



CLASS COUNSEL

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General Information Only – Not Intended as Legal Advice

current to July 2023

FIRST NATION CLASS MEMBERS: KNOW YOUR RIGHTS TO CLEAN, SAFE DRINKING WATER ON-RESERVE

This information bulletin is intended to help First Nation Class Members access funding to realize Canada's legal Commitment and explain the tools found in the Settlement.

CANADA'S LEGAL COMMITMENT

The First Nations Drinking Water Settlement Agreement (the "Settlement") requires Canada to make all reasonable efforts to ensure that Individual Class Members living on reserves have regular access to drinking water in their homes, whether from a public water system (like a water treatment plant) or a private water system (like a well or cistern) approved by a BCR. There is a template of the BCR below. The drinking water must meet either the federal requirements or provincial standards over water quality, whichever is stricter.

There must be enough clean, safe drinking water to do all things on-reserve every day that people off-reserve can normally do, such as cook, clean, do the dishes, take a bath, and more.

To meet these standards – regular access to clean water in quality and quantity enough for everyday use – Canada is required to fund the upgrade, construction, and operation and maintenance of water and wastewater infrastructure at actuals. This is known as Canada's legal Commitment.

To meet their legal Commitment, Canada must spend at least \$6 billion dollars between now and March 31, 2030. \$6 billion dollars is the floor, not the ceiling. If more is required to meet the Commitment, more funding must be made available.

HOW TO GET THERE: FUNDING THE ACTUAL COSTS

In the Settlement, Canada has committed to providing "actual cost funding" for water systems. Article 9.02 of the Settlement states that:

Commitment to Additional Measures

(1) In addition to the measures set out in the Action Plan, **Canada shall make all reasonable efforts to ensure that Individual Class Members living on Reserves have regular access to drinking water in their homes ...**

(b) the Commitment is limited to Canada's reasonable efforts, **including the provision of actual cost funding,** training, planning, and technical assistance... (Class Counsel's emphasis)





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“Actual cost funding” means just that: the actual costs of constructing and operating a water system.

The Settlement also provides some guidance about how to determine what is “reasonable” for Canada to do to meet their legal Commitment. Factors may include:

- the views of the First Nation;
- any federal requirements or provincial standards relating to water;
- whether monitoring and testing are performed on the water system; and
- the physical location of the home, including proximity to centralized water systems and remoteness.

If there is disagreement, First Nations may need to draw on these to advocate for their view of what is reasonable.

There is no menu of infrastructure upgrades to choose from, rather it is up to each First Nation to determine which system works best for their community. First Nations do not have to go it alone: community leadership can request Canada to fund the hiring of technical experts to help the nation better understand what it needs both now and into the future in order to build a water system that works for the community.

The Settlement was effective as of December 22nd, 2021 when it was approved by the Manitoba Court of King’s Bench and the Federal Court. As of then, Canada is required to begin its payments of actuals: actuals for operations and maintenance (including training and payment of water operators), actuals for upgrades, and actuals for new construction. If a First Nation community had a project underway as of that date they may benefit from reviewing the Settlement with their contacts at Indigenous Services Canada (“ISC”) and seeing if, and how, the community can benefit from the terms of the Settlement.

Canada’s Long-Term Drinking Water Advisory Action Plan (“Action Plan”): The Action Plan details the Government of Canada’s plan to end Long-Term Drinking Water Advisories and is updated regularly to match new commitments or completion of existing commitments. As the Action Plan lists existing and completed commitments, First Nations may be added or removed as projects are approved and completed.

This Action Plan does not affect Canada’s legal Commitment in the Settlement but rather demonstrates how the Canada is meeting the Commitment.

WHO TO TALK TO

Canada funds drinking water and wastewater infrastructure on reserve through ISC. First Nation Class Members will access Settlement funding in the same way you regularly access funding for





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water and wastewater infrastructure. **In the Settlement, Canada has made a legal Commitment to cover actual costs, this is different from before.**

NOTE: As is expected with massive claims that take an all-of-department approach, ISC is still working through the policy and program amendments to meet the requirements of Canada's legal Commitment in the Settlement. As a result, your Regional Office may not be in the best position to respond to your requests for funding at actuals, and so you should reach out to the below ISC representatives in your communications:

Devon Rutherford, Litigation Team Leader, Indigenous Services Canada
devon.rutherford@sac-isc.gc.ca

WHAT ARE YOU RESPONSIBLE FOR?

The Settlement does not change how water and wastewater services are provided on-reserve. The Settlement boosts funds available for Canada to distribute to First Nations to meet its legal Commitment.

First Nations should keep full and accurate records (with dates) when seeking funding for water and wastewater and conversations with Canada on the topic in the event the issue proceeds to dispute resolution.

Only First Nation Class Members have access to the dispute resolution process outlined in the Settlement ("Dispute Resolution"). For more on this, see below.

WHAT IF YOU RUN IN TO PROBLEMS? DISPUTE RESOLUTION

If a First Nation Class Member believes Canada isn't meeting its legal Commitment, then according to the Settlement, it is an Underserved First Nation.

Dispute Resolution begins when a First Nation Class Member provides written notice to the Deputy Minister of Indigenous Services Canada (currently Gina Wilson), describing the ways in which Canada is not meeting their legal Commitment. This can come after the First Nation requests funding to receive technical advice to later support a proposal. The description that goes to Indigenous Services will become what the Settlement refers to as a Remediation Plan.

The Deputy Minister's email address is: gina.wilson@sac-isc.gc.ca

Canada will then be obliged to make all reasonable efforts to reach an agreement with the Underserved First Nation and to agree on detailed steps to meet their legal Commitment. This negotiation and dialogue with Canada, and any agreement reached with them will update and





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amend the Remediation Plan. There is an expectation that most disagreements will be resolved by informal discussions.

If an Underserved First Nation and Canada can't agree on what needs to be done within 3 months (90 days) of the First Nation raising the issue or if at any point Canada does not do follow the Remediation Plan, the Dispute Resolution process begins.

The Dispute Resolution process includes three stages: Stage 1 – Negotiations; Stage 2 – Mediation; and, if no agreement can be reached, Stage 3 – Arbitration. All stages will integrate the legal traditions of the Underserved First Nation.

Negotiations will take the form of formal efforts to reach agreement on a Remediation Plan. The negotiations will take place in the Underserved First Nation and be conducted in a way that is accessible and respectful of the community. The use of Indigenous languages is encouraged, and the negotiations will respect the community's legal traditions and protocols.

Mediation will be facilitated. Canada and the Underserved First Nation will establish a roster of mediators, and the mediation will take place in the community. The use of Indigenous languages is encouraged, and the mediation will respect the community's legal traditions and protocols.

Arbitration will be conducted by an arbitrator. Canada and the Underserved First Nation will establish a roster of arbitrators, and the arbitration will take place in the community. The use of Indigenous languages is encouraged, and the arbitration will respect the community's legal traditions and protocols.

Canada is responsible for paying all of the reasonable costs of a First Nation to participate in a collaborative negotiation aside from the legal fees and disbursements (of which Canada will pay 50%). Canada will also pay all the reasonable costs of holding negotiations, mediations and arbitrations.

FURTHER ASSISTANCE

Class Counsel can provide specific legal advice to First Nation Class Members in relation to the Settlement Agreement for free. If a First Nation would like assistance in making a specific infrastructure request of ISC, the First Nation would have to retain counsel, as these requests can be technical, and we would require a specific retainer to exist.

Feel free to get in touch by giving us a call or an email at:

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By phone: 1-833-265-7589





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TEMPLATE BCR, AS PROVIDED IN SCHEDULE P TO THE SETTLEMENT AGREEMENT

**[Name of First Nation]
Band Council Resolution**

Approving Private Water Systems on Reserve

WHEREAS certain plaintiffs commenced a lawsuit styled as Curve Lake First Nation and Chief Emily Whetung on her own behalf and on behalf of all members of Curve Lake First Nation and Neskantaga First Nation and Chief Wayne Moonias and Former Chief Christopher Moonias on their own behalf and on behalf of all members of Neskantaga First Nation v Attorney General of Canada, Court File No. T-1673-19, in the Federal Court on October 11, 2019 (the “Federal Action”);

AND WHEREAS certain plaintiffs commenced a court action styled Tataskweyak Cree Nation and Chief Doreen Spence on her own behalf and on behalf of all members of Tataskweyak Cree Nation v Attorney General of Canada, Court File No. CI-19-01-24661, in the Manitoba Court of Queen’s Bench on November 20, 2019 (the “Manitoba Action”, and together with the Federal Action, the “Actions”);

AND WHEREAS the Actions were certified by the respective courts as class proceedings;

AND WHEREAS the Attorney General of Canada and the plaintiffs in the Actions have negotiated a settlement agreement (the “Settlement Agreement”) in respect of the Actions;

AND WHEREAS the Settlement Agreement provides that Canada shall make all reasonable efforts to ensure that Individual Class Members (as defined in the Settlement Agreement) living on Reserves (as defined in the Settlement Agreement) have regular access to drinking water in their homes, whether from a public water system or a private water system approved by a Band Council resolution including on-site systems, that meets the stricter of the federal requirements or provincial standards governing residential water quality (the “Commitment”);

AND WHEREAS *[Name of First Nation Council]* (the “Council”) wishes to approve the private water systems listed below for the purposes of the Commitment by passing this Band Council Resolution;

AND WHEREAS this Band Council Resolution is not an acknowledgment that the Council is responsible in any way for the private water systems listed below;

BE IT HEREBY RESOLVED THAT:

1. For the purposes of the Commitment only, and without hereby confirming or accepting responsibility, the Council hereby approves the following water systems:





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a. [Identify or describe private water systems, including wells]

2. The Council hereby declares that the approval set out in Paragraph 1, above, may be revoked by the Council at any time.

3. The Council hereby declares that the approval set out in Paragraph 1, above, may be supplemented by the Council at any time to incorporate additional water systems.

4. These resolutions may be signed by the Chief and Council members in as many counterparts as may be necessary, in original or electronic form, each of which so signed shall be deemed to be an original, and such counterparts together shall constitute one and the same resolution.

The signatories below hereby certify and warrant that a quorum of Council has signed this Band Council Resolution as evidenced by their signatures below.

DATED as of the ____ day of _____, 202__.

[Insert Name Here]

[Insert Name Here]

[Insert Name Here]

[Insert Name Here]

[Insert Name Here]

[Insert Name Here]

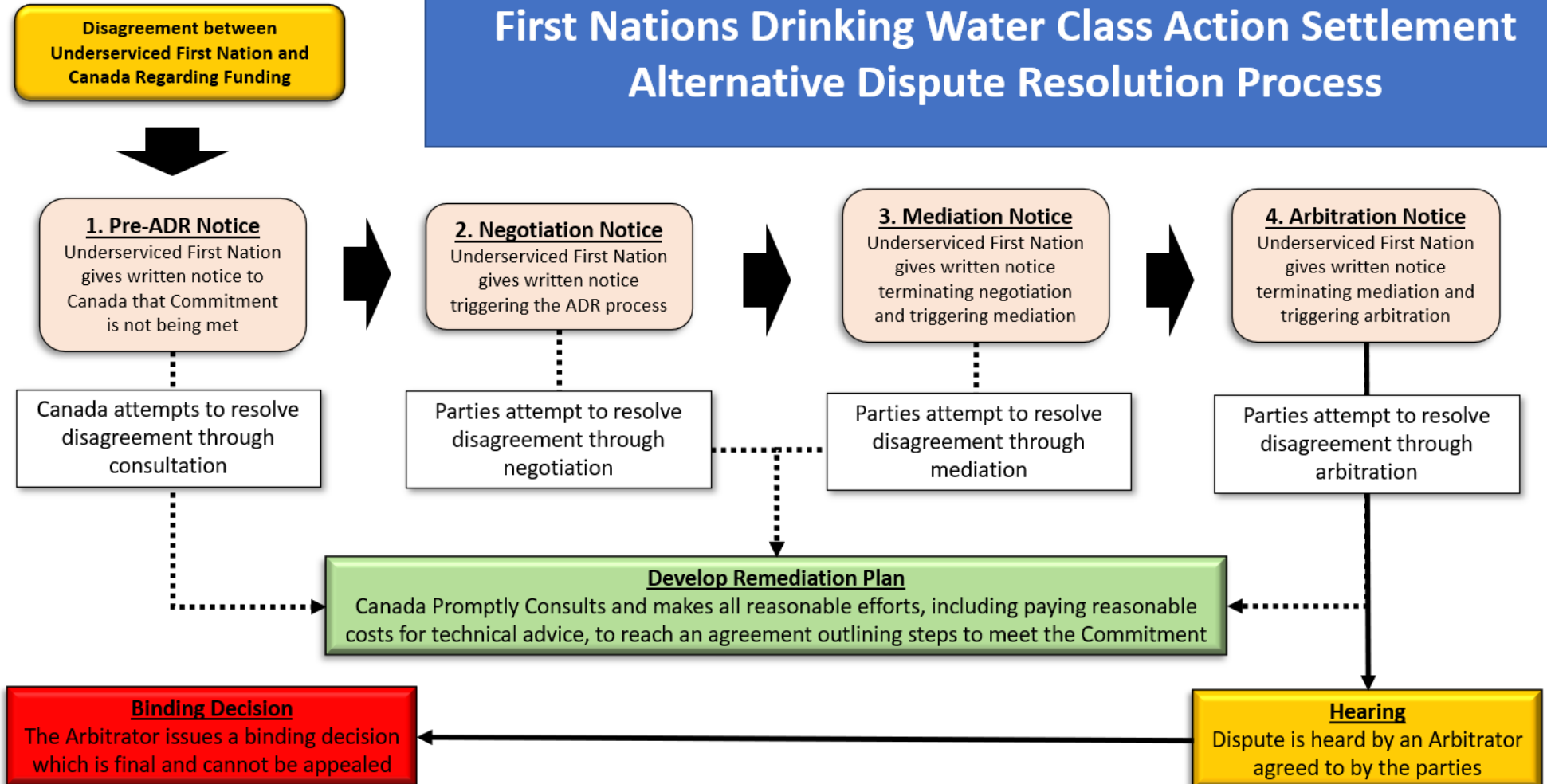
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[Insert Name Here]



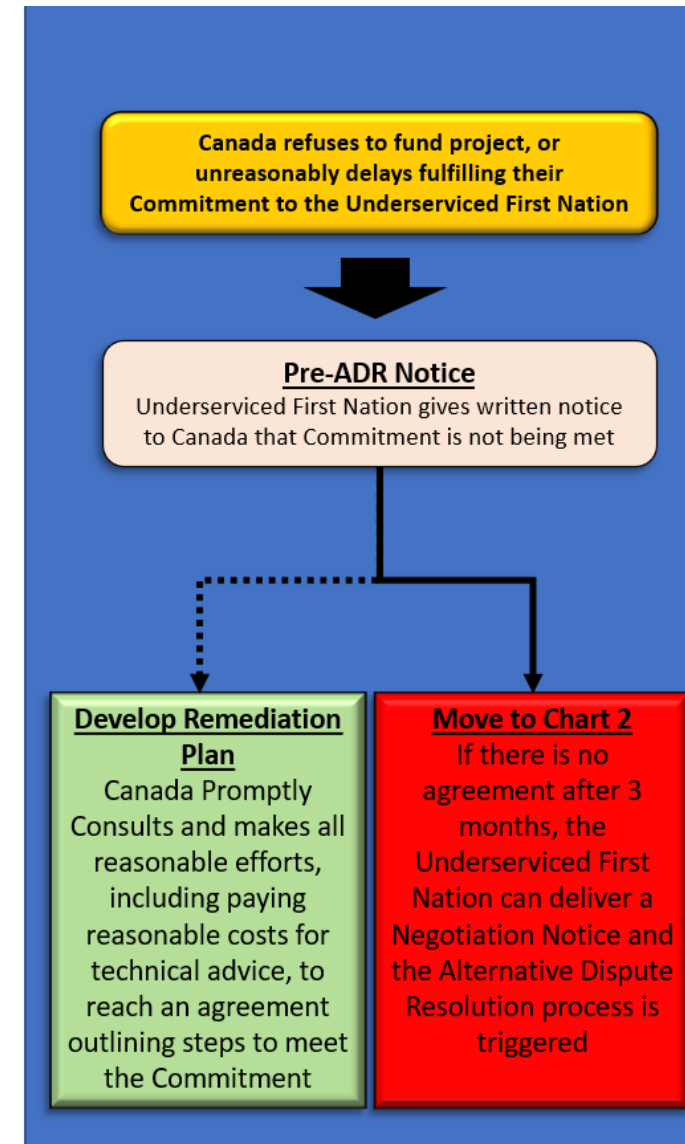
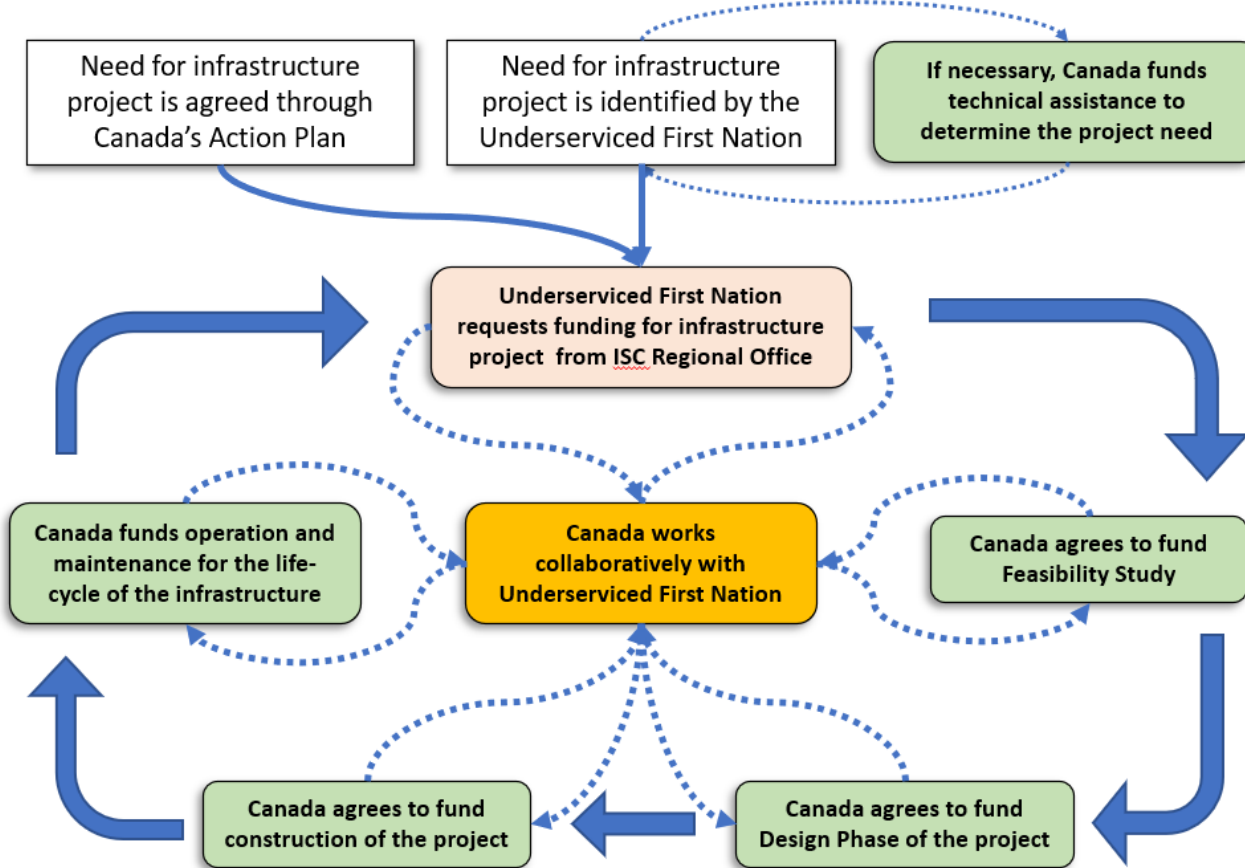
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First Nations Drinking Water Class Action Settlement Alternative Dispute Resolution Process



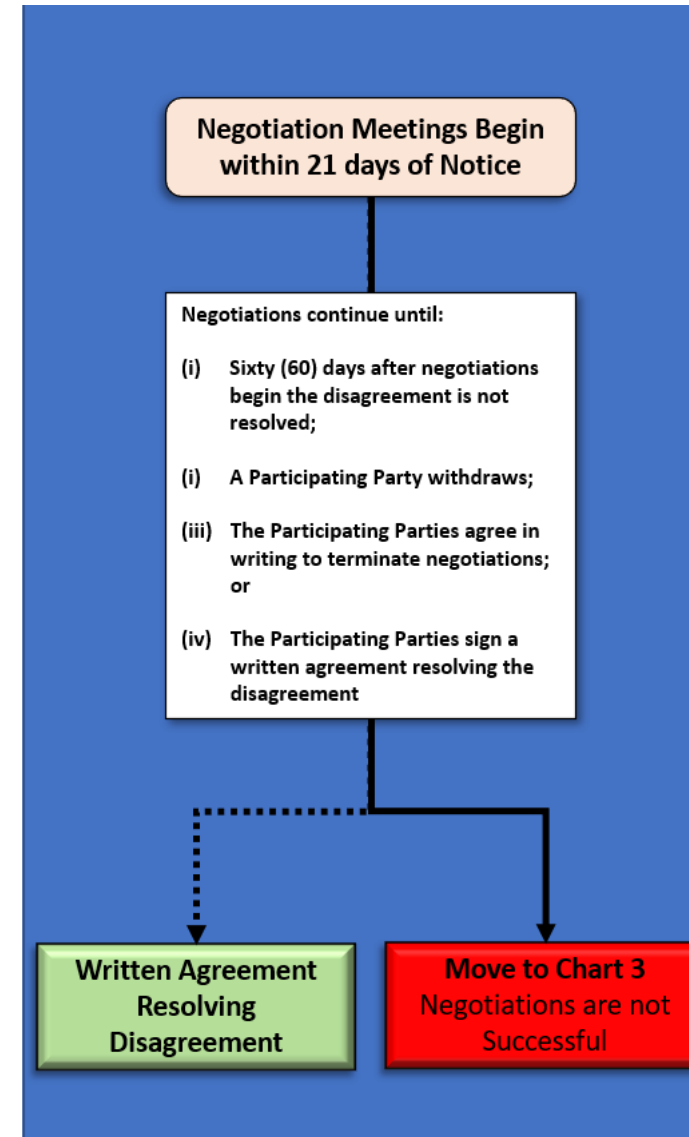
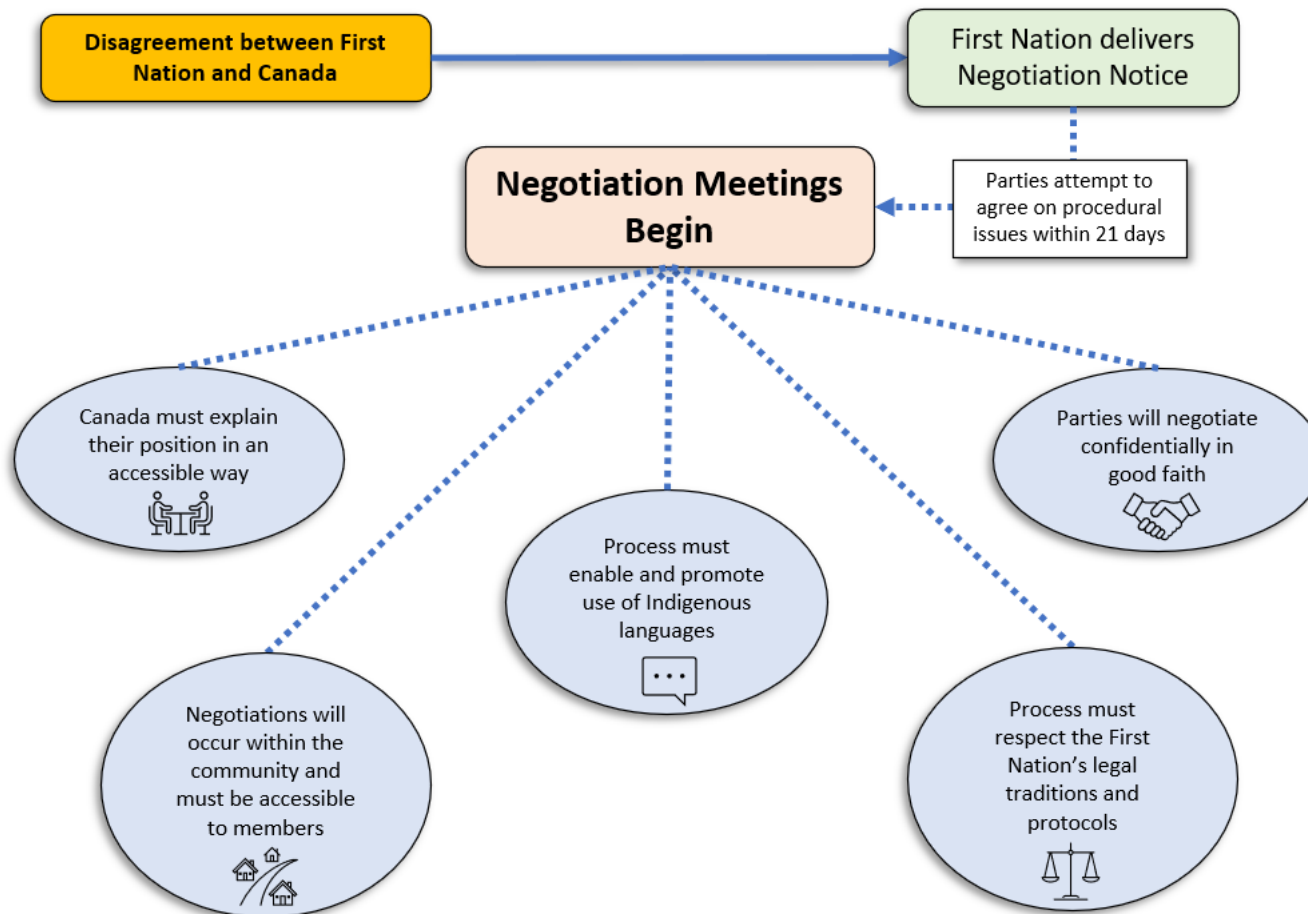
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1. Pre-ADR Process for Water and Waste-water Infrastructure



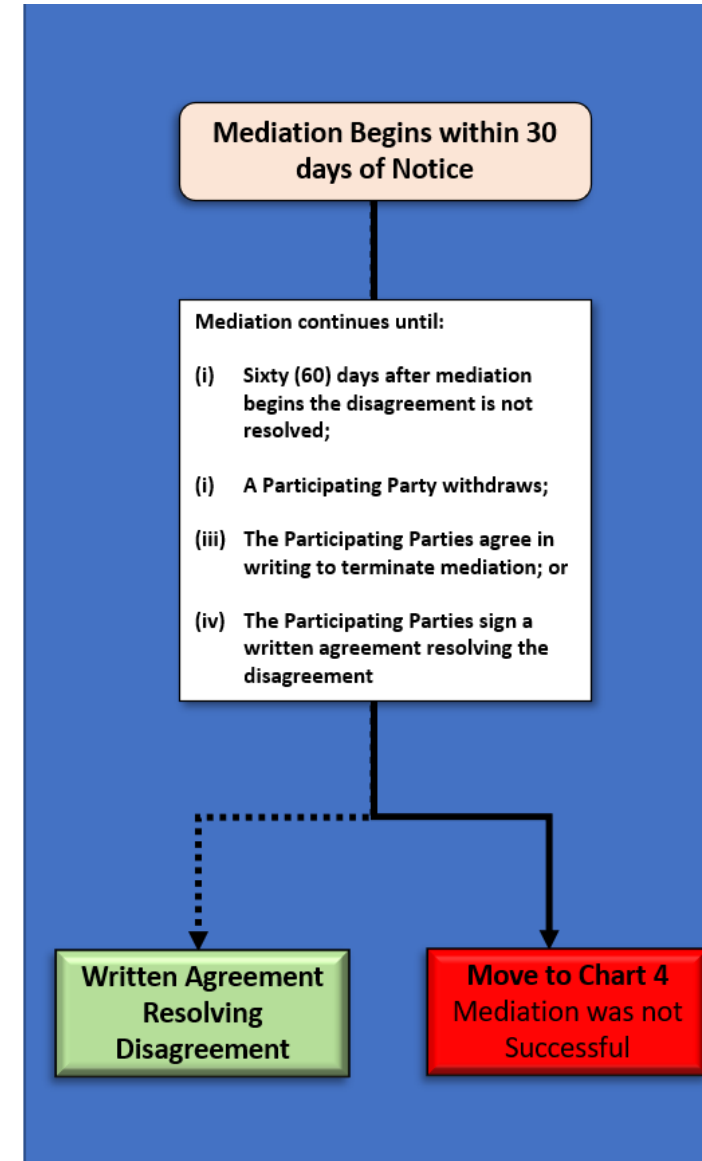
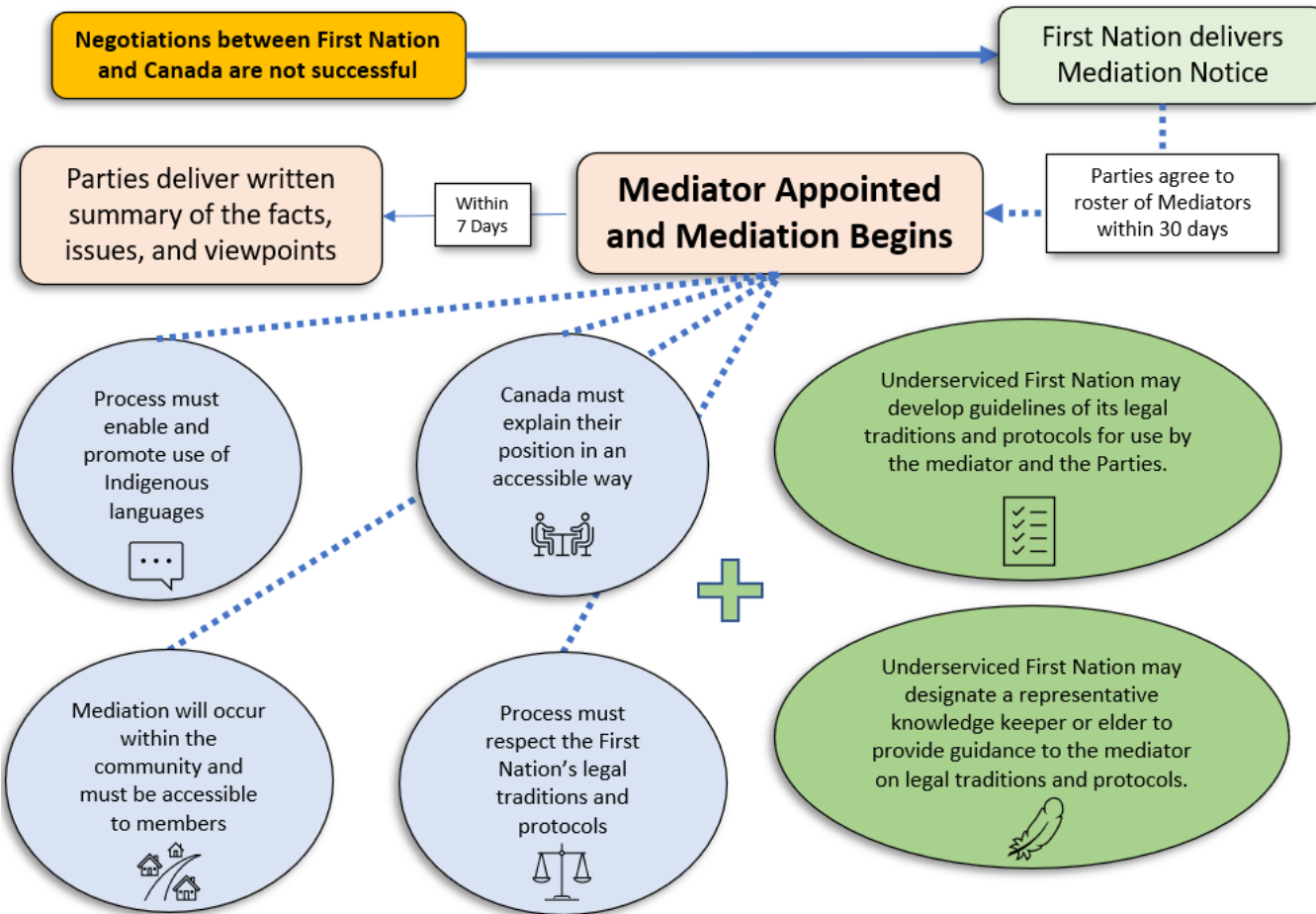
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2. Collaborative Negotiations



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3. Mediation



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4. Arbitration

