

Bill S-11 – An Attempt to Introduce a First Nations Drinking Water Bill

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Insight Aboriginal Law Forum

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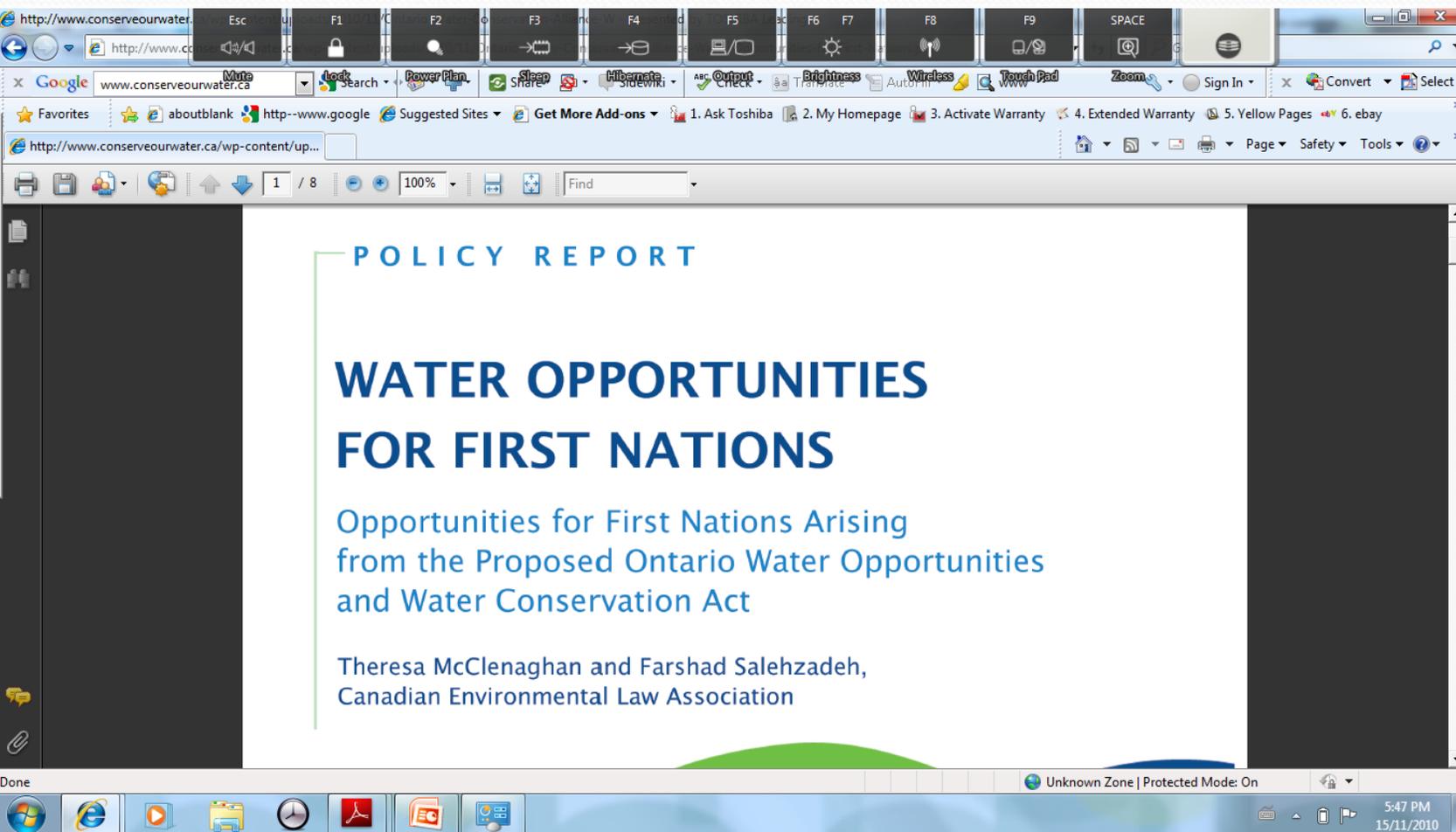
- Canadian Environmental Law Association
- A 41 year old Canadian ENGO
- Also an Ontario Legal Aid Specialty Clinic for the environment
- Water sustainability one of our six priority areas, especially safe and affordable drinking water
- Represented Concerned Walkerton Citizens in all phases of the Walkerton Inquiry

Need for First Nations' Safe Drinking Water

- First Nations communities geographically diverse
- Many sizes of communities and water systems
- Including urban, rural, remote, northern, large and small
- Last year, 116 First Nations across Canada under Drinking Water Advisories
- Mean duration of drinking water advisories were 343 days
- 36% without any level of certification for water system operators

Needs and Opportunities

- Needs and Opportunities have been noted – for example in a Fact Sheet prepared by CELA for new Ontario legislation, the *Ontario Water Opportunities and Water Conservation Act* passed this past year
- Needs include matters like tool kits for operating multiple systems; operator training manuals; risk assessment tools, user friendly educational material, guidelines for source water protection



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Research and Innovation opportunities

- ▶ As a result of geography and history, opportunities specific and unique to First Nations communities arise for research, technology development, and implementation of drinking water treatment, delivery and supply options.
- ▶ Training and green jobs opportunities in the water sector arise for innovative solutions that apply in small, remote and far north communities and should be pursued.
- ▶ Research and innovation opportunities should encourage and enable those opportunities for First Nations communities and their members.

Not one size fits all

- Because of difference in location, size of populations, geology of the near and far north, climate extremes over the course of the year, and differences in access, needs and solutions are not uniform
- Approaches in populated, more southerly communities may work in some First Nations and not in others
- Water technologies may have to be modified for small system perspectives
- Contaminants of concern may differ due to geology and current or past land use

Opportunities for Youth and Young Professionals

- As new solutions are explored, First Nations youth, students and young professionals must be included in the research, related training, and implementation of innovative solutions

Jurisdiction

- Ontario has passed sweeping reforms to its drinking water laws and regulations in the wake of the Walkerton Inquiry
- However, these laws, regulations and programs are often not directly applicable to First Nations' drinking water systems
- For example, the *Clean Water Act* in Ontario provided mechanisms for involvement by some First Nations in watershed based source protection plans, but not all First Nations are located in areas where these plans are applicable; different First Nation communities have different approaches to participating in those plans

Federal approach

- In the Walkerton Inquiry Report issued in 2002, Justice O'Connor stated, "I encourage First Nations and the federal government to formally adopt drinking water standards, applicable to reserves, that are as stringent as, or more stringent than, the standards adopted by the provincial government."
- In response the Federal government introduced the First Nations Water Management Strategy in 2003 with a \$600 million budget over five years in addition to regular program spending

Federal Commissioner for Sustainable Development

- In its 2005 audit of First Nations drinking water programs, the Commissioner noted the significance of the absence of a regulatory regime
- The absence of codes and standards applicable to First Nations drinking water systems was also significant
- The need to build capacity was also stressed, including for example operator training

Federal Approach cont'd

- *A Protocol for Safe Drinking Water for First Nations Communities* issued by INAC, and revised in 2006 – while it has guidelines for design, operation and maintenance of drinking water systems, it is not binding
- The federal government announced a *Plan of Action for Drinking Water on First Nations Reserves in 2006*
- Federal officials described the approach in the decade as “assess, invest, protect” and noted that from 2006 to 2012, \$2.5 billion will have been spent on First Nations drinking water systems; prior to that almost \$2 billion was invested between 2003 and 2007

Federal steps

- Thereafter, the AFN and Government of Canada appointed an Expert Panel on Safe Drinking Water for First Nations which provided its recommendations in November, 2006
- Thereafter, a Canadian Senate Committee issued a report, “Safe Drinking Water for First Nations: Final Report of the Standing Senate Committee on Aboriginal People” in 2007 and suggested that any effort to pursue a regulatory regime without securing greater funding to build capacity is a “fundamentally flawed” strategy

Senate Standing Committee in 2007

- The Committee in its report, stated in respect of the question of the need for legislation:
 - “Considering the sources we consulted and subsequent witness testimony, the Committee is deeply concerned by the Department’s position in this regard, which seems to run counter to that of its own Expert Panel. The Committee agrees with witnesses that the first priority ought to be filling the resource gap, not regulation. Regulatory standards, in the absence of the physical and human capacity to meet them, are unlikely to improve the quality and delivery of drinking water on-reserve, and may in fact worsen the situation.”

Exploring approaches

- In 2008, the federal government extended most elements of the 2006 Action Plan by way of *The First Nations Water and Wastewater Action Plan*
- Similarly, the Expert Panel report in 2006 also noted that closing the resource gap for First Nations' water systems was one of three “preconditions for success”
- Another important precondition noted by the Expert Panel was that the federal government comply with its legal duty to consult with First Nations when it develops and implements any regulatory regime for drinking water in First Nations communities

Options for a regulatory framework

- In its 2006 report, the Expert Panel set out three “viable” options for establishing a regulatory framework:
 - Parliament could enact a new statute referencing existing provincial regulatory regimes
 - Parliament could enact uniform federal standards and requirements
 - First Nations could develop a basis of customary law that could then be enacted in a new federal statute
- Minister Prentice, then Minister of Aboriginal and Indian Affairs presented these possibilities to the House of Commons in December 2006, favouring the second option

Consultations on Federal drinking water legislation

- From summer 2008 to spring 2009, the federal government conducted discussions and engagement sessions with First Nations across the country to ascertain First Nations perspectives on developing federal legislation
- There were uniform responses from First Nations:
 - Firstly a call to recognize the sacred place of water in First Nations cultures, knowledge and worldviews
 - Secondly, criticism of the engagement process – for example a Chiefs of Ontario 2009 Resolution rejected the sufficiency of the 2008-9 consultations

Other concerns during 2008-9 consultations

- Other concerns included:
 - Sufficiency of funding
 - Need to include source water protection from off reserve threats to drinking water
 - Need to seek support for proposed regulations at the community level
 - Concern for protecting Aboriginal and treaty rights

Reaction to proposed frameworks

- Most support from the engagement sessions was for a regionally based regulatory framework
- For example a 2008 Resolution of the Assembly of Manitoba Chiefs supported the approach of incorporating by reference provincial drinking water regulations subject to adaptation as necessary
- Most First Nations did not support a national approach to developing regulations, preferring a regional approach

Introduction of Federal legislation

- The federal government introduced a Bill, Bill S-11, 40th Parl., in the Senate on May 26, 2010
- Bill S-11 was titled An Act respecting the safety of drinking water on first nation lands.
- Bill S-11 went to a Senate Committee for nine days of testimony in February and and March 2011, including CELA's brief to the Committee on Feb. 15, 2011
- While CELA supported the intent of improving First Nations' drinking water systems and thus health and safety of First Nation community members, CELA did not support the Bill in the form introduced in Bill S-11

Abrogating treaty rights

- One of the concerns CELA had was with a section of the Bill, section 4(1)(r) which provided regulation making power to “provide for the relationship between the regulations and aboriginal and treaty rights referred to in section 35 of the *Constitution Act, 1982*, including the extent to which the regulations may abrogate or derogate from those aboriginal and treaty rights.”
- CELA was of the view that this is an unacceptably and unnecessarily broad provision which in itself infringes section 35 of the *Constitution Act, 1982*

Non derogation clause

- This approach in the proposed Federal Bill in S-11 is in stark contrast to the approach taken in Ontario's *Clean Water Act* where after concern was expressed by First Nation communities, the following was added before passage of the bill:
 - “For greater certainty, nothing in this Act shall be construed to as to abrogate or derogate from the protection provided for the existing aboriginal and treaty rights of the aboriginal peoples of Canada as recognized and affirmed in section 35 of the *Constitution Act, 1982*”

Breach of duty to accommodate

- Furthermore, this proposed approach which would have impacted on First Nations' rights without first accommodating the known concerns of First Nations would have been a breach of the government's fiduciary duties and responsibilities, as well as the statements of the Supreme Court of Canada regarding the protections afforded First Nations rights by virtue of Section 35(1) of the Canadian Constitution.

Drafting issue?

- During standing committee hearings, a question arose as to whether a drafting error had been made in respect of section 4(1)(r) with the word “limiting” inadvertently omitted in the English version but included in the French – which might change the clause to read “including limiting the extent to which the regulations may abrogate or derogate...”
- If so, CELA would nevertheless advance a more clear non-derogation clause such as the example from the *Clean Water Act* as opposed to a “derogation” clause

Further concerns with Bill S-11

- Bill S-11 contained no detail or substance to illuminate the vision, if any, of the drafters in providing such unfettered powers
- It also did nothing to allocate resources for First Nations drinking water systems
- It stated in section 4(1)(b) that the regulations “may confer any legislative, administrative, judicial or other power on any person or body” to carry out the provisions of the Bill and any regulation passed under it

Further concerns cont'd

- In section 4(1)(b) the expertise and professional qualifications of “any person” was undefined.
- This clause represented the potential for significant loss of First Nations ability to control and manage their lands and systems in so far as they affect drinking water, without knowing who could take over these powers
- The regulation making powers were over-reaching and for example might have included new authority over land uses on reserves to the delegated persons on the basis of protecting drinking water by way of section 4(1)(p)

Bill S-11 – Opposite to What is Needed

- The Bill S-11 approach was contrary to the recommendations outlined by the Commissioner of Environment and Sustainable Development, as well as the Expert Panel
- Both of those reports emphasized the need to build the capacity of First Nations – by providing adequate training, education, and resources to ensure they have financial resources and governance frameworks to implement safe drinking water systems

Bill S-11 Impact on Self Governance

- Bill S-11 detracted from First Nations' rights to have a central and meaningful place in governance of water on reserve lands
- The preamble assumed that First Nations do not have the authority necessary to govern water on reserves, thereby not respecting First Nations' governance systems – “Whereas existing laws do not provide sufficient authority for Canada or first nations to establish such [regulatory regimes for access to safe drinking water.]”

Impact on self-government cont'd

- Section 6 of the Bill stated that the Act and its regulations would prevail over land claims agreements or self-government agreements, or over any laws or by-laws made by the first nation to the extent of any conflict unless the regulations provided otherwise
- The result is that the Bill could have enabled the federal government to potentially abrogate from the terms of modern Treaties and to significantly diminish the powers already being exercised by First Nation water boards and commissions

Impact on existing powers and rights

- The Bill could also have undermined powers First Nations have had under the *Indian Act* since 1951 (despite the need for substantial improvement to the current approach by way of the *Indian Act*)
- The Bill also could have undermined any authority over water by way of inherent rights of self-government

What was the vision for Bill S-11

- Government witnesses at the Senate standing committee reviewing the Bill stated that it was intended to be comprehensive, but to allow flexibility and to be phased in across the country

An alternative vision

- An alternative vision would see section 35 given additional content by way of First Nations governing their drinking water systems as an aspect of their aboriginal and treaty rights as the case may be
- Many appearing before the Standing Committee stressed alternative visions of First Nations stewardship over water, land and their communities and even if supportive of a legislative approach, did not want to imply that they would give up such responsibilities

Linkage with provincial drinking water law

- Bill S-11 provided that the regulations could incorporate by reference the laws of a province with any adaptations considered necessary
- It also expressly provided that the regulations could vary province to province; and that the regulations could be restricted to first nations specified in the regulations or could exempt specified first nations from their application

Linkage with provincial drinking water law cont'd

- The question of whether First Nations' drinking water protection should be uniform and whether standards should be the same across the country is open for debate
- For non First Nation communities, standards do vary to some degree across Canada since drinking water is a matter of provincial jurisdiction
- In the event that federal standards for First Nations were not as stringent as a particular province's standards, it would be odd to have different approaches for two neighbouring communities just because of different constitutional jurisdiction

Linkage with provincial law

cont'd

- Another interesting question is who would inspect, provide guidance, or enforce standards that vary across the province
- If arrangements are made with provincial regulators, there are thorny issues of how to ensure compliance with orders, particularly if the reason for non-compliance is a lack of resources
- Fundamentally before any mandatory compliance approach can be taken, resources are required; otherwise the standards have no practicable way of being implemented

What others thought

- Union of BC Indian Chiefs in a 2010 Resolution called on Federal government to either abandon Bill S-11 or to severely amend it from its form as introduced
- Chiefs of Ontario in testimony before the Standing Committee noted that while not opposed to the idea of legislation for safe drinking water, the primary issue was to address infrastructure and resources, but they also strongly opposed the prescriptive approach of this Bill
- First Nations witnesses before the Committee universally noted the highly inadequate approach to consultation on the Bill

AFN Reaction

- The Assembly of First Nations in a 2010 Resolution on the Bill
 - Mandated the AFN “to advocate that the Government of Canada provide adequate financial resources to each region to conduct a thorough impact analysis to determine the financial, technical, and policy development needs for each region”.
 - Direct the AFN to urge Canada that any further discussion on Bill S-11 be suspended until the estimated full economic impacts of this Bill are identified and presented to Parliament.
 - At Standing Committee, the AFN Chief called the approach of Bill S-11 “paternalistic”

What others thought continued

- As noted by the Kwilmu'kw Maw-Klusuaqn, Mi'kmaq Rights Initiative in testimony before the Standing Committee, the Assembly of Nova Scotia Mi'kmaq Chiefs passed a Resolution in November 2010, also rejecting Bill S-11
- Many other First Nations, Associations, and Chiefs issued statements opposed to Bill S-11 in the form introduced, and/or appeared before the Standing Committee with the same message

Conclusion

- Safe drinking water for First Nations communities is one of the most pressing issues in Canada
- It also remains a major issue of equity across the country
- At the same time, the approach taken by Bill S-11 was very puzzling in its draconian approach to limiting First Nations rights (even with a potential amendment to section 4(1)(r))

Conclusion cont'd

- Fortunately, Bill S-11 died when Parliament prorogued for the last election
- CELA hopes and trusts that the next time a Bill for First Nations drinking water is introduced, it will respect s. 35, provide a strong central role for First Nations, and will include resources
- Ironically, investments to date have been making a difference, even without legislation, although a great deal remains to be done.

Conclusion cont'd

- However, legislation cannot improve the situation without focussing on resources and capacity
- Furthermore, if a regional approach is taken, which makes much sense, there are still difficult questions as to who will take on enforcement and compliance responsibilities under the legislation and what the respective roles of First Nations, provincial and federal officials might be – these are matters that would be central to proper consultations and discussions