MillerTiterle +Company

MEMORANDUM

TO: **BRITISH COLUMBIA ASSEMBLY OF FIRST NATIONS**
FROM: MILLER TITERLE LAW CORPORATION
SUBJECT: LEGAL REVIEW OF THE DRAFT FIRST NATIONS DRINKING WATER AND WASTEWATER ACT
DATE: MARCH 10, 2023

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1. INTRODUCTION

Following the repeal of the *Safe Drinking Water for First Nations Act* in 2022, the Government of Canada has committed to new safe drinking water legislation to address concerns over access to adequate, sustainable, and sufficiently funded water services for First Nations. Additionally, Canada has expressed its intention to adequately recognize the inherent rights of First Nations over water resources and management and to provide protections for source waters. A consultative draft of a new draft statute has now been released for engagement, entitled "An Act respecting drinking water, wastewater and related infrastructure on First Nation lands" (the "**Draft Act**").

The Draft Act attempts to address ongoing concerns of First Nations regarding the management of water and water infrastructure. However, there is a risk that the Draft Act establishes too low of a bar for Canada to achieve reconciliation concerning Indigenous jurisdiction over its lands and resources, the right to self-governance, and to ensure safe access to water for Indigenous nations. This briefing highlights several issues that must be addressed in the Draft Act, including three key critical areas, namely:

- Indigenous jurisdiction recognized and facilitated by the Draft Act is too narrow;
- the consent standard is not reflected in the Draft Act; and
- the liability framework established in the Draft Act is inappropriate.

2. OVERVIEW OF DRAFT ACT

The Draft Act is intended to cover the governance of drinking water, wastewater, and related infrastructure on First Nation lands.

The Draft Act features an extensive preamble, which looks to affirm Parliament's obligations to First Nations in relation to water stewardship and recognizes the inherent right of self-government of First Nations, particularly in relation to drinking water, wastewater, and related infrastructure on, in or under first Nation lands.

Three key definitions are used throughout the Draft Act:

- **First Nation governing body** – means a council, government or other entity authorized to act on behalf of a First Nation holding rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

- **First Nation lands** – means lands of a First Nation that are referred to in section 91(24) of the *Constitution Act, 1867*, and the source water on those lands. It doesn't include Aboriginal title claimed by a First Nation or that has been affirmed in court. This definition of lands is quite narrow and tied to reserve lands or other lands that have been deemed to be "lands reserved for Indians" pursuant to section 91(24) of the *Constitution Act, 1867*.

- **First Nation law** – means laws made under section 6 of the Draft Act in relation to the exercise of jurisdiction in drinking water, wastewater, and related infrastructure on, in or under First Nation lands.

Where decision-making occurs in the Draft Act, section 5(1) and (2) establish that it must be guided certain principles, including:

- that First Nations are to have reliable access to water services on first Nation lands; and

- the principle of substantive equality in relation to water services.

The Draft Act also affirms an inherent right of self-government in relation to drinking water, wastewater, and related infrastructure on, in or under First Nation lands at section 6. First Nation laws (in relation to drinking water, wastewater, and related infrastructure) are recognized in the Draft Act; however, First Nations laws do not take precedence over certain federal laws where conflicts arise (ie. *Fisheries Act* and the *Species at Risk Act*, among others).

The process for creation of regulations created by the Minister is also addressed in the legislation. The Minister must consult with First Nations before recommending regulations be created by the Governor in Council. This differs from requirements under Article 19 of UNDRIP which necessitate achieving the free, prior, and informed consent of First Nations before implementing legislative or administrative measures that may affect them. Regulations falling under the Draft Act can cover: management of water services, protections for source waters, among other matters. As an important note, the Draft Act provides that future regulations made by the Governor in Council regarding water services on First Nation lands will also prevail over a First Nation's bylaws that have been created under the Indian Act.

The Draft Act also enables the Minister and First Nations governing bodies to enter into various types of agreements:

- agreements between First Nation governing bodies and the Minister to support exercises of jurisdiction under section 6 of the Draft Act; and

- agreements between First Nation governing bodies and the Minister, or provincial & territorial governments, municipalities, or any public body acting under the authority of the First Nation under their First Nation laws.

The Minister is subject to certain legal obligations under the Draft Act, such as 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. The Minister must also consult

with First Nation governing bodies using a needs assessment framework under the Draft Act for water services on First Nation lands which factors in considerations around: capital and upgrades, operations, among others. The Draft Act also features a reporting requirement which can serve as an accountability mechanism regarding the Minister's decision-making.

The Draft Act also provides immunity to any person acting on behalf of the Government of Canada, or any of its employees for anything they have done or omitted to do in good faith in the performance of duties in relation to water services on First Nations lands.

As a final measure, the Draft Act also enables the creation, by the Minister in collaboration with First Nations governing bodies, of a First Nations Water Commission which is to be led by First Nations.

3. INDIGENOUS JURISDICTION IS TOO NARROW

Issues

The jurisdiction afforded to First Nations under the Draft Act is limited to reserve lands under the *Indian Act* or other lands that have been deemed to be "lands reserved for Indians" pursuant to section 91(24) of the *Constitution Act, 1867* ("**First Nations Lands**"). This jurisdiction is too narrow and does not adequately capture or recognize the inherent jurisdiction of First Nations to steward their respective territories and watersheds as recognized under UNDRIP. As a result, the Draft Act fails to support the appropriate management of source waters.

The Draft Act only creates mechanisms for the governance of water resources on First Nations Lands, and does not create any mechanisms for First Nations to protect and manage off-reserve water resources. In doing so, the Draft Act creates an arbitrary divide between water on reserve and off reserve. This divide does not reflect the actual interconnected nature of watersheds; 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. As a result, the Draft Act creates a significant gap in First Nations' ability to protect their water resources. The Draft Act must be revised to support a wider scope of jurisdiction that captures integrated source water management in order to properly reflect Indigenous resource governance practices and to support the achieving of the underlying purposes and principles of the Draft Act directed at the Indigenous governance of water and wastewater.

It is likely that the limited scope of the Draft Act is due to the Constitutional division of powers between Canada and the provinces and Canada's lack of jurisdiction to directly govern provincial matters concerning lands and waters outside of reserve lands. Generally, the Federal government's jurisdiction over in-land waters is limited and relates to navigable waters, fisheries, and, water on reserve lands. The provinces have greater jurisdiction over the management and protection of in-land water within the province. In British Columbia, for instance, the Province has enacted the *Water Sustainability Act* and *Water Protection Act* to address matters related to watersheds, water management, and the licencing of water uses within the province.

To address this Constitutional limitation, the Draft Act authorizes agreements between First Nations and provincial or municipal governments to establish means of administration and enforcement of First Nation water laws off-reserve, which are outside of the jurisdiction of the federal government.

Recommendations

The following are recommendations to support the exercise of Indigenous jurisdiction to steward source waters within Indigenous territories more broadly and to support the effective management of drinking water and wastewater within those territories under the Draft Act:

- Section 17 must be expanded to creating a legal basis for consent-based agreements between Indigenous nations and provincial/territorial, regional, and municipal governments to manage, administer, and undertake enforcement measures concerning source water resources outside of reserve lands through relevant legislation concerning water quality, watershed sustainability, and drinking water standards;

- The following sections must be reframed to adequately recognize the appropriate scope of Indigenous jurisdiction outside of reserve lands, including with respect to watersheds and source waters:

    - Preamble;
    - Section 2 – Definitions: “First Nations lands” and “First Nations law”;
    - Section 3 – Rights of Indigenous Peoples;
    - Section 4 – Purpose;
    - Section 5(1) and (2) – Principles; and
    - Section 6 – Jurisdiction.

4. THE CONSENT STANDARD IS NOT REFLECTED

Issues

The Draft Agreement currently imposes several requirements on the Crown to undertake consultation with Indigenous nations, including with respect to:

- the development of regulations;

- in considering the adequacy of the Minister’s efforts to ensure access to drinking water for Indigenous nations;

- in considering the Minister’s engagement with First Nation governing bodies in developing a framework to fund the implementation of the Draft Act; and

- in assessing the outcomes of the five-year review for the Draft Act.

This reliance on Crown consultation processes provides no assurance that the Indigenous jurisdiction and decision-making will be adequately considered, nor does it meet the free, prior, and informed consent standard. Therefore, these consultation processes cannot be considered to be compliant with UNDRIP.

Recommendations

Consultation activities triggered under the Draft Act concerning the above matters must be revised to 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.

5. LIABILITY CONSIDERATIONS ARE NOT APPROPRIATE

Issues

Indigenous governing bodies that take on the management and control of drinking water and wastewater infrastructure may also take on increased risks of liability relating to the activities that they authorize pursuant to the Draft Act. Currently, the Draft Act provides that water services operators, employees, or officials of Indigenous governing bodies are immune from civil liability for anything done or omitted to be done in good faith performance of their duties to water services. However, this immunity is only provided within the narrow scope of jurisdiction contemplated under the Draft Act – being First Nations lands only. The Draft Act does not provide adequate protection Indigenous governing bodies from liability that may arise from decisions or actions relating to off-reserve water (such as those undertaken pursuant to an agreement made under section 18 with a provincial government).

Additionally, the Draft Act establishes an identical immunity clause for any person acting on behalf of the Crown or any Crown employee acting pursuant to their duties in administering the Draft Act. This immunity exceeds the current common law rule recognized by the Supreme Court of Canada[1] – while there are limitations on civil liability for policy decisions made by Crown representatives, immunity does not extend to representatives or employees of the Crown administering those policy decisions. It is possible that this expanded immunity for Crown representatives or employees under the Draft Act could limit legal remedies available to Indigens nations for harms caused by the Crown in administering the Draft Act.

Recommendations

The following sections of the Draft Act must be revised accordingly to extend adequate 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 for actions undertaken in administering the Draft Act:

- Section 22 – Immunity for First Nations; and
- Section 23 – Immunity for Government of Canada.

6. ADDITIONAL ISSUES

In addition to the above legal concerns, we note the following general issues that have arisen during ongoing discussion concerning the Draft Act:

- the Draft Act must include commitments on the Crown to identify and appropriately fund projects concerning watershed and source water management by Indigenous nations, including though water sustainability planning;

[1] *Nelson (City) v Marchi*, 2021 SCC 41, at 67.

- funding commitments under Section 20 of the Draft Act must be clarified and significantly strengthened, including appropriate commitments from the Crown, in order to give proper effect to the issue of underfunding noted in the Preamble;

- the Draft Act must ensure access to immediate funding for Indigenous governing bodies to implement their respective water management laws;

- the Draft Act must include commitments from the Crown to ensure adequate communication between Indigenous governing bodies and relevant Canadian ministries, including but not being limited to, Fisheries and Oceans Canada;

- [NTD: Additional issues to be discussed following March 10.]