alta. Reg. 99/2013 at Rule 5(2)(b).
AER New News Release 2014-07-29 (AERNR2014-18) [**Tab F**];
Bankes, N., *Directly and Adversely Affected: The Actual Practice of the Alberta Energy Regulator*, Ablawg (June 3, 2014) [**Tab G**];
Responsible Energy Development Act, S.A. R-17.3, at s.21 & Part2, Division 2.
Government of Alberta, *Alberta's First Nations Consultation Guidelines on Land and Natural Resource Management (2014)* [**Tab H**].

51. In summary, to the extent that LARP relies on the existing regulatory regime in the protection of Constitutional Rights, LARP causes a direct and adverse effect on CPDFN because the Plan relies on a regulatory regime that does not address or protect against the cumulative impacts of development on Constitutional Rights for which each project contributes and the regulatory regime has changed with Alberta's new single energy regulator to prevent adequate and thorough consideration of project impacts on CPDFN's Constitutional Rights by relying on LARP, which is hollow when it comes to Constitutional Rights.

G. Crown Errs in Claiming Matters Raised by Application are Outside of the Panel's Jurisdiction

52. The Crown's central argument is that CPDFN's concerns are outside of the Panel's jurisdiction. In making this argument, the Crown adopts an incorrect and unreasonable interpretation of the Panel's jurisdiction and CPDFN's concerns. As provided above the Panel has a broad public interest statutory mandate as provided by the Act that requires a broad and liberal interpretation to its jurisdiction and LARP.

i. Application Does Not Raise Questions of Constitutional Law

53. Contrary to the Crown's Response, CPDFN has not asked the Panel to determine a question of constitutional law or to make findings that LARP infringes CPDFN's Constitutional Rights. Taking into account and considering the impacts of LARP on CPDFN's Constitutional Rights are clearly within the jurisdiction of the Panel. Instead, the Crown seeks the Panel to determine questions of constitutional law by claiming that a change in the manner of CPDFN's Constitutional Rights does not constitute an infringement. The Panel has no jurisdiction to consider this argument made by the Crown. Constitutional Rights must be construed liberally to protect the purpose for which they serve to protect – cultural identity and CPDFN's traditional economy.

R v. Horseman, supra [**Tab 1**].
R v. Badger, supra [**Tab 2**].
R. v. Van Der Peet, *supra* [**Tab 3**].
Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), *supra* [**Tab 4**].
R. v. Sparrow, [1990] 1 S.C.R. 1075 [**Tab 5**].

54. CPDFN agrees with the Crown that the Panel as a statutory decision-maker must act in accordance with *Constitution Act, 1982*, which protects CPDFN's Constitutional Rights. This also means that the Panel must take CPDFN's Constitutional Rights into account. The Crown is deemed to know the contents of CPDFN's Treaty rights and has notice of its claimed aboriginal rights. Therefore, there is no need to determine any rights in this Review as the Crown alleges in its response, but the Panel need only take the Constitutional Rights in account for the purposes of the Review.

Crown's Response at paras. 31.
Crown Response at paras. 31 & 80-81.
Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R. 159 (See Crown's Authorities at Tab 15).
Paul v. British Columbia (Forest Appeals Commission) [2003] 2 S.C.R. 585 at para. 25 [**Tab 22**].
Pridgen v. University of Calgary, 2012 ABCA 139 at paras. 127-128 [**Tab 23**].
Mikisew Cree First Nation, supra [**Tab 4**].

55. As described above at paragraph 41, the protection of CPDFN's Constitutional Rights are clearly within the content of LARP and therefore part of the Panel's Review. For example, in the Introduction at page 5, the LARP recognizes First Nations hold constitutionally protected rights.

At page 29, the LARP directly links the biodiversity management framework and landscape management plan with the potential protection of constitutionally protect rights. In short, the Panel has an important role in assisting the Crown amend LARP to respect CPDFN's Constitutional Rights in accordance with s.35 of the *Constitution Act*.

ii. Crown Errs in Interpreting CPDFN Concerns Relate to Inadequate Consultation during LARP Creation or Implementation

56. The Crown argues that CPDFN's concerns with the Plan's reliance on ongoing consultation with aboriginal peoples are outside of the Panel's jurisdiction because these concerns are not with the content of LARP. This argument is misguided. The Strategic Plan and Implementation Plan identify inclusion of aboriginal peoples in land use planning decisions by relying on ongoing consultation with First Nations. The Crown acknowledges the inclusion of such content of LARP at para. 58.

Crown's Response at para. 55-60.

57. CPDFN's concern with the content of the Plan is that such general statements about including aboriginal peoples in land use decisions without any detailed commitment is ineffective in addressing CPDFN's Constitutional Rights, which is supported by its previous experience engaging with the Crown, including with respect to the creation of LARP. This is also supported by the comments made in paragraph 50 above in the context of the concerns with Alberta's new *Alberta's First Nations Consultation Guidelines on Land Natural Resource Management (2014)* that only require consultation with respect to site-specific impacts of individual projects. Further it is CPDFN's position that statements that Alberta will engage with aboriginal peoples is ineffective for decision-makers like the AER who continue to apply LARP as it exists today, which provides no firm commitments from Alberta, and who has no jurisdiction to assess the adequacy of the Crown's constitutional obligation to consult and accommodate aboriginal peoples. The Plan's reliance on ongoing consultation with aboriginal peoples without any effective and detailed commitment indicates that LARP, and its reliance on an existing flawed consultation process, does not address or protect CPDFN's Constitutional Rights; rather it effectively promotes, authorizes and justifies the accumulation of impacts caused by development without any assessment of those impacts on CPDFN.

Responsible Energy Development Act, S.A. R-17.3, at s.21.

iv. Exiting Harms on CPDFN are Within the Scope of Review

58. CPDFN agrees with Alberta that there are existing and very significant effects of development already on CPDFN. CPDFN has submitted evidence of adverse effects on its community and ability to exercise its Constitutional Rights due to declining land available and declining wildlife populations. Numerical analyses indicate that, at the rate of disturbance experienced in the past 15 years, by the year 2020 to 2030 there will be no land left in the regional Municipality of Wood Buffalo south of Fort McMurray that is farther than 250 metres from an industrial feature. Moose populations have declined significantly in the oil sands region and caribou and bison populations are below populations that can support Constitutional Rights. Proponents are

even reporting the severe decline in wildlife populations. Dover OPCO (now Brion Energy) provided evidence in its application for approval of the Dover Commercial Project that moose and caribou will be extinct or near extinction in area of about 2.2 million ha on the west side of the Athabasca River. In 2008 Suncor's Mine Dump 9 application it concluded declining moose populations in the region.

Crown Response at para. 61,
Application at Appendix 4, CPDFN MSES Ecological Considerations for Designated Areas for Protection.
Dover Operating Corp., 2013 ABAER 014 at paras. 67-75 & 113 [**Tab D**].

59. We disagree with Alberta that these existing impacts are outside of the scope of the Panel's consideration in this Review. The Plan is intended to manage cumulative effects which are existing impacts, as well as existing impacts combined with future approved and planned impacts. Factual context is obviously relevant to understanding the Plan. Indeed, the Plan itself sets out various facts to provide context pursuant to sections 7-8 of the Act. This context is important for the Panel to consider CPDFN's point that the inadequate and incomplete nature of the Plan is jeopardizing the purpose of the Plan, as set out in the Act and the Plan itself.

LARP at Introduction and Strategic Plan.

60. The current level of impacts on CPDFN is due to Alberta's policy of maximizing oil sands development which is carried forward into the Plan by the incorporation of "The Alberta Provincial Energy Strategy and Responsible Actions: A Pan for Alberta's Oil Sands". However, LARP goes further and states that this policy of full development is to be managed by strategies and tools to also ensure a healthy environment and communities and respect the constitutional rights of aboriginal communities. The nub of the problem is that these other strategies are not yet developed, or only partially developed or are so skeletal that the outcomes cannot be achieved. And there is no sign of any substantive change to this situation in the reasonable future. In the meantime, the Plan is binding on statutory decision makers such as the AER and it with industry rely on LARP as the green light for full development, everywhere in the region that is not a conservation area under the Plan.

LARP at p.25.
Dover Operating Corp., 2013 ABAER 014 at paras. 45-46 [**Tab D**].

61. Alberta relies on the fact that it set aside the LARP conservation areas to ameliorate existing effects. However, these conservation areas do not conform with the ecological and cultural needs of CPDFN to protect its Constitutional Rights. The conservation areas largely overlap with existing parks that have had limited development but yet have not prevented the existing impacts from oil sands development including wildlife population declines. Instead, LARP has established provincial designated recreational areas right within CPDFN's cultural homeland, in proximity to settlement areas and the lands CPDFN requested to be protected for Constitutional Rights under LARP.

Application at Appendix 4, CPDFN MSES Ecological Considerations for

Designated Areas for Protection.
LARP at pp.92-93.

62. Alberta relies on the fact that LARP contemplates additional planning for increased tourism and recreational use of the region to better manage the impact on the land of the Plan's aim to increase tourism and recreation within CPDFN's traditional territory. However, this planning is not in existence currently, two years after the Plan has come into effect. Therefore, the impacts are increasing on CPDFN and it sincerely doubts that any effective plans will be in place in the near future. Further, one of LARP's objectives is to promote tourism and recreational pursuits in the region to provide for the needs of the increased workforce in the region. This means LARP's objectives conflict between its need to protect Constitutional Rights and promoting increased recreational pursuits that cause adverse impacts on Constitutional Rights.

LARP at page. 32-33;

63. In *Dover Operating Corp*, the AER found harvesting pressures to be a leading cause of moose population declines and approved the large project despite declines in moose and caribou populations even though the proponent could not under project-specific mitigation to prevent further declines. This indicates that LARP's reliance on the existing regulatory regime causes direct and adverse effects on CPDFN:

    [113] The Panel is concerned about potential declines in both woodland caribou (a threatened species) and moose populations in the region. Although Dover has committed to an off-site habitat enhancement program, it presented no details of what such a plan would include. The Panel notes Dover's commitment to participate in regional wildlife monitoring, a deer and wolf population management program, and a habitat enhancement program. However, the Panel notes that Dover does not have the ability to unilaterally initiate or implement a deer and wolf population control program.

    [114] The Panel accepts that the primary causes of the decline in moose populations are predation and harvesting. Harvesting by non-aboriginal hunters is controlled by ESRD through hunting licences. The Panel notes that moose harvesting by First Nations is not monitored or formally managed.

Application at Appendix 4, CPDFN MSES Ecological Considerations for
Designated Areas for Protection.
Dover Operating Corp. 2013 ABAER 014 at paras.113-114.

64. Alberta relies on its commitment to "integrated land management" among industry to argue CPDFN is not directly and adversely affected by LARP. However, this outcome relies on the landscape management plan that is still not in place, and no evidence has been provided by Alberta of when it will be in place or developed and what the details it will entail. The Panel has to conduct the Review with LARP as it exists today, and the facts before it, and LARP as it exists has no measures in place to enforce integrated land management of industry users and public

land disturbance is increasing in the meantime, which will make integration practically difficult if any such plan is made in the future.

LARP at 38-39.

65. Most importantly for the Panel's purposes of the Review, LARP is intended to be a plan with key elements that will ensure the sustainability of Alberta's, lands, resources and economy. The legislature intended, through the Act, that land use plans would contain the necessary elements to achieve the vision, outcomes and objectives of the regional plan. This is evident from the fact that a review process is only available to CPDFN only once and within 12 months from the effective date of the Plan. Unless the effective date of the Plan is amended or the operative effect of the Plan suspended, no further review is possible. While a review is possible with respect to an amendment, the creation of frameworks, plans and thresholds are not amendments. This is evident from section 22 of the Act which distinguishes a "subregional plan", and an "issue-specific plan" from an "amendment". The Panel must consider the LARP as it stands now. It cannot speculate on what may or may not be in the Plan in the future. That would be an error of law. A statutory delegate, like the Panel, must act upon facts before it and reasonable inferences from those facts.

Act at ss.1 & 22.
LARP at Introduction.
Calterra Land Developments Inc. v. Rocky View (Municipal District No. 44), 2005 ABCA 356 at para. 3 [**Tab 24**].
See also, Earth Sciences Inc (E.S.I. Resources Ltd.) v. Calgary (City), 1978 AltaSCAD 6 (CanLII).

v. Harms Resulting from Potential Activities are Within the Scope of Review

66. Alberta's statement that future harms cannot be considered by the Panel is nonsensical. LARP is a tool to add the present and future conditions in the region. The current conditions are not acceptable, and without a change in the management of development, will only become more unacceptable. Hence the reason for the Plan. It is true that the Plan itself did not create the current level of development and its impacts, but the issue is that the Plan is intended to ameliorate the existing gaps in the regulatory system and conditions in order to achieve healthy environments and communities into the future. The issue for the Panel is that the Plan, as it stands, does not achieve this or create the conditions for achieving this. Further development is being approved all of the time, on the basis that LARP is addressing cumulative and regional impacts but the harm arises from the fact that it does not do so and cannot do so due to incompleteness in considering and addressing the needs to protect Constitutional Rights and the lack of content respecting Constitutional Rights.

Crown Response at 69-70.
Dover Operating Corp. 2014 ABAER 014 at paras. 43-46 [**Tab D**].
Teck Resources Limited, 2013 ABAER 017 at paras.21-22, 28, 55 & 63 [**Tab E**].

67. Interestedly, Alberta asks the Panel to consider unknown and unknownable facts about the future – i.e. it urges to the Panel to take into account that LARP will be completed in future. (For example, see paragraphs 65 & 84, where it says LARP contemplates motorized vehicles will be managed in the future and that the biodiversity management framework and landscape management plan "are to have several measures that will support wildlife populations and should in turn protection treaty rights and traditional land use." But for considering the potential adverse effects on CPDFN, Alberta says that the Panel cannot consider existing impacts nor potential ones. These two positions are incompatible. Alberta has not produced any evidence regarding the ability of the partially developed LARP to meet the outcomes of LARP or statements of intent it relies upon in claiming CPDFN is not directly and adversely affected by an incomplete and inadequate Plan in protecting Constitutional Rights.

Crown Response at paras. 65, 68 & 84.

68. The existing impacts – including increasing levels of air pollution, dramatic declines in moose and caribou, lands disturbed and fragmented by development, have occurred *despite* the existing review and approval mechanisms for oil sands projects. Alberta relies on the existing approval process to say LARP does not create impacts because new projects will go through a review process. It is exactly the failure of the project specific review process that has caused the decline of the health of ecosystems and the environment and quality of life in CPDFN. And the reason LARP came about was to *address this problem* as described in paragraph 45-47 above.

69. CPDFN's concern is that the problem LARP is supposed to address will continue to grow larger and the impacts of CPDFN will increase because projects continue to be approved even though critical aspects of LARP needed to protect Constitutional Rights are not in place, contemplated or yet developed.

70. Alberta relies on conservation areas to address CPDFN's concerns regarding future developments, but again the conservation areas largely exclude the lands CPDFN informed Alberta were needed for the protection of Constitutional Rights. Instead the Plan provides provincially designated recreational areas within those areas. Alberta has not provided any evidence that the conservation areas designated by LARP will be used by CPDFN, especially since there is uncertainty to the extent of CPDFN's use of parks for Constitutional, or evidence that the conservation areas can support the needs to exercise Constitutional Rights, including a harvestable wildlife populations.

Application at Appendix 4, CPDFN MSES Ecological Considerations for Designated Areas for Protection.
Application at Appendix 1: October 19, 2010 Joint Submissions Regarding LARP.

71. LARP is supposed to address the existing impacts of development combined with planned and anticipated development. The Plan cannot be considered or evaluated in a factual vacuum, as Alberta suggests. In fact, the Panel's review would be meaningless if its jurisdiction is as narrow as Alberta proposes.

vi. Harms Resulting from the Application of LARP are Within the Scope of Review

72. Alberta's argument that implementation of LARP cannot be considered because only the contents of the Plan can be considered by the Panel (even though in other sections Alberta asks the Panel to consider future management frameworks yet to be developed and implemented and additional future regulation) is unsupportable. Words on a page cannot cause harms. It is the implementation of the Plan and effects of Plan on the actions of government and companies that cause changes to communities and the environment.

Crown Response at para. 78-79.

73. LARP is in fact being used by Alberta to take away CPDFN's rights to have its concerns regarding impacts to its Constitutional Rights considered, contrary to what Alberta says. This is the single most significant harm to CPDFN – is that Alberta refuses to consult and address the need to mitigate impacts on CPDFN, such as the ability to harvest country foods. Alberta and the AER approach is that these are not "project-specific." Rather, Alberta and the AER rely on LARP to address these concerns considering them regional in nature and therefore outside of the regulatory review process. But LARP is largely an empty box – it is not addressing these impacts.

vi. Harms Resulting from LARP Omissions are Within the Scope of Review

74. The Crown says that the Panel does not have jurisdiction to consider omissions, or the incompleteness of the Plan. The law has long recognized that omissions and acts can equally cause harm and create the right to remedies. For example, the law of negligence holds governments and persons accountable for damages for acts and omissions that cause harm that is reasonably foreseeable as a result of the omission.

See, *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para.6.

75. The Panel's jurisdiction to review the Plan does not preclude it from considering that there are omissions, such as elements of the Plan referenced but not included. For example, clearly the legislature considered that potential adverse effects on a person's health may be affected by a regional plan. How could this occur? It is difficult to imagine that a Plan would be approved that expressly contain provisions stating the Plan was going to adversely affect health. Adverse health effects usually occur from failing to do something. For example, prohibiting the use of a toxic substance.

76. Additionally, the interpretation of the Act clearly places omissions within the Panel's jurisdiction. Any request for review must be made within 12 months from the date the regional plan came into force. Therefore, the legislative intention of the Review was for the Panel to review the Plan as it exists today and how it potentially affects CPDFN. The legislature could not have intended to circumvent the right to a review by deferring central elements of the Plan to a period of time when it could not be reviewed. Rather, the review power is more likely intended to capture problems in the way the regional plan is crafted, including critical omissions. From this, the Panel can safely conclude that the incompleteness of the Plan is a matter within the purview of the Review.

77. CPDFN submits that the exclusion of necessary tools and measures to protect CPDFN's Constitutional Rights does fall within the scope of the Panel's Review because LARP identifies CPDFN's Constitutional Rights as requiring to be considered by LARP, but then fails to consider them in any substantive way while allowing impacts of development to accumulate. It is evident that the content of LARP has this effect as provided by section 7(3) of the Regulatory Details Plan, which prevents project refusal for the incompleteness of the Plan. It is also apparent that the elements omitted from LARP that CPDFN seeks to be included could likely provide the information the current regulatory regime requires to meet the purposes of cumulative effects management. As stated in by the AER in the *Dover Operating Corp.*:

> [168] The TLU section of the EIA identified that, when considering existing disturbances in addition to the proposed Project at the LSA scale, the total disturbance will be about 15 per cent, which is an increase from the baseline condition of 3 per cent. Although both the area of disturbance footprint and the density of linear disturbances will increase, the Panel notes that no thresholds that were identified from policy statements or the scientific literature would allow evaluation of project and cumulative effects. The Panel expects that disturbance will be minimized through both project and cooperative planning and by rapidly initiating the reclamation of disturbances no longer needed for project operations.
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> …
>
> [172] The Panel accepts that some ecological indicators, such as moose, marten, and fisher, and fish populations, have declined below preindustrial and predisturbance levels regionally. However, it is not clear to the Panel how these declines have affected the ability of Fort McKay members to exercise their TLU rights and activities, or at what level of decline of these and other ecological indicators their rights would stop being meaningful to pursue.

Dover Commercial Project, 2013 ABAER 014 at paras. 168 & 172.

78. The Crown's argument at paragraph 82 about a potential division of powers issue preventing Alberta from managing development so as not to adversely affect or eliminate CPDFN's Constitutional Rights, is a red herring and wrong. LARP itself recognizes Alberta has a duty to consult and accommodate such rights. The Supreme Court of Canada has made it clear in the cases of *Grassy Narrows* and *Tsilhqot'in* that the division of constitutional powers does not create immunity from provincial legislation and administration of lands and resources pertaining to "Indians and Lands Reserved for Indians." That is, provincial laws and actions can impair treaty and aboriginal rights provided that the province consults with affected First Nation and accommodates the rights, where possible. Any infringement must be justified by demonstrating that the legislation/decision/action impairs the constitutional right as little as possible, gives priority to the right, and the province establishes a compelling public interest purpose and is meeting its fiduciary obligations to First Nations. However, provincial laws and "taking up of land" cannot be so extensive so as to render the rights to hunt and otherwise harvest, meaningless.

LARP at 5 & 34.
Grassy Narrows First Nation v Ontario (Natural Resources), 2014 SCC 48 [**Tab 17**].

Tsilhqot'in Nation v British Columbia, 2014 SCC 44 [**Tab 16**].

79. Of course, by virtue of article 12 of the *Natural Resources Transfer Agreement*, Alberta expressly undertook to assure that the "Indians" would have a secure supply of fish and game and could hunt and fish during all seasons of the year on unoccupied lands and lands to which they have access, which includes Reserve lands. This is a positive obligation. Alberta's failure to include this important land requirement into LARP, is an omission that requires redress in order for Alberta to comply with the Constitution of Canada, and advance the public interest in ensuring the Crown acts honourably in keeping its commitments.

Constitution Act, 1930, 20-21 George V (U.K.), section 1; and Schedule 2, *Alberta Natural Resources Transfer Agreement*, paragraphs 10 & 12 [**Tab 6**].

80. Overriding all of these points is that Canada, in enacting the *Constitution Act, 1982* included subsection 35(1) which embodies a substantive promise of aboriginal and treaty rights recognition and protection as stated by the Supreme Court in *Sparrow. Sparrow* announced a new era of inter-societal understanding that these rights would be taken seriously. The Court stated that the crown's powers must be reconciled with the duty to recognize and protect the rights. The crown means both the federal and provincial levels of government.

R. v. Sparrow, [1990] 1 S.C.R. 1075 [**Tab 5**].
See, Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73.

H. Crown Errs in Claiming Matters within Panel's Jurisdiction do not Directly and Adversely Affect CPDFN

i. LARP Prioritizes Development

81. Alberta argues that LARP does not prioritize development and therefore does not directly and adversely affect CPDFN. This position is not consistent with the wording of LARP[1] and Alberta's energy policy, such as the Provincial Energy Strategy, which is expressly incorporated into LARP at page 23. It is clear from the fact that the main element of LARP that does exist in its present form, is that most of the lands in the region are designated for oil sands development. Apart from the conservation areas (which are outside of the oil sands deposits) there are no limits that prevent or impede full development in order to achieve a healthy environment and healthy communities and respect property and Constitutional Rights. Rather, the function of LARP has been to support unchecked development because of the unfulfilled promise that LARP will manage the impacts of this development.

Crown Response at para. 98-102.
LARP at p.23 & 25.

[1] See for example LARP at page 14 where it states: "Alberta is committed to optimizing this (oil sands) resources"; page 23 where it states the first outcome as "a healthy economy supported by our land and resources" i.e. development of the resources is primary and other lands and resources will be harnessed to this objective.

82. The prioritization of LARP is also clear from how it is being interpreted by the "decision-makers" responsible for its implementation. Projects are being approved now, although the potential impacts are known but the management tools, and their potential effects, to achieve all of the LARP "outcomes" are not yet known.

Dover Operating Corp. 2014 ABAER 014 at paras. 43-46 [**Tab D**].
Teck Resources Limited, 2013 ABAER 017 at paras. 21-22, 28, 55 & 63 [**Tab E**].

83. Alberta relies on the other six regional outcomes of LARP to argue that oil sands development is not prioritized by LARP but many of mechanisms and tools considered to potentially support the other outcomes such as the biodiversity management framework and landscape management plan are not even in place and there is no evidence provided by the Crown that will be in place and effective in meeting CPDFN's Constitutional Rights in the reasonable future, especially when the timelines imposed by LARP have long passed.

ii. Harms Result from Designated Provincial Recreational Areas

84. While the Crown argues that CPDFN cannot rely on what is missing from LARP to claim it is directly and adversely affected, the Crown urges the Panel to rely on additional regulations to be in place sometime in the future – no time or details of such regulations within the Plan – to argue CPDFN is not directly and adversely affected. The designation of provincial recreational areas provides a policy statement of encouraging tourism and recreation use in the region that will increase in the competition for declining wildlife and other natural resources, without any tools and measures currently in place to ensure CPDFN's Constitutional Rights are protected. This is an adverse impact of LARP now irrespective of what regulations Alberta claims will be in force in the future.

Crown Response at para.103-108.

85. Additionally, the Crown argues CPDFN is not directly and adversely affected by the Plan as it currently exists because the regional plan provides for the existing regulatory regime with respect to recreation on public vacant land. In response, CPDFN states that the existing regulatory regime has not protected CPDFN's Constitutional Rights from the current declines in wildlife populations. This was acknowledged by the AER in the Dover Commercial Project decision which found that over-harvesting is a leading cause of moose declines despite ESRD's management. LARP provides a clear policy statement that promotes increased recreational use of vacant public lands. This policy has a direct and adverse effect on CPDFN made worse by the lack of measures and "additional regulations" the Crown claims are expected in the future will protect Constitutional Rights.

Dover Commercial Project, 2013 ABAER 014 at para.114 [**Tab D**].

I. Conclusion

86. CPDFN is directly and adversely affected by LARP, a "regional plan," defined by the Act, by its failure to provide any effective measure or tool to balance its Constitutional Rights with the other interests promoted and prioritized by the Plan, including oil sands development and increased recreation on public lands in the region.

87. The existing regulatory system fails to provide the adequate protection of the health and rights of CPDFN which are affected by the cumulative environmental effects of development. The purpose of LARP was to manage these impacts and it does so only in a very limited way. This is particularly harmful to CPDFN because LARP is being used to justify and authorize further impacts on CPDFN's Constitutional Rights without regard to cumulative impacts of development. Since LARP's coming into force, Alberta, industry and the AER have relied on LARP to exclude First Nation concerns out of the project-specific regulatory process and to avoid consulting and addressing the very real impacts on CPDFN, such as declining wildlife populations. This indicates that the content of Plan is not working in its achieving the purposes of the Act or the Plan's Vision and Outcomes except for the optimization of oil sands development.

88. CPDFN looks forward to receiving the Panel's report and recommendations.

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

Henning Byrne

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per Tarlan Razzaghi and Karin Buss