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

Dear Review Panel:

**Re: Review of the Lower Athabasca Regional Plan – Response to IR 14**

We write to provide Mikisew Cree First Nation's ("Mikisew") response to Information Request #14 (IR#14) in connection with the above noted review under section 19.2 of the Alberta Land Stewardship Act.

In IR#14, the LARP Review Panel requested that interested First Nations Applicants submit a legal brief setting out their views on the relationship between "quiet enjoyment of property" and the alleged effects of LARP on traditional land use areas. For the reasons set out below, Mikisew submits that the adverse impacts to its Treaty rights that it has raised in this review process fit squarely within section 5(1)(c) of the *Alberta Land Stewardship Regulation*<sup>1</sup> (ALSR).

**"Quiet Enjoyment of Property" is an integral element of the exercise of Mikisew's section 35 rights**

Mikisew has alleged that numerous provisions of LARP adversely affect the exercise of Mikisew's section 35 rights, including those protected under Treaty 8. Therefore, an appropriate starting place for understanding the relationship between the impacts asserted in this review and the term "quiet enjoyment of property" is Mikisew's rights under Treaty 8.

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<sup>1</sup> Alta Reg 179/2011

While Mikisew's Treaty rights are *sui generis*, we note that courts and scholars have found terminology from common law concepts of property to be helpful for understanding section 35 rights and particularly how those rights relate to property interests.<sup>2</sup> To this end, we offer two such references to common law concepts of property to assist the Panel.

First, while it would be improper to reduce the Treaty relationship to that of a landlord and tenant (given the solemn nature of Treaty promises and the constitutional protection they attract), Mikisew notes that the limitations that the Treaty imposes on Crown behavior are, in some senses, analogous to the way that "quiet enjoyment of property" is articulated in the context of landlord-tenant relationships. In the landlord context, "quiet enjoyment of property" is typically articulated as a protection against interference by a landlord with a tenant's foreseeable uses of a property.<sup>3</sup> In the Treaty context, it is clear from the historical record of Treaty 8 (and the jurisprudence interpreting that record) that the aboriginal negotiators' central concern when negotiating Treaty 8 was the protection of their normal uses and occupation of the land (sometimes referred to as "traditional patterns of economic activity").<sup>4</sup> It is similarly clear that the Crown negotiators of Treaty 8 understood this concern and made assurances to the aboriginal signatories that they would retain the right to maintain their use of the land and traditional land use areas.<sup>5</sup> The result was that Treaty 8 established a relationship through which Mikisew was assured of its right to maintain its traditional uses of land, subject to a significantly curtailed ability of the Crown to interfere with those uses.<sup>6</sup> In both cases, the "user" of a property has the right to be free from interference with their intended use of the land.

Second, courts and scholars have used the common law concept of a *profit à prendre* to help explain harvesting rights that are protected under section 35.<sup>7</sup> A *profit à prendre* is

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<sup>2</sup> *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para 54

<sup>3</sup> Bruce Ziff, *Principles of Property Law*, 3<sup>rd</sup> ed (Toronto: Carswell 2000) at 268. See also *Jenkins v Jackson*, (1888) 40 Ch D 71 at 73, *per Kekewich J*: "'Peaceably and quietly' means without interference-without interruption of the possession."

<sup>4</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para 47

<sup>5</sup> *R. v. Badger* (1996), 133 D.L.R. (4<sup>th</sup>) 324, at paras. 39 and 55

<sup>6</sup> See, e.g. *R. v. Horseman*, [1990] 1 S.C.R. 901; *Mikisew*, *supra* at para 48.

<sup>7</sup> *Tolko Industries Ltd. v. Okanagan Indian Band*, 2010 BCSC 24; see also Ziff, *supra* at 344. While the Tolko case dealt with non-treaty harvesting rights, the language used by the Supreme Court of Canada in *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695, to describe how section 12 of the Natural Resources Transfer Act affected Treaty rights bears a striking similarity to the Halsbury definition of a *profit à prendre*:

[Section 12] is concerned rather with Indians as such, and with guaranteeing to them a continuing right to hunt, trap and fish for food regardless of provincial game laws which would otherwise confine Indians in parts of the Province that are under provincial administration. Although inelegantly expressed, s. 12 does not expand

a right to take something off the land of another person... a right to enter on the land of another person and take some profit of the soil such as minerals, oil, stones, trees, turf, fish or game, for the use of the owner of the right.<sup>8</sup>

While harvesting rights should not be understood as identical to a *profit à prendre*, the reference to that common law interest in property is apt in the context of the question posed by the Panel: courts have found that it is possible for one to enjoy a right to “quiet enjoyment” of a *profit à prendre*.<sup>9</sup>

Mikisew respectfully submits that these references to common law concepts of property illustrate how the “quiet enjoyment of property” is integral to Mikisew’s section 35 rights.<sup>10</sup> The critical point in both references – and the point that is key to understanding the relationship “quiet enjoyment of property” and the alleged impacts to Mikisew’s Treaty rights in this review process – is that the Crown has knowledge of the uses to which Mikisew has put (and continues to put) Crown land<sup>11</sup> and the fiduciary relationship that arises out of that knowledge places a burden on the types of decisions the Crown can make that may impact those uses and how the Crown can make those decisions.<sup>12</sup>

The alleged impacts of LARP on the exercise of Mikisew’s rights and traditional land use areas that Mikisew has alleged in this review all pertain to Alberta’s failure to ensure that LARP adheres to these constitutional principles. In other words, the impacts that Mikisew has alleged to traditional land use areas are “cognizable” as impacts to Mikisew’s quiet enjoyment under Treaty 8.

### **A proper interpretation of “Quiet Enjoyment of Property” in s.5(1)(c) requires that the Panel consider LARP’s impacts to Treaty rights when considering Mikisew’s Application**

As the *ALSR* does not provide a definition of the term “quiet enjoyment of property”, the meaning of the term must be ascertained in light of the statutory context in which the provision is

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provincial legislative power but contracts it. Indians are to have the right to take game and fish for food from all unoccupied Crown lands (these would certainly not include Reserves) and from all other lands to which they may have a right of access. There is hence, by virtue of the sanction of the British North America Act, 1930, a limitation upon provincial authority regardless of whether or not Parliament legislates.

<sup>8</sup> Halsbury’s Laws of Canada, *Real Property*, “Easements: General: Easements Distinguished for Other Rights” at “HRP-294 “Rights in Other’s Land” (Cum Supp Dec 2013) [Halsbury’s]; *British Columbia v Tener*, [1985] 1 SCR 533 at paras 12-14.

<sup>9</sup> *Peech v Best*, [1931] 1 KB 1. See also *Komari Inc v Feddema*, [1988] OJ No 2059 (HCJ).

<sup>10</sup> In making this point, Mikisew notes that the Panel must be careful not to minimize or exclude the Aboriginal perspective and understanding of Treaty 8 by overreliance on common law concepts.

<sup>11</sup> *Mikisew*, supra at para 34

<sup>12</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para 59

located and the interpretive tools relating to section 35 rights and access to justice. For the reasons set out below, Mikisew submits that the Panel must interpret “Quiet Enjoyment of Property” in a manner that includes consideration of the alleged impacts to Treaty rights that Mikisew has raised in this review process.

To begin, section 5(1)(c) contains no language to narrow the scope of or qualify the phrase. This is be contrasted with the statutory scheme of the *Alberta Land Stewardship Act (ALSA)*, which establishes separate administrative processes for “title holders” to have restrictions or limitations of title considered (s.15.1) and for “registered owners” to have the diminution or abrogation of property rights, title or interests addressed (s.19.1). As section 5(1)(c) does not contain the same references to title holders or registered owners, the provision must be interpreted to include a broader range of impacts than just those to title or other common law ownership rights.

Given the nature of the regional planning process, it would also make no sense to narrowly interpret “quiet enjoyment of property” to include only landlord-tenant relationships, the primary context in which the phrase “quiet enjoyment” is typically used.

Mikisew submits that the Panel should approach the interpretation s.5(1)(c) in manner that reflects the land use plan at issue in this review. In particular, excluding impacts of Treaty rights from the notion of “quiet enjoyment” under s.5(1)(c) – and therefore from the entire review process – would run contrary to the government of Alberta’s purported commitment to include Aboriginal peoples in the planning process. The *Terms of Reference for Developing the Lower Athabasca Regional Plan* describe the “[i]nclusion of Aboriginal peoples in land-use planning” as a key strategy for improving land-use decision-making in Alberta, and also states that it is “important that regional planning take into account Aboriginal issues with respect to Aboriginal consultation, environmental protection and human development.”<sup>13</sup> It would be contradictory to acknowledge the importance of including Aboriginal peoples in LARP, but exclude Aboriginal peoples from any possible review of that plan.

In addition, a broad and liberal interpretation of s.5(1)(c) to include section 35 rights within the scope of “quiet enjoyment of property” is required for s.5(1)(c) to be consistent with s.1(1) of

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<sup>13</sup> “Terms of Reference for Developing the Lower Athabasca Regional Plan,” Government of Alberta, online: <<https://landuse.alberta.ca/LandUse%20Documents/Terms%20of%20Reference%20for%20Developing%20the%20Lower%20Athabasca%20Regional%20Plan%20-%202009-07.pdf>> at 4, 10.

*ALSA*. Section 1(1) requires the Government to respect *the property and other rights* of individuals when carrying out *ALSA*. Arbitrarily excluding section 35 rights from the statutory review process established under *ALSA* would effectively prevent aboriginal groups from accessing the most accessible forum to raise concerns with how the Government has upheld its obligations under s.1(1) of *ALSA*.<sup>14</sup>

To the extent there is any remaining ambiguity in how to interpret “quiet enjoyment of property”, Mikisew submits that the ambiguity should be resolved in manner that requires that the alleged impacts to Mikisew’s rights be considered in this review process.<sup>15</sup> To this end, Mikisew reiterates that the courts have established that harvesting rights are akin to a form of property right, as described above. Mikisew further notes that a broad interpretation of “quiet enjoyment” would be consistent with the practice in other jurisdictions in Canada.<sup>16</sup>

Finally, Mikisew respectfully submits that declining to consider LARP’s alleged impacts on Mikisew’s Treaty rights because of a restrictive interpretation of “quiet enjoyment of property” would mean that this Panel has failed not only to properly understand what is required for the exercise of Mikisew’s Treaty rights, but also to approach its statutory mandate in a manner that is consistent with the goal of reconciliation.

### **LARP directly and adversely interferes with Mikisew’s enjoyment of its Rights and Lands**

Mikisew has listed in detail the effects already suffered to traditional land use areas under LARP and those expected to be suffered.

It is Mikisew’s understanding that the Panel’s request with IR#14 focuses on understanding how the concept of “quiet enjoyment of property” relates to Mikisew’s rights and does not seek further enumeration of the impacts that LARP has had and will likely have on the exercise of Mikisew’s rights. If this understanding is incorrect, we ask that the Panel clarify its request and provide additional time for Mikisew to respond.

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<sup>14</sup> *Nova Scotia (Workers’ Compensation Board) v Martin; Nova Scotia (Workers’ Compensation Board) v Laseur*, 2003 SCC 54 at para 29

<sup>15</sup> *R v Nowegijick*, [1983] 1 SCR 29 at 36.

<sup>16</sup> *Whiskey’s Lounge Ltd. V. Nova Scotia Utility and Review Board*, 2007 NSCA 95 at para. 28

**Mikisew request relating to future correspondence from the Panel**

The undersigned will be on parental leave for the next 4-5 weeks. Mikisew requests that the Panel and other participants copy Robert Freedman ([rfreedman@jfkklaw.ca](mailto:rfreedman@jfkklaw.ca)) and Karey Brooks ([kbrooks@jfkklaw.ca](mailto:kbrooks@jfkklaw.ca)) on any correspondence during that period.

Respectfully submitted,

JFK Law Corporation

Per: 

Mark Gustafson

MAG/mag

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