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November 19, 2013

File No. 1051-041

Delivered by Email

Alberta Justice
Environmental Law Section
8th Floor, Oxbridge Place | 9820 - 106th Street |
Edmonton, Alberta, Canada | T5K 2J6
Attention: Jodie Hierlmeier

Dear: Ms. Hierlmeier

Re: Consultation regarding the process for the review of the Lower Athabasca Regional Plan ("LARP")

We are legal counsel for the Mikisew Cree First Nation ("Mikisew") in respect of the above-referenced matter.

Mikisew expects to be consulted regarding the design and establishment of the process that will guide the review of LARP.

The Crown has an obligation to consult First Nations regarding the design of review processes that involves matters that may adversely impact Section 35 rights. In this regard, we highlight the *Dene Tha'* decision of the Federal Court of Canada.[1] There, in discussing the role of the review process in that case, the federal court noted that, while "[b]y itself it confers no rights…it sets up the means by which a whole process will be managed" and therefore adversely impacted the First Nation because their specific concerns were not incorporated into the review process.[2] As a result, the Federal Court concluded that the Crown had an obligation to consult the Dene Tha' First Nation respecting the design of the review process for the proposed Mackenzie Gas Pipeline.

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[1] *Dene Tha' First Nation v. Canada (Minister of Environment)* 2006 FC 1354
[2] *Dene Tha', supra* at para. 108 and 114

Subsequently, the Supreme Court of Canada has expanded on the rationale for why the Crown's duty to consult extends to the design of review processes. For example, in *Rio Tinto*, the Supreme Court of Canada stated:

> Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. **Thus the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5–41, emphasis omitted). Examples include** the transfer of tree licences which would have permitted the cutting of old-growth forest (Haida Nation); the approval of a multi-year forest management plan for a large geographic area (Klahoose First Nation v. Sunshine Coast Forest District (District Manager), 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); **the establishment of a review process for a major gas pipeline (Dene Tha' First Nation v. Canada (Minister of Environment), 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd, 2008 FCA 20, 35 C.E.L.R. (3d) 1);** and the conduct of a comprehensive inquiry to determine a Province's infrastructure and capacity needs for electricity transmission (An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re, 2009 CarswellBC 3637 (B.C.U.C))... (emphasis added)[3]

As set out in Mikisew's August 22, 2013 application for a review of LARP and its supporting materials, Mikisew has raised serious concerns about the adverse impacts of LARP on the exercise of Mikisew's Section 35 rights. Mikisew will be further adversely impacted if Alberta does not meaningfully consult respecting the development of an appropriate review process for LARP. Accordingly, the honour of the Crown obligates Alberta to consult Mikisew and other First Nation parties to the review respecting the design of the review process.

Mikisew further notes that consultation regarding the design of the review process for LARP is particularly important given the context of this review. Context is a critical factor in determining the content of the duty to consult, including what is required during consultation to uphold Crown Honour.[4] One of the precipitating factors leading to Mikisew's request for a review of LARP is that the process by which Alberta engaged Mikisew during the development of LARP was not developed through consultation and because the process excluded Mikisew's Rights and interests throughout the development of LARP. Mikisew is concerned that if Alberta deprives Mikisew of the opportunity to be consulted at the outset regarding the design of this review process, Mikisew's Rights and interests will be excluded yet again.

My client has reviewed the November 18, 2013 letter from Jenny Biem, legal counsel for the Athabasca Chipewyan First Nation ("ACFN"), and are of the view that the proposed process set out in that letter is reasonable and effective. Mikisew looks forward to discussing that proposal

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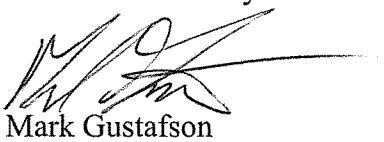
[3] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para 44
[4] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at 63

further with Alberta and other First Nations participating in the LARP review process during consultation regarding the design of the process.

Finally, I note that Mikisew shares ACFN's concerns that Alberta's continuing efforts to implement LARP during this review process could create an apprehension of bias and the impression that this review is just an opportunity for First Nations to blow off steam. We are hopeful for a respectful, transparent and orderly review process.

Sincerely

Janes Freedman Kyle Law Corporation



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January 28, 2014

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File No. 1051-041

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Attention: Jodie Hierlmeier

Dear Ms. Hierlmeier:

Re: Review of the Lower Athabasca Regional Plan ("LARP")

We represent Mikisew Cree First Nation ("Mikisew") in respect of the above-referenced matter. We write in response to your email of December 2, 2013 and further to our letter of November 19, 2013 regarding the need for Alberta to consult Mikisew on the development of the process for the review of LARP.

The development and design of the process to review LARP triggers consultation

We disagree with your position that Alberta has no obligation to involve the First Nations that triggered a review of LARP in the design of the process to review LARP. In our view, your position runs contrary to the consultation jurisprudence and perpetuates the exclusion of aboriginal groups that led to multiple requests for a review of LARP.

Alberta's refusal to consult about the design of the LARP review process runs contrary to two established consultation principles. First, the LARP review involves an administrative process dealing with matters that may adversely impact Mikisew's section 35 rights. The Crown has an

obligation to consult First Nations regarding the design of such review processes.[1] This principle was cited with approval by the Supreme Court of Canada in *Rio Tinto*.[2] Second, the LARP review is part of Alberta's land use planning process, which is a strategic, higher level decision respecting the allocation of Crown resources among various interests and rights holders. The Supreme Court of Canada has been clear that the duty to consult is triggered early in the process of contemplated Crown action—at a strategic, higher level stage—before decisions with an immediate impact are made.[3] We can see no principled reason why the review of LARP, which may result in amendments to Alberta's primary land use planning policy in the Lower Athabasca Region, is not part of a strategic, higher level process, particularly given that Alberta appears to have acknowledged that land use planning is a strategic decision that triggers consultation.

In our view, your position is also inconsistent with Alberta's First Nations consultation policy, which states that consultation is triggered by regulations, policies and plans relating to "land and resource management" that may adversely impact treaty rights.[4] The LARP review process will lead to a recommendation or decision (whether to amend LARP), which trigger consultation based on the criteria given in the 2013 and 2005 First Nations Consultation Policies. In addition, the design and selection of terms of reference for regulatory review processes and the development of policies and plans also trigger consultation. We see no basis in the consultation policy for distinguishing the development of a review process for a project (which clearly does trigger First Nation consultation in Alberta) from the development of the LARP review process (which you claim does not trigger First Nation consultation).

Furthermore, we see no impediment in the *Alberta Land Stewardship Act* or elsewhere to consulting with Mikisew and other aboriginal groups that have triggered a review of LARP.

Alberta's decision to exclude the aboriginal groups that requested a review of LARP from the design of the review process is particularly problematic because it perpetuates the distrust that arose from the flawed process of designing LARP in the first place. A major fault of LARP was that the design process lacked transparency and failed to meaningfully and effectively include First Nations. The result was a LARP document that, as pointed out by multiple aboriginal groups and independent experts, failed to recognize section 35 rights or uphold basic land use planning principles. Now, Mikisew and other groups are effectively being told that they will again have no involvement in the development of a central piece of Alberta's land use planning regime.

Consultation cannot wait until after the statutory review has been completed

My client is very concerned by your suggestion that *if* there is to be any Crown consultation regarding the review of LARP, it would only occur after the LARP review has been completed. This is far too uncertain and far too late in the process to credibly, transparently or meaningfully

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[1] *Dene Tha' First Nation v Canada (Minister of Environment)* 2006 FC 1354 ["*Dene Tha*"].
[2] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* 2010 SCC 43 ["*Rio Tinto*"] at para 44.
[3] *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73 at para 76; *Rio Tinto*, *supra* note 2 at para 44; *Dene Tha'*, *supra* note 1 at paras 106-110.
[4] *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013* at 3.

consult Mikisew. The Crown cannot allow momentum to build, only to carry out consultation at the last minute, without any real opportunity to incorporate a First Nation's concerns and views: "The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions."[5] As Justice Binnie of the Supreme Court of Canada noted in the *Mikisew* case, the duty to consult is not just an occasion to "blow off steam" but is supposed to have the potential to actually cause change.[6]

One of the purposes of the duty to consult is to encourage reconciliation by requiring that the concerns of Aboriginal people be taken into account in Crown decision-making.[7] In light of this purpose, the importance of taking a broader perspective on the type of decisions that trigger the duty to consult is evident. Reconciliation is better served if Aboriginal perspectives are taken into account early in the process, and not after reports have been finalized and recommendations have already been developed.

Capacity Funding

Mikisew requests that Alberta provide capacity funding to allow Mikisew to meaningfully participate in the LARP review process. We would like to discuss this with you at your earliest convenience.

Conclusion

For the reasons set out in our previous correspondence and in the foregoing, Mikisew again requests that Alberta consult regarding the design of the LARP review process. We look forward to your response.

Yours truly,

Janes Freedman Kyle Law Corporation

Per: Marie Albert, legal assistant for

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[5] *The Squamish Nation et al v The Minister of Sustainable Resource Management et al* 2004 BCSC 1320 at para 74.
[6] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69 ["*Mikisew*"] at para 54.
[7] Dwight Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009) at 16-20.

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February 4, 2014

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File No. 1051-041

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Attention: Jodie Hierlmeier

Dear Ms. Hierlmeier:

Re: Review of the Lower Athabasca Regional Plan ("LARP")

We are legal counsel for the Mikisew Cree First Nation ("Mikisew") in connection with the above-referenced matter. We are in receipt of your email dated January 31, 2014, wherein Alberta maintains that it will not consult potentially affected First Nations about the development of the LARP review process.

We wish to comment directly on the distinction you raised in your email between consultation in the context of a quasi-judicial regulatory process for an industrial project and consultation in the context of decisions relating to the development of a statutory review process for LARP. As set out below, it is our view that such a distinction is unwarranted and runs contrary to the purposive approach to the duty to consult required by the Supreme Court of Canada.

Duty to consult case law does not distinguish between quasi-judicial regulatory processes and other Crown decisions that may adversely impact section 35 rights. Indeed, the view that consultation is restricted to decisions made in the context of quasi-judicial regulatory processes was rejected by the Supreme Court of Canada in *Rio Tinto* in the following passages:

> [43] This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests), 2005 BCSC 697, [2005] 3 C.N.L.R. 74, at paras. 94 and 104; Wii'litswx v. British Columbia (Minister of Forests), 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.
>
> [44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (Haida Nation); the approval of a multi-year forest management plan for a large geographic area (Klahoose First Nation v. Sunshine Coast Forest District (District Manager), 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (Dene Tha' First Nation v. Canada (Minister of Environment), 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re, 2009 CarswellBC 3637 (B.C.U.C.)).

Put more simply, it is irrelevant for the purposes of consultation that the review of LARP is not taking place within a quasi-judicial regulatory process relating to a proposed industrial project. The central issue is whether there is a potential for adverse impacts to Mikisew's section 35 rights. In its previous correspondence and in its LARP review request, Mikisew has set out numerous ways in which LARP has the potential to adversely impact their section 35 rights and how this review process may contribute to or fail to address those impacts.

The distinction in your email between quasi-judicial regulatory processes and other Crown decisions that may adversely impact section 35 rights has not support in Alberta's Consultation Policy. The distinction you rely on would seem to run contrary to Alberta's stated intention in the consultation policy to "increase its emphasis on strategic consultation."[1] To this end, I note that has been Mikisew's experience that when Alberta officials refer to "strategic consultation," they specifically mean consultation that is separate and apart from quasi-judicial regulatory processes for industrial projects.

Lastly, my client is concerned that the distinction you have made undermines a central purpose of consultation. The determination of whether a decision or action may impact an Aboriginal right (and, hence, trigger a duty to consult) must be guided by a generous purposive approach because "actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects

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[1] The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013 at page 2

that are not in keeping with the honour of the Crown".[2] The duty to consult is designed to serve two related but distinct purposes. First, consultation serves the purpose of preserving the subject matter of Aboriginal claims and, second, it is a means of encouraging reconciliation by requiring that the concerns of Aboriginal people be taken into account in Crown decision-making.

When viewed from the second perspective, the problem with your distinction becomes even more evident – reconciliation is better served if Aboriginal perspectives are taken into account early in a review process before key strategic decisions are made. This is particularly true with respect to the review of LARP, where it was my client's experience that being unable to participate in the development of the process for creating LARP had real and adverse consequences for the exercise of their section 35 rights. Mikisew has put Alberta on notice of this concern on many occasions. Mikisew is worried that Alberta's steadfast refusal to consult about the development of the review process for LARP suggests this opportunity to transparently and meaningfully include Mikisew, its rights and its traditional knowledge in LARP may be lost again.

For these reasons, Mikisew again asks Alberta to consult on the design of the process to review LARP. Mikisew remains willing to work with Alberta and other potentially affected aboriginal groups to develop an appropriate LARP review process.

Sincerely,

Janes Freedman Kyle Law Corporation

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[2] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para 43