



BRITISH COLUMBIA
ASSEMBLY OF FIRST NATIONS



YUKON
REGION

BCAFN - AFN YUKON

C-61 MEETING

JULY 16, 2024 - VIA ZOOM

BCAFN Legal Analysis of Bill C-61:

An Act respecting Water, source water, wastewater and related infrastructure on First Nations lands

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Timeline of Bill C-61

- + Canada committed to co-develop with First Nations in alignment with Article 19 of UNDRIP
 - + Consultation started in December 2022
 - + First Nations provided first draft in February and second in July 2023
- + **December 11, 2023:** First Reading
- + **June 5, 2024:** Second Reading
- + **June 19, 2024:** Debate before the Standing Committee on Indigenous and Northern Affairs
- + Subject to further debate before Standing Committee



Overview of Bill C-61

The Bill does the following:

- + affirms First Nations' jurisdiction over water, source water, wastewater and related infrastructure on reserve lands
- + sets federal and/or provincial minimum standards for the provision of water quality, quantity, and wastewater treatment on reserve lands
- + seeks to strengthen federal funding accountability for water services on reserve lands

The Bill does not:

- + recognize the human right to safe and clean drinking water
- + recognize First Nations' jurisdiction over source water located off-reserve which are intrinsically interconnected to water on, in, and under reserve lands
- + provide statutory requirement for federal funding or otherwise regulate federal funding for the exercise of jurisdiction under the Bill
- + reflect shared decision-making and FPIC standards to the exercise of jurisdiction over water on and off reserve lands.



No Recognition of Human Right

- + No substantive provision to recognize Canada's endorsement of UN Resolution 64/292 (2010): the human right to safe and clean drinking water
- + Preamble simply acknowledges international instruments which recognize the human right to safe and clean drinking water



Section 6 – Affirmation of Jurisdiction

6(1) 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:

(a) water, source water, drinking water, wastewater and related infrastructure on, in and under First Nation lands; and

(b) water and source water in a protection zone that is adjacent to the First Nation lands of a First Nation, if a governing body of the First Nation, the Government of Canada and the government of the province or territory in which the First Nation lands are located have agreed on an approach to coordinate the application of the First Nation laws of that First Nation, federal laws and the laws of that province or territory in respect of the water and source water in the protection zone.

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

First Nations laws means a law made in the exercise of the jurisdiction referred to in section 6.



Section 6 – Issues & Recommendations

Issues:

- + Does not recognize jurisdiction over source water flowing to reserve lands - intrinsically connected to water in, on and under reserve lands
- + Definition of “First Nations laws” limited to section 6
- + No definition of “protection zone”

Recommendations:

- + Expand scope to include protection of all source waters flowing to reserve lands
- + Define “protection zone”
- + Require tripartite Coordination Agreements of jurisdiction in relation to protection of source waters
- + Seek clarification on how Canada will address multi-jurisdictional reality



Section 6 – Recommended Language

***protection zone* means the area of land and water within [X] kilometers of a surface or groundwater water intake for all source waters flowing to First Nations lands.**

6 (1) 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:

(a) water, source water, drinking water, wastewater and related infrastructure on, in and under First Nation lands; and

(b) water and source water, including surface and groundwater, in a protection zone that flows to the First Nation lands of a First Nation.

[X] – Coordination Agreement

[X](1) At the request of a First Nation governing body, the Government of Canada and the government of the province or territory in which the protection zone is located must enter into a coordination agreement with the First Nation governing body in relation to the exercise of legislative authority under subsection 6(1)(b).



Section 21 – Protection Zones

Issues:

- + Not defined
- + No parameters on how Minister will define
- + No timeline for when Minister will define

Recommendation:

- + Define “protection zone” to encompass all source waters flowing to reserve lands
- + Alternatively, require definition to be made in collaboration with First Nations and specify a reasonable timeline for the Minister to define



Sections 14 to 16 – Minimum Standards

Issues:

- + Decentralized approach with different standards
 - + “at least meet the guidelines” – unclear which is the floor
- + Crown guidelines do not always fit distinct needs of First Nations
- + Different minimum standards “for different locations to address local circumstances”
 - + Allows Canada to determine minimum standards on case-by-case basis and discriminate based on location
 - + Minimum requirements could fall short compared to those of non-Indigenous communities
 - + First Nations laws can exclude application
 - + creates potential gap in minimum standards
 - + puts onus on First Nations to ensure minimum standards



Section 18 - If No Choice Made

Issues:

- + Allows for several options for choosing minimum standards, creating gaps
- + There should always be mandatory minimum standards in place
- + Only requires the Minister to make “best efforts” to consult with First Nations

Recommendations:

- + Minimum standards must always be the highest - no option for standards that fall short of the highest minimum standards
- + Mandatory requirement for Canada to ensure minimum standards are met, *in addition* to the application of First Nation laws and legal orders
- + Allow First Nations to request that applicable provincial or territorial minimum standards apply



Section 14 – Recommended Language

Recommended Language:

14(1) The Minister must ensure that the quality of drinking water on the First Nation lands of that First Nation must at least meet the guidelines set out in the Guidelines for Canadian Drinking Water Quality **or, at the request of the First Nation,** the drinking water standards in place in the province or territory where the First Nation lands are located, **whichever is highest.**

(2) The mandatory minimum requirements under paragraph (1) shall apply despite any exercise of jurisdiction under section 6.

Issues:

- + Limits the quantity of water available for First Nations to reserve lands and for certain purposes. Does not include water needed for:
 - + exercise of Aboriginal rights and cultural practices
 - + economic purposes (i.e. agriculture, commercial development)
- + Language “current and projected water usage needs” is highly ambiguous



Section 15 – Recommended Language

Recommended Language:

15(1) The Minister must ensure that the quantity of water available on the First Nation lands and in the protection zone adjacent to the First Nation lands of a First Nation meets the drinking, cooking, sanitation, hygiene, safety, fire protection, emergency management, cultural practices, including Aboriginal rights, and economic needs of the First Nation, based on its current and projected water usage needs.

(2) For the purposes of paragraph (1), the current and projected water usage needs of a First Nation is to be assessed by the framework under section 27.

(3) The mandatory requirements under paragraph (1) shall apply despite any exercise of jurisdiction under section 6.



Section 16 – Wastewater

Issues:

- + Only applies wastewater effluent standards to reserve lands.
 - + Industry and private companies located off and adjacent to reserve lands dispose excessive amounts of wastewater into source waters that flow to and supply reserves

Recommendations:

- + Expand the minimum standards for wastewater effluent to source waters flowing to reserve lands (*i.e.*, “protection zones” once defined)



Section 16 – Recommended Language

Recommended Language:

16(1) The Minister must ensure that wastewater effluent on the First Nation lands **and in a protection zone adjacent to First Nation lands** of that First Nation must at least meet the standards set out in the *Wastewater Systems Effluent Regulations* **or, upon request of a First Nation,** wastewater effluent standards in place in the province or territory where the First Nation lands are located.

(2) The mandatory minimum requirements under paragraph (1) shall apply despite any exercise of jurisdiction under section 6.



Not Consistent with FPIC

Issues:

- + Section 5(3) – “is to be guided by” FPIC
- + Section 19(1) – no requirement for GIC to include First Nation governing bodies
- + Section 27(1) FPIC standards do not apply

Recommendations:

- + FPIC must be a requirement and not merely a guiding principle



Section 27 - Funding Allocation

Issues with Consultation:

- + Allows Canada to develop a framework for needs assessment based only on consultation and cooperation with First Nations
- + The proposed framework is prejudicial, paternalistic and undermines s. 35 rights
- + Does not include needs related to source water protection adjacent to reserves

Issues with Allocation Decisions:

- + Does not require minister to consider (a) through (e), they are merely guiding principles
- + Won't know how much funding is required until the regulations are drafted



Section 27 - Recommendations

Recommendations:

- + Require needs assessments and funding allocation to:
 - + be developed in partnership with First Nations
 - + include source water protection adjacent to reserve lands
 - + involve the distinct cultural practices, laws, Aboriginal rights, and lands of each First Nation
- + Include funding requirement for future regulations made under s.19(1)
- + Include deadline for Minister to complete collaboration with First Nations
- + Remove “best efforts” standard



Section 27 – Recommended Language

Recommended Language

27(1) In collaboration with First Nation governing bodies, the Minister must develop a framework for assessing needs — and the making and implementing of funding allocation decisions — respecting water services on First Nation lands and in protection zones that are adjacent to First Nation lands.

(2) The Minister’s development of the framework for assessing needs in collaboration with First Nations must involve, among other things, the following matters:

[...]

(j) the distinct cultural practices, Aboriginal rights, lands and laws of each First Nation.

[...]

(3) The Minister’s funding allocation decisions under subsection (1) must be consistent with the principles that the funding for First Nations water services are to...

[X] In collaboration with First Nations, the Minister must update the needs assessment and funding allocation decisions made under subsection (1) to account for any regulation enacted under section 19(1) of this Act within six (6) months of the regulation coming into force.

(5) The Minister must begin the collaboration required by subsection (1) no later than the last day of the sixth month after the month in which this section comes into force and must complete the framework required by subsection (1) no later than two (2) years after collaboration with each First Nation is commenced.



Sections 30 to 32 – Funding

Issues:

- + No statutory requirements to provide funding, rather the standard is “must make best efforts”
- + The “needs” under s. 27(1) fails to encompass funding required for full exercise of jurisdiction. Does not include:
 - + critical infrastructure
 - + water services subject to future regulations
- + Provisions are silent on funding formula
- + Discretionary federal funding for First Nations has been a failure
- + No accountability of dispute resolution mechanisms



Sections 30 to 32 - Recommendations

Recommendations:

- + There must be explicit federal funding obligations in order to ensure accountability and predictable, adequate funding to the legal standard of substantive equality
- + Remove references to “best efforts”
- + Include dispute resolution mechanisms in the event of inadequate funding

Recommended Language

30(1) The Government of Canada **must provide** funding that meets the needs assessed in the framework referred to in subsection 27(1).

[X] If the First Nation governing body, the Government of Canada, or the government of the applicable province or territory make reasonable efforts to enter into an agreement under section 6 [jurisdiction over protection zone], 23, 24, and 25, but do not enter into the agreement, a dispute resolution mechanism provided for by the regulations under section 19 may be used to promote entering into an agreement.



Implications for Modern Treaty and Self-Governing Nations

- + Does not apply to MTNs or SGNs due to restrictive definition of “First Nations lands”
 - + Separation of powers - provincial jurisdiction over settlement lands vs federal jurisdiction over reserve lands
- + Section 12 – does not exempt Bill C-35
- + Pathway to collaboration under section 25(1), other Agreements, where a First Nation and the Minister can enter into Agreements related to water that are not limited to the restrictive definition of First Nations Lands.
- + No explicit language that recognizes inherent right to clean water



First Nations Water Commission

Standing Committee Debate

- + The need for an independent Commission to be established
- + The Commission will play a critical role re effective implementation and oversight given multi-jurisdictional reality of the Bill
- + Would be responsible for annual reports based on feedback from FN communities.
- + 5-year review of provisions and operations of the Bill should be done in partnership with the Commission.
- + Composition should be mostly Indigenous women, with training to Indigenous youth



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