

Consultation draft: Proposal for An Act respecting drinking water, wastewater and related infrastructure on First Nation lands

Summary

This enactment affirms that the inherent right to self-government, recognized and affirmed by section 35 of the *Constitution Act, 1982*, includes the jurisdiction of First Nations in relation to drinking water, wastewater and related infrastructure on, in or under First Nation lands. It sets out principles, such as substantive equality, to guide the provision for First Nations of clean and safe drinking water and the effective treatment and disposal of wastewater on First Nation lands. It also provides pathways to facilitate source water protection.

Preamble

Whereas the stewardship, the protection and the sustainable use of water are of fundamental value to First Nations;

Whereas the health, safety and well-being of First Nations must be the primary consideration in every aspect of the provision of water services;

Whereas clean and safe water is integral to the traditions, customs and practices of First Nations, particularly in relation to sustenance, transportation, trade, agriculture, cleaning and purification, and it is essential for the habitat of the plant, fish and other animals that are the source of food and medicines;

Whereas it is desirable that First Nations' knowledge of water stewardship be incorporated into federal laws and policies regarding water services on First Nation lands;

Whereas it is desirable to establish national principles, including the principle of substantive equality, that will guide all decision making regarding water services for First Nations;

Whereas Parliament affirms the need to take into account the lived experience, and to address the needs, of First Nations persons, including those of elders, parents, youth, children, persons with disabilities, women, men, gender-diverse persons and two-spirit persons, and specifically of those who have compromised health due to inadequate quality and quantity of drinking water, wastewater treatment and related infrastructure;

Whereas Parliament recognizes that regulatory gaps, policy gaps and underfunding have resulted in inadequate infrastructure for the provision of drinking water and wastewater treatment and

disposal on First Nation lands and that those gaps and that underfunding have contributed to social and health conditions that are not equal to those of other people in Canada and to long-term drinking water advisories on First Nation lands, and have left First Nations in vulnerable circumstances that must be addressed;

Whereas Parliament recognizes that jurisdiction over water services by First Nations is a primary means of achieving self-determination by First Nations and that there is a need for a transparent and clear process for First Nations to exercise that jurisdiction;

Whereas Parliament recognizes that regulatory measures will help ensure reliable access to clean and safe drinking water and effective treatment and disposal of wastewater on First Nation lands;

Whereas Parliament recognizes the inherent right of self-government as an existing right under section 35 of the *Constitution Act, 1982*, which includes, for First Nations, jurisdiction in relation to drinking water, wastewater and related infrastructure on, in or under First Nation lands and is committed to supporting the implementation of that right, in particular through affirming that First Nations have authority to make and enforce laws in relation to drinking water, wastewater and related infrastructure;

Whereas Parliament recognizes the role of First Nation women as water protectors and in a First Nations water ceremony and in water governance and management;

Whereas Parliament recognizes the role of First Nation Elders as keepers of traditional knowledge that is of vital importance to water governance and management;

Whereas the Government of Canada plays a key role in ensuring that substantive equality is achieved in respect of the provision of First Nations water services;

Whereas the Government of Canada recognizes that Indigenous parties to land claims agreements within the meaning of section 35 of the *Constitution Act, 1982* exercise their rights in a manner consistent with the terms of their respective land claims agreements as those agreements may evolve through amendments, or through any processes for periodic renewal;

Whereas the Government of Canada acknowledges

- that First Nations, the Government of Canada and provincial, territorial and municipal governments all have responsibilities related to clean and safe drinking water and that they exercise those responsibilities within the limits of their respective jurisdictions and that the protection and sustainable use of source water is critical for the cost-effective and efficient provision of water services on First Nation lands;
- that it is desirable that First Nation, the Government of Canada and provincial, territorial and municipal governments collaborate in order to ensure the protection and sustainable use of source water, reliable access to clean and safe drinking water and the effective treatment and disposal of wastewater, on First Nation lands;
- that it has committed to implement the United Nations Declaration on the Rights of Indigenous Peoples;
- that under the *United Nations Declaration on the Rights of Indigenous Peoples Act*, it must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with that Declaration;

- First Nations have made multiple calls for water services funding that is adequate, predictable, stable, sustainable, needs-based and consistent with the principle of substantive equality in order to secure long-term positive outcomes for First Nations;
- that the General Assembly of the United Nations and the United Nations Human Rights Council have passed resolutions that recognize the right to safe and clean drinking water and sanitation as a human right;

Whereas the Government of Canada recognizes

- that First Nations have authority over the creation and use of data and information relating to water services and that it is critical that First Nations control their own data and information, including their traditional knowledge, relating to water services;
- the necessity of collaborating with First Nations to protect and promote public health and protect the environment by ensuring reliable access to clean and safe drinking water and the effective treatment and disposal of wastewater on First Nation lands;

Whereas the Government of Canada is committed

- to reconciliation with First Nations, including through affirming, recognizing and upholding their rights under section 35 of the *Constitution Act, 1982*;
- to strengthening its collaboration with First Nations, and to taking traditional knowledge into account in all decision making regarding water services on First Nation lands, including with respect to measures related to water services on First Nation lands that can mitigate climate change;

And Whereas Parliament recognizes the value of a review of the operation of this Act at a future date, in collaboration with First Nations, to ensure that the Act is meeting its purposes;

Short Title

Short title

1 This Act may be cited as the *First Nations Drinking Water and Wastewater Act*.

Definitions

Definitions

2 The following definitions apply in this Act.

First Nation governing body means a council, government or other entity that is authorized to act on behalf of a First Nation that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*. (**corps dirigeant**)

First Nation lands means lands of a First Nation that are referred to in Class 24 of section 91 of the *Constitution Act, 1867*, and source water on, in or under those lands. It does not include lands over which Aboriginal title is claimed by a First Nation or has been confirmed by a court. (**terres**)

First Nation law means a law made in the exercise of the jurisdiction referred to in section 6. (**texte législatif**)

Minister means the Minister of Indigenous Services. (**ministre**)

water services means services and systems for, and infrastructure related to,

- a. the collection, storage, treatment and distribution of water intended for drinking or for sanitation or hygiene purposes; and
- b. the collection, treatment and disposal of wastewater. (**services relatifs à l'eau**)

Rights

Rights of Indigenous peoples

3 This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.

Purpose and Principles

Purpose

4 The purpose of this Act is to

- a. ensure that First Nations have reliable access to a sufficient, adequate and safe quantity and quality of drinking water — and reliable access to effective treatment and disposal of wastewater — to assist First Nations in achieving the highest attainable standard of health, safety and well-being;
- b. affirm the inherent right of First Nations to selfgovernment, which includes jurisdiction in relation to drinking water, wastewater and related infrastructure on First Nation lands;
- c. ensure that laws in relation to water services on First Nation lands, and policies and practices implementing those laws, are consistent with section 35 of the *Constitution Act, 1982* and the United Nations Declaration on the Rights of Indigenous Peoples;

- d. establish principles applicable to decision making regarding water services on First Nation lands, minimum national standards for the provision of water services on First Nation lands and a federal regulatory regime respecting those services;
- e. facilitate the closing of the gaps with respect to infrastructure, socio-economic status, governance and health and well-being in relation to water services between First Nations persons and persons in non-Indigenous communities; and
- f. facilitate collaboration between First Nations and federal, provincial, territorial and municipal governments through transboundary source water protection planning and the entering into of agreements to protect source water.

Principles – water services

5 (1) The making of decisions under this Act is to be guided by the principle that First Nations are to have reliable access to water services on First Nation lands, as reflected in the following concepts:

- a. reliable access to clean and safe drinking water and the effective treatment and disposal of wastewater are fundamental to the protection and promotion of community wellness, including public health, and a healthy environment;
- b. the effective management and monitoring of all stages of water services delivery, from the protection of source water to the treatment and disposal of wastewater, is necessary to ensure reliable access to clean and safe drinking water;
- c. the effective management and monitoring of water services includes
 - i. a multi-barrier approach,
 - ii. a comprehensive asset management plan, risk assessment and risk management approach applied to all stages of the delivery of water services,
 - iii. the training and certification of water services operators, and
 - iv. sustainable water services;
- d. transparency and accountability are to form the basis of the effective management and monitoring of water services;
- e. information and data relating to water services on First Nation lands should be shared between the Government of Canada and First Nations, and be accessible to First Nations, whenever possible and while respecting the rights to privacy; and
- f. the quality of drinking water on First Nation lands should at least meet the guidelines set out in the *Guidelines for Canadian Drinking Water Quality*.

Principles – substantive equality

(2) The making of decisions under this Act is to be guided by the principle of substantive equality in relation to water services, as reflected in the following concepts:

- a. the distinct needs of First Nations for reliable access to water services must be addressed in a way that respects First Nations rights and their access must be comparable to that in non-Indigenous communities;

- b. First Nations are, without discrimination, to have control over their water services, including any related information management systems and the data and information they contain, and the design, construction, operation, maintenance and management of their water services; and
- c. First Nations may, without discrimination, exercise their right to deliver water services through service delivery models designed by them to suit their needs, including through the adoption of innovative approaches and technology.

Jurisdiction

Affirmation

6 For greater certainty, the inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to drinking water, wastewater and related infrastructure on, in or under First Nation lands, including

- a. legislative authority in relation to those matters and the power to administer and enforce First Nation laws made under that legislative authority and to provide for dispute resolution mechanisms in those laws; and
- b. the ongoing development of First Nation laws based on the distinct traditions, customs and practices of First Nations.

Application

7 The *Canadian Charter of Rights and Freedoms* applies to a First Nation governing body in the exercise of the jurisdiction referred to in section 6.

Limitation – risks to the environment

8 In order to reduce risks to the environment, the provisions of the *Fisheries Act*, the *Migratory Birds Convention Act, 1994*, the *Canadian Environmental Protection Act, 1999* and the *Species at Risk Act* and of regulations made under those Acts prevail, to the extent of any conflict or inconsistency, over the provisions of a First Nation law.

Publication

9 The First Nation governing body that makes a First Nation law must, as soon as feasible after it is made, publish it on its or on the First Nation's website, if any, and in the *First Nations Gazette*.

Delegation

10 For greater certainty, any jurisdiction referred to in section 6 — including in respect of any legislative authority and of the administration or enforcement of a First Nation law — may be delegated by a First Nation governing body, in whole or in part, to the government of a province or territory, a public body or a not-for-profit corporation.

Conflicts

First Nation laws

11 A provision of a First Nation law prevails, to the extent of any inconsistency or conflict, over a provision of an Act of Parliament or of any of its regulations, other than this section, sections 5 and 7 to 9 of this Act and the provisions of the *Access to Information Act*, the *Canadian Human Rights Act* and the *Privacy Act*.

Land claims agreements

12 The provisions of a land claims agreement within the meaning of section 35 of the *Constitution Act, 1982* prevail, to the extent of any inconsistency or conflict, over any provision of this Act or of any regulation made under subsection 14(1).

Regulations

13 Except as otherwise provided in regulations made under subsection 14(1), a provision of those regulations prevails, to the extent of any inconsistency or conflict, over a provision of a by-law made under the *Indian Act*.

Regulations

Governor in Council

14 (1) The Governor in Council may, on the Minister's recommendation, make regulations respecting water services on First Nation lands, including regulations respecting

- a. the management of water services, including asset management plans;
- b. the protection of source water, including source water protection plans;
- c. the consultation process in respect of funding allocation decisions made under subsection 20(1);
- d. the training and certification of water services operators;
- e. occupational health and safety;
- f. the monitoring, assessment, inspection and review of water services;

- g. emergency planning and response and recovery following emergencies;
- h. permits, licences and other authorizations, including their issuance, suspension and revocation;
- i. the disclosure, public or otherwise, of information;
- j. the administration and enforcement of any regulations made under this subsection, including the designation of officials for the administration and enforcement of those regulations and the creation of offences and imposition of penalties;
- k. the insurance required to be maintained in respect of water services and water services operators; and
- l. minimum standards in respect of water services, including the quality and the quantity of drinking water.

Non-application

(2) A First Nation law may exclude the application of any regulations made under subsection (1) to First Nation lands in respect of which the law applies.

Different locations

(3) Regulations made under paragraph (1)(l) may provide for different minimum standards for different locations to address local circumstances.

Consultation – proposed recommendation

15 (1) The Minister must consult with First Nation governing bodies before the Minister makes any recommendation under subsection 14(1).

Six months

(2) The first consultations required by subsection (1) must begin no later than the expiry of six months after the day on which this section comes into force.

Agreements

Support for exercise of jurisdiction

16 (1) A First Nation governing body and the Minister may, on request of the governing body, enter into an agreement with respect to the Minister's support of the exercise of the jurisdiction referred to in section 6.

Subject matter

(2) The agreement may include

- a. fiscal arrangements in respect of the delivery of water services on First Nation lands; and
- b. arrangements on information and data sharing, monitoring, reporting, enforcement and measurement of outcomes in relation to water services.

Administration and enforcement of First Nation laws

17 A First Nation governing body may enter into an agreement with the Minister or a provincial, territorial or municipal government or with any public body acting under the authority of the First Nation respecting the administration and enforcement of its First Nation laws.

Other agreements — source water, services, etc.

18 (1) The Minister may enter into an agreement with a First Nation governing body, a provincial, territorial or municipal government or any public body acting under the authority of the First Nation in respect of

- a. the protection of source water;
- b. water services; and
- c. the administration and enforcement of regulations made under subsection 14(1).

For greater certainty

(2) For greater certainty, nothing in subsection (1) is to be construed as preventing any other federal minister from entering into any agreement referred to in that subsection.

Powers, Duties and Functions of Minister

Reasonable efforts — access to drinking water

19 The Minister, in consultation with a First Nation governing body, must make all reasonable efforts to ensure that access to drinking water, whether from a public water system or a private water system, is provided to all residents, occupiers or users of buildings located on First Nation lands.

Consultation — funding allocation

20 (1) The Minister must consult with First Nation governing bodies in respect of a framework for assessing needs — and the making and implementing of funding allocation decisions — respecting water services on First Nation lands.

Framework

(2) The Minister's consultations in respect to a framework for assessing needs may include

- a. capital and upgrades;
- b. operations and maintenance;
- c. monitoring;
- d. enforcement;
- e. reporting; and
- f. capacity development.

Making of funding allocation decisions

(3) The Minister's consultations with respect to the making of funding allocation decisions are to be guided by the principles that the funding for First Nations water services should

- a. be sufficient, predictable, stable, sustainable and needs-based;
- b. be responsive to immediate infrastructure and future projected needs;
- c. be responsive to infrastructure lifecycle planning related to local needs;
- d. achieve positive long-term health outcomes; and
- e. align with the use of clean and sustainable technologies to reduce the carbon footprint of water services.

Report

(4) After the Minister's consultations with respect to implementing funding allocation decisions, the Minister must publicly respond, if appropriate, in a report to be tabled in each House of Parliament, to the views submitted by the First Nation governing bodies during the consultations.

First consultations

(5) The first consultations must begin no later than the expiry of six months after the day on which this section comes into force.

Support

21 The Minister may provide support to First Nation governing bodies with respect to the entering into of the agreements referred to in sections 16 to 18.

Immunity

First Nations

22 No action or other proceedings for damages lies or may be instituted against any certified water services operator or any employee or official of, or any person acting on behalf of, a First Nation governing body for anything done or omitted to be done in good faith in the performance, or intended performance, of their duties in relation to water services on First Nation lands.

Government of Canada

23 No action or other proceedings for damages lies or may be instituted against any person who is acting on behalf of the Government of Canada, or any employee of His Majesty in right of Canada, for anything done or omitted to be done in good faith in the performance, or intended performance, of their duties in relation to water services on First Nation lands.

First Nations Water Commission

Terms of reference

24 (1) Within one year after the day on which this section comes into force, the Minister must commence to collaborate with First Nations governing bodies in respect of the development of terms of reference for the establishment of a corporation under the *Canada Not-for-profit Corporations Act* that is to be led by First Nations.

Articles of incorporation – mandatory provisions

- (2)** The terms of reference must provide that the corporation's articles of incorporation stipulate
- a. that one of the corporation's purposes is to support the purpose and principles set out in this Act; and
 - b. that the corporation must provide the Minister, no later than six months after its financial year end, an annual report describing its activities for that year, including its activities as they pertain to source water protection plans and agreements and the supporting of First Nations in the management of water services.

Articles of incorporation – optional provisions

(3) The terms of reference may also provide that the corporation's articles of incorporation include among the corporation's purposes one or more of the following:

- a. supporting and coordinating the monitoring by First Nations of drinking water, source water and wastewater treatment and disposal on First Nation lands;
- b. providing advice to First Nations in relation to drinking water and wastewater, including obtaining legal advice and coordinating its provision to First Nations;
- c. providing support and advice to First Nations in respect of certifications related to water services on First Nation lands;
- d. making recommendations to the Government of Canada, provincial, territorial and municipal governments and First Nations in relation to drinking water and wastewater, including recommendations relating to laws, regulations, policies, guidelines and the drafting of model laws; and
- e. providing other services in relation to planning, coordination and reporting in relation to drinking water, wastewater and source water on, in or under First Nation lands.

Tabling of corporation's report

25 The Minister must cause to be tabled in each House of Parliament, on any of the first 15 days on which that House is sitting after it is received by the Minister, a copy of the annual report that is received from a corporation whose articles of incorporation include the requirement set out in paragraph 24(2)(b).

Five Year Review

Report

26 On the fifth anniversary of the day on which this section comes into force, the Minister must, in consultation with First Nation governing bodies, cause a review of the provisions and operation of this Act to be conducted and the Minister must cause a report of the review to be tabled in each House of Parliament before the sixth anniversary of the day on which this section comes into force.

Coming into Force

Order in council

27 The provisions of this Act come into force on a day or days to be fixed by order of the Governor in Council.