

IMPLICATIONS OF BILL S-8 AND FEDERAL REGULATION OF DRINKING WATER IN FIRST NATION COMMUNITIES

Allison A. Thornton
Koch Thornton LLP

OFNTSC Water Symposium
Sheraton Niagara, March 20/21, 2012

THE CURRENT SITUATION

- Delivery of drinking water and treatment of wastewater is currently formally unregulated in First Nation communities; governed by guidelines and enforced if at all by contracts with AANDC (funding conditions)
- Some individual First Nations have passed their own water laws of varying complexity: no national/regional template for what is governed or how
- *Fisheries Act* governs discharge of effluent based on harmful effects on fish
- Provincial laws generally do not apply to water and wastewater treatment on reserve

CURRENT LEGAL RESPONSIBILITIES

- Crown in Right of Canada: fiduciary responsibility for building capacity and providing adequate resources:
 - Programs and Funding through AANDC 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

CHALLENGES OF A LACK OF ENFORCEABLE STANDARDS

- AANDC Standards are not enforceable against or recognized by third parties (e.g. contractors)
- AANDC Standards do not necessarily correspond or integrate with those applicable in neighbouring municipalities
- First Nations are affected by but not necessarily fully represented in local/regional source water protection plans which affect water sources on reserve
- Real or perceived shortfalls in stringency and enforcement of guidelines may impair community sense of well-being and may be a barrier to economic development

PROTOCOL FOR SAFE DRINKING WATER IN FIRST NATIONS COMMUNITIES

- A product of the First Nations Water Management Strategy, the Protocol was developed in 2006 to take a web of confusing and conflicting standards and guidelines and consolidate into a single document
- Most recently updated in April 2010 and remains the key document for First Nation facilities
- Applies to:
 - Small Community Systems (5-100 households)
 - Community Systems (>100 private households)
 - Public Facilities and Trucked Systems
- Compliance is a requirement for receiving federal funding

DIFFERENCES BETWEEN PROTOCOL AND REGULATIONS

- Far more generic than provincial legislative/regulatory regimes: suggestions, not prescriptions
- Regional differences (e.g. in water operator training requirements)
- Continues to invite confusion (e.g. “stricter of Protocol or applicable provincial standard”)
- Cannot be enforced against third parties or federal government itself
- Single “remedy” is withholding of funding: counter-productive

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”

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.

CURRENT CONDITIONS IN ONTARIO –

Neegan Burnside Report, April 2011

- Ontario First Nations have some of the most urgent needs among First Nations in Canada with 46% classified as “high risk” systems
- Across Canada, First Nations communities have a generalized need for back-up and fully certified operators and systems, emergency response plans and adequate operation and maintenance funding to meet the full cost of operating and maintaining existing systems
- \$1.08 billion in construction needs, plus \$79.8 million in non-construction costs identified on a preliminary basis to meet protocol without extensively investigating each system – before accounting for 30% projected population growth

BILL S-8: AN EMPTY AND DANGEROUS RESPONSE TO PRESSING NEEDS

- Introduced in the Senate in May 2010, Bill S-11, *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
- Current Bill S-8, introduced in the Senate on February 29, 2012, has most of the same flaws of its predecessor and does not seem to have taken First Nations' concerns into account
- **Senate misrepresents the recommendations of the Expert Panel and the degree to which Bill S-8 responds to First Nation concerns**

KEY MISDIRECTIONS IN BILL S-8

1. Offers weak protection to aboriginal and treaty rights.

- Non-abrogation of existing Aboriginal and treaty rights is explicitly subject to a clause which suggests that such rights can be overridden “to the extent necessary to ensure the safety of drinking water on First Nation lands” (s. 4)
- While this provision is a marked improvement over “free derogation” language in its predecessor, Bill S-11, when it is noted that other parts of the Bill allow the Governor-in-Council to “confer on any person or body any legislative, administrative, judicial or other power the Governor-in-Council deems necessary to effectively regulate”, the arrogation of the power to override constitutionally protected rights “to the extent necessary” remains concerning

KEY MISDIRECTIONS IN BILL S-8

2. Fails to address the continuing resource gap.

- As a Senate bill there is (and can be) no funding appropriation attached to Bill S-8, nor has any specific commitment been made to address the deficiencies documented in the Neegan Burnside Report
- Massive new costs and responsibilities are imposed on First Nations without a committed transfer of resources
- No specific provision for delaying the coming into force of the legislation before the resource gap has been addressed

KEY MISDIRECTIONS IN BILL S-8

- 3. Undercuts the notion of the Crown's fiduciary responsibility with 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 “
 - Contrary to 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 the Crown

KEY MISDIRECTIONS IN BILL S-8

4. Fails to respect the Crown's duty to consult

- Legislation largely ignores the testimony of First Nations leaders before the Senate Standing Committee that underscored the need for committed resources and a government-to-government dialogue on how to address pressing problems
- Regulations provide for almost any water-related power to be regulated or delegated with the stroke of a pen in a back room
- No role defined for First Nations in making new regulations or adapting provincial regulations; First Nation-made laws must yield to regulations except for those First Nations who have self-government agreements with Canada who may opt in or out.

KEY MISDIRECTIONS IN BILL S-8

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 BILL S-8

- 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 the Bill suggests who, what, where, why or how those decisions will be made, other than giving AANDC virtual carte blanche to make those decisions at some future time without enshrining any consultative process

SYNOPSIS of BILL S-8

- In its current form, Bill S-8 is a legal and constitutional non-starter which makes no progress towards its stated end of providing safe drinking water to First Nation communities and which threatens to undercut aboriginal autonomy and rights
- Shows the current government's hand – pushing for more private control, less accountability to First Nations and less responsibility to AANDC

WHAT NEXT?

- A law in the form of Bill S-8 must be vocally resisted. First Nations must speak out against the lack of dedicated resources and unprecedented delegation of decision-making for water and land-use planning issues in First Nation communities to unaccountable persons and bodies
- A well-resourced, First Nations-directed solution to the problem is needed in keeping with Expert Panel recommendations
- Collective actions and collective proposals have the best chance of success in this legal and political environment

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 and treaty rights promoted and preserved in adopting best practices for safe and sustainable water supplies?

CURRENT STATUS OF S-8

- Second Reading in Senate – debate may resume on March 27, 2012
- Unlikely to be sent to committee given the official stance that First Nations were “consulted with” on S-11
- Given Conservative majority in both Houses, likely to pass
- Still room to press for changes or reconsideration
- Implementation will be key: First Nations need to be ready for both the practical and the legal implications of what is coming ahead – both at a federal *and* provincial level

Questions and Discussion

Contact:

allison.thornton@ktbarristers.com

(416) 216-0225