

Concept Paper on the Process to Develop a New Federal Bill on Safe Drinking Water for First Nations



The
**Phare
Law**
Corporation

1 Background

Assembly of First Nations (AFN) Resolution 76/2015 calls for the federal government to immediately repeal the *Safe Drinking Water for First Nations Act* and to develop, in partnership with First Nations, appropriate outcomes

for the provision of safe drinking water that are respectful of First Nations rights including the identification of necessary funds for capital investments, operations and maintenance funding, and personnel, and training for all First Nations communities, to improve the state of First Nations water systems while a new legislative framework is in development.

Further to that, AFN Resolution 88/2017 directs the AFN to:

1. *Establish a joint Working Group comprised of AFN, Chiefs Committee on Housing and Infrastructure and their regional technicians, federal representatives, legal counsel for AFN and the federal government, and other experts, as necessary, to co-develop a draft framework for new legislation.*
2. *Call upon the federal government to commit to adequate multi-year funding for the co-development of a draft framework for new legislation and to support First Nations engagement sessions.*
3. *Co-develop a framework for a First Nations Water Commission with First Nations and Indigenous and Northern Affairs Canada, and to call on the federal government to secure funding for the design and implementation of a Water Commission.*
4. *Ensure that the co-development of a draft framework for new legislation respects the following principles:*
 - a. *Is respectful of First Nations inherent rights and Indigenous laws.*
 - b. *Meets the spirit and intent of the United Nations Declaration on the Rights of Indigenous Peoples.*

The federal government has committed to eliminating all long-term drinking water advisories (LTDWA) on public systems on reserve (there are 1047 such systems) by 2021 and has allocated significant resources¹ to achieve that commitment. Part of achieving – and maintaining - the elimination of all DWAs is the creation of legislation that adequately, properly, and respectfully fills the regulatory gap regarding safe drinking water on reserves. Budget 2016 provided \$1.8 billion over 5 years and Budget 2018 provides an additional \$172.6 million over three years, beginning in 2018–19, to improve access to clean and safe drinking water on reserves.

The co-drafting approach proposed in this Concept Paper is the best way to achieve a First Nations safe drinking water Bill that is acceptable to First Nations and is based on First Nations' needs and values.

2 Co-drafting: A Proposed Approach to Developing the Bill

2.1 What is "Co-Drafting"?

Co-drafting is an innovative approach to developing draft legislation in a collaborative and respectful way. It gives the opportunity for the perspectives around the table to learn from each other, collaborate on acceptable solutions, and reach agreement on the words that are to be proposed in the draft law. This approach does not mean that everybody gets what they want in every part of the law, but it allows for a direct negotiation and collaboration between First Nations and the federal government. It means that First Nations will have direct engagement in writing up an adequate, proper, and respectful First Nations safe drinking water law.

2.2 Why Do Co-Drafting?

There are numerous incentives to adopt a co-drafting approach for federal First Nations water legislation. First, the federal government committed to implementing the "*Principles on Government's Relationship to Indigenous*

¹ Chad Westmacott, "*Canada's Approach to Clean Drinking Water*" February 6, 2018, slides 2 and 3 of PowerPoint delivered at Assembly of First Nations National Water Symposium and Trade Show February 6, 2018 provided that "Budget 2016 provided \$1.8 billion over five years to improve on-reserve water and wastewater infrastructure, ensure proper facility operation and maintenance, support the training of water system operators, and provided \$141.7 million over 5 years to improve drinking water monitoring and testing on reserve."

Peoples". Principles 1, 4 and 5² specifically address matters directly related such as the need to work together very differently:

*It is the mutual responsibility of all governments to shift their relationships and arrangements with Indigenous peoples so that they are based on recognition and respect for the right to self-determination, including the inherent right of self-government for Indigenous nations. For the federal government, this responsibility includes **changes in the operating practices and processes of the federal government**. For Indigenous peoples, this responsibility includes how they define and govern themselves as nations and governments and the parameters of their relationships with other orders of government. [emphasis added]*

Also, from Principle 4:

Nation-to-nation, government-to-government, and Inuit-Crown relationships, including treaty relationships, therefore include:

- a. ***developing mechanisms and designing processes** which recognize that Indigenous peoples are foundational to Canada's constitutional framework;*
- b. ***involving Indigenous peoples in the effective decision-making** and governance of our shared home;*
- c. *putting in place effective mechanisms to support the **transition away from colonial systems** of administration and governance, including, where it currently applies, governance and administration under the Indian Act; and*
- d. *ensuring, based on recognition of rights, the space for **the operation of Indigenous jurisdictions and laws**. [emphasis added]*

Other obligations include meeting the spirit, intent and letter of the United Nations Declaration on the Rights of Indigenous Peoples, the Truth and Reconciliation Calls to Action, the recommendations of the Royal Commission on Aboriginal Peoples, and the human and international rights to safe drinking water (for example, under the United Nations Sustainable Development Goals).

Co-drafting, as a process by which to reach mutual agreement, is in line with many of the above commitments. The process is one where equal partners at a common table create a mutually agreeable law. Co-drafted legislation, as it will be crafted from the values, views and text brought by First Nations directly to the co-drafting table, will result in a better, more relevant, and much more acceptable and meaningful law.

2.3 How does Co-drafting Work?

The Government of Canada states that:

"Legislation refers to written laws, often referred to as Acts or statutes, which are enacted by Parliament, the legislative arm of government. Draft legislation, called a bill, is introduced to Parliament and requires the assent of the House of Commons, the Senate and the Crown to become law.

*Regulations are a form of law, sometimes referred to as subordinate legislation, which define the application and enforcement of legislation. Regulations are made under the authority of an Act, called an Enabling Act. Regulations are enacted by the body to whom the authority to make regulations has been delegated in the Enabling Act, such as the Governor in Council or a minister, etc."*³

² <http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>

³ <https://www.canada.ca/en/health-canada/corporate/about-health-canada/legislation-guidelines.html>

When a federal, provincial or territorial government seeks to develop or amend legislation, a series of steps are generally followed as shown in the diagram below.

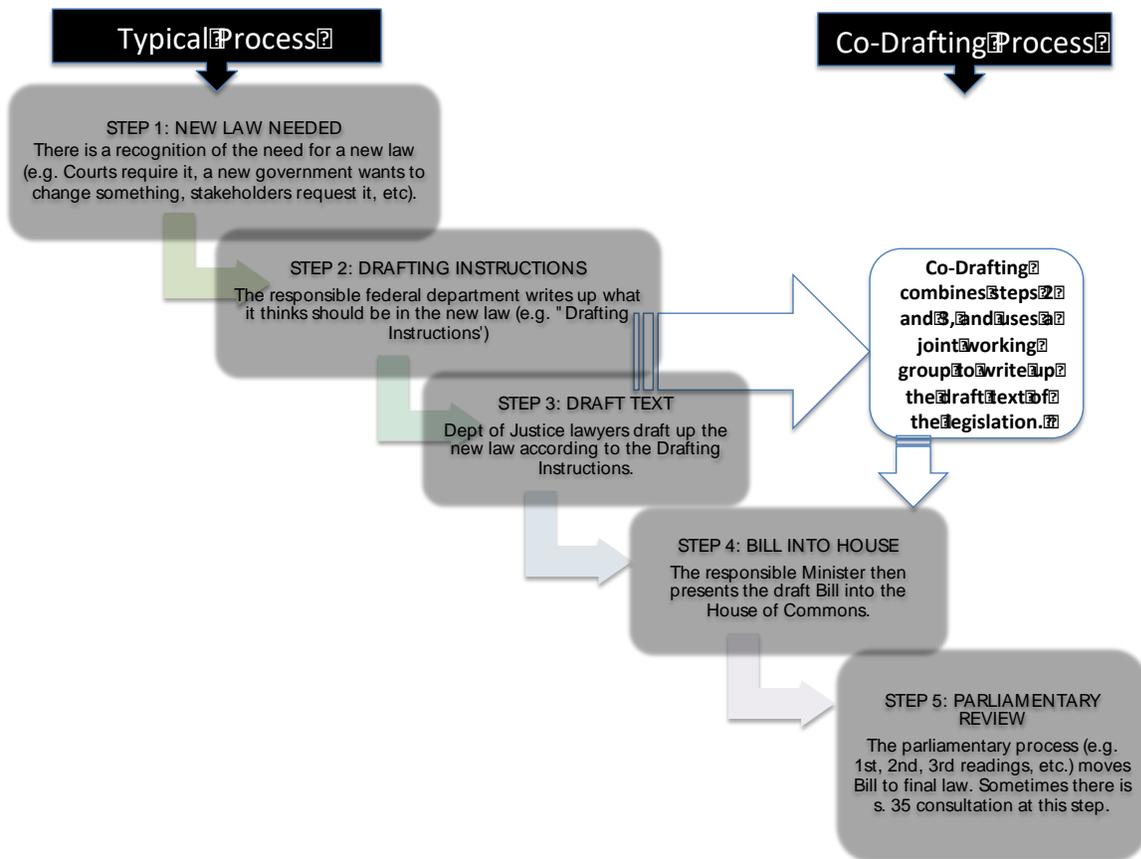
Co-drafting is a process that changes – and combines – the scoping and writing of the legislation (Steps 2 and 3, below) so that First Nations and the federal government work collaboratively to write a draft Bill that is acceptable to both parties.

Co-drafting creates a process where a Working Group (Resolution 88/2017), comprised of First Nation safe drinking water experts and lawyers, and federal safe drinking water officials and lawyers, collaborate to write up a Draft Bill together. They do Steps 2 and 3 together: the participants in the Co-Drafting Joint Working Group work on all aspects of a proposed Draft Bill until they reach agreement on text. At this point (subject to any engagement or consultations that are required) the "Final Draft Bill" is ready and, the co-drafting stage is complete.

The final steps (Steps 4 – 5) include the Federal government taking the Final Draft Bill and proposing it in the House of Commons. The Final Draft Bill then goes through the regular parliamentary processes for consideration, revision, and approval bills (for example, 1st, 2nd, and 3rd readings, etc.). As this stage, consultation with First Nations across Canada on the Draft Bill will likely occur. Canada's engagement with the public occurs at this time. Extensive changes may still be made at this stage, but are less likely given the extensive involvement of First Nations in the co-drafting process.

These typical steps are shown below:

PROCESS TO CREATE LEGISLATION



2.4 Critical Aspects of Co-Drafting

2.4.1 Co-Drafting means Writing the Draft Bill Together with a Legislative Drafter

The federal government has indicated that the Department of Justice lawyers are required to write up the legal text of the Bill, without First Nations being involved (even through a co-drafting table). In other words, the federal government is currently suggesting that Step 3 must not be included in the co-drafting process and that First Nations can only be involved in writing up Drafting Instructions (rather than writing up the law itself).

There is no known legal reason why the actual writing of the draft Bill has to be an internal - meaning hidden within the federal government - process. It is only by way of convention, or general habit, that it is done this way. Often concerns are raised about "confidentiality" or "parliamentary process", but these concerns are not valid, can be addressed, and are no longer in line with the numerous commitments made by Canada to engaging very differently and building new, strong, nation-to-nation relationships with First Nations.

Requiring the text of the proposed bill to be drafted at the Co-Drafting Joint Working Group ensures that all interests are brought forward to the table openly and directly and can be addressed openly and directly. Writing

the text of the law together means that the federal participants at the co-drafting table must bring all concerns, including those it receives from other departments, Cabinet etc. as the drafts of the Bill evolve. They must explain the interests of Cabinet without breaking government confidentiality requirements, and they must be mandated to speak openly with instructions to reach a negotiated solution. Members of the co-drafting table must be allowed and capable of explaining the reasons for their views on any particular element of the draft Bill under discussion, so that innovative solutions may be found collectively.

There have been other co-drafting processes where this has occurred. First Nations were directly involved in drafting the text of the Northwest Territories *Species at Risk Act* in 2010 and the *Wildlife Act* in 2014. These are laws that serve as workable examples of First Nations having their "hands on the pen" regarding writing up the text of the draft Bill in the co-drafting process. In the NWT process, Steps 2 and 3 of the Typical Process were combined as is proposed in this Concept Paper.

2.4.2 The Co-Drafted Bill May Still be Revised After Co-Drafting

Co-drafting creates a Final Draft Bill ready for first reading and the start of the formal legislative process of law-making (Steps 4 and 5 in the Typical Process). This existing, formal part of the legislative process is legally mandated and deeply engages the roles of parliamentarians to review, research, and seek public, indigenous and other government views on the draft bill. This process results in changes to the draft Bill to create a law that is democratically acceptable to all lawmakers. The co-drafting process proposed in this Concept Paper is not aimed at modifying this end process.

However, a good faith co-drafting process would result in a commitment of the National Chief of the AFN, the Minister responsible for the proposed Bill (likely the Minister of CIRNA), and the Minister of Justice to publicly support the final Draft Bill once it finally leaves the Co-Drafting Joint Working Group. This requirement ensures that all items are presented and addressed to the Co-Drafting Joint Working Group and nowhere else (until the Final Draft Bill is submitted to the parliamentary process).

2.4.3 Co-Drafting Does Not Eliminate the Crown's Consultation Obligations

Just as co-drafting doesn't eliminate the need or opportunity for public scrutiny of the Bill (through 1st, 2nd and 3rd readings), neither does co-drafting eliminate the need for the Crown to engage in consultation, and if appropriate accommodation, with First Nations rights holders. As noted in section 3.2 above, this will occur once the Minister has given the Final Draft Bill to the government.

3 What Legislation will be Created?

This has not been decided, but will be considered in the development of the framework for the bill. The Co-Drafting Joint Working Group will recommend a framework and then First Nations will be able to review and give a further mandate to the AFN members of the Co-Drafting Joint Working group to proceed to draft the bill in accordance with the mandate.

It is possible that enabling legislation will be required, including the development of a draft "template" regulation that First Nations could use to set out the regime that will be used to ensure safe and clean drinking water on reserve. The enabling legislation could also immediately integrate any existing regulations that have been close to final stages of development (for example, the pilot regulation that has been developed in the Atlantic region).

As set out below, First Nations will be widely engaged in the discussion of this framework, the draft bill and the regulations.

4 How AFN will Engage First Nations' in the Co-Drafting Process

This Concept Paper proposes a high-level approach, led by the AFN, to full and extensive engagement of all interested First Nations in the co-drafting process. The diagram on the next page summarizes the five phases in the proposed co-drafting process, and shows how each involves and is based on and meant to ensure alignment with First Nations needs and values.

Phase 1: A draft Framework for the Bill will be developed by the Co-Drafting Joint Working Group based on previous and current statements, research, and viewpoints expressed by First Nations, First Nation organizations, ally lawyers and consultants, the Expert Panel on Safe Drinking Water for First Nations, the work done by the Assembly of First Nations during the 2009 development of their positions on the *First Nations Safe Drinking Water Act*, along with the expertise of the AFN's members on the Co-Drafting Joint Working Group;

Phase 2: The AFN will hold approximately 12 regional engagement sessions (BC, YK, NWT, AB, SK, MB, ON, QC, ATL) on the draft framework with all interested First Nations and will clearly outline how the implementation of such a framework could impact First Nations and how it addresses previous identified concerns of First Nations. These sessions will be for First Nations to be able to review the Draft Framework and provide feedback and direction on the Draft Framework for the legislation. AFN will produce a summary of each round of the regional engagement sessions, and will use these summaries to form the basis of the next round of proposed work at the Co-Drafting Joint Working Group;

Phase 3: The AFN will share with the Co-Drafting Joint Working Group the interests identified by First Nations in Phase 2. The Joint Working Group will address the interests, resulting in a modified legislation framework that all members of the Joint Working Group can support. The relevant Co-Drafting Joint Working Group members will each take the legislative framework back to their systems to secure their respective mandates to proceed to the legislative drafting phase;

Phase 4: The Co-Drafting Joint Working Group will implement a joint legislative co-drafting process and will develop the text of the Final Draft Bill. The Final Draft Bill will be supported by the Minister and the AFN at this stage based on the recommendation of the Co-Drafting Joint Working Group. Throughout this process, the AFN



members on the Co-Drafting Joint Working Group will regularly brief and receive input and advice from the Special Chief's Committee on the Safe Drinking Water Legislation on progress being made in drafting the Bill;

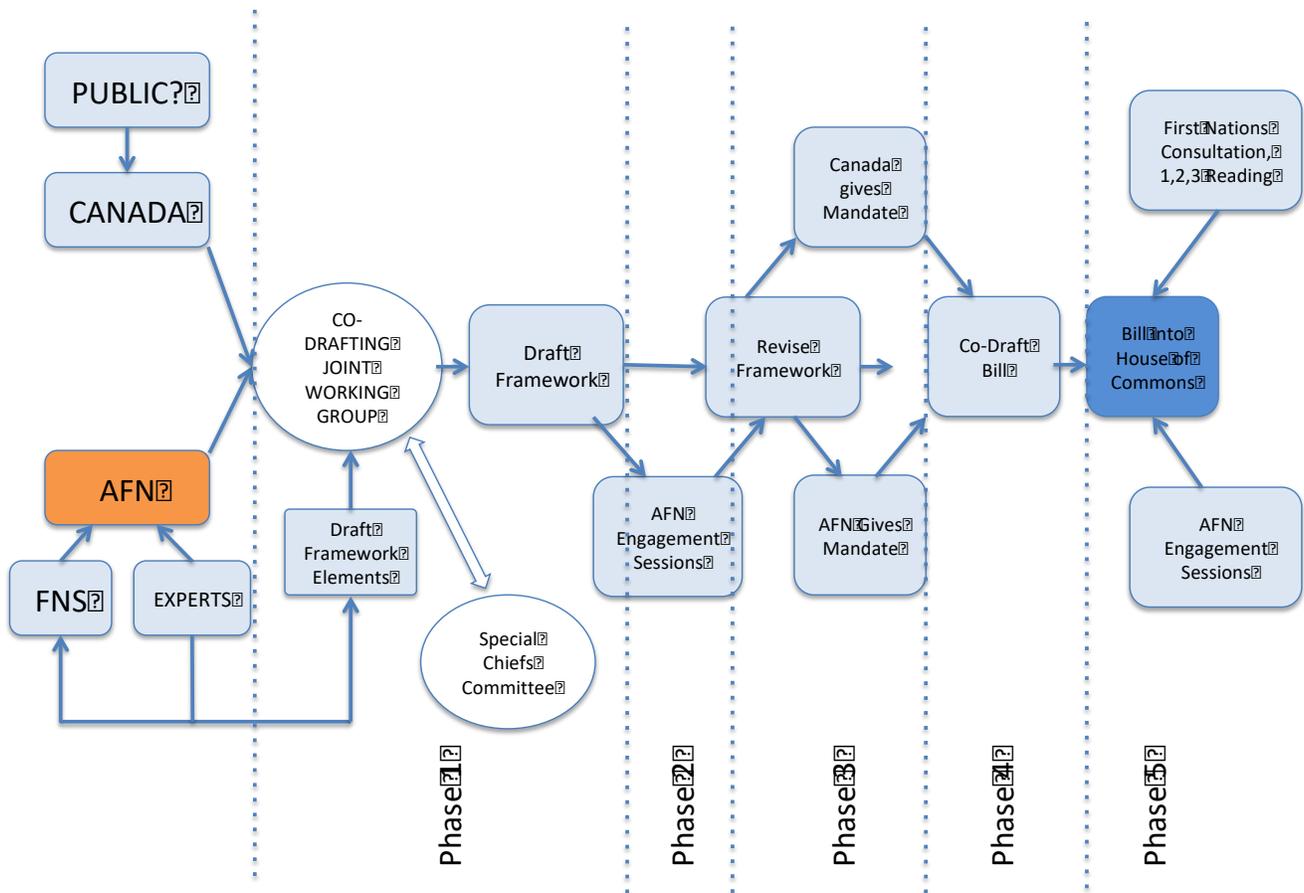
Phase 5: The agreed Final Draft Bill will be introduced into the House of Commons by the Minister. As it proceeds through the legislative review processes of the House of Commons (e.g. 1st, 2nd and 3rd reading). Canada will likely begin s.35 consultation on the Final Draft Bill also at this time. The AFN will hold regional engagement sessions with all interested First Nations where it will provide First Nations with sufficient information about the Final Draft Bill and will clearly outline how the implementation of the bill could impact First Nations. This will allow First Nations to engage in the legislative review processes and s.35 consultations processes as they wish. These sessions will be for First Nations to be able to:

- Review the Final Draft Bill;
- Provide comments and concerns;
- Suggest alternate or additional means to improve the Draft Bill;
- Indicate their level of support for the Draft Bill;
- Prepare for and engage in s.35 consultations;
- Prepare for and engage in parliamentary review processes.

These engagement points will ensure First Nations views, needs and concerns direct AFN's participation in the Co-Drafting Joint Working Group process.

By way of visual summary, the co-drafting process is:

Summary of Proposed Co-Drafting Process



5 Purpose, Structure, Reporting, and Composition of the Co-Drafting Joint Working Group

5.1 Guiding Purpose

The Co-Drafting Joint Working Group will explore ways and means to conduct its work in a manner consistent with First Nation Water protocols and will endeavor to participate in appropriate water ceremonies, site-visits and protocol exercises so as to inform themselves and their work of the First Nation perspectives and rights that must be incorporated in the co-drafting process. This ensures alignment with the Government of Canada's acknowledgement that strong First Nations cultural traditions and customs, including languages, are fundamental to rebuilding First Nations. As this work is water-focused the Co-Drafting Joint Working Group will commit to informing itself of the diverse needs and experiences of First Nation women and girls which must be considered as part of this work given women's deep spiritual, legal, ceremonial and practical connection to safe drinking water.

5.2 Structure

The Co-Drafting Joint Working Group:

- Will have co-chairs, one from Canada and one from the AFN;
- Will have equal numbers of members;
- Will have a full range of expertise to ensure that First Nations values, needs, and interests can be fully articulated and addressed;
- Will operate by consensus (meaning by widespread agreement of its members).

5.3 Composition

The AFN will ensure that its representatives on the Co-Drafting Joint Working Group will comprise the following expert knowledge areas:

- **Legal:** AFN will have lawyers expert in water and drinking water law, constitutional law, and First Nations law, customary law, treaty and Aboriginal rights, the Indian Act, legislation development, and legislative drafting;
- **Technical:** AFN will have experts knowledgeable in water treatment technology; local and regional service delivery; capacity building and technical training; infrastructure; project management and implementation;
- **Governance:** AFN will have experts in water governance, water policy development, source water protection;
- **Financial and Economic:** AFN will have experts in financing and financial sustainability of water service systems; First Nation finance structures, limitations, and opportunities; funding programs and opportunities; investment; insurance; and taxation; modeling economic sustainability of water service delivery; pricing operations and maintenance;
- **Indigenous and Western Scientific Knowledge:** AFN will have experts in source surface and groundwater, drinking water quality; water monitoring; contaminants; human health and First Nation cultural understandings and values regarding water.
- **First Nation Water Ceremonies and Protocol:** AFN will be supported in ensuring that individuals familiar with water ceremonies and protocol and are available and incorporated into the co-drafting process.

Finally, the Co-Drafting Joint Working Group will have a lawyer, agreed to by both the AFN and the federal government that has specific expertise in and will be a member of the Co-Drafting Joint Working Group charged with the group's legislative drafting tasks.

The Co-Drafting Joint Working Group will likely have equivalent numbers and skill sets of lawyers and experts appointed by the federal government.

5.4 Reporting

This Concept Note recommends the creation of a Special Chief's Committee on the First Nations Safe Drinking Water Legislation struck for the specific purpose of advising and supporting the Co-Drafting Joint Working

Group. A critical purpose of this Special Chiefs Committee is assist the AFN representatives on the Co-Drafting Joint Working Group with keeping the process moving quickly and with focus (which may require the Chiefs on the Special Chiefs Committee to engage and brief Ministers if the co-drafting table meets excessive delay, resistance or other unreasonable challenges from federal counterparts).

This Committee should:

- Be comprised of 4-6 Chiefs from the AFN General Assembly of Chiefs that have direct experience, interest, and time to dedicate to advising the Co-Drafting Joint Working Group on the proposed aspects of the Bill as it is developed.
- Assist the Co-Drafting Joint Working Group in addressing serious political concerns, the event that these kinds of concerns arise.
- Include the Chair of the Chiefs Committee on Housing and Infrastructure and the Chair of the Chief's Committee on the Environment.

6 Timeline for Development of the Final Draft Bill

There are about 500 days left in the life of the current federal government (it goes to election October, 2019).

This Concept Paper proposes that the most optimistic outcome would be the completion of Phases 1-4 by May 31 2019). This timeline would result in an Act being in place before October, 2019. This is the recommended option. See the timeline graphic below.

Completion of all phases (the Final Draft Bill) by May 2019 allows for 5 months to be allocated to the parliamentary process of 1st, 2nd and 3rd readings and s.35 consultations. This is an aggressive timeline, and would require a sincere commitment by all parties to resolving matters expeditiously. This would also require direct and committed political oversight by the federal government and the AFN.

This aggressive timeframe is manageable if the Draft Bill is well-drafted and truly integrative of First Nation needs and perspectives (which is the intent of the co-drafting process proposed), because this would minimize the extent of revisions in Phase 5. However difficult, this is the preferred option because it results in a completed Act before the election in October 2019, minimizing the risk that a new government would cease development of the Act, or that it dies on the order paper.

6.1.1 Recommended Timeline (Option 1)

