



FIRST NATIONS SUMMIT

A Water Sustainability Act for BC: Legislative Proposal

Comments to:

**THE MINISTRY OF ENVIRONMENT
GOVERNMENT OF BRITISH COLUMBIA**

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INTRODUCTION

1. The First Nations Summit (FNS) is comprised of a majority of First Nations and Tribal Councils in British Columbia, and represents First Nations in BC involved in and supportive of treaty negotiations with the governments of Canada and British Columbia. The FNS provides a forum for First Nations in BC to address issues related to treaty negotiations as well as other issues of common concern.
2. The FNS does not hold Aboriginal title or rights, or treaty rights. It does not participate in negotiations at individual treaty tables, nor does it represent, or purport to represent, any one or more First Nations for the purposes of consultation with the Crown where First Nations' rights may be impacted.
3. **The Crown owes a duty of consultation and accommodation directly to the First Nations who hold Aboriginal title and rights, or treaty rights, as the case may be.**
4. In British Columbia, the *Water Act* is the primary law for provincial management of water resources. It operates in conjunction with various other provincial and federal statutes that also address water and water-related matters. Under the Act, the Province makes decisions on water licences, as well as water management planning, allocation planning and drought management. The Province undertook a Water Act Modernization initiative "to respond to new challenges that exist for managing our waters, including dealing with population growth and climate change."
5. As part of this process, the Province issued a Discussion Paper that set out possible solutions for changing the existing Act. The FNS submitted comments on this Discussion Paper in April 2010 to provide a general overview of First Nations' rights and interests as they relate to water, and to propose approaches for ensuring that First Nations perspectives are included in the modernization process and resulting *Water Act* regime.
6. In September 2013, the Ministry of Environment provided the FNS with a copy of the Province's detailed legislative proposal for a new *Water Sustainability Act* (WSA) for review and comment.
7. The proposed WSA is in the Stage 3: Detailed Policy Proposal of the Province's *Water Act* Modernization process. Stage 4 is the Formal Legislative Process. Minister Polak has indicated the Bill will be introduced to the Legislature in the spring 2014 session.

CONTEXT FOR FIRST NATIONS' COMMENTS

8. The Province's legislative proposal represents a narrative of what would be set out in formal legislation. It is presented as a discussion paper and not draft legislation. The Province is seeking public feedback. The Province is also seeking comments from First Nations and First Nation organizations.
9. The Province states that the proposal is not intended to identify or address specific First Nations interests, but proposes that the provisions of the WSA would "take into account current and future Treaty negotiations." The October 2013 public version of the WSA proposal states that the Act "would not address Aboriginal rights and title to water or infringe on existing rights."

Clarification is needed on whether the Province is proposing and intending to include a non-derogation clause in the WSA.

10. The WSA proposal acknowledges that: the existing Aboriginal and treaty rights of First Nations are recognized and affirmed by the *Constitution Act, 1982*; the Province has a duty to consult and, where required, accommodate First Nations whenever it proposes a decision or activity that “could impact treaty rights or (claimed and proven) aboriginal rights (including title)”; and, treaties, and other non-treaty agreements may also have specific notification and consultation requirements.
11. The version of the WSA proposal shared with the public in October 2013 states that “[p]otential opportunities to address First Nations interests through the [WSA] include: establishing Environmental Flow Needs for use in decision-making to protect fish and habitat and maintain stream functions and other ecosystem services; continued mechanisms to reserve water for First Nations; consideration of traditional ecological knowledge; and great involvement and participation in water management and water planning processes.”
12. While these “potential opportunities” are suggested in the public version of the WSA proposal, there is no clarity or assurance that such First Nations participation would occur, or that it would occur through agreed upon processes. Instead, the proposed WSA largely treats First Nations as “stakeholders” and fails in critical sections to assure First Nations’ needs are met. For example, Part 2 sets out key goals of the WSA, which lacks any mention to protecting First Nations’ rights to water, and ensuring their water needs are met.
13. It appears that the Province is choosing to legislate as it has always done – that is, on the presumption that it has the full jurisdiction to do so (i.e. presumption of Crown ownership), while leaving matters related to Aboriginal title rights and interests to processes of consultation and treaty negotiations.
14. This is not a satisfactory approach as it represents the status quo. If the Province intends to consult with First Nations where its duty is triggered on the ground, then presumably the Province’s *Updated Procedures for Meeting Legal Obligations When Consulting First Nations – Interim* (07 May 2010) (the “Provincial Consultation Policy”) will guide how the Province will engage with First Nations. The Provincial Consultation Policy, though, has proven ineffective from the perspective of First Nations.¹
15. Clearly treaties must include water provisions. However, if by acknowledging in the WSA that treaty negotiations are ongoing the Province intends to largely defer water issues with First Nations to treaty negotiations, this does not provide reasonable or satisfactory solution for First Nations that have serious and immediate concerns about the health and availability of fresh water resources within their territories now.
16. The proposed WSA will set the overall *strategic legislative framework* for regulations, planning and decision-making around water allocation throughout First Nations territories. These are the very kinds of activities that we politically committed to advance through government-to-

¹ For a discussion of this provincial policy, see the Report on the Key Findings of the BC First Nations Consultation and Accommodation Working Group (2013: First Nations Leadership Council).

government relationships in the *New Relationship* document (“shared decision-making about the land and resources”). The Province and First Nations should be jointly setting the direction and creating the legislative and policy space for shared decision-making to occur.

17. Informing this political engagement is the fact that First Nations, as the holders of Aboriginal title, rights, and treaty rights, and a range of Indigenous human rights, including inherent governance authority, must be meaningfully consulted and engaged on the proposed legislation itself. First Nations’ inherent rights and authority are not inferior or subject to that of the Province. Fundamentally, the intent of the *New Relationship* was to enter an era of co-recognition and co-existence to minimize conflict and increase mutual benefits.
18. There is also a substantive concern and question as to the Province’s intentions behind “continuing dialogue” with First Nations regarding the WSA legislative proposal if it does not intend to address First Nations interests in the legislation itself. This is a particular concern given that First Nations largely do not have the capacity or resources to undertake in-depth review of the proposal. The proposal addresses a number of strategic and technical matters and which must be assessed in the context of the unique constitutional relationship between the provincial Crown and First Nations. There are very real challenges that the short timeline for review presents for First Nations, as well as the ongoing lack of an appropriate engagement process, which bring into question the purpose of the Province’s outreach to First Nations if it does not intend to address First Nations interests in the legislation.
19. First Nations have decried the Province’s engagement process on the *Water Act* Modernization process and development of the WSA proposal as it failed to engage First Nations in a distinct and direct process. Rather, the Province implemented an online blog process, convened a handful of workshops and solicited written comments. The process lacked meaningful conversation on a government-to-government basis. By indicating its intention to not address First Nations interests in the legislation, the Province’s process cannot be deemed to constitute meaningful consultation with First Nations.
20. Unfortunately, overtures by First Nations leadership to engage the Ministry of Environment in a political process to address the very kind of issues we raise in our comments were declined by the then Minister. This represents a missed opportunity for the kind of robust and difficult conversation needed to build greater mutual understandings around perspectives on the use and management of water and water resources, including through any new iteration of the *Water Act*.
21. It is with these concerns in mind, and within this very challenging context, that the FNS offers the comments set out herein in support of First Nations and in the hope and spirit of advancing the government-to-government dialogue and relationship between the Province and First Nations, as envisioned and committed to in our mutual *New Relationship* vision document.
22. We also point to the recently re-proposed political process between the Ministry of Environment and the First Nations Leadership Council, including a senior working group, as a means for ensuring ongoing robust dialogue on many issues of mutual interests and concern.
23. These comments are intended to serve as high-level, contextual points important to the relationship between the Crown and First Nations. We do not undertake a section-by-section

analysis. In addition, the comments set out in our 2010 submission remain relevant and valid and we include them as part of this submission (see attached). In some cases, important points bear repeating.

RECOMMENDATIONS

24. That the Province extend its process on the proposed WSA to allow for the government-to-government engagement approach framed in the *New Relationship* vision document. This could be facilitated through the political engagement process under the recently re-proposed Memorandum of Understanding between the First Nations Leadership Council (FNS, Union of BC Indian Chiefs and BC Assembly of First Nations) and the Minister of Environment. It should also include review of the draft legislation by First Nations in advance of being introduced into the Legislature.
25. That the Province respect First Nations' right of self-determination and right to participate in matters that affect them, including the management of water and water resources, by engaging with First Nations on a government-to-government basis on:
 - a. the development of water legislation and policy, consistent with:
 - i. section 35 jurisprudence on Aboriginal title and rights, and treaty rights, and Crown legal obligations to First Nations;
 - ii. the BC-First Nations *New Relationship* vision document; and,
 - iii. international standards governing Indigenous human rights;
 - b. all areas of water management, including commercial use, irrigation and environmental management and monitoring;
 - c. supporting the development and implementation of First Nations territorial use plans.
26. That any provincial legislation or policy related to water and water resources expressly acknowledge and respect that:
 - a. Aboriginal title and rights, and treaty rights, exist in BC;
 - b. These include title and rights to water and water resources, including governance rights;
 - c. The pre-existing sovereignty of Aboriginal peoples in the province gives First Nations true "first in time" standing as against any other granted interest in water;
 - d. Treaty and other negotiations are underway with the ultimate objective of reconciling pre-existing Aboriginal sovereignty with the assertion of Crown sovereignty in BC, where treaties remain largely outstanding.
27. That any provincial legislation or policy related to water and water resources ensure First Nations' right to protect, steward and access safe, clean, accessible and affordable water for personal, domestic and community use, and to respect First Nations' perspectives about water as a social and cultural good, not primarily as an economic good. The right to water must be

realized in a manner that is sustainable for present and future generations, and ensure space and capacity for First Nations to “design, deliver and control their access to water.”²

28. That any water legislation or policy recognize and protect First Nations’ cultural right to water and support the right of First Nations to hunt and gather food resources from waters used for cultural, economic and commercial purposes.³
29. That First Nations access to, use of and exercise of governance over water and water resources be pursued through interim measures agreements where treaty negotiations are underway.
30. That the Province respect the minimum Indigenous human rights standard of free, prior and informed consent required for proposed decisions or activities that will affect First Nations or their lands, resources and territories, including the allocation of water and water resources.

COMMENTS

Water is Sacred

31. Water is a sacred resource to all humans; the right to water is a fundamental human right. For First Nations, this right is uniquely situated within a framework of inherent rights of Indigenous people that are constitutionally protected and elaborated upon by international mechanisms and instruments, such as the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).
32. While we characterize First Nations’ use of water as falling within the scope of Aboriginal title or other “rights”, within the rights paradigm of the common law, constitutional law and international law, it is essential to understand that First Nations have a sacred, cultural and deep *relationship* with water and water resources today that is rooted back in time immemorial. Water infuses many Indigenous teachings and traditions. It is “an important aspect of indigenous peoples’ spirituality and takes the form of many water bodies such as seas, rivers, lakes, rain, snow, fog and clouds and is an inseparable part of their heritage. As well as underpinning their social and economic well-being, indigenous peoples’ relationship with waters, lands and its resources is crucial to cultural vitality and resilience.”⁴ Water simply cannot be separate from our territories or our very beings.
33. Aboriginal title and rights include the right to use water for its many inherent uses, such as sustenance, irrigation, commercial purposes, transportation, and access for fishing, hunting, trapping and other harvesting and gathering activities. These rights also include the right to

² As urged by the United Nations Permanent Forum on Indigenous Issues, “Recommendations Specifically Pertaining to the Right to Water and Indigenous Peoples, adopted by the Permanent Forum on Indigenous Issues”, in reference to Tenth Session (7-18 May 2012), E/2011/43, E/C.19/2011/14, para 79.

³ As recommended also by the United Nations Permanent Forum on Indigenous Issues, “Recommendations Specifically Pertaining to the Right to Water and Indigenous Peoples, adopted by the Permanent Forum on Indigenous Issues”, in reference to Tenth Session (7-18 May 2012), E/2011/43, E/C.19/2011/14, para 82.

⁴ United Nations Permanent Forum on Indigenous Issues, “Right to Water and Indigenous Peoples: Fact Sheet” (www.un.org/indigenous).

responsibly steward water and the aquatic habitat that supports all life forms with whom First Nations share their traditional lands and upon whom they depend. As the Special Rapporteur on the human right to safe drinking water and sanitation affirms, Indigenous peoples' human rights, particularly in the context of their right to water, are "indivisible, interdependent and interrelated."⁵

Water Legislation Must Reflect that Aboriginal Title & Rights Exist in BC

34. The BC *Water Act* was developed prior to the enactment of section 35 of the *Constitution Act, 1982* and the many years of litigation that has evolved the jurisprudence on Aboriginal title and rights, and treaty rights. It was also developed when issues such as environmental protection needs and climate change were not known.
35. Any new provincial legislation or policy regarding the allocation of water must reflect the reality that Aboriginal title and rights exist in BC. This is a legal truth that the Province can no longer deny.
36. Aboriginal title is an exclusive legal right to the land itself, and includes both the right to choose how the lands and resources upon it are used and an inescapable economic component. These rights are of the highest order in Canada as they are recognized, affirmed and protected by the Constitution.
37. The right to choose how the lands are used, and how rights are exercised, is governed by First Nations' own laws and legal traditions. The Province does not have authority over these rights.
38. Critical to the discourse on Crown-First Nations relations in BC is the fact that the Province **does not have absolute or perfected Crown title, nor does it enjoy full jurisdiction**, with regard to the lands and resources in BC. Rather, the reconciliation of pre-existing Aboriginal sovereignty with assumed Crown sovereignty remains largely outstanding in BC. Until such time as the land question is resolved, the Province's title and jurisdiction over lands and resources remains, by virtue of s.109 of the *Constitution Act, 1867*, encumbered by unceded Aboriginal title lands.
39. The Province indicates that it has heard this concern and perspective of First Nations through its *Water Act* Modernization process; however, the WSA proposal does not address this reality and, instead, perpetuates the assumption of provincial Crown ownership and jurisdiction and the full "vesting" of water ownership in the Crown. This puts at risk any decisions made under the authority of the legislation that will affect First Nations' Aboriginal title or rights.
40. Rather than relying solely on consultation on specific issues on the ground to address potential impacts on Aboriginal title, rights or treaty rights at an operational level, meaningful engagement at the strategic legislative level represents an opportunity to address key concerns of First Nations and, ideally, minimize potential for conflict on the ground.

⁵ Catarina de Albuquerque, Special Rapporteur on the human right to safe drinking water and sanitation, Statement to the Permanent Forum on Indigenous Issues (24 May 2011). See also United Nations Permanent Forum on Indigenous Issues, "Recommendations Specifically Pertaining to the Right to Water and Indigenous Peoples, adopted by the Permanent Forum on Indigenous Issues", in reference to Tenth Session (7-18 May 2012), E/2011/43, E/C.19/2011/14, para 78.

41. The Province has an opportunity to advance the Crown-First Nations relationship in BC, and the laudable objectives and principles of the *New Relationship*. Working collaboratively with First Nations, it can develop legislation that reflects the existence of constitutionally protected Aboriginal title and rights, and treaty rights, in BC, and the corresponding obligations the Province has to First Nations when it undertakes planning and decision-making with respect to lands and resources. The Province can also promote the meaningful and effective participation of First Nations, and use of traditional knowledge, in water stewardship, planning and decision-making.

Division of Powers and Jurisdictional Interplay

42. The *Constitution Act, 1867* sets out the division of powers between the federal and provincial governments. Water is not listed as a separate matter within the Constitution. Rather, water (and the environment generally) has been managed through a mix of provincial and federal statutes, as part of the management of other resources.
43. Sections 91 and 92 do not exhaustively set out all powers under the Constitution. *Campbell* confirms that First Nations continue to have inherent self-government authority.⁶ **There exists legal pluralism in Canada that includes the common law, the civil law and Indigenous law.**
44. Recognition of Indigenous legal orders by the Supreme Court of Canada, and supported by international mechanisms and instruments such as the UNDRIP, helps create space and guiding principles for meaningful reconciliation. It means that tools recognized by, but apart from, the common law are available to bridge the gap and create opportunities for two legal traditions to operate together as a manifestation of the legal pluralism that exists in Canada but has yet to realize its full potential through law, policy and agreements. Reconciliation under section 35 (and the common law) arises from

...the beginnings of Canadian history that witnessed three distinct peoples intersect and come together to form the foundation of modern Canada in the aftermath of the Seven Years War, the American Revolution, and the War of 1812. These founding nations are the Aboriginal peoples of Canada, the French and the British respectively, and their relationship constituted Canada.⁷

45. Indigenous legal orders, then, form a part of the constitutional fabric of Canada and must be visible in the go-forward First Nations-Crown relationship.
46. An important element of water management and decision-making, therefore, which has not historically been fully considered, and which is not addressed or reflected in the proposed WSA, is the **interplay between Aboriginal rights, and treaty rights protected under section 35(1) and the provincial and federal legal framework for water management.**

⁶ 2000 BCSC 1123

⁷ Peeling, A. and J. Hopkins, "Aboriginal Judicial Appointments to the Supreme Court of Canada", A Paper Prepared for the Indigenous Bar Association, April 6 2004, at p. 5.

47. Since the enactment of section 35(1), the Courts have clarified that there are **constraints on the exercise of Crown discretion**. Section 35 places limits on Crown sovereignty, for the purpose of ensuring that Aboriginal and treaty rights are recognized and affirmed.⁸
48. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. It is widely understood that the honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty.⁹ In all situations, the Crown's duty requires it to engage substantively and meaningfully with First Nations at an early stage and to demonstrate a good faith intention to fully engage at each successive stage of decision-making as part of its ongoing duty.
49. The honour of the Crown is at play where the government develops regulatory schemes to govern and manage resource use. Parliament may not simply adopt "an unstructured discretionary administrative regime which risks infringing aboriginal rights..." and if a statute confers an administrative discretion that may carry significant consequences for the exercise of an Aboriginal right, it "must outline specific criteria for granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights."¹⁰
50. The WSA proposal does not address First Nations interest in any cognizable way and, so, the exercise of discretion by statutory decision-makers under the Act, including those who may be delegated authorities, is entirely ambiguous, really, unknown.

International Discourse

51. International laws and standards provide important guidance regarding State-Indigenous relations, and the protection and enjoyment of Indigenous human rights. The UNDRIP offers guidance on how this may be achieved by setting minimum standards, including steps to be taken by the State, for the protection of Indigenous human rights.
52. The right to water is a human right that is protected in a wide range of international instruments, including the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, and the UNDRIP.¹¹
53. As observed by the United Nations Permanent Forum on the Rights of Indigenous Peoples:

"Policies to privatize and individualize water rights creates enormous dangers for indigenous peoples because there is concern that regulations around access to water systems have enabled and permitted the abuse of water supplies on which indigenous peoples depend. Climate change, drought, mismanagement and over-allocation of

⁸ Dr. John Borrows, "Let Obligations Be Done", in J. Webber, H. Foster and H. Raven, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Aboriginal Rights* (Vancouver: University of British Columbia Press, 2007) at 201.

⁹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para 18.

¹⁰ *R. v. Adams*, [1996] 3 S.C.R. 101.

¹¹ United Nations Permanent Forum on Indigenous Issues, "Right to Water and Indigenous Peoples: Fact Sheet" (www.un.org/indigenous).

water as well as deforestation, extractive industries, intensive agricultural practices and the use of agro-chemicals has significantly decreased the availability and quality of water resources. This has subsequently caused harmful impacts on lives of indigenous peoples such as disadvantages in health; economy and social well-being; compromised cultural and linguistic diversity and displacement...[and] the loss of significant landscapes and sites of spiritual, historical, and cultural importance.”¹²

54. The UNDRIP, endorsed by Canada in 2010, establishes **minimum standards** in this regard, including:

Article 18: Indigenous peoples have the **right to participate in decision-making** in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 25: Indigenous peoples have the **right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources** and to uphold their responsibilities to future generations in this regard.

Article 32: 1. Indigenous peoples have the **right to determine and develop priorities and strategies** for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free and informed consent prior** to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

55. Canada has endorsed the UNDRIP and the standards set out therein are applicable in Canada. It is therefore incumbent upon provinces, in upholding the honour of the undivided Crown, to adhere to these standards in order to respect and uphold the human rights of the Indigenous peoples in Canada.

56. The United Nations Conference on Sustainable Development (UNCSD), also known as Rio+20 (or Earth Summit 2012) was the third international conference on sustainable development aimed at reconciling the economic and environmental goals of the global community. Hosted by Brazil in Rio de Janeiro in June 2012, Rio+20 was a 20-year follow-up to the 1992 Earth Summit / United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro. It was also the 10th anniversary of the 2002 World Summit on Sustainable Development (WSSD).

¹² United Nations Permanent Forum on Indigenous Issues, “Right to Water and Indigenous Peoples: Fact Sheet” (www.un.org/indigenous).

The outcomes document, "The Future We Want," was a nearly 50 page document in which the heads of state of the 192 governments renewed their political commitment to sustainable development and declared their commitment to the promotion of a sustainable future.

57. The Rio+20 outcomes document makes a number of non-binding commitments. For example, it recognizes water as being at the core of sustainable development as it is linked to key global challenges. They also recognized the key role that ecosystems place in maintaining water quantity and quality and undertook to support actions to protect and sustainably manage these ecosystems. The participants also reaffirmed their commitment to regarding the human right to safe drinking water and basic sanitation. In the case of Canada, it was the first formal recognition of water as a human right.
58. As recently at November 25-27 2013, a technical workshop brought together around thirty senior-level water managers, economic planners and statistical experts from fifteen countries to identify priority actions to strengthen institutional capacity for implementing a more holistic water agenda in the post-2015 development framework. The Workshop was organized by the Division for Sustainable Development in collaboration with the Statistics Division supported by UNICEF, the World Bank, UNEP-DHI and UN-Habitat (<http://sustainabledevelopment.un.org/index.php?page=view&type=12&nr=778&menu=1532>).
59. The participants at this Workshop highlighted the importance of water as a resource and a human right, and reinforced why a more holistic water agenda for the post-2015 development framework needs to go beyond water, sanitation and hygiene, to one that includes water resource management and water quality/wastewater management.

Treaties and Treaty Negotiations

60. A small number of treaties exist in BC that reference First Nations rights related to water and water resources. For example, the Douglas Treaties on Vancouver Island include the right to "carry on their fisheries as formerly", and Treaty 8 in northeastern BC guarantees the rights of hunting, trapping and fishing "for as long as the rivers run". The honour of the Crown requires that these treaty promises be upheld and necessitate a government-to-government approach, within the context of this treaty relationship, to ensure these rights remain capable of being exercised by future generations.
61. Modern treaty negotiations have been underway in BC under the BC treaty negotiation process, overseen by the BC Treaty Commission, for more than 20 years. Rights to water are a key component in these comprehensive negotiations about jurisdiction and ownership of lands, waters and resources. For First Nations, water is interconnected with the lands and resources that it is a part of – these cannot be divided.
62. Only two final agreements have been concluded under this process and are being implemented. The Nisga'a Final Agreement is a modern day agreement concluded outside of the BC treaty negotiation process. The final agreements generally provide water reservations for First Nations and require the government to consult with the local First Nation about the issuance of public water licences. They also contain provisions regarding the extraction and use of groundwater. For example, where BC brings into force provincial law regulating the volume of groundwater under the First Nations Lands which may be extracted and used, BC must negotiate and attempt

to reach agreement with the First Nation on the volume of groundwater which may be extracted and used for domestic, agricultural and industrial purposes by that First Nation on its Lands.¹³ The final agreements also contain provisions regarding certain First Nations law-making powers in relation to water and circumstances under which First Nations consent is required. The Maa-Nulth Final Agreement also includes provisions for hydropower reservations.¹⁴ The Tsawwassen Final Agreement does not include water reservations but, rather, provides that the First Nation will receive water from the Great Vancouver Water District.

63. The Province comes to treaty negotiations with a mandate focused on ensuring its water management regime applies within the treaty context, leaving little room for true negotiation. In addition, the application of the “first in time, first in right” principle is a central facet of this regime and is problematic in the context of treaty negotiations. The Province fails to recognize First Nations as the true first users of the resource and instead First Nations’ place in line is determined by when the allocation is actually made, not when it is initially reserved. Given the slow pace of negotiations, this is detrimental to First Nations.
64. There is great opportunity, if the political will exists, to ensure that First Nations have early and meaningful access to and exercise governance over water and water resources, prior to treaties being concluded. This can be achieved through interim measures agreements where treaty negotiations are underway.

Water issues

65. First Nations have a number of significant concerns about the future of water and water resources in their respective territories. We point to the **First Nations Water Strategy**, recently endorsed by First Nations leadership in BC. This Strategy includes a vision and principles held by First Nations in relation to water and water resources. It also provides an overview of the nature and scope of First Nations interests, concerns and perspectives on water, including for example:
 - a. The existence of approximately 44,000 active water licences in BC;
 - b. Insufficient water access in First Nations communities for community and economic purposes and lack of safe drinking water;
 - c. Declining groundwater levels in wells;
 - d. The significant number of applicants for water licences by independent power producers;
 - e. Increasing demand on water resources, particularly for purposes of major resource development;
 - f. Water loss due to increasing shale gas development and hydraulic fracturing (fracking);

¹³ See Maa-Nulth First Nations Final Agreement, section 8.5.0.

¹⁴ *Ibid*, section 8.6.0.

- g. Climate change;
 - h. Recent unilateral federal legislative initiatives that significantly altered or overhauled key legislation intended to provide environmental and species protection (commonly referred to as Bills C-38 and C-45), as well as legislation addressing safe drinking water, without consulting with First Nations; and
 - i. Development of provincial legislation relating to natural resources (e.g. water, mining), on the premise of absolute provincial ownership and jurisdiction.
66. These examples demonstrate the serious nature of issues faced by First Nations and other water users. First Nations have gone so far as to call for a moratorium on water licences, which lock in rights of access to water supplies for extended periods of time, without appropriate consideration of cumulative effects and changing circumstances.
67. Access to safe drinking water is an ongoing issue for many First Nation communities. In 2005, Canada's Office of the Auditor General charged its Commissioner of Environment & Sustainable Development (CESD) with reviewing the status of First Nations drinking water. The CESD reported that, despite a significant amount of federal funds invested, there remains a significant proportion of drinking water systems in First Nations communities that continue to deliver drinking water whose quality or safety is at risk. Of particular concern is that, as of June 30, 2009, the Canadian government reported that 110 First Nations communities across Canada are under a "drinking water advisory". Of those 110, the federal government indicated that 21 are at high risk.¹⁵
68. Currently in BC there is a significant emphasis on major resource development that underpins the Province's *Jobs Plan*. Focal developments include oil and gas, in particular liquefied natural gas, as well as mining. Included in this is interest in shale gas development, using hydraulic fracturing (fracking) technology. The proposed WSA appears to be designed to help facilitate development, for example by moving some decision-making to the Oil and Gas Commission.
69. All proposed developments are located in First Nations territories and each would require or substantially affect water and water resources. A thoughtful approach is required in considering the impacts generally, specifically and in terms of cumulative effects. First Nations must be a decision-maker in whether and how water and water resources are used. They must have the opportunity to meaningfully assess proposed development, and to apply their own traditional knowledge within the decision-making processes.
70. Recently, major federal legislative changes, such as the replacement of the *Canadian Environmental Assessment Act* and major changes to the *Fisheries Act*, *Species At Risk Act* and *Navigable Waters Protection Act*, have created a whole new set of challenges in the context of managing water and water-related resources.
71. Too often, First Nations "face increasing competition for their scarce water reserves from agricultural plantations, as well as from hydroelectric, mining and commercial entities. In many instances, the privatization of water, combined with the failure to provide indigenous peoples

¹⁵ Merrell-Ann Phare, *Deny the Source: the Crisis of First Nations Water Rights* (Surrey: Rocky Mountain Books, 2009) at p.7.

with timely and adequate information about how to register their water rights, ignores and abuses indigenous peoples' right to water."¹⁶ Canadian water resources are also experiencing growing stress from urban land development, pollution, climate change, and logging of watersheds from which Indigenous communities draw their domestic water supply.¹⁷

72. Current legislation and policies have created water disputes on the ground. Many First Nations have had to legally challenge the governments and proponents in various review and assessment processes, quasi-judicial processes and in court with regard to development projects that would significantly impair or destroy important water resources (e.g. the proposed expansion of a gold and copper mine that would dump 800 million tonnes of tailings and waste rock into the pristine, high elevation, freshwater lake called Amazay Lake). First Nations are continually forced into lengthy and costly litigation and other processes to advance their Aboriginal title and rights as a means of protecting the environment against unsustainable development and practices. This perpetuates a relationship with the Crown, and proponents, based on conflict, rather than mutual respect and cooperation.
73. The range and magnitude of issues and concerns has resulted in some First Nations in BC issuing Declarations or policies setting out their rights and positions in relation to water (e.g. Simpcw Water Declaration and the International Indigenous Declaration on Water).
74. Given these challenges and realities, First Nations welcomed the following commitments made by the provincial government in the *Living Water Smart British Columbia's Water Plan*. These commitments are a result of the provincial government's overall strategy to respond to modern expectations, as well as to promote stream health and water resource sustainability¹⁸:
 - a. Government will improve the quality and protection of drinking water sources, particularly in First Nations communities;
 - b. Tools to incorporate traditional ecological knowledge into information and decision-making will be developed by 2015; and
 - c. Government will continue to work toward preserving First Nations' social and cultural practices associated with water.
75. First Nations share the BC government's objective of improving water governance and protection, **if they are achieved on the basis of recognition of Aboriginal title and rights, and with the full involvement of First Nations.**

¹⁶ United Nations Permanent Forum on Indigenous Issues, "Recommendations Specifically Pertaining to the Right to Water and Indigenous Peoples, adopted by the Permanent Forum on Indigenous Issues", in reference to Tenth Session (7-18 May 2012), E/2011/43, E/C.19/2011/14, para 81.

¹⁷ Karen Bakker, ed., *Eau Canada: The future of water governance in Canada*. Vancouver: UBC Press, 2006 at pp.304-306.

¹⁸ *Living Water Smart. British Columbia's Water Plan* may be accessed online at <http://www.livingwatersmart.ca/book/>.

Comments on the Proposed Water Sustainability Act

General

76. The Province's proposed WSA, provided September 20, 2013, is "intended to communicate the key concepts and ideas" underlying the proposed new WSA. The proposed WSA is comprised of 5 parts:

Part 1: The Current Legislative Framework

Part 2: A Legislative Proposal for a New Water Sustainability Act

Part 3: Water Fees and Rentals

Part 4: Implications: Costs and Benefits

Part 5: Overview of Engagement Response

77. The Province intends to "modernize" the *Water Act*, replacing it with the WSA, while also making changes to other related statutes. The WSA would further the "decentralization" of government power, and would address such things as climate change, increasing demand on water resources and the regulation of groundwater.

78. While the WSA proposal includes stated goals in relation to environmental protection and water sustainability, other aspects of the proposal seem to seek to introduce changes to the water management regime to facilitate certain resource development within the province – in particular oil and gas energy development and mining.

79. Further, proposed measures intended to enhance sustainability through decision-making are weak (e.g. Water Objectives need only be "considered" by statutory decision-makers). This creates an inherent tension within the proposal that makes it difficult to discern from the proposal alone whether a true balance can be struck between environmental protection and easing the pathway for resource development.

80. The WSA proposal intends to grant "water rights" through water licences or short-term use approvals. An applicant for a water licence must be "the owner of the land, mine or undertaking where the water will be used." Copies of the application "may also be referred to First Nations" for comment and input.

81. There is no reference to a process by which First Nations will be meaningfully engaged early on (i.e. at the outset) in the allocation of water rights by the Province to third parties beyond receiving a referral from the Province. There is no indication that First Nations would be involved in decision-making, nor how their interests or traditional knowledge will be factored meaningfully into decision-making processes.

Fundamental Flaw: Provincial assumption of ownership

82. The proposed WSA will suffer a fundamental flaw from the outset in that it will perpetuate the premise of the "vesting of ownership of water in the Crown" found in early water legislation. As described above, where treaties are not in place in BC, the Province does not have absolute or perfected Crown title; instead, it is encumbered by unceded Aboriginal title lands. This means

that decisions made by the Province in relation to lands and resources including, in particular the grants of interests and allocations through tenures, are legally tenuous.

83. The WSA proposal acknowledges that First Nations have expressed “a key interest” in water, in particular access to water for sustenance, social, economic and ceremonial purposes. First Nations interest in water goes far beyond being a “key interest”. Rather, as described above, First Nations view water, in all its forms and functions, as sacred. Water is essential for all living things and healthy water supplies are critical to the integrity of the environment and ecosystems.
84. So, the Province is choosing to legislate as it has always done – on the presumption of provincial Crown ownership and jurisdiction – and leaving matters related to Aboriginal title rights and interests to processes of consultation and treaty negotiations. This means that First Nations would only have input at an operational level when a specific decision is being contemplated that triggers the Crown’s duty to consult. We have seen where this can end up when considering the Halalt litigation regarding an aquifer crossing under reserve lands and can anticipate further litigation in the future.
85. As described above, this approach fails to address First Nations’ rights and interests at the strategic level. By addressing First Nations concerns in legislation, where the strategic framework is established to guide decision-making, the potential for conflict may be significantly reduced and the protection of environmental integrity greatly enhanced.
86. On a related point, the WSA will continue the principle of “first in time, first in right” (also known as FITFIR) that exists under the current *Water Act*. This principle, as applied by the Province, does not acknowledge the fact that First Nations are the true first users of water and water resources, having used these resources since time immemorial.
87. The WSA must recognize that First Nation were here first and are, therefore, the real “first users” of water and resources and also that First Nations have a priority *interest* in water and water resources held by First Nations, which is required where First Nations hold Aboriginal rights to a resource.¹⁹
88. The legislation, based on input from First Nations, must ensure First Nations’ right to access safe, clean, accessible and affordable water for personal, domestic and community use, and respect First Nations’ perspectives about water as a social and cultural good, not primarily as an economic good. Legislation must recognize and protect First Nations’ cultural right to water and support the right of First Nations to hunt and gather food resources from waters used for cultural, economic and commercial purposes.²⁰
89. The appropriate approach would be to engage with First Nations on a government-to-government basis to set the strategic framework for water allocation to their respective territories.

¹⁹ See *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

²⁰ As recommended also by the United Nations Permanent Forum on Indigenous Issues, “Recommendations Specifically Pertaining to the Right to Water and Indigenous Peoples, adopted by the Permanent Forum on Indigenous Issues”, in reference to Tenth Session (7-18 May 2012), E/2011/43, E/C.19/2011/14, para 82.

Seven (7) Policy Directions of the Proposed WSA

Protecting stream health and aquatic environments

90. The proposed WSA discusses Environmental Flow Needs (EFNs), which “refers to the quantity and timing of flows in a stream that are required to sustain freshwater ecosystems, including fish and other aquatic life” or, in other words, “maintaining stream health”.
91. First Nations hold significant information about the water systems in their respective territories, based on generations of observations and understandings through to current day. This generations old knowledge is an invaluable data bank of critical information about the sensitivities and resilience of watersheds and resources, which includes, by its very nature, knowledge of cumulative effects of the various uses of the resource.
92. A meaningful government-to-government management regime would allow for the important infusion of First Nations’ knowledge into the planning, use and management of water and water resources. This would include the setting of thresholds and standards to be met in order to ensure the health of a water body or resource.
93. The proposed WSA would now legally require that statutory decision-makers “consider” EFNs when reviewing applications for water allocations or changes to existing water licences. Given the fundamental need to protect stream health, this is a very weak and ambiguous protection measure. If protecting stream health is a priority of the Province, then facilitating EFNs must be mandatory, and the decision-making process must limit the exercise of discretion and set out clearly how EFNs will be factored into the decision as a priority matter.

Considering water in land use decisions

94. The proposed WSA provides that Water Objectives would provide strategic direction for decision-makers for understanding, protecting and managing water quality, water quantity, and aquatic ecosystem health when making decisions that have potential for impacting the water resource. Water Objectives would help “provide clarity and consistency in decision-making and would create a common approach” to decision-making.
95. Again, First Nations have existing title and rights, including governance rights. They also have particular water needs, their own laws and legal orders, and wealth of local traditional knowledge. First Nations must have a key role in establishing Water Objectives in their respective territories to contribute to the “clear and consistent” decision-making over water and water resources.
96. Assuming Water Objectives would be a form of legal tool that can be applied to ensure that certain objectives, standards or thresholds are met in relation to decision-making around a particular area of land or resource, there is great potential in applying them in the context of a shared management regime. Currently, however, there is no mention of any process by which First Nations will be engaged in decision-making under the WSA and, so, the implication is that there will be decision-making by the Province with, perhaps at best, “input” from First Nations.

97. The WSA proposal states that Water Objectives “could” be established to address water quality, water quantity and aquatic ecosystem health. Again, the Province is opting for weak language of requiring decision-makers to “consider” the objectives to the “degree practicable”. This is ambiguous and it is not clear how much discretion a decision-maker will actually hold.
98. The WSA proposal would replace current Water Management Plans with Water Sustainability Plans as a planning tool. First Nations must be an integral party (not stakeholder) to any resource plans, on a government-to-government basis, in their respective territories.
99. More broadly, First Nations need to be supported in developing their own resource plans, and broader territory plans, as governance tools to support their role as decision-makers, consistent with the *New Relationship*.

Regulating and protecting groundwater use

100. Under WSA, the Province proposes to, for the first time, establish a regulatory framework for existing and new groundwater extraction and use.
101. This framework will parallel the “first in time, first in right” framework that governs surface water use and diversion and the Province proposes to grant licences to existing users (except domestic well users) based on their historical use to establish order of priority.
102. Again, First Nations must be recognized and respected as the true first users, and have their current range of needs assured.
103. Further, it is unclear whether the securing of interests of current users through licences will entail a consideration of the sustainability of those uses. It is unclear as well if there will be uses given priority (e.g. EFNs, drinking water). On its face, it appears that the licences will be granted automatically, potentially securing unsustainable or undesirable uses of groundwater and potentially affecting domestic well users.
104. A thoughtful, strategic approach is needed to implement a management regime with regard to groundwater. Because First Nations rely heavily on groundwater (e.g. aquifers running under reserve lands) and have rights to groundwater, they must be a party to establishing appropriate plans, priorities and thresholds in their respective territories. Also, groundwater cannot be addressed entirely separately from surface water, as they are interconnected (groundwater may become surface water) and must be viewed holistically to ensure protection of the overall health of the resource.
105. First Nations must be engaged with regard to any and all uses of groundwater, and allocations, to ensure a comprehensive approach to water governance that anticipates and monitors all impacts, including cumulative impacts.

Improving security, water use efficiency and conservation

106. The “first in time, first in right” water management approach holds that the earlier water licence holder has priority over more recent licensees in times where water supplies cannot meet the demands of all licence holders (i.e. during times of scarcity).
107. The proposed WSA would allow the decision-maker to regulate water using this system, with some modifications. For example, decision-makers would be provided with explicit authority to regulate water use for the purposes of protecting Critical Environmental Flows on a temporary basis.
108. Fundamentally, planning for and responding to times of water scarcity must engage First Nations from the outset, on a government-to-government basis. Some First Nations communities experience drought situations regularly. Others may begin to experience scarcity where their water sources are overburdened by user demands. These plans and response mechanisms need to be jointly identified and developed, and a mutual plan for implementation agreed on.
109. The WSA proposal notes that under the current *Water Act*, an engineer has broad discretion for determining what constitutes a “beneficial use” of water.
110. The proposed WSA would include “beneficial use” requirements for licensees and short-term use approval holders (i.e. private interests). The proposal defines beneficial use as “using the licensed volume of water for the intended purpose(s) and in compliance with the terms of the water licence.” It is unclear how the Province came up with this definition or what purpose it is intended to serve. Arguably, this definition speaks more to compliance; that is, using a licensed volume of water for intended purpose(s) in accordance with a licence. Applying the term “beneficial use” raises questions as to its purpose, who will determine what is a beneficial use and whether how this determination may affect a water licence or short-term use approval.
111. Using the term “beneficial” implies that uses will be assessed against priorities, standards and/or thresholds (e.g. a standard of reasonableness or a conservation priority). For example, fishing may be a beneficial use. Or, a water use contributes to ensuring Environmental Flow Needs. Standards may also set out what may be determined or deemed to not be a beneficial use (e.g. wasteful uses). However, it is not clear that this is the intent.
112. Again, First Nations have a rightful governance role in setting principles that guide decision-making in any water management regime. They have important traditional knowledge that would help to establish relevant and necessary standards and thresholds for effective water management.

Measuring and reporting

113. The proposed WSA would enable the development of a regulation requiring larger water users to measure, record and report actual water use and related information on a more comprehensive and consistent basis. This would support compliance verification with licensed water volumes and promote water use efficiency.

114. Effective resource management regimes must include monitoring and reporting. Such processes must be robust, transparent, accountable and accessible. Data collected must equip decision-makers to make sound decisions.
115. While the WSA proposal suggests some elements of this process, it leaves the details on how monitoring and reporting will be carried out to the regulation. First Nations must be a party to identifying and determining appropriate monitoring and reporting systems. Critically, First Nations must have ready access to data about water diversion and use within their respective territories.

Enabling a range of governance approaches

116. The WSA proposal intends to enable a framework to support a range of approaches for water and watershed governance in the province, such as through regulations. Regulations may allow for “delegation of particular authorities”, the creation of “advisory groups for both surface and groundwater” and “other governance approaches.”
117. The notion of delegating authority arises from the Province’s continued assertion of ownership and jurisdiction. As described above, the Province does not have perfected title or jurisdiction over the lands and resources, including water and water resources.
118. Again, section 35 of the *Constitution Act*, and the commitments in the *New Relationship*, set out a framework for a new governance relationship that entails shared planning, management and decision-making, as well sharing in revenues and benefits arising from the use of resources. First Nations are not mere stakeholders.

CONCLUSIONS

119. The *Constitution Act, 1867*, which sets out the division of powers between the federal and provincial governments, does not specifically provide for jurisdiction over water as a separate matter, nor does it exhaustively distribute all powers among the federal and provincial governments.
120. Generally, water has been managed through a mix of provincial and federal statutes. The current *Water Act* is outdated and requires updating.
121. A new regime must reflect the legal reality that title and jurisdiction over land and resources in BC remains subject to reconciliation by the Crown and First Nations through honourable negotiation of treaties or other agreements. A new regime must reflect the interplay between provincial authority and First Nations’ rights and authority under section 35(1).
122. Generally, First Nations support fundamental principles that focus on sustainability, protection of the resource, and assured access by First Nations communities for subsistence and other uses. Protection and sustainability must be primary principles that are taken into consideration by all decision-makers prior to making any decisions that involve or may have an indirect impact upon water resources.

123. The Province's approach to water governance has largely been to manage water as a commodity – a resource to be exploited for economic gain. This contrasts with the near opposite worldview of First Nations who primarily view water and water resources as essential for life and a resources to be valued and protected first and foremost.
124. The Aboriginal right to water flows from the historic and on-going connection of First Nations to their traditional lands and resources. Aboriginal title and rights include the ability of First Nations to make decisions about their lands and resources, and to benefit from the resources that are used or extracted. Until recently, government legislation, regulations and policies have largely ignored the existence of the Aboriginal right, which has led to recent water disputes with a number of First Nations.
125. Any contemplated legislative changes that impact significantly on Aboriginal rights and title must be developed in collaboration with First Nations. First Nations are prepared and able to engage in discussion on an equal government-to-government basis. Indeed, the modernization of the provincial *Water Act* is an opportunity for the Province to live up to its commitments in the *New Relationship* and to embark on shared planning, management and decision-making, and benefits sharing, based on mutual recognition.
126. First Nations have a unique constitutionally grounded role in ensuring sustainable development occurs in BC. First Nations may rely on and exercise their inherent rights as a means of stewarding the lands and resources responsibly. In doing so, they are guided by their own laws and invaluable traditional knowledge that have enabled them to be effective stewards of the resources since time immemorial, and which equip First Nations to be partners in shared processes going forward.