

WATER PROTECTION: THROUGH THE RESPONSIBLE USE OF OUR TREATY & INHERENT RIGHTS



**CHIEFS
OF ONTARIO**



PRESENTATION BY:

ONTARIO REGIONAL CHIEF ISADORE DAY

&

LEAH BALLANTYNE, LLM

CHIEF OF STAFF TO ONTARIO REGIONAL CHIEF DAY

MESSAGE FROM ONTARIO REGIONAL CHIEF ISADORE DAY----PROTOCOL

- Acknowledgement of the traditional territory of the Musqueam, Squamish and Tseil-Waututh Territory
- To the Creator, Creation; especially today in honour of “**Nippi – Pimastisiwin,**” which in Cree translates to “***Water Is Life***”
- To the Protocols and Prayers that are maintained and offered by our Elders and Faith Keepers in all of our regions and First Nation communities – Kinanaskowmitinaw
- To our Water Keepers and Water Protectors, our humble appreciation for sustaining that which sustains life --- Water



CHIEF ISADORE DAY
ONTARIO REGIONAL CHIEF

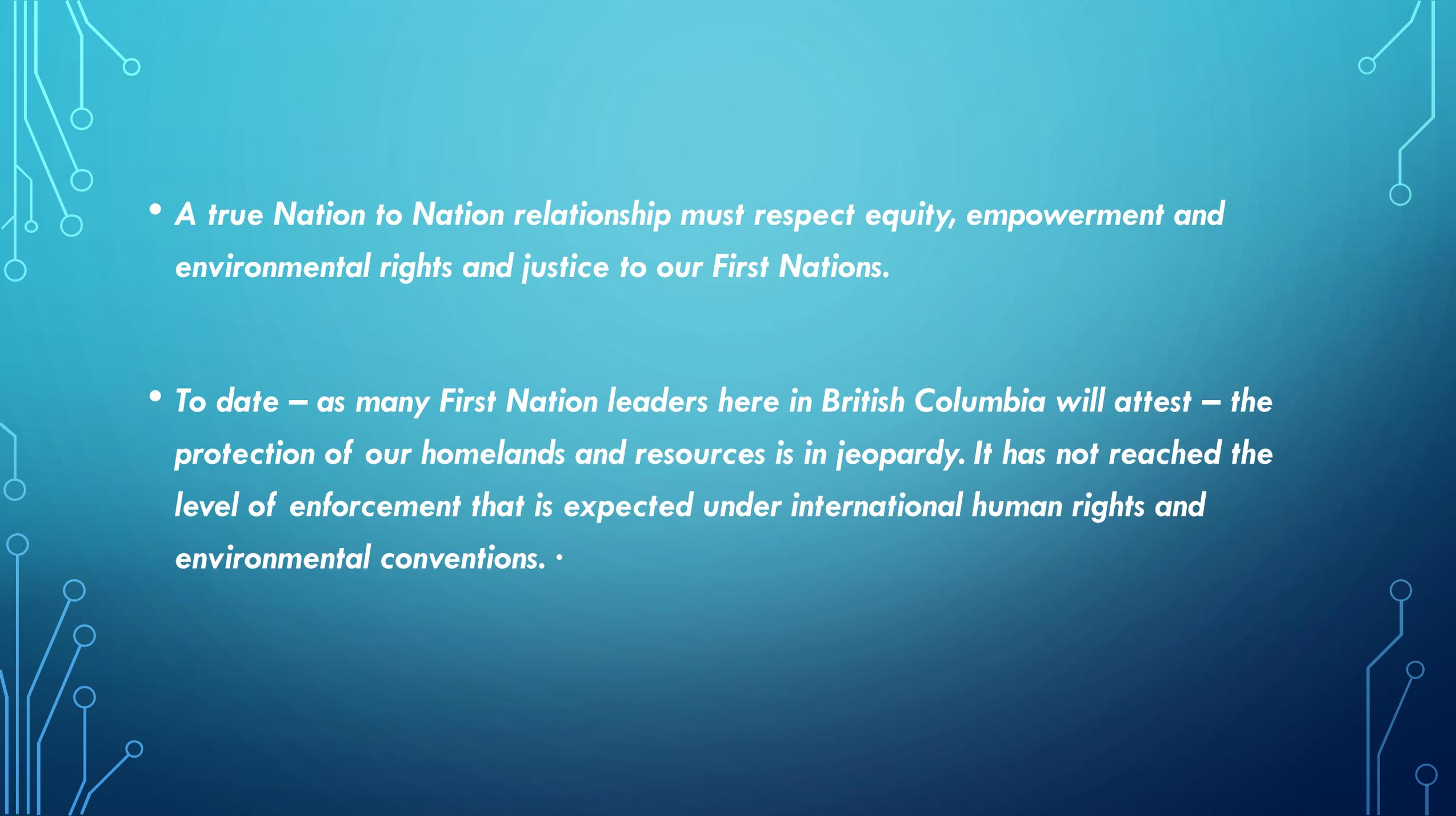
- *Acknowledge traditional territory.*
- *Acknowledge leadership, Elders, youth, delegates.*
- *Special acknowledgement of Youth Water Advocate Autumn Peltier.*
- *Autumn's commitment to clean water is a reminder of the work we do as leaders. The most critical work we must do is to preserve our planet – our lands, waters, and air – for future generations.*

- *In Ontario, we believe in our sovereign and treaty rights to the land, waters, energy, and food. As we speak, the federal government is reviewing four critical pieces of legislation that will have major impacts to all our Peoples, from coast to coast.*

- *As you know, the federal government claims to want a new nation-to-nation relationship with our Peoples. Every minister has a mandate letter which states that “no relationship is greater than that with Indigenous Peoples.”*
- *In this spirit of a new relationship, I participated as a co-chair on the AFN Advisory Committee on Climate Action and the Environment (ACCAE).*
- *Last year, we began a joint review of those four critical pieces of legislation: The Canadian Environmental Assessment Act, the National Energy Board Modernization, the Fisheries Act, and the Navigation Protection Act.*

- *Last October, my fellow co-chairs – Regional Chief Kevin Hart and Regional Chief Bill Erasmus – sent a letter to Prime Minister Trudeau. We expressed our frustration at the lack of transparency in dealing with the government on this joint review. •*
- *There was no true Nation-to-Nation relationship.*
- *Instead, we were told that “cabinet confidentiality” would prevent a true, equal co-drafting of legislation. •*

- *Last month, I resigned as a co-chair.*
- *In all good conscience, I could not and cannot participate in a process that may infringe and result in damaging our Constitutional, treaty and sovereign rights to the lands, air and waters.*

- 
- The background is a dark teal color with decorative white circuit-like lines in the corners. These lines consist of straight lines and small circles, resembling a network or data flow diagram. The lines are more dense in the bottom-left and top-right corners.
- *A true Nation to Nation relationship must respect equity, empowerment and environmental rights and justice to our First Nations.*
 - *To date – as many First Nation leaders here in British Columbia will attest – the protection of our homelands and resources is in jeopardy. It has not reached the level of enforcement that is expected under international human rights and environmental conventions. •*

- *Canada proclaims it has accepted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) “without qualification”. However, the rights of our First Nations continue to be negatively impacted by decisions and policies from both the provincial and federal Crown.*
- *In Ontario, we continue to assert the need for respect, equity and empowerment through the voices of our ancestors. We continue to assert through the wisdom of our elders, the convictions of our women as water keepers, the hopes and dreams of our youth ambassadors -- and the future of ‘the faces below our feet, yet to come’.*

- *The Chiefs in Assembly in Ontario continue to call upon the Crown to adhere to its obligations and responsibilities under UNDRIP, Section 35 of the Constitution, treaty relations, and international human rights conventions. •*
- *Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) speaks on the rights to lands, territories and resources. Article 29 declares the right to conservation and protection of the environment. •*
- *Several Articles throughout declare the need for free, prior and informed consent (FPIC) from Indigenous peoples for all land, water and environmental decisions or activities that could impact Indigenous, lands, territories and resources. •*

- *Our Ontario Chiefs-in-Assembly, our elders, our women, our warriors, and our youth ambassadors will continue to raise their voices on this important matter of **WATER SECURITY.***
- *We believe that water is a living, legal entity through treaty.*
- ***-END-** of Speaking Notes for Regional Chief Isadore Day*

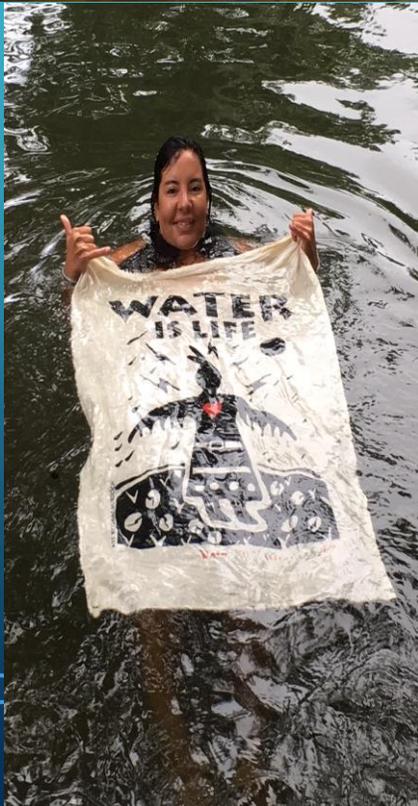
INTRODUCTION

- My name is Leah Ballantyne and my Cree name is "Mikisew Iskwew"
- Pukatawagan ochi, that's where I come from
- Our First Nation signed adhesion to Treaty 6 in 1910, and we are the only Cree Nation in Manitoba that is part of Treaty 6
- All waters were part of our territories and was not something we gave up during Treaty-making
- In exercising my rights and responsibilities as a Treaty partner, I advocate for our people and our territories
- I am currently the Chief of Staff in the Office of Ontario Regional Chief Isadore Day in his capacity at the Assembly of First Nations, and at Chiefs of Ontario

FIRST NATIONS HAVE A RESPONSIBILITY TO EXERCISE OUR RIGHTS IN THE AREA OF WATER PROTECTION

- My personal responsibility for water protection includes professional advocacy & stewardship
- I'm an active scuba diver and participate in water and shoreline cleanups
- I have a deep love and respect for all waters





LEGAL TOOLS FOR WATER PROTECTION

- Here in our territories, we know that First Nations submissions in support of water protection were made in regards to *the Environmental and Regulatory Review Processes*
- We know that the AFN and Canada had agreed to a bilateral “joint drafting process” that would have presumably included co-development of new legislation, regulations, policies and programs
- We know that Crown decisions impacting the rights and interests of our First Nation, require our **Free, Prior and Informed Consent**.

- First Nations must continue exercising our rights and responsibilities via Treaty, Inherent, Constitutional and International law for the protection of water
- There are a great many examples of First Nations exercising rights to protect water
- but!
- Given limited time for presentation and depth, and the most recent developments to the suite of Environmental legislation,
- I am going to explore a few International examples of legal protections specific to Rivers, and limit the depth of discussion as introductory to the topic

EXAMPLES OF INTERNATIONAL LEGAL PROTECTION OF RIVERS

- In recent years, rivers have received a lot of attention internationally, and some have been afforded some unique legal protections
- Certain rivers have been afforded legal personality, similar to what is afforded corporations worldwide under “separate legal entities”, or “rights and liabilities of a legal person”

EXAMPLE # 1

THE WHANGANUI RIVER, AOTEAROA, NEW ZEALAND “TE AWA TAPUA”

- Te Awa Tapua is the longest navigable river in New Zealand, and passes through the traditional territory of the Whanganui Iwi Tribes
- In March 2017, the Parliament of New Zealand gave legal personality to the river, and re-named it “Te Awa Tapua”
- Separate legal personality is a much stronger set of rights than any provided under “rights of nature” doctrines, and is more similar to a corporate entity

TE AWA TAPUA

- Rights for Te Awa Tapua were realized by a lengthy litigation commenced by the Maori Tribe under the Treaty of Waitangi and held in litigation that began in 1920.
- The “heart” of the litigation involved the **ownership of the water itself.**
- The Maori never gave up their right to water during Treaty-making. In fact, culturally and spiritually, the Maori identify as “ONE” with the River itself
- ***Kaitiaki***, or “guardians of the River” and of its “life force” ***Mauri***
- ***“I am the River, and the River is Me.”***

TE AWA TUPUA *WHANGANUI RIVER CLAIMS SETTLEMENT) ACT 2017* (2017/7)

- The Settlement Act derived from petitions to Parliament, Royal Commission Reports, Waitaingi Tribunal Claims, and numerous court cases between 1938 to 2010
- The Act incorporates the legal personality of the river and upholds the spiritual relationship of Whanganui Iwi
- Te Awa Tupua is now legally recognized as “a living entity in its own right and is incapable of being “owned” in an absolute sense

LEGAL EFFECT OF THE SETTLEMENT ACT

- The *Intrinsic worth of the River* is recognized in law
- A *Transfer of Property* from the Crown took place that enables co-governance and *responsibilities* to be identified
- A *monetary fund* of NZD \$30 Million was established for the “*health and well-being of the River*”



EXAMPLE #2

THE RIVER GANGA, INDIA

- The river “Ganga” or “Ganges” is the third largest river in the world
- It is the 5th most polluted river in the world, yet is relied on by over 400 million people for drinking, bathing, fishing, transport and increasingly irrigation
- **On March 20, 2017, the River Ganges, India, and its major tributary Yamuna, were recognized as legal persons in an attempt to restore water health.**
- **The recognition derived from a landmark court ruling just 5 days after New Zealand awarded similar rights to Whanganui River - its own spiritual river. Those three rivers are now the first in the world to have all rights that persons have.**
- On Monday, March 20, 2017, the highest court in the Indian state of Uttarakhand, where the Ganges originates, declared the Ganges and Yamuna as 'living entities having the status of a legal person' and all corresponding rights.

- The state's High Court said it took "extraordinary measures to preserve and conserve the rivers" because the hallowed rivers upon which Hindu rites are conducted were "losing their very existence".

The Court invoked "*Parens Patriae*" – a common law doctrine of guardianship over public resource

Many celebrated the groundbreaking ruling but cautioned against over-optimism given the scale of the task at hand.





EXAMPLE #3

THE ATRATO RIVER, COLUMBIA

- The Atrato River is one of the most biodiverse rivers in the world
 - It is home to Indigenous Columbians who rely on it as a principal source of food and water in the Choco Region
 - The River is severely degraded due to mining and forestry practices, as well as cartel and the drug-trade
- 
- 

TIERRA DIGNA “EARTH DIGNITY” LEGAL CHALLENGE

- “Tierra Digna” or “Earth Dignity” filed a Constitutional Case citing Indigenous Rights as a means to halt mining operations on the Atrato River
- Evidence also relied on “illegal” mining that also caused environmental degradation and violations of fundamental human rights
- The Columbian Court held that state authorities were responsible for “*the right to life, health, water, food security, the right to a healthy environment, as well as cultural and territorial rights of the ethnic communities.*”
- The Court also inferred the *concept of biocultural rights into Columbian Constitutional law*

- The Court made an Order pronouncing ***”The Atrato River as a legal subject with specific rights, regarding its protection, conservation, maintenance and rehabilitation.”***
- The Columbian Court further ordered:
 - A Commission of guardians
 - An Advisory Body of Experts
 - Clean-up Measures



EXAMPLE #4

THE VILCABAMBA RIVER, ECUADOR

- The Constitution of Ecuador 2008, Art 275 states:
 - *“Buen Vivir”* which requires that *individuals, communities, peoples and nations...exercise their responsibilities in the context of interculturalism, respect for diversity and harmonious co-existence with nature.*”
 - ...and *“the right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and good living (Title VII, Art. 14).*

CORTE CONSTITUCIONAL DEL ECUADOR, 2015

- **“Rights of Nature”** and **“*buen vivir*”** are central to the Ecuadorian Constitution
- **13 Cases** have involved the application of these ***Constitutional Rights of Nature provisions***
- The Court balanced the rights of the Vilcabamba River with the human needs of development (in this case road widening)
- The Court Ordered the Provincial government to remedy and rehabilitate existing damage to the river and riverbed

THE SIMILARITIES BETWEEN THE 4 RIVER EXAMPLES

- Recognition of a river as its own *independent legal entity*
- Reliance on *Indigenous, religious or traditional conceptions of property rights & legal relationships*
- Imposition of a duty on the state to *take action to preserve the river for current and future generations*
- Acknowledgment of the *interdependence between indigenous cultures and natural features*

THE DIFFERENCES BETWEEN THE 4 EXAMPLES

- Legal bases of Rights: *Human Rights, Rights of Nature, responsibility*
- Recognition of *ancestral relationships* tied to the river
- Ensuring *responsibility is upheld*
- Creation of *legal personality to the river*



LEGAL TOOLS AVAILABLE FOR WATER PROTECTION FOR FIRST NATION RIGHTS & RESPONSIBILITIES

- UNDRIP
- TRC 94 CALLS TO ACTION
- *S.35 AND S.52 of the Constitution of Canada*
- Treaty and Aboriginal Title and Rights
- *Canadian Charter of Rights and Freedoms*
- First Nation enactments of laws, protocols and expression of guidelines
- Negotiation, agreement and /or litigation(s).
- Protection of water resources through utility and regular activity
- Emerging precedent law locally, nationally and internationally

WHY IT IS IMPORTANT TO CONSIDER ALL LEGAL TOOLS AND RESOURCES AVAILABLE FOR THE PROTECTION OF WATER

- Outcome of SCC decision on the *Mikisew Appeal*
- The Trudeau government's introduction of legislation which will overhaul environmental assessments on major energy projects, including impacts to water

- Environment Minister Catherine McKenna will table a bill **TODAY OR THIS WEEK** to enact:

1. *The Impact Assessment Act*
2. *The Canadian Energy Act*
3. *The Navigation Protection Act*

Fisheries Minister Dominic LeBlanc will table a second bill to amend:

1. *The Fisheries Act*

- We know that First Nations were **NOT AFFORDED** an opportunity by Canada for our First Nation to review and comment on any **Draft Legislation** prior to submission to Governor in Council for this week's tabling of bills.

THE MIKISEW CASE

- This past January 2018, the SCC heard the Mikisew Appeal from the Treaty 8 Territory in Alberta.
- MIKISEW could impact our First Nation role in the creation of legislation where it involves Treaty Rights
- in December 2016 the Federal Court of Appeal allowed the appeal of the Governor General in Council & 6 federal government Ministers on finding they breached their **duty to consult** the Mikisew Cree on the omnibus bills that reduced federal regulatory oversight of works and projects that may affect the Treaty Rights of the Mikisew Cree.

- The Federal Court of Appeal held in *Canada (Governor General in Council v. Mikisew Cree First Nation* [2017] 3 FCR 298, 2016 FCA 311; that “while federal ministers have executive powers in their responsibilities for their departments pursuant to the statutes, those statutes do not refer to the ministers’ roles as policy-makers or to the development of the legislation for introduction into Parliament.”
- Those roles flow from the Constitution and from Canada’s system of parliamentary democracy.
- Interveners in the **Mikisew** case are many and include the attorney generals of Quebec, New Brunswick, British Columbia, Saskatchewan and Alberta, several Yukon First Nations, The Assembly of First Nations, the Grand Council of the Crees, the Manitoba Metis Federation, and Advocates for the Rule of Law.

POSSIBLE OUTCOMES TO THE SCC MIKISEW DECISION

- If Successful, the SCC decision on the appeal of **Mikisew** will push lawmakers to consider the approach and process of consulting First Nations.
- The Court may go further and recognize a justiciable duty to consult with First Nation ***at any stage of the law-making process.***
- If unsuccessful, the SCC may not recognize a justiciable duty to consult at *any stage* of the law-making process as it would be contrary to the constitutional principles of parliamentary sovereignty and the separation of powers, and would severely impede the law-making process and rule of law.
- ****Either way, the Mikisew appeal will impact water and water protections within First Nation territories****

KI-NANASKOWMITNAW CHI-MIIGWETCH FOR YOUR TIME!

