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TO: Chiefs and Council of the First Nations of the Anishinabek Nation

CC: Chiefs Committee on Governance
Dava Shawana, Director, Restoration of Jurisdiction
Martin Bayer, Chief Negotiator

FROM: Jide Afolabi, BA, LLB, LLM - Fiscal Negotiator

RE: Correcting Assertions in Legal Opinions on the Anishinabek Nation Governance Agreement - Summary Version

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Over the past few weeks, a number of independent legal opinions (ILOs) on the Anishinabek Nation Governance Agreement have been released.

These ILOs contain a number of problematic assertions, and the Leadership of the Anishinabek Nation has requested that summary responses to the problematic assertions be put together.

The summary responses are set out below. It should be noted that detailed responses have also been prepared, and those are available upon request.

Assertion 1: That the Anishinabek Nation Governance Agreement is not a "true form" of the Inherent Right to Self Government.

In truth, the Anishinabek Nation Governance Agreement is one form of actioning the Inherent Right to Self Government, but it is not the only form. Another form would argue that the status quo is sufficient - that Canada already recognized First Nations through

treaty. It may be more useful to ask whether any form of actioning the Inherent Right to Self Government fulfills some key criteria, such as:

- not undermining Treaty and Aboriginal rights;
- containing a framework for future relationships with the settler nation (Canada);
- pre-empting future conflicts as much as possible, in order to save on the expense of fighting and instead focus on national advancement; and
- securing the tools to ensure that the damages of colonialism can be progressively undone.

In essence, a “good” form for actioning the Inherent Right to Self Government must be one that “holds treaty in one hand” while “securing the tools to undo colonial damage” with the other. The Anishinabek Nation Governance Agreement fulfills this requirement.

Assertion 2: That the Anishinabek Nation Governance Agreement is “under the Inherent Right Policy of the Canadian Government”.

The Inherent Right Policy of the Canadian Government was cancelled while the Anishinabek Nation Governance Agreement was being negotiated. At the time, Minister Bennett indicated in effect that it was not a viable framework for nation-to-nation relationships. She also indicated in effect that a policy was not needed by Canada in order to conclude negotiations on such nation-to-nation relationships. As a result, the Anishinabek Nation Governance Agreement was concluded without reference to a set “policy approach” on Canada’s side. It was not concluded under the Inherent Right Policy.

Assertion 3: That law-making in the Anishinabek Nation Governance Agreement is “circumscribed by liberal values”.

Overall, this assertion is essentially asking - should the Anishinabek Nation Governance Agreement in any way reflect the fact that Canada has an existing constitutional order? So, for example, should it say things like “the Canadian Charter of Rights and Freedoms applies to First Nation Governments”?

In truth, if a crime is committed on reserve today, it ends up in front of a Canadian court in most instances, and Charter arguments are made in those proceedings. All of that happens today without the Anishinabek Nation Governance Agreement being in place.

The Anishinabek Nation Governance Agreement readily accepts the application of the Canadian Charter, but it also makes Canada accept the application of some core

Anishinabek laws. It endeavours to reconcile the Canadian constitutional order with the Anishinabek way of knowing - the Anishinabek constitutional order. That starts explicitly with *Ngo Dwe Waangizid Anishinaabe*, which is embedded at the very beginning of the Anishinabek Nation Governance Agreement.

Assertion 4: That "fiscal contribution" in the Anishinabek Nation Governance Agreement may mean that any settlement of the Robinson Huron annuities claim could be considered revenues that would offset future federal funding by a more adversarial government.

This assertion is untrue, and is likely based on a mis-reading or incomplete reading of the Anishinabek Nation Fiscal Agreement. The First Nations Fiscal Contribution does not apply to the Anishinabek Nation Governance Agreement - it is in a moratorium. The moratorium is achieved by setting out the related formula in the Anishinabek Nation Fiscal Agreement, then suspending its application.

Why this approach? Canada took the position in negotiations that placing the formula in the Anishinabek Nation Fiscal Agreement serves as "full disclosure" to First Nations of its future intentions. The Anishinabek Nation's governance negotiators took the position in negotiations that the formula cannot begin to apply automatically. So, the Anishinabek Nation's governance negotiators secured language in D.36 to D.38 of the Anishinabek Nation Fiscal Agreement indicating (a) the formula will not apply now, and (b) rather than apply automatically in the future, it will only apply if Canada and the First Nations are able to separately agree on its application.

This is a very high bar, one might say a bar that is practically insurmountable into the foreseeable future for Canada to overcome - regardless of how friendly or "adversarial" its government is. Nonetheless, and importantly, the Anishinabek Nation Governance Agreement creates contractual obligations for Canada to fund governance activities at a much higher level, regardless of the absence of the First Nations Fiscal Contribution.

Assertion 5: That the relationship between Indigenous People and Canada is fully expressed in treaties, and all that is required is to seek the recognition by Canada of the Aboriginal title rights that underpin those treaties, along with resource sharing.

This assertion contains a nugget of truth - the relationship between Indigenous People and Canada *should have remained* fully expressed in treaties. That is, the treaties were intended to be the first and final word, and things should have stayed that way. In truth, however, we all know the actual history - Canada began an intense and

inter-generational program of colonial interference that continues to this day. It is a colonial program that means that all these years after the treaties were signed, recognition by Canada of the Aboriginal title rights that underpin the treaties remain, at best, a work in progress.

In the face of this history of colonial interference, the Anishinabek Nation's governance negotiators were of the opinion that a few more things were needed - first, a framework for future relationships with Canada that is premised on the reconciliation of Anishinabek and Canadian legal traditions so their various laws can operate as well as co-operate; and second, a securing of the tools to ensure that the damages of colonialism can be progressively undone.

These additional needs have been secured in the Anishinabek Nation Governance Agreement, without prejudicing future negotiations on rights recognition and resource sharing. By comparison, the approach set out in Assertion 5 remains theoretical - there is simply no guarantee that Canada, in negotiations that involve give and take, will agree to fully recognize Aboriginal title rights without securing some recognition of its own constitutional framework and legal traditions.

Assertion 6: That the jurisdictional capacities in the Anishinabek Nation Governance Agreement concern matters that First Nations can already act on pursuant to federal legislation like the *Indian Act* or the *First Nations Elections Act*.

This assertion, carried to its logical conclusion, undermines the earlier assertion that the relationship between Indigenous People and Canada is fully expressed in treaties. For that assertion to be made, and then for this new assertion to follow, is baffling since this new assertion effectively argues that Indigenous People don't need Canada recognizing *their own* law-making capacity because they are *already permitted* through Canada's colonial laws to do the things their own laws would say. It is not that Indigenous People can express the Inherent Right given by the Creator, it is that they can already safely rely on Canada's colonial laws!

In truth, colonial laws cannot be used to express the Inherent Right given by the Creator. What the Anishinabek Nation Governance Agreement does is get Canada to give blanket recognition (*that is, acceptance, not permission*) to the laws the Anishinabek people pass as their own expression of the Inherent Right given by the Creator. That expression of their Inherent Right can look radically different from anything in the *Indian Act*. For example, there would be nothing stopping a First Nation from putting a hereditary leadership framework in place, or using an approach to

elections that would never find its way into Canada's *First Nations Elections Act*. Of course, that First Nation can also simply keep any aspect of the status quo that works for the First Nation. That is, each First Nation has a legitimate choice.

Assertion 7: That the resources to implement the agreement are few, and that there is no commitment to increased funding from Canada.

This assertion is untrue. For Anishinabek First Nations that ratify the Anishinabek Nation Governance Agreement, the Anishinabek Nation Fiscal Agreement grants, on average, a 700% increase in governance funding. Since the increase is an average, and the overriding objective is to ensure that governance funding for Anishinabek First Nations does not fall below an established threshold, the fiscal offer contains actual increases ranging from 550% to 1400%.

Assertion 8: That the First Nations Land Management Act Framework Agreement grants greater powers than those in the Anishinabek Nation Governance Agreement.

This assertion engages in the age-old error of comparing an apple to an orange. The First Nations Land Management Act (FNLMA) is about lands and related powers. The Anishinabek Nation Governance Agreement (ANGA) is about governance. It is obvious that the two jurisdictional matters are not the same. In truth, they both grant "greater powers" in their areas of concern.

While they concern different matters, it is not impossible that someone might identify a small area of overlap. For example, a scholar may assert that lands administration as provided for within the FNLMA overlaps with the management and operation of government generally as provided for within the ANGA.

For such an eventuality, the ANGA has fashioned a way of ensuring First Nations can decide on the approach or tool they prefer. Section 10.13 of the ANGA provides that in the event of a conflict with the FNLMA, the ANGA prevails. To understand the implications of that section, one needs to understand the underlying legal structure of the two tools. The FNLMA is *prescriptive* - it contains clear rules in an agreement designed for its operation. The ANGA, on the other hand, is *permissive* - it simply recognizes that First Nations have law-making powers without setting out the content or form of the laws First Nations can or will legislate.

So, if provisions in the two tools actually overlap or clash, and if a First Nation prefers the provision in the FNLMA, it can simply use the ANGA to confirm that preferred

provision as its law - the ANGA would “prevail”, but it would simply spell out the provision in the FNLMA. For the reverse, if there is a clash and a First Nation prefers an approach different from one in the FNLMA, it can use the ANGA to make that approach its law instead.

Assertion 9: That the Anishinabek Nation Governance Agreement merely devolves administrative powers, and does not mention lands, resources or treaty.

The Anishinabek Nation Governance Agreement recognizes the law-making power of Anishinabek First Nations. That is far removed from the mere devolution of Canada’s own administrative powers.

In keeping with the mandate received from the Grand Council of the Anishinabek Nation, as aligned with its incremental approach to self-government, the Anishinabek Nation Governance Agreement does not delve into lands, resources or treaty. It makes clear that it does not abrogate or derogate from treaty and Aboriginal rights. It also provides for - and sets the stage for - future negotiations in a broad range of areas, including lands and resources. It represents a starting chapter, not the final page, in the re-asserting of the jurisdiction of Anishinabek First Nations.