CHIEFS OF ONTARIO

Chiefs of Ontario
Submission to the House of Commons
Standing Committee on Aboriginal Peoples

Bill S-8: Safe Drinking Water for First Nations Act

May 27, 2013
INTRODUCTION

Mr. Chair, Honourable Members, on behalf of the Chiefs of Ontario (COO), thank you for the opportunity to provide our perspective, highlight some of the fundamental challenges with Bill S-8, and revisit some of the amendments made from Bill S-11.

COO is a political forum and secretariat for collective decision-making, action, and advocacy for the 133 First Nations communities located within the boundaries of the Province of Ontario. We are guided by the Chiefs-in-Assembly, which represent the Anishinaabek, Mushkegowuk, Onkwehonwe, and Lenape Nations and Peoples. We coordinate activities that are collectively mandated. First Nations in Ontario are generally opposed to key elements of Bill S-8.

LEGISLATIVE CONTEXT

Bill S-8 is part and parcel of a suite of federal measures that target First Nation rights and interests. Other related measures include the following: (1) Bill C-27, the recently passed First Nation Financial Transparency Act; (2) Bill S-6, the First Nations Elections Act; (3) Bill S-2, the Matrimonial Real Property measure; and, (4) the First Nation Education Act, which the federal government intends to impose some time in 2014. While the Bills have benign titles, including Bill S-8, they are correctly understood by First Nations as a general attack on their international Treaty rights. In the context of the Idle No More movement and the hunger strike of Chief Theresa Spence of Attawapiskat, the legislative suite was one of the factors that prompted the Ontario Regional Chief, Doctor Stan Beardy, to send an open letter to Queen Elizabeth on December 30, 2012. The letter appealed for Her Majesty’s intervention on behalf of First Nations, based on the still vibrant Treaty relationship between the British Crown and First Nations. A copy of the letter and other relevant information is available on the COO web site: www.chiefs-of-ontario.org.
VIOLATION OF TREATY RIGHTS

The Drinking Water Bill unilaterally and substantially interferes with property rights on reserve, including the creation of new authorities for non First Nation entities (eg. provinces). Reserves in Ontario were created as a direct result of international Treaties between the British Crown and sovereign First Nations. In other words, the reserves are a Treaty promise. The colonial successor state, Canada, is obliged as a matter of domestic and international law to honour and abide by the Treaties. Canada does not have the right to change the rules for Treaty reserves without the Free Prior and Informed Consent (FPIC) of the right holders, being the individual First Nations that signed Treaty. It must be emphasized that the standard is consent, and not only consultation and accommodation. The weaker test of consultation and accommodation is not appropriate here, in view of the fundamental changes proposed to reserve lands established by solemn Treaty. In any event, the federal government has not even come close to meeting the consultation/accommodation test for Bill S-8. The Bill violates the Treaties in the most fundamental way and is unconstitutional.

ISSUES SPECIFIC TO BILL S-8

Bill S-8 does not recognize the inherent jurisdiction of First Nations over their lands and resources. For example, sec. 7 of the Bill provides that any regulation passed under the Bill supercedes any First Nation law or by-law. Bill S-8 needs to be radically transformed through government-to-government negotiations in order to recognize and respect First Nation inherent jurisdiction and Treaty rights to deliver a critical measure of health and safety in their communities. Clean drinking water is also essential to greater economic and social development in First Nations communities. Above and beyond these more pragmatic considerations, respect for water is a central part of First Nation spirituality and culture.

COO vehemently opposes the inclusion of sec. 3 in Bill S-8, a clause which permits the abrogation and derogation of constitutionally protected
Aboriginal and Treaty rights. Ontario First Nation opposition to the current text of sec. 3 was confirmed by All Ontario Chiefs Conference Resolution 12/10 (“Derogation Clause in Bill S-8”) on June 28, 2012. COO insists on a true non-derogation clause, as follows:

“For greater certainty, nothing in this Act or the regulation is to be construed so as to abrogate or derogate from any existing Aboriginal or Treaty rights of the Aboriginal peoples of Canada under section 35 of the Constitution Act, 1982.” Section 3 of Bill S-8 contemplates the abrogation and derogation of Aboriginal and Treaty rights “to the extent that it is necessary to ensure the safety of drinking water on First Nation lands”. This provision is almost certainly unconstitutional. Rights under the Canadian Charter of Rights and Freedoms are subject to “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society: article 1 of the Charter. This “reasonable limits” exemption does not apply to the Aboriginal and Treaty rights confirmed by article 35 of the Canadian Constitution Act, 1982. Likewise, the conditional authority of Parliament to override certain Charter rights under article 33 of the Charter does not apply to the Aboriginal and Treaty rights of article 35. Therefore, the purported attempt to override Treaty and Aboriginal rights in sec. 3 of Bill S-8 is invalid.

Canada is obligated to respect the inherent and Treaty rights guaranteed by article 35 of the Canadian Constitution Act, 1982. We also remind Canada of its 2010 endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (2007). Even though the Drinking Water Bill contains numerous provisions that are in clear violation of important norms and standards in the UN Declaration, the federal government has made no significant move to amend the Bill S-8 package. This violates the basic international responsibilities of Canada. Examples of UN Declaration norms trampled by Bill S-8 are as follows: (1) article 4 of the Declaration provides that First Nations have the right to self-determination; (2) article
19 provides that First Nations are entitled to Free Prior and Informed Consent before the adoption of legislative measures that may affect them; (3) article 20 provides that First Nations have the right to engage freely in traditional and other economic activities; (4) article 21 entitles First Nations to the improvement of their social and economic conditions; (5) article 23 provides that First Nations have the right to develop strategies for the exercise of their right to development; (6) article 26 provides that First Nations have the right to their lands, territories, and resources; (7) article 29 provides that First Nations have the right to environmental protection and the productive capacity of their lands; (8) article 32 provides that First Nations have the right to determine strategies for the development of their lands and resources; and, (9) article 37 protects First Nation Treaties and requires states like Canada to respect and honour such Treaties. In summary, the extent to which Bill S-8 flies in the face of the UN Declaration is shocking and should cause a complete re-think of the federal approach.

Safe drinking water requires more than writing new regulations. Safe drinking water requires infrastructures and facilities, skills, training and resources. Outsourcing the management of water and wastewater facilities to non-First Nation entities undermines the development of First Nation capacity, and limits the ability of the related expenditures to be an economic driver for communities. The federal government should make a clear commitment to provide adequate resources and supports for all identified resource gaps of First Nation communities in relation to the delivery of safe drinking water. In addition, the federal government should provide First Nations with adequate resources and supports to investigate collective solutions and to develop community plans based on factual and current data. The federal government should collaborate with First Nations to develop a strategy that is inclusive and reflective of Traditional Ecological Knowledge and Practices for safe drinking water on reserves. First Nation water law should be respected, not unilaterally superceded.
No New Funding

It is clear that Bill S-8 will impose substantial new costs and responsibilities on First Nations without a committed transfer of resources. Currently, there are no legislative or other guarantees that an adequate level of funding will be provided to address the needs of First Nations communities.

Bill S-8 would transfer the liability for water treatment plants from the federal government to Chiefs and Councils without any guarantee that adequate financial resources will be made available to satisfy the legislation and regulatory requirements. This is a sure recipe for continuing failure.

It is acknowledged that over the past decade, the federal government has established several new initiatives focused on safe water for First Nations and has invested hundreds of millions of dollars in upgrading drinking water and wastewater infrastructure on reserves. Despite these steps, inadequate funding continues to be a key obstacle to ensuring universal access to safe drinking water. Three major problems remain. First, the Expert Panel on Safe Drinking Water for First Nations concluded in 2006 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.” Second, the Expert Panel also identified that it is “not credible to go forward with any regulatory regime without adequate capacity to satisfy the regulatory requirements”. They also concluded that “regulation without the investment needed to build capacity may even put drinking water at risk by diverting badly needed resources into regulatory frameworks and compliance costs.” Finally, the National Engineering and Water and Wastewater Systems in First Nations report, released July 2011, identified $4.7 billion in servicing needs over a 10 year period. The Department of Aboriginal Affairs and
Northern Development has not yet provided a comprehensive financial plan to respond to this assessment.

**Bill S-8 Safe Drinking Water For First Nations Act**

**Excessive Reliance on Regulations**

This Act will allow Canada to override First Nation by-laws, BCRs and policies to protect safe drinking water: sec. 7 of Bill S-8. Furthermore, the Minister will now have the power to require First Nations to charge fees to members for receiving clean water. Section 5(1)(d) states: “regulations may fix or establish a manner of calculating, the fees to be paid for the use of drinking water or of a waste water system.”

The Bill has little or no substantive content on drinking water quality. The Bill is essentially an open-ended platform for regulations (sec. 4) and related powers (sec. 5). While there is a strong indication that the federal government will look to provincial models for regulation making, there is no guarantee that this will happen. The Bill creates the appearance of regulatory action on First Nation drinking water quality, but in fact does little or nothing. There is no legal obligation on the federal government to fill the Bill in with a meaningful and acceptable regulatory regime. Unlike the Matrimonial Real Property Bill (S-2), the federal government made no effort here to set any kind of a national standard or template. The lack of substance and the sweeping extent of delegation of legislative authority to the federal Cabinet raise additional questions about the constitutionality of the Bill.

The little substantive content that there is in Bill S-8 relates mostly to liability protection in favour of the federal government, notably sections 11-13. These self-serving provisions are a transparent attempt to transfer liability for water management from Canada to First Nations and other entities. As in most other program areas (eg. child welfare), the federal
government is working hard to entrench a model where it provides inadequate funding without incurring any liability exposure. The exercise is shameful and unacceptable in view of the Treaty and fiduciary relationship between First Nations and Canada.

Delegation of powers to persons with no direct responsibility to First Nations

Bill S-8 would let the federal government set enforceable health and safety standards for drinking water and sewage treatment on reserves, without any explicit obligation to consult affected First Nations. Bill S-8 would also give federal officials broad powers to delegate the provision of drinking water and sewage treatment and enforcement of standards to third parties, which could include the Province, municipalities, and even private entities, such as corporations and individuals.

Section 5(1)(c) includes the power “to appoint a manager independent of the First Nation to operate a drinking water system or waste water system on its First Nations lands”. This makes it clear that third party management can be imposed on the direction of a person or body not accountable to the First Nation nor even under the direct supervision of AANDC.

The regulations made under sec. 4(2) may confer on”any person or body” any legislative, administrative, judicial or other power that the Governor in Council considers necessary to effectively regulate drinking water systems and wastewater systems: sec. 5(1)(b). Using a regulation to sub-delegate legislative and even judicial powers is almost certainly unconstitutional. This and other related provisions, notably secs. 8 and 9, reflect a failure to carefully think through the intricacies of the relationship between provincial and First Nation water regulation, assuming Bill S-8 leads to an incorporation of provincial standards. First Nations’ own administrative and enforcement powers ought to be recognized and entrenched, not those of third parties.
For source protection to be meaningful there needs to be tripartite co-
ordination between First Nation, federal and provincial governments, to
extend balanced protection of sources of drinking water for First Nation use
of lands.

**Incorporation-By-Reference**

Bill S-8 allows for regulations to adopt provincial legislation, which is wholly
inappropriate for the conditions and rights of First Nations. Section 5(3) of
the Bill provides that the regulations made under section 4 may adopt – or
“incorporate by reference” – laws of a province. This clause also provides
that the Governor in Council, when making regulation under the Act, may
make such adaptations to the provincial regulations as it considers
necessary. Regulations with this kind of significant impact on the control of
Treaty reserves should be subject to First Nation Free Prior and Informed
Consent. It should be up to each First Nation to decide whether or not to
adopt appropriate aspects of the provincial regulatory model.

**CONCLUSION**

First Nations in Ontario are firmly opposed to Bill S-8. The sec. 7 non-
derogation clause is an unprecedented and unconstitutional attack on
Treaty rights, including the right to First Nation control of their land and
resource base. Except for indemnity and liability provisions in favour of the
federal government, the Bill has practically no real content. It is merely a
platform for possible future regulations and powers. There is a strong hint
that much provincial law on water management will be incorporated by
reference, but little thought has been given to the detail of integrating First
Nation and provincial systems. There is no substantive federal standard.
There is no commitment to adequate federal funding to implement any new
regulations. In short, Bill S-8 is a disaster which will do long term damage
to the relationship between First Nations and Canada. Therefore, the
federal government is urged to withdraw the Bill and start over with a
respectful dialogue with First Nation governments. In the mean time the
federal government should increase resourcing on a priority basis to
ensure that water management systems on reserve are safe for all concerned.

ENDNOTES


