

MillerTiterle
+Company

FIRST NATIONS DRINKING WATER ACT - PRELIMINARY LEGAL REVIEW

FEBRUARY 27, 2023

Jordan Ardanaz

Lawyer

Miller Titerle Law Corporation



Overview

“Proposal for An Act respecting drinking water, wastewater and related infrastructure on First Nation lands”

Roadmap:

1. Overview of the First Nations Drinking Water Act (the “**Draft Act**”);
2. Primary issues: Jurisdiction; Consent; and Liability;
3. Discussion.

MT
+Co.

OVERVIEW OF THE DRAFT ACT



First Nations Drinking Water Act Pt. 1

- + The Draft Act is intended to cover the governance of drinking water, waste water and related infrastructure on First Nation lands.
- + Preamble affirms Parliament's obligations to First Nations regarding water stewardship and recognizes the inherent right of self-government.
- + Decision-making in the Draft Act follows certain principles:
 - + First Nations are to have reliable access to water services on reserve lands; and
 - + Achieving the principle of substantive equality in relation to water services.
- + Three key definitions: **“First Nation governing body”**, **“First Nation lands”**, **“First Nation law”**.

- + The inherent right of self-government in relation to drinking water, wastewater and related infrastructure on First Nation lands is affirmed.
- + First Nation laws (on reserve lands) regarding drinking water, wastewater and related infrastructure are recognized, they do not take precedence over federal laws that may conflict.
- + Regulations can cover management of water services, protections for source waters, etc.
 - + The Minister must consult with First Nations before recommending Regulations be created;
 - + *But note that:* regulations made regarding water services on First Nation lands will also prevail over a First Nation's own bylaws created under the Indian Act.

- + Agreements can be created under the Draft Act:
 - + Between First Nations and the Minister to support exercises of jurisdiction (i.e. the delivery of water services, data sharing, etc).
 - + Between the Minister and First Nations, provincial, territorial, or municipal government, or any public body regarding the enforcement of First Nation laws (i.e. relating to drinking water, wastewater, and related infrastructure on First Nation lands).



First Nations Drinking Water Act Pt. 4

- + The Minister has an obligation to make all reasonable efforts to ensure access to drinking water is provided to all residents, occupiers or users of buildings located on First Nations lands.
- + Consultation is required in assessing needs for water services on First Nation lands: capital and upgrades, operations, among others. The Draft Act has certain principles and reporting requirements in this regard.
- + Civil immunity is extended for to any Crown representatives or employees for anything they do or omit to do in good faith in relation to their duties related to water services on First Nations lands.
- + Finally, it enables the creation of a First Nations Water Commission, led by First Nations, which is to be created by the Minister in collaboration with First Nations governing bodies.

MT
+Co.

PRIMARY ISSUES AND RECOMMENDATIONS

- + Key issues:
 1. Jurisdiction is too narrow;
 2. The consent standard is not met; and
 3. Liability immunity is poorly addressed.

- + Jurisdiction afforded to First Nations primarily limited to reserve lands.
- + Limited jurisdiction does not reflect scope of Indigenous jurisdiction and stewardship of source waters (i.e. watersheds, etc) recognized under UNDRIP.
- + Significant gap in First Nations' ability to protect water resources by dividing the right to govern water on-reserve vs water within Indigenous territories.
- + Issues affecting off-reserve water resources, such as contamination or reduced water availability, directly impact water resources on reserve given the movement and connectedness of surface and groundwater.



Issue 1: Jurisdiction

- + Limitations on Canada's ability to legislate – Canada cannot directly govern provincial authority over lands and in-land waters.
 - + e.g. in British Columbia, the *Water Sustainability Act* and *Water Protection Act* address watershed, water management, and licencing.
- + The Draft Act already authorizes agreements between First Nations and provincial, territorial, and municipal governments concerning administration and enforcement of First Nation water laws.

Recommendations

The Draft Act must support jurisdiction that captures integrated source water management within Indigenous territories by:

1. Expanding scope of governance: Expand the scope of “First Nation laws” and “First Nation lands” to accurately reflect Indigenous jurisdiction over water and watersheds;
2. Expanding implementation mechanisms: Clarify authority for First Nations to enter agreements with provinces/territories and municipalities to enforce Indigenous laws within wider watershed areas to give fuller meaning to Indigenous jurisdiction; and
3. Accurately reflecting jurisdiction: Revise the definitions of “First Nations lands” and “First Nations law”, and revise Sections 3 through 6 to properly reflect Indigenous jurisdiction over source waters and watersheds.

- + The Draft Agreement requires the Ministry to consult with First Nations in implementing the Draft Act and does not consider or require the *free, prior, and informed consent* of First Nations in any regard:
 - a. when developing regulations;
 - b. in considering the Minister's efforts in ensuring access to drinking water;
 - c. in considering the Minister's engagement in developing funding frameworks for First Nations; and
 - d. In assessing the outcome of the five-year review.

Recommendations

1. Require Consent: Consultation activities must reflect commitments of the Ministry to secure the free, prior, and informed consent to activities proposed under the Draft Act that may impact Indigenous rights within the following sections:
 - + Section 15 – Consultation – proposed recommendation;
 - + Section 19 – Reasonable Efforts – access to drinking water;
 - + Section 20 – Consultation – funding allocation; and
 - + Section 26 – Report.

Liability considerations in the Draft Act are not appropriate.

- + First Nations managing and controlling water resources may take on increased liability relating to activities they authorize.
- + First Nations – including their water services operators, employees, or officials – are only immune from civil liability for activities authorized/undertaken relating to actions taken in implementing water services under the Draft Act.
- + Broader water stewardship activities outside of “First Nation lands” that could impact water sources and infrastructure on reserve lands are not included in immunity.
- + Similar immunity for Crown employees extends beyond the common law standard, and protects not only policy decisions but actions taken by employees in administering the Draft Act.
- + Risk that this could limit remedies by First Nations against the Crown.

Recommendations

1. Clarify Immunity Language: Extend appropriate immunity for Indigenous governing bodies from decisions or actions undertaken to administer and protect their source waters off reserve, and to remove the expanded immunity given to Crown representatives or employees by revising the following:
 - + Section 22 – Immunity for First Nations; and
 - + Section 23 – Immunity for Government of Canada.

MT
+Co.

DISCUSSION

MillerTiterle
+Company