

Protecting Water - Pathways to Drinking Water Protection in First Nations Communities



CELA and Chiefs of Ontario (COO)

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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.



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Canadian Environmental Law Foundation

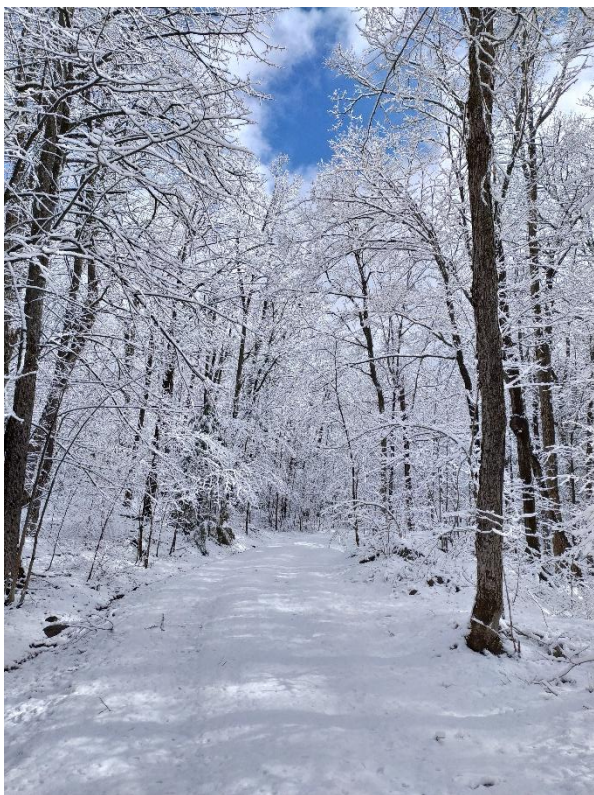


Photo: Ghislain Tillard

- 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.

Protecting Drinking Water

- For the last twenty years, in Ontario, most municipal drinking water has the benefit of a full suite of protections under a “multi-barrier” approach
- However most First Nations with drinking water systems do not yet have access to a full “multi-barrier” approach



Justice O'Connor

- Justice O'Connor devoted a chapter to First Nations drinking water quality in the Walkerton Inquiry report
- He stated “this is not acceptable” that “water provided to many Metis and non-status Indian communities and to First Nations reserves is some of the poorest quality water in the province”

Walkerton recommendations

- Invite Ontario First Nations to join watershed planning process
- First Nations and federal government to formally adopt drinking water standards as stringent or more stringent than province
- First Nations and federal gov't move to a quality management standard
- OCWA services offer
- Provincial government training facilities and technical assistance to operators on cost-recovery if requested



What is a Multi-Barrier Approach?

- Multi-barrier approach: from source water protection to treatment technology, distribution system maintenance, water quality monitoring, and emergency response planning.
- If one barrier should fail, there are more safeguards to prevent contamination.
- The first barrier is the protection of the sources of drinking water from threats to that source.
- Common threats include run-off from farms, sewage disposal, industrial waste, fuel storage tank leaks and others.



Watershed Source Water Protection

- Watershed-based source protection was a key recommendation of the Walkerton Inquiry by Justice O'Connor, which followed the drinking water tragedy of May 2000 where seven people died from drinking that tap water, and thousands more became critically ill.
- Following the Walkerton tragedy, multiple advisory committees across successive governments considered how to establish a framework for this “first barrier” in a multi-barrier approach to protecting drinking water which was adopted in 2006 as binding law for most municipal drinking water systems in Ontario.
- Sources of the municipal drinking water are mapped and the top priority threats to its safety are assessed, followed by a binding plan to ensure protection from those threats



What is Source Water Protection (SWP)?

- Surface water or ground water.
Examples: lakes, rivers, wetlands, underwater aquifers.
- Easier and cheaper to protect, than to clean up a water source after contamination is found.
- A science based approach, tailored to each location
- Establishes mechanisms to ensure that drinking water threats from surrounding circumstances or activities do not reach the tap water

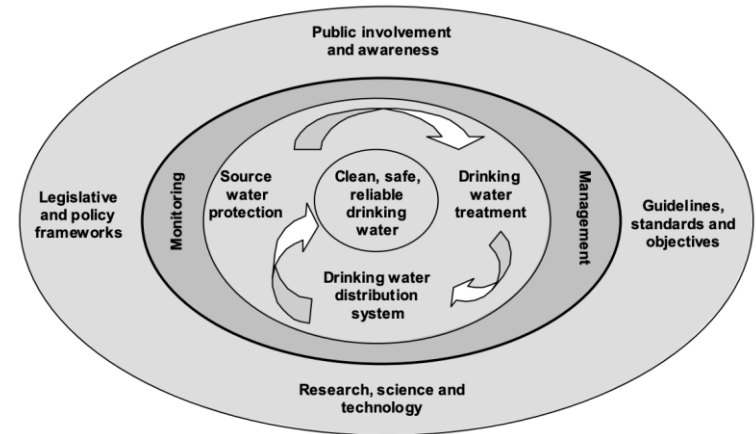


Image source: From Source To Tap - The Multi-Barrier Approach To Safe Drinking Water ([link](#)).



Proposed Bill C-61 First Nations Clean Water Act



Photo: Richard Lindgren

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.



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What are the current pathways for First Nations communities to legally protect their source water?

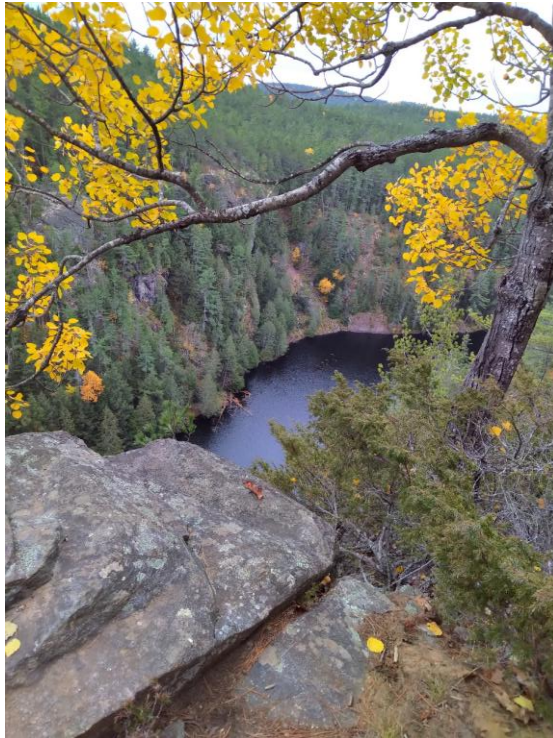


Photo: Theresa McClenaghan

- Existing Treaty Rights
- Existing Aboriginal Rights
- Section 35 of the *Constitution Act*
- Enacting by-laws under the *Indian Act*
- Passing a Band Council Resolution
- Developing a Land Management code
- Opting into the provincial SWP regime
- Introduction of new federal legislation devoted to First Nations drinking water (as co-developed with First Nations)



Exercise Inherent Jurisdiction



Photo: Fe de Leon

- Many First Nation communities in Canada are considering or already utilizing inherent jurisdiction over environmental matters by way of pre-existing Aboriginal and treaty rights. For example, see [CELA's workshop presentation, *First Nations' Environmental Governance*](#)



By-laws under the *Indian Act*

- First Nations can manage SWP by controlling certain on-reserve activities such as well regulation, zoning by-laws and wildlife conservation.
- By-laws can be enforced by the local policing agency or by-law enforcement officers. Violating a by-law can lead to a conviction and a fine.
- It is important to consider that the subject of the by-law must fall within the authority of the First Nation, as covered by one of the provisions of the *Indian Act*.
- Formal process must be followed at the Band Council Meeting, and each step documented.
- An overview of current source water protection tools is available in the [Source Water Protection in Indigenous Communities Legal Tool Kits](#).

Band Council Resolutions



Photo Fe de Leon

- Band Councils pass BCRs to take action in response to short-term situations that will likely not happen again.
- For example, a Band Council may pass a BCR agreeing to hire an expert to see whether a fuel storage tank on reserve is leaking into the groundwater.



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Band Council Resolutions [2]

- First Nations can expand their regulatory power by opting out of the 34 sections of the Indian Act that deal with land management
- First Nation Land Management is jointly supported by the departments of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) and Indigenous Services Canada (ISC).
- The Minister of Indigenous Services has been delegated the operational responsibility for First Nation Land Management and provides funding and technical support to First Nations transitioning away from the application of the lands related sections of the *Indian Act*.
- First nations can then develop a land code through a community approval process



Land Management Regime



Photo: Linda Pim

- Land Management regimes may give a First Nation the power to:
 - Administer their land
 - Pass laws regarding the land, environment, and most resources
 - Enforce the laws
- Land code gives FNs more power to regulate SWP by going beyond the by-law powers of the *Indian Act*.



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Ontario Clean Water Act, 2006 (CWA) [1]



Photo: Linda Pim

CWA allows First Nations Reserves to opt in to participate in Source Protection Planning if the reserve is inside a Source Protection Planning Area, or borders the Area CWA includes a “non-derogation” clause with regards to existing Aboriginal and treaty rights enshrined in the Constitution.

- Band Council Resolution is needed to participate
- Jurisdiction and funding issues are not clear



(CWA) [2]



Photo: Linda Pim

- CWA establishes a source protection planning process that is locally driven, science-based, and consultative in nature.
- The CWA creates obligations for four main groups to develop and implement source protection plans: The Provincial Government, source protection authorities, source protection committees (SPC), and municipalities.



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(CWA) [3]



Photo: Linda Pim

- Once a source protection plan is in effect, regulations, restrictions, and prohibitions may come into force under the enforcement sections of the CWA.
- The Province establishes the framework, provides guidance, approves plans, and is responsible for implementation and enforcement related to provincial instruments such as permits and approvals.



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Opting into the provincial SWP regime



Photo: Krystal Rousel

- The process of including a First Nation system would be initiated, by a resolution of a First Nation band council. The Province would then have the authority to include, as part of the SWP, a drinking water system that serves a First Nation reserve, as long as the First Nation requests it.
- Some First Nations see this as an abrogation of inherent and Treaty rights and choose not to participate under the provincial regime, while other Nations are excluded because they are outside the geographical jurisdiction covered by the provincial framework.
- First Nations within a source protection area may not have similar expectations and views on source water protection.



First Nations On-Reserve Source Water Protection Plan Guide and Template

Source Water Protection in Indigenous Communities Legal Tool Kits



T Former COTTFN Chief Leslee White-Eye, the Late George Henry, Workshop Facilitator, Kerrie Blaise (CELA), Elder Irene Peters, Mark Peters, Heather Gingrich

Since 2017, the **Chippewas of the Thames First Nation**, the **Oneida Nation of the Thames**, the **Munsee-Delaware Nation (CMO)** and the **Canadian Environmental Law Association (CELA)** have undertaken a collaborative, community-based project to identify threats to source waters in the Indigenous communities along the Thames River and, develop legal tools and policy aimed at their protection.

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- Provides a five-stage process for communities to develop a SWPP to manage drinking water sources:
- Stage 1: Form your Source Water Protection Working Committee
- Stage 2: Complete your source water assessment
- Stage 3: Identify management actions to address potential risks
- Stage 4: Develop an implementation strategy
- Stage 5: Review the plan every 5 years



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Community-led action (resources/toolkits)

- Communities must decide which measures they wish to adopt, and it's best if they are broadly supported, with mandatory tools or enforcement actions limited to the most critical issues or egregious action
- There are often multiple approaches that can be taken and each community needs to decide which one works best for the situation
- With guidance from the community-based steering committee, CELA has drafted legal instruments to respond to source water threats identified and prioritized by the communities



Photo: Linda Pim



Community-led action (resources/toolkits)

[Source Water Protection in Indigenous Communities
Legal Tool Kits](#)

[A First Nations Source Protection Toolkit](#)

[First Nations' On-Reserve Source Water Protection: A
Legal Toolkit](#)

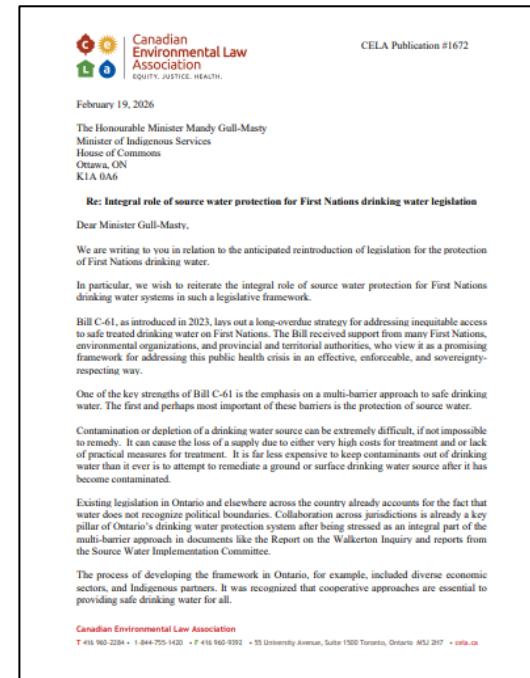


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Need for Federal Legislation - Source Water Protection in Bill C-61

- Bill C-61 included provisions for source water protection as part of a multi-barrier approach when this legislation to protection First Nations' drinking water was introduced in the last Parliament.
- CELA is calling on the federal government to ensure that these protections are included in the next version it introduces.



[CELA Submission: Integral role of source water protection for First Nations drinking water legislation](#)

Bill C61 Recognized Inherent rights



Photo: Zoé St-Pierre

- Preamble and the purpose clause,
- Expressly recognizes Rights of First Nations peoples, including the human right to have access to clean and safe drinking water,
- Affirms 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.



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Source Water Protection Content from Bill C-61

Principles

Reliable access to water services

- **5 (1)** The making of decisions under this Act is to be guided by the principle that First Nations are to have reliable access to water services on First Nation lands, as reflected in the following concepts:
- **(b)** the effective management and monitoring of all stages of water services delivery, from the **protection of source water** to the treatment and disposal of wastewater, is necessary to ensure reliable access to clean and safe drinking water;
- **(c)** the effective management and monitoring of water services includes
- **(i)** a **multi-barrier approach** that consists of an integrated system of procedures, processes and tools that collectively prevent or reduce the contamination of drinking water, from the collection to the distribution of drinking water, in order to reduce risks to public health



Increased Water Protection under Bill C-61



Photo Fe de Leon

- The tools under Bill C-61 may reduce the burden of proof of showing the nexus of the interest in drinking water protection and that proposed activity.
- Proposed new SDCWA could assist and give both momentum and leverage for source water protection.
- New legislation working together with existing rights such as section 35 could be a strong new combination.



Call-to-Action on federal First Nations drinking water protection legislation

Minister of Indigenous Services, Hon. Mandy Gull-Masty.



Ontario's Minister of the Environment, Conservation and Parks, Hon. Todd J. McCarthy.



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Next Steps Continued

Advocate for Inclusion of SWP [strengthened by community support.]

CELA submissions:

[CELA Submission re: Integral role of source water protection for First Nations drinking water legislation](#)



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