

# Using Section 35 of the Constitution and Potential New First Nations Drinking Water Legislation to Prevent Harm to Drinking Water Sources



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Canadian  
Environmental Law  
Association  
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*Photo: Linda Pim*

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# Canadian Environmental Law Association (CELA)



*Photo: Kelly Mathews*

- Specialty legal aid clinic dedicated to environmental equity, justice, and health
- Founded in 1970, funded by Legal Aid Ontario since 1978
- CELA provides free legal services relating to environmental justice in Ontario, including representing qualifying low-income and vulnerable communities in the courts and before tribunals. CELA also provides free summary advice to the public and engages in legal education and law reform initiatives.



# Canadian Environmental Law Foundation



*Photo: Ghislain Tillard*

- Key initiatives include:
  - Canadian Environmental Law Archives
  - Annual fellowship for one aspiring environmental lawyer,
  - Access to Justice for Northern Communities Initiative.
- The Foundation also supports ongoing education and outreach efforts to promote public participation in environmental decision-making.

# Source water protection

- In a multi-barrier approach to protecting drinking water, the **concept of prevention** is key
- Prevention is about keeping contaminants from getting into the source water in the first place (also applies to water quantity)
- Prevention of harm - such as illness - can be promoted by ensuring safe clean drinking water

# Proposed Bill 61 First Nations Clean Water Act

- Purpose includes ensuring **safe water**, assistance in achieving “**the highest standard of health, safety and well-being**”, as well as affirming inherent right of First Nations to **self-government**, including **jurisdiction** in relation to water, source water, drinking water and ensuring that laws, policies and practices relating to water services on FN lands are **consistent with section 35** of the Constitution Act and UNDRIP

# Proposed FNCWA

- Key provisions go beyond the interpretive statements in the preamble and the purpose clause, to **expressly recognize** Rights of First Nations peoples, including the **human right to have access to clean and safe drinking water**, and to **affirm the inherent right of self-government**
- The Bill would affirm jurisdiction in relation to water, source water, drinking water on, in, under First Nations lands

# Intergovernmental agreements



Photo: Fe de Leon

- The proposed bill affirms **FN jurisdiction over source water in a protection zone** where the FN governing body, as well as federal and provincial or territorial governments have agreed on an **approach to coordinate** the application of the FN laws
- Authority for such agreements is specified in the Bill



# FN Jurisdiction

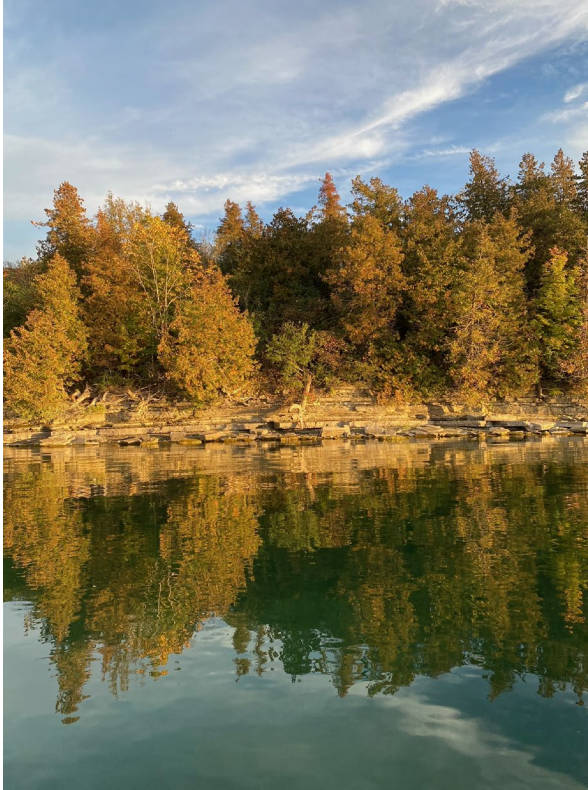


*Photo: Ajman Ladher*

- The Bill provides for jurisdiction
- **under the Act, as well as**
- ongoing development of FN laws “based on the **distinct traditions, customs and practices of First Nations**”



# Caveat



*Photo: Rick Lindgren*

- This presentation is not a thorough review of Bill 61; there are many **other quite important provisions** such as requirement of publication, the conflicts provisions vis a vis other federal law, the Minister's obligations and much else



# How Bill 61 and S 35 could work together re source water

- On amendment in Committee last December, a new proposed section provides that:
  - water and source water quality available on FN lands,
  - and in a protection zone under jurisdiction of FN (such as by way of an intergovernmental agreement)

**“must be consistent with the rights recognized and affirmed by section 35 of the *Constitution Act*, 1982.”**

# Section 35 and Prevention

- Canadian courts have stated that section 35 of the Constitution can provide relief in **anticipation of currently foreseeable harm** to Indigenous rights, before such harm occurs.
  - I will next review three high level scenarios related to potential contexts for source water protection and how they might fit into the proposed Bill along with section 35 recognition and protection by the Courts.
- How could a First Nation utilize the provisions of Bill 61 along with its section 35 Rights to protect its source of drinking water

# Scenario 1- Proposed activity “crown land”

- If the harm is “**currently foreseeable**” from that proposed activity, then current case law may provide at least a duty to consult within that permitting process under **Section 35** even without Bill 61, regardless of whether it is a provincially or federally regulated activity.
- **Bill 61 supplements the protection** especially if it adds defined context for source water as a result of development of source water protection plans with the resources and tools added by the Bill
- The tools under Bill 61 may also **reduce the burden of proof** of showing the nexus of the interest in drinking water protection and that proposed activity.

# Scenario 2 - No Plans Yet - “crown land”

- **Section 35 alone would not provide a mechanism to set up a prevention scheme where there are no current plans for an activity under the current case law because the courts have said remedies under that section can only be provided where the harm is foreseeable based on a currently occurring or anticipated activity.**

# Scenario 2 cont'd

- An advantage of Bill 61 is that **once source protection requirements are defined** for the First Nation's drinking water supply  
(for example with mapping of the source, times of travel, potential contaminant pathways),  
the Bill provides for a **potential Agreement** to be established between the FN and the Crown.

# Scenario 2 cont'd

- The Agreements contemplated under the Bill could provide for **controlling future activity** that could harm that drinking water source.
- Use of **source protection planning under Bill 61 and resulting agreements** between the Crown and the FN would conceivably be binding on the Crown in respect of any other activities it contemplates authorizing in the future. (Note the importance of drafting in the Agreement to ensure definitions are adequate; and provisions are given binding effect.)

# Scenario 3 - Proposed or current activity “private land”

- Using Bill 61 for this scenario might break **new legal ground**
- A precedent exists under Ontario’s Clean Water Act where it is possible to affect **current or proposed land use or activities on private land** for the purpose of source water protection on First Nations
- Bill 61 would likely **need to be amended** to expressly add this power to the federal government for any lands it controls or activities it regulates

# Scenario 3 Cont'd

- A companion statute would likely need to be enacted in **each of the provinces and territories** although in the Ontario case the power is likely already sufficient
- Without new legislation, **section 35 is probably not enough** for the First Nation to protect its source water against private actors since section 35 applies to actions by the Crown
- On the other hand, western common law and other statutory tools may provide **preventive relief** that could be awarded by the courts by way of injunctions or **remedies after-the-fact** for nuisance or negligence actions on the same principles that apply to a dispute between any two users of the land - but of course subject to the uncertainties of evidentiary assessments and risks of outcomes in the courts

# Conclusion



- Meeting the goal of safe drinking water for First Nations requires **new approaches and new tools**
- Existing rights such as s. 35 and UNDRIP provide **some protection**
- Proposed new SDCWA could assist and give both momentum and leverage for source water protection
- New legislation working together with existing rights such as s 35 could be a **strong new combination**

*Photo: Breanne Finnigan*

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# For reference:

## Other Legal definitions related to prevention of harm

- Harm: Loss or detriment resulting from any cause (Black's)
- Hazard: A danger or Risk; Hazardous = exposed to or involving danger (Black's)
- Prevention: “This principle allows action to be taken to protect the environment at an early stage. It is now not only a question of repairing damages after they have occurred, but to prevent those damages occurring at all. This principle is not as far-reaching as the precautionary principle. It means in short terms: it is better to prevent than repair.” - European Environment Agency
- “The precautionary principle enables decision-makers to adopt precautionary measures when scientific evidence about an environmental or human health hazard is uncertain and the stakes are high.” (Didier Bourguignon, European Parliament Think Tank, 2015)