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LAW CORPORATION

PUBLIC LANDS ADMINISTRATION REGULATION

**TREATY 8 FIRST NATIONS OF ALBERTA
Regional Session on Water, Lands and Treaty Rights**

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Topics of Discussion

- Summary of Key Concerns with the Public Lands Administration Regulation (“PLAR”)
- The Inadequate Process Leading Up to Alberta’s Adoption of PLAR
- Alberta’s Failure to Address First Nations’ Concerns about PLAR
- The Litigation Response

PLAR

- The Alberta Cabinet adopted PLAR on August 25, 2011 and it came into effect on September 12, 2011
- Alberta claims PLAR is needed to manage access to, and use of, public lands in Alberta
- Alberta says that PLAR applies to “all Albertans”
- PLAR treats Treaty and Aboriginal rights as if they were “recreational uses”

Permits Required to Use Unoccupied Lands

- Under PLAR, individuals are now required to obtain an access permit from SRD to go out on the land for more than 14 days for the purposes of hunting, fishing, gathering and camping, even when these activities are protected as Treaty or Aboriginal rights
- Access permits have to be renewed every 14 days

Permits Required to Use Unoccupied Lands

- Under PLAR, individuals are now required to obtain an access permit from SRD to go out on the land for the purposes of hunting, fishing, gathering and camping, if the individual goes into an area closed by SRD, if the individual's activities may damage land, or if the activities contravene a "disturbance standard" established by SRD

Permits Required to Use Shorelines

- Permits are required to use or occupy shorelines of any lakes, rivers or streams, except for boating purposes
- Permits are required to use wheeled or tracked conveyances, such as ATVs, on the shores of any waterways, even if they are being used in relation to the exercise of Treaty or Aboriginal rights

Permits May be Required for Events

- Individuals or First Nations will require a permit to hold an event if any person or organization makes money from the event
- Individuals or First Nations may require a permit to hold an event if the event takes place in an area closed by Alberta, if the event may cause impact to the land, or if the event is on or near the shore of a water body

Permits May be Required for Cabins

- Permits will be needed to build or use a cabin wherever a disturbance standard includes cabins in the definition of “ancillary facilities”. SRD has not created disturbance standards yet
- Even without a disturbance standard, a permit may be required to use a cabin for hunting, fishing, trapping or gathering.

Restrictions in Public Land Use Zones and Public Recreation Areas

- A number of restrictions apply in public land use zones and public land recreation areas, including in relation to firearms, fires, vehicle use, camping, dressing game and removal of firewood – these provisions restrict the ability to exercise Treaty and Aboriginal rights

Relationship Between PLAR and Regional Planning Process

- In the Lower Athabasca Regional Plan (“LARP”) land use planning process, Alberta has said that conservation areas will secure First Nations’ ability to exercise Treaty and Aboriginal rights – however those conservation areas include public land use zones and public recreation areas where the exercise of rights is essentially impossible because of the PLAR restrictions

Disturbance Standards & Closures

- SRD is now able to set “disturbance standards” on lands after some level of public consultation – these disturbance standards could further restrict the exercise of Treaty or Aboriginal rights.
- Some areas of Crown land could be closed entirely under PLAR – Alberta says those closures will apply to First Nation land users exercising Treaty rights in the same way that they apply “to all Albertans”

An Inadequate Process

- Alberta did not undertake a meaningful consultation process in relation to PLAR:
 - SRD provided a short timeframe for First Nations to comment on the draft Regulation (circulated the 274 page draft Regulation in August 2010 and required comments by September 2010)
 - SRD only held one meeting with each First Nation, despite requests for more engagement

Inadequate Consultation

- It was clear that SRD had decided the consultation process would end at the end of September 2010, even before it met with First Nations and heard the concerns
- SRD did not try to explore ways to address the concerns that were raised by First Nations
- SRD did not provide information that was requested by First Nations

An Inadequate Response

- In the consultation process, First Nations demanded that Treaty and Aboriginal rights be exempted from the scope of PLAR
- Alberta refused to exempt Treaty and Aboriginal rights
- However, in the 2nd draft and in the final version of PLAR, Alberta exempted other user groups, such as outfitter-guides, from the permitting requirements in PLAR

Standard Operating Procedure

- Alberta's response to First Nations' concerns was to adopt a Standard Operating Procedure ("SOP") that directs conservation officers not to charge individuals who don't have permits if they are exercising Treaty rights to hunt, fish or trap for food, or incidental Treaty rights, in areas that are not closed to access

The Problems with the Standard Operating Procedure

- Alberta did not consult on the SOP
- It is left to the discretion of conservation officers to decide whether a Treaty or incidental Treaty right is being exercised
- The SOP is not part of the Regulation and is not legally binding
- Alberta has taken the position in other cases that policy documents, similar to the SOP, cannot be used as a defence to a charge – the Alberta courts have agreed with that position

Standard Operating Procedure Is Not the Solution

- If harvesters are charged under PLAR when exercising Treaty or Aboriginal rights without PLAR permits, they probably won't be able to use the Standard Operating Procedure as a defence

Legal Issues

- The PLAR provisions can be challenged on the basis of:
 - unjustified infringement of Treaty and Aboriginal rights
 - lack of jurisdiction of Alberta to regulate Treaty and Aboriginal rights
 - breach of the duty to consult

The Litigation Response

- Attempts have been made to get Alberta to change its approach under PLAR, but Alberta isn't listening
- PLAR affects all First Nations in Alberta – Alberta is purporting to apply PLAR to all Aboriginal people exercising their Treaty or Aboriginal rights in the Province
- Because the same concerns arise for all First Nations under PLAR, a collective litigation response makes sense to challenge the constitutionality of PLAR

Litigation

- Athabasca Chipewyan First Nation, Dene Tha' First Nation, Duncan's First Nation, Horse Lake First Nation and Mikisew Cree First Nation have retained JFK Law to start a judicial review application to challenge PLAR
- Sucker Creek, Whitefish (Goodfish) Lake First Nation, Tsuu T'ina Nation and Ermineskin Cree Nation have retained MacPherson Leslie & Tyerman LLP to bring a challenge as well
- The two law firms are working together to bring coordinated attacks on PLAR

AoTC Resolutions

- On June 6, 2011, the Assembly of Treaty Chiefs passed a Resolution supporting a constitutional challenge to PLAR
- The AoTC re-endorsed the litigation approach in another Resolution passed on October 25, 2011
- Following the October 25th Resolution, a number of First Nations passed BCRs to join the fight against PLAR.



Next Steps

- JFK and MLT are working together to prepare the legal documents, and additional evidence is being collected to show how PLAR adversely affects the exercise of constitutionally-protected Treaty and Aboriginal rights
- The litigation will be filed early in 2012
- Political pressure will also be brought to bear on the Alberta government