Safe Drinking Water for First Nations Act – An Unsafe Foundation for Safe and Sustainable Drinking Water in First Nation Communities

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CURRENT LEGAL RESPONSIBILITIES

- Crown in Right of Canada: fiduciary responsibility for building capacity and providing adequate resources:
  - Programs and Funding through INAC and Health Canada
- First Nation Chief and Council:
  - responsibility to community members;
  - contractual commitments with water operators and/or other service providers;
  - obligations as condition of federal funding to comply with federal Protocol document
- Operator/Public Works Department:
  - direct responsibility to Council under contract

2006 EXPERT PANEL FINDINGS

- "Regulation alone will not be effective in ensuring safe drinking water…. Regulation without the investment needed to build capacity may even put drinking water safety at risk by diverting badly needed resources into regulatory frameworks and compliance costs"
- "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."
- "The federal government must accept that 'comparable' in this case should be understood as comparable in quality, not in cost"

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EXPERT PANEL RECOMMENDATIONS

1. First and most critically, the federal government must close the resource gap.
2. The legal duty to consult with First Nations is essential in developing regulations.
3. High-risk communities must be dealt with immediately.
4. New federal legislation, adaptation of provincial standards, or a regulatory system based in customary law are three legitimate routes to regulation, each with drawbacks which would need to be addressed.
5. First Nation Water Commission proposed.

SDWFNA: AN EMPTY AND DANGEROUS COLONIAL RESPONSE TO PRESSING NEEDS

- Introduced in the Senate in May 2010 as Bill S-11, the *Safe Drinking Water for First Nations Act* was sharply criticized by First Nations and NGOs for ignoring the Expert Panel recommendations and for claiming sweeping jurisdiction without consultation
- After S-11 died on the order paper, the re-elected Harper Government re-introduced SDWFNA in the Senate as Bill S-8 on February 29, 2012 with few of the original concerns addressed
- **No amendment since 2013 – a Harper hangover (literally and figuratively) which is fundamentally inconsistent with a Reconciliation Approach**

KEY MISDIRECTIONS IN SDWFNA

1. Offers weak protection to aboriginal and treaty rights and utterly fails to acknowledge First Nation jurisdiction over water

- Non-abrogation of existing Aboriginal and treaty rights is explicitly subject to a clause which suggests that such rights can be overridden by regulation "to the extent necessary to ensure the safety of drinking water on First Nation lands" [s. 3]
- Governor-in-Council ostensibly authorized to "confer on any person or body any legislative, administrative, judicial or other power the Governor-in-Council deems necessary to effectively regulate" – opening up potential to privatize operations and even regulation [s. 5(1)(b)]
- Contains the threat of third party management as a punitive consequence of contravening regulations [s. 5(1)(c)(iii)]

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KEY MISDIRECTIONS IN SDWFNA

2. Fails to address the continuing resource gap.

- As a Senate bill there was no funding attached to SDWFNA when enacted . It remains unfunded legislation which imposes burdens rather than supplies tools.
- Contemplates that massive new costs and responsibilities may be imposed on First Nations without a permanent and committed transfer of adequate resources
- No specific provision for delaying the coming into force of the legislation before the resource gap has been addressed in fundamental contravention of advice of the federal government's own Expert Panel

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KEY MISDIRECTIONS IN SDWFNA

3. Undercuts the notion of the Crown's fiduciary responsibility with grossly excessive immunity provisions

- Other than acts performed directly by a minister or federal Crown employee, purports to absolve the Crown of any liability and provides that "no payment may be made under an appropriation authorized by an Act of Parliament in order to satisfy any claim " [s. 12]

- Contrary to Expert Panel recommendation that Crown and First Nations be regulated by the same hand, provides that there is "no civil liability or penalty that can be brought against Her Majesty in right of Canada under the regulations[s. 13]

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KEY MISDIRECTIONS IN SDWFNA

4. Fails to respect First Nation authority and concerns

- Legislation was enacted virtually ignoring the testimony of First Nations leaders before the Senate Standing Committee that underscored the need for committed resources and a respectful government-to-government dialogue on how to address pressing problems
- Regulations provide for almost any water-related power to be regulated, delegated, or re-delegated with the stroke of a pen in a back room
- No role defined for First Nations or First Nation organizations in making new regulations or adapting provincial regulations; under *SDWFNA* **all** First Nation-made laws must ostensibly and automatically yield to regulations including for those First Nations who have self-government agreements with Canada (unless exempted or given preference under regulations) [s. 7]

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KEY MISDIRECTIONS IN SDWFNA

5. Provides for unreasonably broad powers to delegate to “any person” almost any aspect of drinking water provision, monitoring or enforcement.

- Specific provision for regulations to “confer on any person or body” powers to make compliance orders, to do and charge First Nations for remedial work, to force First Nations to enter into management contracts and to appoint independent managers on First Nation lands
- This could include a private corporation if the Minister so-designated
- Even legislative and judicial powers can be delegated by the Governor-in-Council to an unaccountable body: a sweeping and very constitutionally suspect provision which gives unprecedented disrespect to those subject to the Act

KEY MISDIRECTIONS IN SDWFNA

6. Fails to engage upfront with any of the practical and legal issues of "borrowing" from the provincial regimes.

- Although providing broadly for the making of regulations, for the adoption and adaptation of provincial laws, and for the creation of enforcement and administrative bodies, nothing in SDWFNA prescribes who, what, where, why or how those decisions will be made, other than giving INAC virtual carte blanche to make those decisions at some future time without enshrining any consultative (let alone co-regulation) process

KEY MISDIRECTIONS IN SDWFNA

7. Highly Vulnerable to Shifts in Political Commitment by the Federal Crown

- Even in a best-case scenario where regulations developed in full collaboration and implementation assigned to First Nation bodies, the fact that the statute itself has no structure means a future government can purport to re-assign authority and re-write the rules of engagement without debate or consultation

SYNOPSIS of SDWFNA's Deeply Flawed Nature

- In its current form, the SDWFNA is a legal and constitutional non-starter which supplies none of the tools necessary to achieve its stated end of providing safe drinking water to First Nation communities and the active implementation of which threatens to undercut indigenous autonomy and rights

- An ugly relic of the pre-Reconciliation colonial style approach of imposing more unaccountable private-sector control, denying fiduciary responsibilities, and imposing burdens without resources

WHAT INSTEAD?

- While regulation has many benefits and enforceable standards and science-based protocols for building, testing, monitoring and reporting have a place in a sustainable solution to a long-term problem, the SDWFNA is not a viable platform
- Well-resourced, First Nations-directed solutions are in keeping with Expert Panel recommendations
- In a Reconciliation model, the Federal Crown needs to deliver tools and support the creation by First Nations of supportive infrastructure to sustain water quality, not to seek to shield itself behind a statute that denies its fiduciary obligations for the broken system that federal policy built

WHAT NEXT?

- Difficult questions need to be addressed head on, such as:
  - The price tag for addressing serious resource gaps: Who will foot the bill
  - How can a regulatory regime deal fairly and practically with inherently inter-jurisdictional questions such as source water protection?
  - What aspects of provincial regimes are worth borrowing, and which do not have a place within First Nation systems?
  - How are First Nation inherent rights promoted and preserved in adopting best practices for safe and sustainable water supplies?

Questions and Discussion

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