



ASSEMBLY OF FIRST NATIONS
45TH ANNUAL GENERAL ASSEMBLY:
Strengthening our Relations
ASSEMBLÉE DES PREMIÈRES NATIONS
45^E ASSEMBLÉE GÉNÉRALE ANNUELLE :
Renforcer nos relations



JULY 9-11, 2024 • IN-PERSON ONLY • PALAIS DES CONGRÈS, MONTRÉAL, QUÉBEC
DU 9 AU 11 JUILLET 2024 • EN PERSONNE • PALAIS DES CONGRÈS, MONTRÉAL (QUÉBEC)

Summary – Bill C-61, *An Act respecting water, source water, drinking water, wastewater and related infrastructure on First Nation lands (First Nations Clean Water Act)*

Preamble

Legislative Preambles are not binding elements of legislation (i.e., they are not enforceable); a preamble is at the beginning of legislation and provides opening words to describe the objective and purpose of the legislation, the spirit under which it has been developed, and aids judges in interpreting the law in the event of legal disputes.

This section contains:

- Inclusion of recognition of First Nations rights in the preamble, which dominated feedback from the Assembly of First Nations (AFN) Regional and National Engagements.
- Reference to First Nations rights to water, relationship with water and context related to jurisdiction and self-government.
- Links to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA) National Action Plan.

Rights

Section 3 (1) is a non-abrogation and non-derogation clause that upholds Section 35 Rights under the *Constitution Act, 1982*.

Purpose

Section 4 describes the purpose of the proposed legislation, including ensuring safe and reliable access to water and sanitation; affirming inherent rights to self-government and jurisdiction over waters; ensuring laws are consistent with Section 35 and UNDRIP; establishing principles applicable to decision-making on water; closing the water services-related infrastructure, socio-economic, health, governance, and well-being gaps; and, facilitating collaboration between First Nations and governments.

Principles

Principles set out in the legislation must guide decisions made under the proposed legislation. However, they do not create specific direction on how to apply the principles in each decision. This discretion is in the hands of the decision-maker.

This section contains:

- Section 5 (1) on Reliable Access to Water Services. This section says that First Nations are to have reliable access to water and sanitation including: effective management of water services and sanitation (including a multi-barrier approach, asset management plans, and training and certification); transparency and accountability; and accessible information and data for First Nations.



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- Section 5 (2) on Substantive Equality. This section says that decision making under the proposed legislation is to be guided by principles of substantive equality recognizing that: First Nations have distinct and unique needs and access to water must not only be comparable to non-Indigenous communities, but also must address historic disadvantage and colonial policies; First Nations are to have control over their water and sanitation without discrimination; and, First Nations may exercise their right to deliver water and wastewater without discrimination.
- Section 5(3) on Free, Prior, and Informed Consent (FPIC). This section says that the making of any decision under the proposed legislation is to be guided by the principles of FPIC.

Jurisdiction

Sections 6 through 10 of Bill C-61 relates to jurisdiction under the proposed legislation. This section:

- Reaffirms Section 35 and includes recognition of the inherent right of First Nations over the subject matter and their jurisdiction over water, source water, drinking water, wastewater, and infrastructure on First Nations lands, as well as water and source water located in a protection zone adjacent to First Nations lands (as long as there is an agreement on coordination of jurisdiction in place).
- Affirms that First Nations' jurisdiction includes legislative authority including the power to administer and enforce First Nations laws made under the proposed legislation, as well as, ongoing development of First Nation laws.
- Applies the Canadian Charters of Rights and Freedoms.
- Indicates that the *Fisheries Act*, *Canadian Navigable Waters Act*, *Migratory Birds Act*, *Canada Marine Act*, *Canadian Environmental Protection Act*, *Canada Shipping Act*, and the *Species at Risk Act* prevail over an inconsistent or conflicting First Nations law.
- Allows First Nations to delegate their authority to another First Nations Governing Body (as defined), or to any government, public body or non-for-profit corporation.

Conflicts

Sections 11 through 13 indicate that: First Nations laws prevail over all provisions in the proposed legislation (with some important exceptions); and that Modern Treaties and self-government agreements will also prevail over any conflicting provision of the proposed legislation.

Standards

The proposed legislation (Sections 14-18) stipulates the standards applicable for water quality, quantity and wastewater effluent for both public and private systems (Section 17). Specifically:

- Section 14 states that as a minimum, drinking water quality must meet either the Canada Drinking Water Quality Guidelines or the provincial/territorial standards that are in place where the First Nation is located. The First Nation can choose which one applies.
- Section 15 states that the quantity of water available must be sufficient for drinking, cooking, sanitation, hygiene, fire protection and emergency management needs based on both current and projected water use needs.



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- Section 16 states that as a minimum, wastewater effluent quality must meet either the Wastewater System Effluent Regulations or the provincial/territorial wastewater standards that are in place where the First Nation is located. The First Nation can choose which one applies.
- Section 18 states that if a First Nation does not make a choice under Sections 14 or 16, the Minister, in cooperation with the First Nations, will set the highest of the standards as the minimum. In addition, the process for setting these decisions must begin no later than the 90th day (approximately three months) after coming into force.

Regulations

The Regulations Section discusses the powers of the Governor in Council (GIC), under recommendation by the Minister, to make regulations, and states that:

- Subsection 19(1) - the GIC may make regulations on: water management, protection of water, funding allocations (based on consultation), training and certification, occupational health and safety, monitoring and inspection, emergency planning and response, permits and licenses, disclosure of information, enforcement, insurance and minimum standards.
- Subsections 19(2) and (3) indicated that a First Nation's law may exclude these regulations, and that standards may be different depending on location.
- Section 20 states that the Minister must consult and cooperate with First Nations before making a recommendation to the GIC, and that the Minister must do so within six (6) months of the proposed legislation coming into Force.
- Section 21 says that the Minister must consult and cooperate with First Nations before making regulations defining a "protection zone".
- Section 22 states that the Minister must consult and cooperate with First Nations before making any regulations with respect to the enforcement of First Nation laws within the protection zone.

Agreements

Sections 22 to 25 describe the kinds of agreements that may be created under the proposed Act and include:

- That a First Nation and the Minister may enter into an agreement to support the exercise of jurisdiction, including funding arrangements and information/data sharing.
- That a First Nation may enter into any agreement with other levels of government or a public body.
- That the Minister can enter into an agreement with the First Nation and other levels of government with respect to protection of source water, water services, and enforcement of regulations.
- The First Nation must either be a party to the agreement or consulted with before any agreement is entered into.
- Nothing stops another Minister from entering into an agreement under legislation that the other Minister has (and further in Section 38, from exercising any of the powers and duties they have).



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Powers, Duties and Functions of Minister

This section has important implications for funding allocations and decisions. Under Section 26, the Minister commits to making best efforts to ensure First Nations have access to clean and safe drinking water, in consultation and cooperation with First Nations. Further to this:

- Subsections 27(1) and (2) state the Minister must consult and cooperate with First Nations to develop a framework for assessing needs and the making and implementing of funding allocation decisions and that these decisions must include, at a minimum: capital costs and upgrades, operations and maintenance, monitoring, enforcement, reporting, actual costs, governance, capacity development, and comparability. This includes long-term funding arrangements like grants under Section 36.
- Subsection 27(3) further states that the funding decisions are to be guided by the principles that funding be: adequate, sustainable, needs-based, responsive to current and project needs, responsive to life-cycle costs, contribute to long-term health and align with clean and sustainable technology developments.
- Subsection 27(4) to Section 28 says the Minister must table a report on funding allocations publicly in Parliament, may provide support to First Nations to enter into agreements, and must begin consultations within six (6) months.
- Section 29 says the Minister must consult and cooperate with First Nations to ensure laws protect the environment as much as federal laws.

Obligations of Government of Canada

Section 30 to Section 32 says that Canada must make best efforts to: provide funding that is adequate and meets the actual cost needs of First Nations; ensure comparability with non-Indigenous communities; and provide sustainable funding to implement the terms of reference of a First Nations Water Commission. Section 36 allows Canada to make long-term funding grants.

Settlement Agreement

Section 33 to 35 ensure that Canada fulfills its obligations under the settlement agreement, including funding commitments.

Immunity

Section 37 states that no employee or person hired by a First Nation can be held liable if they acted in good faith in their duties in the provision of water and wastewater services. A First Nation may still be held liable.



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First Nations Water Commission

Sections 39 and 40 address the establishment of a First Nations Water Commission to support the purpose and principles of the proposed legislation, including:

- Subsections 39(1) and (2) state that the Minister must consult and cooperate with First Nations to develop terms of reference for a corporation that will support the purpose and principles of the proposed legislation, and that these terms must specify that the corporation reports to the Minister within six (6) months of its financial year end, which the Minister must then report to Parliament under Section 40.
- Subsection 39(3) says that the terms of reference could also include, among other things, that the corporation also: support and coordinate monitoring; provide advice; provide guidance on certification; make recommendations on law, regulations and policies; and/or provide other services with respect to water and wastewater management. Other responsibilities could be included.
- Section 39 (4) says the Minister must make best efforts to start the discussion on a Commission within six (6) months of the proposed legislation coming into force.

Annual Report

Section 41 says the Minister must produce an Annual Report on the implementation of the proposed legislation, in consultation and cooperation with First Nations annually, and must present to Parliament.

Five-Year Review

Section 42 says the Minister must conduct a review on the five-year anniversary of the proposed legislation coming into force, and report on this review to Parliament the following year.

Coming into Force

Section 44 states the proposed legislation comes into force on a day or days fixed by order of the GIC.

The AFN will continue to facilitate partnerships between Canada and First Nations to close gaps in essential services and protect First Nations rights, title, and jurisdiction.