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January 30, 2015

VIA EMAIL

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

Dear Panel:

Subject: GoA Reply to Information Request No. 14 and the Applicants' Responses

On January 12, 2015, the Panel issued Information Request No. 14 to the "First Nations Applicants" to "submit a legal brief by setting out their views of the relationship between "quiet enjoyment of property" and the alleged effects of LARP on TLU [traditional land use] areas." The Applicants were requested to provide such legal briefs by January 23, 2015.

The Panel encouraged "Counsel for Alberta" to respond "to any submissions received". The Government of Alberta (GoA) was given a deadline of January 30, 2015, to provide any response to the Panel "to this Information Request".

Absence of authority

The GoA submits that the Panel's request for "a legal brief" from "interested First Nations Applicants" is outside the authority provided to the Panel under the *Rules of Practice for Conducting Reviews of Regional Plans* (Rules).

The relevant Rules, when read together, are clear that the Panel's information requests must pertain to factual matters, rather than requesting further legal argument.

Rule 28 provides that the Panel may request that a party provide "further information". Rule 29(c) indicates that such a request for information must "contain specific questions for clarification about the party's evidence, documents or other material that may be in the possession of the party...".

None of the Rules enabling information requests allows the Panel to request further legal argument, as contained in Information Request No. 14.

Further, none of the Rules enabling information requests allows their recipients to self-select whether an information request applies to them, on the basis of being "interested".

Procedural concerns

In the review request process, the Applicants have had a number of opportunities to make factual submissions and legal arguments, both in their initial application and again in their replies to the GoA responses to the initial application.

It is an Applicant's responsibility to put their "best foot forward" at the front end of this process to meet their onus to prove their case. The GoA submits that it is not appropriate to give the Applicants another opportunity to restate their previous legal argument.

In response to previous information requests, the GoA and several of the Applicants have made statements to the effect that a "traditional land use area" as such is not a term defined or recognized at law. It remains unclear to the GoA what areas of the province the Panel intends to include in the Panel's use of this term.

Nonetheless, given that five of the six First Nations Applicants have availed themselves of this opportunity for further legal argument, the GoA finds it necessary to reply.

The GoA notes that the Information Request is not specific as to which party's material it pertains to. The GoA also notes the very short time provided for the GoA to respond to multiple incoming submissions.

Accordingly, the GoA replies generally to the Information Request and the submissions of the Applicants in a single document below.

No special interpretation of legislated definitions

The Applicants argue that the legislated definition of "quiet enjoyment of property" and "directly and adversely affected" should be given a special interpretation on the basis that each of the Applicants is an aboriginal people.

Case law suggests that "statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians". This principle has been applied to interpreting Indian-specific federal legislation, such as the *Indian Act*. However, the case law is clear that this principle does not apply to provincial legislation of general application.[1]

The *Alberta Land Stewardship Act* (ALSA) and the associated *Alberta Land Stewardship Regulation* (ALSR) are provincial legislation of general application. They are not legislation specifically "relating to Indians". Therefore this principle does not apply here.

This issue was previously raised and argued in some of Applicants' initial review request applications and again in their replies to the GoA responses to the initial application.

Similarly, it is not a constitutional imperative (as suggested by Chipewyan Prairie Dene First Nation (CPDFN), Fort McKay First Nation (FMFN), Cold Lake First Nation (CLFN) and Mikisew Cree First Nation (MCFN)) to expand the interpretation of "property" and "quiet enjoyment of property" in the section 5(1)(c) ALSR definition of "directly and adversely affected" beyond their ordinary legal meaning to include any and all treaty rights.

The ability to request a review of the LARP is not a constitutional right. It is a process created by provincial legislation of general application. The legislator can prescribe as narrowly or broadly

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[1] *Wasauksing First Nation v. Wasausink Lands Inc.*, 2004 CarswellOnt 936 (Ont. C.A.), paras. 91 - 93.

as it deems appropriate on what grounds one is eligible to invoke such a process. There is no constitutional basis for expanding the interpretation of words in this legislation of general application beyond their ordinary legal meaning on the basis that the Applicants for this review of this regional plan are First Nations holding treaty rights.

MCFN, FMFN, CPDFN and CLFN also suggest that an expanded interpretation of "property" and "quiet enjoyment of property" in section 5(1)(c) of ALSR is necessary as the definition of "directly and adversely affected" does not expressly mention title holders or registered owners as portions of the ALSA do. In response, the intentional use of one word ("property") over other possible words ("title holders" or "registered owners"), does not mean that the words which are contained within section 5(1)(c) should be interpreted beyond their ordinary legal meaning.

ALSR expressly includes specific, enumerated rights or attributes which, if directly and adversely affected by LARP, could form the basis for a request for review of LARP. Those attributes are health, property, income or quiet enjoyment of property. The fact that other, narrower terms could have been used does not mean that "property" or "quiet enjoyment of property" now mean something more than they ordinarily do.

No "quiet enjoyment of property" without property

Section 5(1)(c) includes both "property" and "quiet enjoyment of property". The GoA submits that, although 5(1)(c) lists both, there is no right to quiet enjoyment of property without an underlying property right. The difference between property and quiet enjoyment of property relates to the type of impacts. It does not take away the need for a property right to exist in order to prove such impact.

Alberta case law indicates that, as a matter of contractual interpretation between commercial parties, a covenant of "quiet enjoyment" means protection from either of "interference with the title and physical interference with the use of the property".[2]

There is also Alberta case law regarding "enjoyment of property" as used in criminal legislation regarding mischief. The case law interpretation of this phrase in that context has varied, but the prevailing view seems to be that it should be interpreted broadly to include "the action of obtaining from property, which a person lawfully holds, the satisfaction that this property can provide to that person".[3]

Case law regarding quiet enjoyment of property, such as the various cases relied upon in the Applicants' submissions, delineates between acceptable and unacceptable impacts to property: it is the nature of the impact that is in issue, not the property right. For example, *Whiskey's Lounge*, cited by some of the Applicants, states that the right to quiet enjoyment of property precludes "disturbing activity... that significantly limits the use and enjoyment of a person's property" (emphasis added).

"Quiet enjoyment" is therefore dependent upon there being a property right. In order to have a right to "quiet enjoyment of property", one must first have a right to such property.

The GoA submits that the Applicants do not have property rights or analogous rights in "traditional land use areas", and therefore, the Applicants do not have the right to quiet enjoyment of property with respect to these areas.

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[2] *581834 Alberta Ltd. v. Alberta (Gaming & Liquor Commission)*, 425 A.R. 248, 2007 ABCA 332, para. 9.

[3] *R. v. Anderson*, 2009 ABPC 249, 10 Alta. L.R. (5th) 377, summarizes the different interpretations and quotes this interpretation from earlier case law.

No Property rights

Treaty rights and "Traditional Land Use areas"

Both Treaty 6 and 8, to which the Applicants are adherents, contain a right to receive reserve land. The effect of this right is discussed further below. The present heading discusses treaty rights other than the right to reserve land.

The Applicants' treaty rights off Indian reserves, as modified by the Natural Resources Transfer Agreement (NRTA), are the right to hunt, trap, and fish for food on any unoccupied Crown land and on land to which "Indians may have a right of access" for such purposes.[4]

In Alberta, the Natural Resources Transfer Agreement (NRTA) modifies the treaty right to hunt, fish, and trap on Crown land, and "is the legal instrument which currently sets out and governs" those rights.[5]

Whether specific Crown land is "unoccupied" is a factual inquiry, determined by the purpose to which the land has been put.

Whether "Indians" have a right of "access" to Crown land for the purposes of hunting, fishing, or trapping for food is determined by factors such as whether the general public is allowed to hunt there and under what rights of access.

In Alberta, the treaty right to hunt, trap, and fish for food is not site-specific. According to the Alberta Court of Appeal, "[t]he treaty protects an activity; no site specific rights are granted".[6] This is a context different from the British Columbia case law on site-specific aboriginal rights cited by some of the Applicants.

The Saskatchewan Court of Appeal has similarly found that the right to hunt, fish, and trap for food under Treaty 6, either alone or as modified by the Saskatchewan NRTA, is not a property interest in land.[7]

As a result, the right of one First Nation (in common with other First Nations) to use or access portions of the province for these purposes (apparently referred to by the Panel as a "traditional land use area") is not a right of a First Nation to hold or enjoy property, nor is it analogous to such a right.

In Alberta today, there are no established treaty rights which are akin or analogous to property rights in relation to areas outside of reserve lands.

Aboriginal rights?

CLFN, FMFN, CPDFN and Athabasca Chipewyan First Nation (ACFN) mention "aboriginal rights" as something in addition to treaty rights. However, the Supreme Court of Canada has found in the Alberta context that First Nations after adhering to treaty, as have the Applicants,

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[4] *Alberta Natural Resources Act*, S.C. 1930, c. 3, Schedule, part 12.

[5] *R. v. Badger*, [1996] 1 S.C.R. 771, para. 47.

[6] *R. v. Lefthand*, 2007 ABCA 206, para. 101.

[7] *James Smith Indian Band v. Saskatchewan (Master of Titles)*, [1995] 123 D.L.R. (4th) 280 (Sask. C.A), para. 26, affirming [1994] 107 D.L.R. (4th) 9 (Sask. Q.B.) (see paras. 15-34). Treaty 8 and the Alberta NRTA are substantially the same in the relevant portions.

no longer have aboriginal rights. Those have been "surrendered and extinguished" in exchange for treaty rights.[8]

The GoA is not aware of any case law in this province that has found a treaty First Nation to be entitled to the benefit of any existing aboriginal right.

Other rights

FMFN and CPDFN mention in their submissions in response to Information Request No. 14 "registered traplines", presumably to indicate that these are property rights or akin to property rights. This warrants clarification.

In Alberta, individuals may hold a revocable license (referred to as a Registered Fur Management Area (RFMA)) issued at the discretion of the GoA pursuant to the *Wildlife Regulation* to trap within a certain area.[9]

This license does not give its holder the ability to exclude other land users from this area, nor do such other land users need the license holder's consent to use the area.[10]

Therefore, the GoA submits that this license is not a property right nor analogous to a property right as that term is used in section 5(1)(c) of ALSR. Also, an RFMA licence is issued to an individual rather than a First Nation.

In any event, this license is for purposes other than trapping for food, and so not for exercising any treaty right existing today.

Reserve lands

The case law is not clear that the Applicants have property rights in relation to reserve land. The property is ordinarily held by the Crown in right of Canada for the "use and benefit" of the band. The *Indian Act* states as follows:

> 18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band. [11]

Both Treaty 6 and 8 contain a similar right to receive reserve land. Both Treaties speak to the size of the reserve land entitlement, but without specifying the activities which the First Nation may pursue there.

The nature of a First Nation's interest in reserve land is discussed extensively in *Ermineskin Indian Band & Nation v. Canada*, a Treaty 6 case from central Alberta.[12] Key points include the following:

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[8] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, paras. 2, 31 and 52.

[9] *Wildlife Regulation*, Alta. Reg. 143/1997, s. 21 and 33; *Wildlife Act,* R.S.A. 2000, c. W-10, s. 19.

[10] See for example, *Public Lands Administration Regulation*, Alta. Reg. 187/2011, s. 1(1)(ff)(E), 1(1)(gg) and 32(1).

[11] R.S.C. 1985, c. I-5, s. 18.

[12] 2005 FC 1622.

765 I cannot conclude that anything in either the written text of Treaty 6 or the surrounding negotiations and historical context shows that there was any kind of understanding that bands would administer and manage their reserve lands and resources. Quite the contrary, it is clear that this was to be a function and responsibility of the Crown, which dates back to the Royal Proclamation of 1763. Neither the written text of Treaty 6 nor the treaty negotiations supports the contention that the Cree retained unto themselves the right to sell, lease, or otherwise dispose of their interests in their reserves. In my opinion, the Cree leadership who signed Treaty 6 understood that by doing so, they would be putting themselves under the protection of the Crown in return for receiving certain specified benefits.

766 I conclude that Samson has not established an aboriginal or treaty right to own, manage, control and administer their own reserve lands, resources, and any money arising therefrom.

As it is not clear that the Applicants have property rights in reserve land, it is even less likely that the Applicants would be found by a Court to have rights akin to property rights off-reserve in "traditional land use areas".

Conclusion

The Applicants have no property right or analogous right known to law with respect to portions of the province outside reserve lands, including any "traditional land use areas" there.

Therefore, the GoA submits that the Applicants have no corresponding right to "quiet enjoyment of property" with respect to those off-reserve areas.

Yours sincerely,

Witek Gierulski
Barrister and Solicitor