TO: Chippewas of the Thames First Nation
FROM: First Peoples Law Corporation
SUBJECT: Anishinabek Nation Governance Agreement & Fiscal Agreement
DATE: January 17, 2020

This memorandum sets out our analysis of the Anishinabek Nation Governance Agreement and Anishinabek Nation Fiscal Agreement for the Deshkaan Ziibing Anishinaabeg / Chippewas of the Thames First Nation.

OVERVIEW

The Governance Agreement and Fiscal Agreement could have a number of implications for COTTFN’s law-making authority, rights and financial affairs. In providing our analysis, we have sought to objectively identify the potential advantages and disadvantages of the Governance Agreement and Fiscal Agreement for COTTFN. We have not provided our opinion on the agreements themselves, nor do we provide advice on whether COTTFN should proceed with ratification votes in respect of either agreement.¹

In our opinion, the Governance Agreement and Fiscal Agreements could have the following advantages and disadvantages for COTTFN:

Advantages

By signing onto the Governance Agreement, COTTFN will be recognized by Canada as a government with law-making authority. While this law-making authority will be limited to begin, there is the potential for COTTFN to expand its areas of jurisdiction under the Governance Agreement. Further, with the Fiscal Agreement, COTTFN might gain a greater degree of transparency and stability in the funding provided by the federal government for governance programs and services.

Disadvantages

The Governance Agreement appears to conflict with the underlying principles set out in COTTFN’s Chi-Iinaakonigewin. It also negatively affects COTTFN by confirming that certain federal and provincial laws will prevail over COTTFN laws, potentially limiting COTTFN’s ability to advance the position that it holds Aboriginal title to its reserve, and increasing the likelihood that Anishinaabe laws will be

¹ Our advice is intended to build upon, rather than replace or duplicate, the previous legal opinions prepared in respect of the Governance Agreement by Sara Mainville of Olthuis, Kleer, Townshend, LLP.
interpreted by Canadian courts. In addition, the Fiscal Agreement could create uncertainty around the way in which governance funding for the First Nations will be determined. It could potentially limit the funding to be provided to COTTFN as a result of fiscal contributions required by the First Nations, and could limit COTTFN’s ability to participate in the negotiation of future fiscal agreements.

ANALYSIS

Background

The Governance Agreement is a proposed agreement between Canada, the Anishinabek Nation and the First Nations that approve the Governance Agreement. COTTFN is currently considering whether it will approve and become a party to the Governance Agreement.

The Governance Agreement recognizes certain law-making powers of the Anishinabek Nation Government and First Nation governments; establishes a new government-to-government relationship with Canada within the framework of the Constitution Act, 1982; and provides new funding arrangements to support the governance systems that are established and the delivery of governance programs and services. The new funding arrangements are detailed in a separate Fiscal Agreement, to be entered into between the Anishinabek Nation, on behalf of itself and the First Nation signatories to the Governance Agreement, and Canada.

Implications

The following is an overview of potential implications of the Governance Agreement and related Fiscal Agreement for COTTFN.

Chi-Inaakonigewin

COTTFN’s constitution, the Chi-Inaakonigewin, provides that it is the supreme law of Deshkan Ziibiing Anishinaabe Aki. Provisions in the Governance Agreement which provide the applicability and paramountcy of certain federal and provincial laws or which purport to limit the First Nations’ law-making authority are inconsistent with the Chi-Inaakonigewin.

Aboriginal Title, Rights & Treaty Rights

The Governance Agreement is not a treaty within the meaning of section 35 of the Constitution Act, 1982. Consequently, the law-making powers of the Anishinabek Nation and First Nations under the
Governance Agreement do not receive constitutional protections under section 35 and are subject to the Charter of Rights and Freedoms.

The Governance Agreement provides that it does not abrogate or derogate from any Aboriginal or treaty rights. However, the Governance Agreement could potentially affect COTTFN’s ability to advance its Aboriginal title to its reserve, particularly if the Governance Agreement is expanded in the future to address land-related issues.

Law-Making Powers

The law-making authority provided for under the Governance Act does not significantly expand First Nations’ existing law-making powers under section 81 of the Indian Act. The Governance Agreement does not address how conflicts between a First Nation’s laws under the Government Agreement and by-laws enacted pursuant to the Indian Act would be resolved.

The Governance Agreement provides that federal and provincial laws will prevail over Anishinabek Nation and First Nation laws that relate to matters outside the Governance Agreement, and that federal laws on matters of national importance will be paramount over Anishinabek Nation and First Nation laws. These provisions could limit a First Nation’s ability to assert jurisdiction over certain issues, including the production and distribution of cannabis. It is also unclear, based on the language in the Governance Agreement, whether these provisions are intended to mean that the First Nations have no law-making authority beyond those set out in the Governance Agreement, or simply that the terms of the Governance Agreement do not apply to laws on matters beyond its scope.

Citizenship

The Governance Agreement’s citizenship provisions could be interpreted as requiring First Nations to accept current members of the First Nation or those entitled to membership under the Indian Act as citizens, even if those individuals do not meet the First Nation’s citizenship requirements.

Land Management

The Governance Agreement does not currently address land-related issues, but provides that it will prevail in the event of a conflict with the First Nations Land Management Act. It is unclear how these provisions could affect the Framework Agreement on First Nation Land Management or a First Nation’s land code under the Framework Agreement and how conflicts between the Governance and Framework Agreement would be resolved.

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6 Governance Agreement, section 3.3.
7 Governance Agreement, sections 4.12, 4.14, 4.20, 4.23, 5.10, 5.12, 5.21, 5.24. Pursuant to the Governance Agreement, the Anishinabek Nation and First Nations have authority to determine their own leadership selection processes, and make laws in relation to elections, citizenship, culture and governance operations. Subject to exceptions, the Indian Act (including by-law making powers under section 81) will also continue to apply.
9 Governance Agreement, sections 5.14, 5.15, 5.16.
10 Governance Agreement, sections 10.12, 10.13.
Ratification

Based on the language in the Governance Agreement, it could be ratified if a minimum of two eligible voters vote in favour of it twice. This ratification process could also apply to future self-government agreements.

Fiscal Arrangements

Transfer payments to be provided under the Fiscal Agreement will replace Band support funding and will be calculated using, in part, a base funding amount and adjusters (including FDDIPI). It is not clear from the Fiscal Agreement how this base funding will be determined. While we assume the calculation used to determine the base funding will include a per capita component, it is unclear whether this will be based on the First Nations’ E'Dbendaagziig or their total registered status population. Depending on which number is chosen, there could be significant disparities in the base funding to be provided by Canada.

A percentage of certain of the First Nation signatories’ revenues, including any tax revenues, royalty revenues and business profits, will be deducted from the base funding as a “First Nations’ Fiscal Contribution”. The definition of royalty revenues included in the Fiscal Agreement leaves open the possibility that the First Nations’ Fiscal Contribution will include payments received as part of an impact benefit agreement. The First Nations’ Fiscal Contribution will only take effect after Canada and the Anishinabek Nation have conducted an “Expenditure Needs Assessment”. The Fiscal Agreement does not provide details about the Expenditure Needs Assessment and when it will be conducted.

The First Nations working with the Anishinabek Nation Government are expected to develop an internal distribution model to determine the shared allocation of the First Nations’ Fiscal Contribution. Depending on how this model is arrived at, certain First Nations may be expected to contribute a greater percentage of their revenues and will be disproportionately affected. This is especially true for First Nations with greater revenue generating potential.

Various other factors, including a basic exemption amount, an inclusion rate of 50 per cent and a phase in factor, will also be factored in to determine the First Nations’ Fiscal Contribution on a yearly basis. As well, the Fiscal Agreement identifies a number of exemptions from the First Nations’ Fiscal Contribution, including “program transfers” from the federal or provincial governments.

11 Governance Agreement, sections 15.5, 15.6.
12 Governance Agreement, section 15.19.
13 Fiscal Agreement, Schedule B, section 2.
14 Fiscal Agreement, Schedule D, Part 3.
16 Fiscal Agreement, Schedule D, section D.36.
17 Fiscal Agreement, Schedule D, section D.35.
18 Once applicable, the First Nation Contribution Amount will be phased in over a period of 20 years. See Fiscal Agreement, Scheduled D, section D.33.
19 Fiscal Agreement, Schedule D, sections D.31 and D.33.
20 Fiscal Agreement, Schedule D, section D.27(iv).
The Fiscal Agreement also includes a “Transfer Floor” which is the minimum amount that Canada will provide under the Fiscal Agreement. The Transfer Floor is determined using the total registered status population of the First Nation,\(^\text{21}\) which may be less than the First Nation’s E’Dbendaagziig.

To determine the full implications of the Fiscal Agreement for COTTFN, we recommend that COTTFN retain a financial expert to apply the various formula outlined in the Fiscal Agreement using COTTFN’s existing revenue and population numbers.

The initial term of the Fiscal Agreement is 5 years. The Anishinabek Nation and Canada will commence the negotiation of a new fiscal agreement 24 months prior to the expiry of the 5-year term. If the parties are unable to reach a new fiscal agreement by the end of the 5-year term, the existing Fiscal Agreement will extend for a further 2 years or any other period agreed to by the parties.\(^\text{22}\) The Anishinabek Nation Government will be the First Nations’ sole agent in negotiating future fiscal agreements.\(^\text{23}\) These provisions could limit the influence that COTTFN will have in determining future funding amounts for its governance.

The Fiscal Agreement does not include termination provisions. The Fiscal Agreement does include dispute resolution provisions, but provides that disputes under the Fiscal Agreement may not be referred to arbitration for final resolution.\(^\text{24}\) These provisions could make it difficult to resolve funding disputes under the existing Fiscal Agreement or in the negotiation of future agreements.

Other Issues

No party may challenge any provision of the Governance Agreement once it has been ratified, and there are no provisions that allow a First Nation to terminate or withdraw from the Governance Agreement.\(^\text{25}\) As such, the Governance Agreement will bind future First Nation governments.

Federal and provincial courts have jurisdiction to hear and determine disputes arising from laws of the Anishinabek Nation and First Nations under the Governance Agreement.\(^\text{26}\) These provisions increase the likelihood that Canadian courts will be used to interpret Anishinaabe laws.

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\(^{21}\) Fiscal Agreement, Schedule D, section D.11.
\(^{22}\) Fiscal Agreement, sections 2.1, 2.2 and 2.6.
\(^{23}\) Fiscal Agreement, section 2.7.
\(^{24}\) Fiscal Agreement, section 9.5.
\(^{25}\) Governance Agreement, section 3.19.
\(^{26}\) Governance Agreement, sections 6.12, 6.13, 6.14, 6.15.