

The Safe Drinking Water For First Nations Act (Bill S-11)
Standing Senate Committee on Aboriginal Peoples

Council of Canadians Submission
February 18, 2011



The Council of Canadians thanks the Standing Senate Committee on Aboriginal Peoples for providing the opportunity to comment on the Safe Drinking Water for First Nations Act (Bill S-11).

The Council of Canadians, which was founded in 1985, is Canada's largest member-based advocacy organization. We have tens of thousands of members and over 60 community-based chapters across the country. The Council of Canadians focuses on water, climate and trade issues from a social justice perspective. Maude Barlow, the National Chairperson of the Council of Canadians, also served as Senior Advisor on Water to the 63rd President of the United Nations General Assembly (2008-2009).

With 117 communities under water advisories in December, we strongly support the creation of legislation that recognizes First Nation communities right to water and ensures safe drinking water for First Nation communities. The stated aim of the bill is to improve the safety of drinking water in First Nation communities. While we commend the stated aim, we have several concerns regarding the bill, which will be outlined below. First, Bill S-11 does not stipulate funding commitments and funding roles for the three government departments responsible for water on First Nation reserves (Indian and Northern Affairs Canada, Health Canada and Environment Canada). With the lack of funding commitments, trends toward privatization in Canada will force some communities to privatize their water systems. Finally, in developing Bill S-11 many First Nation communities were not consulted and the bill does not require consultation in developing regulations on safe drinking water for First Nation communities.

Funding

While Bill S-11 creates a regulatory framework for water on First Nation reserves, it does not allocate financial responsibility to any of the government departments currently responsible for water and wastewater on First Nation reserves. The failure to mandate funding roles and commitments is a glaring gap in legislation aimed at ensuring safe drinking water on First Nation reserves.

As highlighted by the Union of B.C. Indian Chiefs, "The lack of safe drinking water to First Nation communities is not caused by a lack of regulations. The lack of safe drinking water is caused by a lack of infrastructure, financial resources and technical expertise to ensure the safety of the water supply."

The Expert Panel on Safe Drinking Water for First Nations stated that "adequate resources – for plants and piping, training and monitoring, and operations and maintenance – are more critical to ensuring safe drinking water than is regulation alone." Although the federal government spends over \$1 billion in infrastructure including on water and wastewater systems, the Expert Panel pointed out that "the federal government has never provided enough funding to First Nations to ensure that the quantity and quality of their water systems was comparable to that of off-reserve communities." More specifically, the Panel noted that for the five-year capital plan covering 2002-07, "INAC officials acknowledge[d] that the federal government's initial estimates of the capital needed to invest in First Nations water and wastewater systems turned out to be one-third to one-half of what was actually needed."

The Expert Panel's report outlined components of "What a New Law Might Look Like" and highlighted that, "Given resource concerns of First Nations, it would be useful, almost necessary for INAC's funding role to be mandated in legislation."

On July 28, 2010, the United Nations (UN) General Assembly unanimously passed a resolution recognizing the right to safe and clean drinking water and sanitation. On September 30, 2010, the UN Human Rights Council passed a second resolution recognizing the right to water and sanitation. The UN Independent Expert on human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque, noted the significance of the HRC resolution and said that "this means that for the UN, the right to water and sanitation is contained in existing human rights treaties and is therefore legally binding."

The UN General Assembly's resolution "calls upon States and international organizations to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all."

Indian and Northern Affairs Canada (INAC) is concluding a national assessment of First Nation water and sanitation systems, which will be released in the spring. INAC claims that the assessment enables them "to develop an investment plan on water" including infrastructure,

capacity, training, operation and maintenance requirements. As some have noted, it is puzzling why this assessment is not included in the discussion of Bill S-11.

Considering that funding is a key barrier to upholding the right to water for First Nation communities, we recommend that any bill aimed at ensuring safe drinking water for First Nations include clear funding roles and commitments.

Risk of Water Privatization in First Nation Communities

Subsection 4. (1)(c)(iii) states that “regulations may confer on any person or body the power, exercisable in specified circumstances and subject to specified conditions, to require a first nation to enter into an agreement for the management of its drinking water system or waste water system in cooperation with a third party.”

We are extremely concerned that this clause could open the door to water privatization in First Nation communities. This subsection provides the Canadian government with the power to force a First Nation community to allow a private, for-profit entity to build, operate and/or manage its water and wastewater services. To be clear this clause alone does not guarantee the privatization of water and wastewater services in First Nation communities. However, given the lack of funding commitments in Bill S-11, this clause facilitates water privatization on reserves. Given federal financing trends and the negotiation of a trade agreement between Canada and the European Union, it is possible that the operationalization of this clause in the current economic and political context will lead privatization in some First Nation communities.

2010 Federal Budget

The 2010 Federal Budget stated that “the Government will undertake a comprehensive review of its current approach to financing First Nations infrastructure. To be undertaken in partnership with First Nations representatives, the review will focus on ways to more effectively support access by First Nations to alternative sources of financing, and approaches to improve the life-cycle management of capital assets.” Some of the “alternative sources of financing” may include private, for-profit entities. Some First Nation communities may be forced to allow the private sector to build, manage and/or operate their drinking water services because it is their only source of funding.

P3 Fund

In 2007, the Federal government began the Public Private Partnership (P3) Fund under the Building Canada Plan. The P3 Fund explicitly promotes privatization by offering massive subsidies to P3 projects. The P3 Fund accepts applications for provincial, territorial, municipal and First Nation P3 projects. In the last round of applications, there were 12 proposals for First Nations projects. Without explicit commitments for funding in Bill S-11, communities may be forced to enter into a P3 project even if they oppose treating water as a commodity because they lack financing to build, upgrade or maintain infrastructure for drinking water.

Canada-EU Comprehensive Economic and Trade Agreement

Canada and the European Union (EU) are currently negotiating the Comprehensive Economic and Trade Agreement (CETA). Canada and the EU concluded their sixth round of negotiations in the third week of January. CETA has been noted as the most far-reaching trade agreement to date. Drinking and sanitation services are being negotiated and if included, it would be the first time that drinking water services were included in a trade agreement. This is particularly concerning because the world's two largest water multinationals, Suez and Veolia, are headquartered in France. Water services in First Nation communities would also be open to European corporations. Water privatization around the world, which has resulted in price increases, job losses and decreases in water quality, have violated peoples' right to water.

Last December, the Council of Canadians released a report entitled *Public Water for Sale: How Canada Will Privatize Our Public Water Systems* warning of the potential impacts of the CETA on water systems in Canada. The report noted that, "The private sector will have the ability to enter First Nations as owners and operators of water and wastewater facilities due to a lack of infrastructure, resources and training within First Nations. Private operation of public facilities can lead to higher costs of service and user fees downloaded to First Nations resulting in further inequality. An added problem is that set-asides for First Nations companies, an important means for provincial-territorial governments to encourage economic development, may be lost to the CETA procurement chapter." CETA and Bill S-11 combined could prevent First Nations from building, owning and operating their own water and wastewater plants.

If Bill S-11 passes in its current form and without funding commitments, communities already lacking funding will have no alternative other than to turn to the private sector. People who

cannot afford to pay for water services may be denied access to water thus violating their human right to water.

Section 4(1) contains clauses that enable regulations to:

- (d) establish offences punishable on summary conviction for contraventions of the regulations and set fines or terms of imprisonment or both for such offences;
- (g) establish a system of administrative monetary penalties;
- (h) confer on any person the power to verify compliance with the regulations, including the power to seize and detain things found in the exercise of that power;
- (i) confer on any person the power to apply for a warrant to conduct a search of a place;

It is concerning that a community may be fined for violating regulations if the reason for the violation is lack of funding. We are also very concerned that these subsections could be used to fine, seize and detain things or search a place for non-payment of water services. It remains unclear as to why these subsections have been included in a bill pertaining to safe drinking water for First Nation communities. We request clarification on whether or not regulations penalizing community members for non-payment could be developed based on these subsections.

What is also troubling is that Bill S-11 could be interpreted as eliminating responsibility or liability of third party. Section 4.(1)(o) states that regulations may “establish defences and immunities for, any person or body exercising a power or performing a duty under the regulations.”

If a community resorts to privatizing their water system because they lack funding, some members may not be able to pay for water services. Cut-offs for non-payment have been common in privatization cases as well as ensuing health problems, illnesses and even deaths. Section 4.(1)(o) may absolve the private entity from responsibility for health problems, illnesses and deaths due to lack of clean drinking water. Based on the UN resolutions passed last year, the right to water is legally binding. In 2006, the then-High Commissioner for Human Rights, Louise Arbour, released the Report on Indicators for Monitoring Compliance with International Human Rights Instruments and pointed to the State as primary duty bearers. However, the UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, noted that corporations have a duty to respect human rights and to apply due diligence. In order to uphold the human right to water, any bill ensuring safe clean drinking water must outline clear liabilities and responsibilities for governments and private companies.

Lack of Consultation

Despite INAC's claim to have consulted with First Nations, the Chiefs of Ontario and the Union of B.C. Indians Chief have asserted that they were not consulted.

Bill S-11 also does not require consultation with First Nation communities in developing regulations. In fact, a couple of clauses affirm that the regulations made under Bill S-11 take precedence over aboriginal and treaty rights and First Nation laws or by-laws. Subsection 4. (1)(r) states that the regulations may "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." In Section 6. (1) Regulations made under this Act prevail over any laws or by-laws made by a first nation to the extent of any conflict or inconsistency between them, unless those regulations provide otherwise."

The UN Declaration on the Rights of Indigenous People, which Canada endorsed last November, requires free, prior and informed consent to any decisions affecting indigenous lands and resources. Article 32 states:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

The lack of stipulations for free, prior and informed consent in Bill S-11 is troubling. Any bill or regulations involving safe drinking water in First Nation communities should be developed alongside First Nation communities and must include their concerns.

Conclusion

Water is a human right, public trust and global commons. We recommend the following for any bill on safe drinking water for First Nation communities:

- Funding commitments and roles must be stipulated.
- The right of First Nation communities to build, own and operate their own water systems should be explicitly stated.
- Clear liabilities and responsibilities for governments and private companies must be outlined.
- A clause on free, prior and informed consent on any decisions affecting water systems should be included.

We thank the Standing Senate Committee on Aboriginal Peoples for considering our concerns about the Safe Drinking Water for First Nations Act (Bill S-11).