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Dear Honourable Members of Standing Committee on Indigenous and Northern Affairs (INAN):

Re: Brief of Mikisew Cree First Nation – Restitution of Land – Land Back

On behalf of Mikisew Cree First Nation, we thank the INAN committee for looking at the critical issue of "Land Restitution" – restitution for our dispossession can be addressed through land restitution, land reparations and also, "land back". We refer to these collectively as "Land Back". Land Back, most simply, is "any action taken with the purpose of returning jurisdiction, authority, and resources to Indigenous people. This might include taking land back into Indigenous stewardship, restoring Indigenous people's legal rights to their land, or the active refusal to follow colonial laws on traditional and unceded territories."[1]

We are concerned, however, that INAN is looking at Land Back through a colonial, "White Paper" assimilationist lens.[2] In other words, Land Back is being considered as "economic development". This approach fails to consider the fundamental Nation-to-Nation relationship between Canada and Mikisew. We explain Land Back options that the federal government can address below through a (1) review of Treaty No. 8, (2) the unilateral transfer of resources to the provinces without our free prior and informed consent (*Natural Resources Transfer Act*, 1930) and (3) the cumulative impacts of the failure to upheld Treaty No. 8 on our territories.

Treaty No. 8 was an agreement to Share the Land

Treaty making has been a practice that existed within our peoples' memories and practice[3] long before European contact. When non-Indigenous peoples started to make their way west for settlement of land through the numbered Treaty process, it was a practice that our people were already familiar with. Treaty making was also a form of Indigenous diplomacy[4] and an expression of our nationhood that was well established and used between Nations to facilitate understanding, respect and recognition of each Nations culture, laws, legal processes, and way of life. The Treaties made between the Crown and First Nations confirm a sacred solemn relationship that exists forever "as long as the sun shines, grass grows and rivers flow"[5] as many Elders have reaffirmed through oral history. Our Elders consistently remind us that we must look to the spirit and intent and the "entire negotiating process"[6] of the Treaties over the written text to fully understand the lasting commitments made between the parties. We are reminded by our Elders that our Treaty is to last forever and our ancestors

[1] Riley Yesno, "Decolonize How? Land Back" *New Internationalist (24, October 2022)*, online: https://newint.org/features/2022/10/24/land-back-decolonize-how
[2] Yellowhead Institute, "Land Back: A Yellowhead Institute Red Paper" (2019). Retrieved from: https://redpaper.yellowheadinstitute.org/wp-content/uploads/2019/10/red-paper-report-final.pdf
[3] Sharon Venne, "Treaties Made in Good Faith" (2007) *Canadian Review of Comparative Literature*, vol. 34, no. 1 at 2.
[4] Shalene Jobin, "Cree Peoplehood, International Trade, and Diplomacy" (2013) Volume 43, Number 2 at 623. Retrieved from: cree-peoplehood-international-trade-and-diplomacy.pdf (ualberta.ca)
[5] Interview of Elder Louie Boucher (February 6, 1974) from the Treaty and Aboriginal Rights Research (TARR) interviews.
[6] Richard Price, *The Spirit of the Alberta Indian Treaties*, 3rd ed. (Edmonton: University of Alberta Press, 1999), at 47.

negotiated terms and promises that would help our future generations, as we were told our "way of life would not be curtailed"[7].

The Crown continues to misunderstand the spirit and intent of the Treaties made with the Imperial Crown, including the oral understanding. Treaty No. 8 is an international treaty of peace of friendship. It did not follow a war of independence so, unlike many international treaties, there is no severance of land. Treaty No. 8 was necessary for the Imperial Crown to enter and use our territory for their settlement. Cree lawyer Sharon Venne explains: "there is no justification in international law to allow the expropriation of Indigenous lands without our consent. There is only one legal avenue: a treaty must be made with the Indigenous Peoples"[8]. Instead, the shared meaning of Treaty No. 8 was to share the land. Our elders and knowledge keepers have told us, for many generations, that our Cree ancestors agreed to "share the land"[9] to the depth of the plough. There is no word in our language to sell or give up the land as most Canadians commonly believe through a Treaty surrender narrative that has been taught in schools and told through generations.

In our oral histories and traditions, 'sharing the land' did not equate to 'cede, release, surrender and yield up" as contained in the written text of Treaty No. 8. In fact, historian Sheldown Krasowski writes in his book *No Surrender: The Land Remains Indigenous* that Canada's "interpretation is based upon the standard sources of history, including commissioner's reports and treaty texts. Indigenous oral histories state that there was no surrender of lands through the Treaty process. First Nations agreed to share their lands in exchange for benefits offered by the Canadian government"[10]. This sentiment is affirmed by Hikey et al in *The Spirit of the Alberta Indian Treaties* which states "Most people do not know 'the Indian view' of the treaties, yet this view is very important for understanding Indian attitudes and actions with regard to the wider society, as well as Indian-White relationships in general"[11]. Treaty 8 Elders who hold the oral history, provide a fulsome narrative that our way of life and livelihood would remain intact[12] for future generations.

Treaty No. 8: What Wasn't Included

What was not included in the Treaty No. 8 discussions were water (rivers, streams, lakes, aquifers etc), waterbeds, watersheds, and natural resources (above and below ground) among many other things. We shared the land, not the resources[13]. In interviews with Treaty 8 Elders, they specifically stated "Mineral and other resource rights are mentioned as things that the government never bought from the Indians, nor was agreement made on them"[14]. This is an inconvenient truth for Canada's history. For the purpose of this brief and the current issues Mikisew faces, we will focus on water and natural resources as our lives have been impacted by the inability to have stewardship, control and decision-making capacity of our own lands, waters and resources within our Treaty territory.

On the subject of reserves, it's important to note that our land base was not to be restricted to solely reserves. We were to have access to all the Treaty territory to continue our way of life. It was understood at Treaty

[7] Supra note 4 (Elder Louie Boucher).
[8] Supra note 3 at 4 (Venne).
[9] Interview of Elder Francis Bruno (February 7, 1974) from the Treaty and Aboriginal Rights Research (TARR) interviews. Francis Bruno stated "*what I do understand is that we were to share the land with other people, who were the white people. That was the purpose of the treaty I think since there was going to be more white people to share the land with them. We still get our treaty money today, but what concerns me, also still get provisions, but not in products as before."*
[10] Sheldon Krasowski, *No Surrender, The Land Remains Indigenous,* (Regina: University of Regina Press, 2019), at 1.
[11] Supra note 6 at 103 (Price).
[12] Supra note 5 at 93 (Elder Louie Boucher).
[13] Supra note 5 at 107 (Price).
[14] Ibid (Price).

making that we were to share some of our Treaty lands with the Queen's subjects but certain lands would not be shared, these were referred to as "reserved lands"[15]. Any discussion of Land Back must start from the idea that all land was to be shared. Our reserves were lands set aside for our exclusive use and purpose to continue our way of life and to live uninterrupted by the settler population. It's critical to fully understand the Treaty history, the intentions of Treaty making and how Treaty No. 8 is the foundation to any Crown-First Nation relationship that is based on mutual respect and recognition of rights, moving forward.

Our land is our life[16] and livelihood. Land is central to our people as it is a significant part of who we are as land is tied to our Creation stories, laws, legal orders and is connected to our culture and way of life as Cree people. Therefore, any discussion of land needs to be framed within a Treaty understanding and Cree legal framework that privileges our worldview. For this reason, any private property law regime[17] that originates with fee simple title would not be viewed as land restitution or land back, as our lands are held for the collective interests of the Nation and future generations. Canada's proposed land restitution packages founded in private property regimes do not align with ensuring collective ownership and interest of land is held for our future generations of peoples. They do not follow Treaty.

Recent court decisions that deal with Treaty provide some clarity in how the Crown can honourably implement the Treaty. In *Mikisew*[18] the Court raised the issue of treaty implementation in relation to lands to be "dictated by the duty of the Crown to act honourably" in the creation of a *process* (our emphasis). In *Yahey v British Columbia* the court found that the Province failed to honourably and diligently implement the Treaty. The honour of the Crown requires the province to act with diligence and integrity to uphold, implement and protect the promises and purpose of Treaty 8. Regarding cumulative effects of land and the inability to exercise one's Treaty rights, the court found that "provincial processes do not adequately consider treaty rights or cumulative effects and have contributed to the diminishment of…treaty rights when viewed within the way of life from which these rights arise and are grounded"[19]. Therefore, it's critical that any Treaty implementation process that is created is done so alongside and with First Nations whose rights are being impacted. In relation to land restitution and land back, this means a process where First Nations are part of decision making, not a predetermined process that has already been created unilaterally by the Crown.

Unilateral transfer of resources: NRTA, 1930

Our fundamental issue is the land and the wealth that comes off our lands without any coming back to our people and Nation. Land is central to our cultural, political and nation resurgence.[20] We cannot have reconciliation until the land question is meaningfully dealt with. Our dispossession and present-day situation dates back to 1930. That year the Imperial Crown illegally transferred the natural resources to the provinces through the *Natural Resources Transfer Act*, 1930[21]. The NRTA was passed into law without our free prior and

[15] Supra note 3 at 1 (Venne). Sharon Venne further explains reserved lands stating "In an abuse of history as well as of the Cree Peoples, the settlers called the areas of land that would not be shared "reserves" and wrote that "Indians" were placed on "reserves". That is a lie".
[16] Clifford Atleo and Jonathan Boron, "Land is Life: Indigenous Relationships to Territory and Navigating Settler Colonial Property Regimes in Canada" (2022), 11, 609. Retrieved from: Land | Free Full-Text | Land Is Life: Indigenous Relationships to Territory and Navigating Settler Colonial Property Regimes in Canada (mdpi.com)
[17] Kanatase Horn, *Reconfiguring Assimilation: Understanding the First Nations Property Ownership Act in Historical Context* (2013) [unpublished, archived at Carlton University]. retrieved from: horn-reconfiguringassimilationunderstandingthe (1).pdf
[18] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69.
[19] *Yahey v British Columbia*, 2021 BCSC 1287 (CanLII), at para 1751. <https://canlii.ca/t/jgpbr#par18>, retrieved on 2023-10-31
[20] Supra Note 2 at 6 (Land Back).
[21] Constitution Act, 1930 (U.K.), 20 & 21 Geo. V., c. 26, reprinted in R.S.C. 1985, App. 11, No. 26.

informed consent. The Crown breached Treaty No. 8 by unilaterally transferring jurisdiction of our natural resources to the provinces – political entities that did not even exist when Treaty No. 8 was entered into. Also, during this time, Canada amended the *Indian Act*[22] to make it impossible for any Indian to hire a lawyer[23]. The NRTA is the root cause of the environmental and economic racism we face today.

Efforts to seek redress for these actions in Court are unsuccessful.[24] In fact, just last week, the federal government argued before the Supreme Court of Canada that the Blood Tribe (K'aina Nation) of Treaty No. 7 should not get their Land quite literally Back because of "limitation periods" fundamentally unsuited to Treaties[25] The Crown is using their common law to override our Treaties. What about our Indigenous laws that predate Canada?

Gross inequities of Revenue Sharing

Since 1930, under the direction of the province of Alberta and with the non-intervention of the federal government - even where they have powers to intervene - the province has reaped billions of dollars from First Nations' lands and resources. By contrast, Mikisew has seen no protection of our lands, despite the hopes of the *Mikisew* 2005 Supreme Court decision. Revenue-sharing is a laughable concept in 2023.

Publicly available data provides one example of the gross discrepancy between federal, provincial and municipal governments and First Nations' governments. In 2022, Mikisew received a fraction of benefits, payments, and taxes from the key industry players as compared to Alberta, Canada and the Regional Municipality of Wood Buffalo ("**RMWB**"). Mikisew's impacts downstream the Athabasca River, on the other hand, have been grossly disproportionate to these governments' impacts. High-level data from federal government sources demonstrates this disparity:[26]

2022	Imperial Oil Ltd.	CNRL	Syncrude Canada Ltd	Suncor Energy Inc.	Cenovus
Alberta (royalties, taxes, fees)	1.836 billion	8.103 billion	2.605 billion	3.344 billion	4.535 billion
RWMB	50.39 million	100.3 million	64.97 million	47.44 million	26.10 million
Mikisew	2.73 million	1.56 million	330,000	560,000	$990,000
Canada	97.98 million	2.187 billion	N/A	3.19 Billion	197 million

[22] s. 141 of *Indian Act* stated "*Every person who… receives, obtains, solicits or requests from an Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs…shall be guilty of an offence and liable to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months".*

[23] Maie Wikler, "Access to Justice Was Outlawed with the Indian Act", (24 June, 2020). Retrieved from: Access to Justice was Outlawed with the Indian Act - RAVEN (raventrust.com)

[24] *Wesley v Alberta*, 2022 ABKB 713 (CanLII), at para 147, <https://canlii.ca/t/jssgs#par147>, retrieved on 2023-10-30

[25] *Jim Shot Both Sides, et al*. v. *His Majesty the King* – federal Crown submissions.

[26] ESTMA data available to search here: https://dv-vd.cloud.statcan.ca/71-607-x2022008_en (**Note**: There are limitations to this data - for example, they do not include equity stakes in projects and they are overinclusive of the areas in Alberta, but, even still, they demonstrate the gross inequity between compensation to non-First Nation governments versus First Nation governments).

Until Mikisew is treated like a government (like we were at Treaty making), with a seat at the table, the promise of Treaty No. 8 and the hope of Land Back will remain unfulfilled. To date and at present, the governments have delegated restitution to industry for the impacts to our traditional territory through the negotiation of IBAs. IBAs invariably require Mikisew to provide "regulatory certainty" - ie. to give up the limited rights we have to object to any industrial development – to obtain any restitution. Without an IBA, Mikisew gets nothing from the industrial development on our Treaty territory. By contrast, Alberta, Canada and RMWB, as non- First Nation governments, are not subject to this same *quid pro quo*.[27]

Mikisew's Traditional Territory is cumulatively and irreversibly impacted by provincially and federally enabled resource development and park creation

As a result of the unfilled promises of Treaty No. 8 and the unlawful transfer of natural resources, Mikisew has experienced and continues to experience land alienation and dispossession. Two examples are noted in this short submission.

1. **Cumulative Effects of Development is land alienation**

The NRTA allowed for the creation of a provincial regulatory regime that only needs to consult federally on issues like fisheries and species at risk. Left to their own devices, the province of Alberta, through broken regulators, steam-rolled over our rights and our land. For example, the Alberta Energy Regulator is funded by industry - it is "captured" by design. It is not surprising, then, that industry is allowed to 'self-police'. In other words, the province relies on industry to tell on themselves. This is not regulation. Meanwhile, the federal government often refuses to conduct federal environmental assessments, for example, on a project that will go right up to the Athabasca River.[28]

The provincial consultation regime does not consider cumulative effects. However, back in 2007, when Imperial's Kearl Project was approved, even the Joint Review Panel noted the cumulative effects.[29] Fast forward 16 years later, it is only worse. This alienation is to the point where we have considered whether our community will have to be relocated. If we are not, many Mikisew members will leave our community, viewing the health risks[30] as too significant to remain on our traditional territory.

2. **Wood Buffalo National Park**

Wood Buffalo National Park encompasses a large portion of Mikisew Treaty territory. The creation of parks, while good for conversation, is not Land Back. This is because the land is still administered by a colonial government. While buzz words such as "co-management" are thrown around, in practice, this has meant that we have no decision-making power.

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[27] Supra Note 2 (Land Back) at 38: The Yellowhead Institute criticized this approach: "But rather than engaging with Indigenous peoples as nations with inherent responsibilities to govern their territories, governments have sought to manage the uncertainty of Indigenous land rights by encouraging industry, in essence, to supply much-needed social investments in communities (the promise of infrastructure, jobs, capital) in exchange for social license to develop Indigenous lands." The authors also note that IBAs are "private law contracts that do not rise to the legal standard required for consent at the nation-to-nation level"

[28] *Mikisew Cree First Nation* v. *Canadian Environmental Assessment Agency*, 2023 FCA 191 (CanLII), at para 51.

[29] EUB/CEAA Joint Review Panel Report (EUB Decision 2007-013) (February 27, 2007), at 85

[30] Stéphane M. McLachlan (Environmental Conservation Laboratory). "Water is a living thing" Environmental and Human Health Implications of the Athabasca Oil Sands for the Mikisew Cree First Nation and Athabasca Chipewyan First Nations in Northern Alberta. Retrieved from: RFR_ACFN Reply to Crown Submission 6 - TabD11 Report_2014-08_PUBLIC.pdf (alberta.ca)

Solutions

In this short brief we offer some Treaty-based solutions:

1. **Establish a process for restitution of Federal Crown Land.** The federal government should create a process with First Nations to have access to and return of lands to exercise our Treaty and inherent rights.

2. **Restoring Mikisew's jurisdiction**. Through Treaty, we never agreed to be subsumed to the colonial state on resource development. To implement Treaty No. 8, Mikisew should be granted a seat at every table affecting them, including but not limited to the Alberta Energy Regulator and the Impact Assessment Agency of Canada.

3. **Establish Financial Participation in Resource Development**, including through unconditional transfer payments to First Nation governments. This will alleviate the pressure on First Nations to enter IBAs and give up rights just to pay for infrastructure, health access, and education.

4. **A rights-based, restitution approach to Government Resource Revenue Sharing** should be established for Mikisew. The amounts and percentages shared should be reviewed to ensure they are, indeed, "fair sharing". This analysis cannot be based on population. It must be based on the impact and dispossession suffered by our Nation.[31]

5. **A federally negotiated moratorium and/or fiduciary consideration of First Nations in provincial land sales**. At present Alberta provincial crown land is sold without our free, prior and informed consent. In Alberta, mineral leases are granted to industry without any consultation, let alone consent. This process must be brought into line with Treaty No. 8.

6. **Revamping the Additions to Reserve (ATR) process.** At present, there is no capacity funding to engage in addition to reserve processes. Much of the bureaucratic work is placed on the First Nation alone (i.e. to negotiate with municipalities and provinces) to get the Land Back that was taken from them without their free prior and informed consent. When finally complete, it takes years to obtain approval. The Crown has fiduciary duties to fund and facilitate an expedited addition to reserve process.[32]

We thank you for considering Mikisew's submissions on this important matter.

In the Spirit of Reconciliation,

Chief Billy-Joe Tuccaro, on behalf of Mikisew Cree First Nation

[31] Supra Note 2 (Land Back) at 39-41.
[32] Land Management Manuel, Chapter 10 - Additions to Reserve/ Reserve Creation, 2016. Retrieved from: **https://www.sac-isc.gc.ca/eng/1465827292799/1611938828195**