

Memorandum

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To: Treaty 6, 7, 8 Chiefs

From: First Peoples Law LLP
Cynthia Westaway, Senior Counsel
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Subject: **Briefing Note on Legal Strategy re: Canada’s proposed First Nations Drinking Water and Wastewater Act**
For Discussion at August 15/16, 2023 Chief’s Gathering hosted by TSAG

Date: August 15, 2023

Background:

We have been working to support the Technical Services Advisory Group (TSAG) Chief’s Steering Committee on building strategy around the following:

- the federal initiatives regarding water/wastewater infrastructure transfer to First Nations;
- proposed new water/wastewater legislation stemming from the Safe Drinking for First Nations Class Action Settlement Agreement (the proposed “First Nations Drinking Water and Wastewater Act”); and,
- broadening the dialogue beyond water/wastewater to require a Treaty-rights framework as the foundation and minimum expectation for any devolution.

Our strategy to date involves launching litigation against Canada respecting their rushed and flawed process of enacting new legislation (the proposed “First Nations Drinking Water and Wastewater Act”).

Chief Rupert Meneen of Tall Cree First Nation has offered to lead the charge and be named plaintiff in the proposed litigation.

Support Sought:

Support is being sought from Alberta First Nations Leadership to:

1. Reject the proposed *First Nations Drinking Water and Wastewater Act* legislation and any ongoing and unilateral effort of the Government of Canada to further transfer large scale programs and services including capital and infrastructure;



2. Demand a First Minister's meeting with the Chiefs in the Alberta Region to be meaningfully consulted and to seek consent on the outstanding issues related to the development of legislation related to water and related infrastructure projects in Alberta; and,
3. Support the advancement of a strong legal strategy to reclaim First Nations jurisdiction as Treaty and inherent rights holders related to all matters of water and related infrastructure and as delegated with continued assistance and support of the Technical Services Advisory Group (TSAG) and designated representative(s) of each Nation.

Basis of Legal Claim/Proposed Litigation:

The Crown has not lived up to its obligations to First Nations respecting water and water infrastructure.

When we consider Crown impacts to Treaty rights and jurisdiction, we see the following:

- Breach of fiduciary duties
- Failure to uphold the honour of the Crown
- Discrimination in violation of s. 15 of the Charter (guaranteeing right to equal benefit of the law without discrimination)
- Interference with security of person and violation of s. 7 of the Charter (guaranteeing life, liberty and security of person)
- Failure to uphold UNDRIP principles (Articles 18 – rights to participate in decision making institutions; Article 19 – free, prior and informed consent; and others)
- Colonial impacts and breach of treaty obligations to prevent the exercise of full jurisdictions
- Water pollution, degradation of systems, impacts to water flow and levels
- Substandard drinking water
- Substandard infrastructure for both drinking water and wastewater
- Inadequate, piece-meal funding and sustained policy implementation affecting and adding to the current poor state of infrastructure for First Nations.

Devolution/Transfer Principles

Any dialogue regarding delegation or transfer of services needs to begin from a place of trust, respect and understanding. This should be the foundation, based on inherent treaty-based principles of relationship and Nation building.

Devolution or transfer discussions cannot simply be a task or a check box on a Crown workplan. The Crown must act honourably, and as a fiduciary in the best interests of Treaty Nations.

Dialogue needs to be well planned, funded and part of an express Treaty recognition framework. This framework should reaffirm inherent rights and jurisdiction over water and related infrastructure, grounded in traditional laws and teachings. Traditional connections to water and its protection must be there for next generations.

Canada is very behind. There has not been a significant plan, investment or strong enough results to support devolution in a manner consistent with Treaty principles.

Leverage of UNDRIP and Canada's Action Plan

UNDRIP requirements and the recently released Action Plan must be leveraged and used as part of the framework for any devolution and transfer of services.

A specific action related to transfer/devolution identified by Canada (noted “in consultation and cooperation with Indigenous peoples”) includes:

27. Engage with partners on the co-development of a Service Transfer Policy Framework. The purpose of the Framework would be to jointly advance the transfer of responsibility for the design, delivery and management of services from Indigenous Services Canada to Indigenous partners.

Further actions of relevance include:

24. Remove and address jointly identified barriers to settlement, and co-develop approaches for the implementation of the right to self-determination through treaties, agreements and other constructive arrangements, as well as through new policies and legislative mechanisms.

31. Building on ongoing policy and program renewal, the Government of Canada will work in collaboration with Indigenous partners to identify opportunities to reform and strengthen the foundational elements that support rights-based negotiations and approaches. This collaborative work may include a review of program administration, capacity support, funding and delivery models, including the management of the process for determination of section 35 rights.

67. Work with Indigenous partners to ensure co-development of legislation, policies, programs, regulations and services furthers the right of Indigenous peoples to self-determination, led by priorities and strategies determined and developed by Indigenous peoples and that co-development processes result in initiatives that comply with Indigenous rights and advance Indigenous priorities.

Canada needs to be called out on these Actions and incorporate these into dialogue, processes and implementation plans respecting devolution and transfer.

Recommended Approach

We recommended a three-pronged approach to build the proposed vision expressed above and that considers the following:

1. Preparation of litigation strategies against the Crown to demonstrate the clear risk of their continued inaction or status quo.
2. Gathering and Documenting past, current and future impacts and harms to water, water resources within Treaty Nations territory.
3. Proceeding, through a careful, multi-phased approach to rebuild the necessary capacity and infrastructure to ensure a full exercise of Treaty Nation jurisdiction over water, including protection and long-term sustainability.

This approach (consisting of at least 8-10 phases) would include:

- compiling an inventory of water issues/infrastructure;
- accessing and gathering of Traditional Knowledge;
- a full evaluation of the state of infrastructure and current and future required mitigation/sustainability/growth plans;
- **confirming a fulsome implementation plan and agreements;**
- creating a framework government to government agreement, confirming transfer payments and continued viability/sustainability and ensuring this framework is different from any co-developed and/or self-government objectives that are currently not working.

Next Steps:

1. Seeking support from Nations directly on this strategy (see attached draft resolution language)
2. Preparing potential litigation strategies/claims.
3. Gathering evidence/traditional knowledge.
4. Proceed towards a multi-phased approach to an inherent rights and jurisdiction-based framework with Canada respecting water and water infrastructure legislation development and implementation.

For any further information contact Vaugh Paul, CEO, TSAG at transfer@tsag.net.