

**A METRO VANCOUVER POSITION PAPER ON
BILL S-8: *THE SAFE DRINKING WATER FOR FIRST NATIONS ACT***

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1. Purpose

To provide a Metro Vancouver perspective and position on the recent Federal legislative initiative, Bill S-8: *The Safe Drinking Water for First Nations Act*, related to the provision of clean drinking water and effective treatment of wastewater on Indian Reserves.

2. Delivery of Water and Treatment of Wastewater on Indian Reserves

Pursuant to Section 91(24) of the *Constitution Act, 1867*, the Federal government has exclusive jurisdiction over Indian Reserves and therefore provincial regulatory water and wastewater standards do not apply to on-reserve First Nation communities. Delivery of drinking water and treatment of wastewater are currently unregulated on Indian Reserves and mainly governed by guidelines set by the Department of Aboriginal Affairs and Northern Development Canada (AANDC). Some First Nations have passed their own water laws with a varying level of complexity. The *Fisheries Act* governs discharge of effluent based on harmful effects on fish; Provincial laws generally do not apply to water and wastewater treatment on Reserve. The Federal Crown has a fiduciary responsibility for building capacity and providing adequate resources to First Nations.

A lack of enforceable water standards remains a key challenge on Reserves, as AANDC standards are not enforceable against or recognized by third parties such as contractors. AANDC standards do not necessarily correspond with those applicable in neighbouring municipalities. First Nations, on the other hand, are not always fully represented in regional source water protection plans which impact water sources on Reserves.

3. Bill S-8: *The Safe Drinking Water for First Nations Act*

Bill S-8, the *Safe Drinking Water for First Nations Act*, was passed by the Senate on June 19, 2012. The Bill passed First Reading in the House of Commons on June 19, 2012 prior to the summer break. Bill S-8 is the second Federal legislative initiative intended to address safe drinking water and wastewater treatment on Indian Reserves. Its predecessor, Bill S-11, was introduced in Parliament in May 2010 and died in Committee on Second Reading on March 26, 2011 as a result of the dissolution of Parliament.

The enabling Bill would allow the Federal government, in collaboration with First Nations, to develop Federal regulations for access to safe drinking water, and to ensure the effective treatment of wastewater and the protection of sources of drinking water on First Nation lands.

The Bill lays out the areas that Federal regulations could address, including the:

- quality of drinking water;
- training and certification of water and wastewater system operators;
- treatment of water and wastewater;
- monitoring, testing, sampling and reporting; and,
- protection of sources of drinking water located on Reserve.

In 2009, the Federal government launched the National Assessment of First Nations Water and Wastewater Systems in order to conduct a detailed assessment of existing public and private water and wastewater facilities operating on First Nation lands across the country. Recommendations from the National Assessment were released in July 2011 and stated the need for a water and wastewater regulatory regime on First Nation lands.

As with Bill S-11, Bill S-8 has been criticized by many First Nation communities for the lack of consultation and recognition of the inherent jurisdiction of First Nations over their lands and resources. Considering significant infrastructure gaps on Indian Reserves, one of the main concerns is that the Bill includes no provision of resources to ensure that First Nations are able to meet any standards and regulations set by the Federal government. The National Assessment report estimates that, over the next ten years, the combined projected capital and operating costs to meet the water and wastewater servicing needs of the communities of the 618 individual First Nations across Canada will be approximately \$4.7 billion, plus a projected operating and maintenance budget of \$419 million annually. The National Assessment report found that in 2009 the water and/or wastewater systems of 153 of BC's 203 First Nations were considered to be high risk systems.

As currently no legally enforceable standards and protocols governing water quality exist on Indian Reserves, the main objective of this proposed legislation is to ensure that First Nation communities have access to safe drinking water on their lands. This legislation will allow the Federal government to develop regulations to ensure access to clean drinking water, effective treatment of wastewater, and protection of water sources on First Nation lands. Bill S-8 grants extensive powers to the Federal government to impose a strict regulatory regime on First Nations and to delegate any of the powers listed in the Bill to a non-First Nation third party to ensure enforcement of the established regulations.

The proposed legislation will apply to lands that are administered under the *Indian Act* or the *First Nations Land Management Act*. Under Clause 14 of the Act, self-governing First Nations, that have removed themselves from the *Indian Act* and have assumed responsibility for local infrastructure, may choose to opt-in to the proposed legislation, or make other arrangements. Therefore, this legislation may apply to existing (Tsawwassen) and any future treaty First Nations (e.g. Katzie and Tsleil-Waututh) located within the Metro Vancouver area.

As introduced, Bill S-8 contains 15 clauses. Many of the clauses relate to the Governor-in-Council's power to make regulations governing the provision of drinking water and the disposal of wastewater on First Nations' lands. Key Bill S-8 provisions include:

- Canada's commitment to work with First Nations on the development of future Federal regulations stemming from the legislation
- regulations would not include the power to allocate water supplies or license users of water for any purpose other than the purpose of drinking water
- only the powers necessary to effectively regulate drinking water and wastewater systems would be conferred on any person or body
- third parties that own systems on Reserves, not First Nations, will be held liable
- the legislation could apply to First Nations that are signatories to self-government agreements at their request, and
- a non-derogation clause addressing the relationship between the legislation and Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*, was added by the Senate following criticism of the proposed Bill by the Assembly of First Nations.

4. Local Government Issues for Consideration

Bill S-8 provides for broad powers to delegate to any person or body any aspect of drinking water provision, monitoring or enforcement, which may have significant implications for local government as providers of utility services.

The proposed legislation raises the following issues and concerns for local governments:

1) A Lack of Consultation and Local Government Input

Even though local governments may be potentially impacted by Bill S-8, local government interests were not considered in the drafting of the legislation. A lack of acknowledgement of local government interests and the absence of a meaningful consultation process, including opportunities for local government involvement and input, pose serious challenges for local communities in that public interests with respect to Bill S-8 are not being fully considered.

2) The Transfer of Responsibilities Is Unknown

Bill S-8 does not explicitly download duties and responsibilities onto local governments. The objective of the Bill is to provide local governments with authorities and powers with respect to First Nations' lands since, under the current constitutional regime, local governments do not have the authority or jurisdiction on those lands. Bill S-8 contemplates local governments enforcing the Federal regulations on First Nations' lands if the local government has entered into agreements with the Federal government with respect to those services. An obligation to provide those services and enforce the regulations could be imposed on local governments if the Federal government and the Provincial government enter into an agreement under which the Provincial government is obliged to compel local governments to provide water and wastewater services.

3) The Level of Services Are Unclear

If a local government is already providing water or wastewater services to a First Nation, Bill S-8 will permit the Governor-in-Council to require the local government to comply with the water or wastewater regulations the Federal government imposes on those First Nations' lands. Some unanswered questions to this point include whether new requirements will be imposed on Metro Vancouver that will require it to modify the provisions of water services to all municipalities and whether Metro Vancouver will be required to increase its level of service to accommodate all growth and development within First Nations' lands. It's unclear whether the Federal government will impose higher obligations in which case it would be up to local governments to either decide to terminate the provision of such services to First Nations' lands or alternatively address them locally within the First Nations' lands rather than undertaking system-wide works.

With respect to an obligation to expand services, Bill S-8 appears to be more concerned with addressing inadequate water and sanitary services on First Nations' lands than creating capacity on First Nations' lands. However, the Federal government could attempt to impose a requirement to increase the level of service. The Bill is premised on agreements between a provincial body, such as local governments and the Federal government with respect to the provision of services. If the Federal government sought to require Metro Vancouver to increase the level of services, Metro Vancouver would have to examine the specific facts of each case to determine whether there was an obligation to provide increased services.

4) Challenges with Bylaw Regulation and Enforcement

Enforcement of drinking water and wastewater treatment regulations on Indian Reserves would be a challenge for any entity in charge of ensuring water safety on Reserve lands. For example, it is not clear how the Federal government will facilitate enforcement of local government bylaws on Reserve lands regarding the provision of utility and other services to First Nations. This provision requires further clarification.

5) Legislative and Jurisdictional Uncertainties Appear to be Similar to FNCIDA Legislation

Links exist between Bill S-8 and the *First Nations Commercial and Industrial Development Act* (FNCIDA). Both of these recent Federal legislative initiatives raise the issue of existing inter-jurisdictional uncertainties with respect to First Nations' lands. At the Annual Convention held in September 2012, the Union of BC Municipalities (UBCM) delegates unanimously endorsed a Special Resolution (SR1), "Service Agreements with First Nations and the Regulatory Gap", regarding legislative and regulatory barriers to servicing agreements with First Nations. UBCM will now work with the Federal and Provincial governments and First Nations to: (1)

close the regulatory gap that presently exists regarding the establishment of service agreements between local governments and First Nations; and (2) seek effective legislative tools for local governments to protect themselves and reduce their exposure to financial, environmental and public health liabilities.

Similar to FNCIDA, which referentially incorporates provincial legislation in relation to First Nation lands, the Bill establishes that Federal regulations developed to govern the provision of drinking water and the disposal of wastewater on Reserve may incorporate, by reference, Provincial regulations governing drinking water and wastewater in First Nation communities. This provision may, in fact, face similar challenges to those associated with the FNCIDA legislation and the existing jurisdictional and legislative gaps on Reserve lands.

6) Regulatory Authority over Indian Reserves Is Unclear

By incorporating provincial laws by reference into the Federal legislative framework, the Federal government is delegating to the provincial government its exclusive legislative authority over Indian Reserves. Thus, this legislation proposes the involvement of another order of government that does not have any jurisdiction over Indian Reserves. The primary intent of the Bill, as it would apply to Metro Vancouver and First Nations' lands within the Metro Vancouver area, is that it would permit the Federal Governor-in-Council to pass regulations to address the issues of enforcement of Metro Vancouver bylaws within First Nations' lands. In essence, Bill S-8 augments the FNCIDA authorities specifically within the area of water and wastewater and permits the imposition of Metro Vancouver bylaws and regulations on First Nations' lands. This would permit Metro Vancouver to regularize the provision of its services to First Nations' lands and impose its bylaws on those lands. Bill S-8 could be regarded as providing a benefit to Metro Vancouver in the enforcement and regulation of the use of water and wastewater services on First Nations' lands where it is currently supplying those services to First Nations.

What is not clear, however, is how the Federal government proposes to protect local governments regarding environmental and public health liabilities related to servicing agreements with First Nations when local governments have no regulatory authority over Reserve lands, and Indian Bands do not have "natural person powers" to enter into contractual arrangements with local governments. This short-coming was recently addressed in the proposed FNCIDA regulations by including provisions for the First Nation under FNCIDA to be a legal entity, with the power and capacity to hold interest in its project lands and with the power and capacity to acquire, hold and dispose or rights in relation to, or estates and interests in, those project lands. A similar clause in Bill S-8 is necessary for the purpose of First Nations carrying out or administering their activities, subject to any other limitations or conditions that may be contained in legislation or regulations.

7) Financial Liabilities Require Clarification

Regulating drinking water on Indian Reserves would have significant capacity and resource-related implications for local government. In fact, regulations developed under the Act may confer any person or body to do any work considered necessary and to recover the costs of that work, which, in practice, would mean no Federal funding. The Governor-in-Council can also delegate legislative and judicial powers to any third party. It is possible that where Metro Vancouver is currently providing water or wastewater services to First Nations lands, the Bill would permit the Federal government to impose obligations on Metro Vancouver to alter the treatment of water sent to those lands and/or to expand its services. Furthermore, the provision of any new water or wastewater services to First Nations' lands in the Metro Vancouver area would have to occur within the context of an agreement between Metro Vancouver and the Federal government. As this is not explicitly referenced in the Bill, these issues will likely need to be considered on a case-by-case basis, which could lead to inconsistent approaches taken across the region.

It is also not immediately clear how Bill S-8 will protect local governments that provide utility services to First Nations against financial liabilities when local governments do not have taxation authority over First Nations'

lands serviced. Clarification and discussion are needed to address these unknowns.

8) Funding Capacity Is Unknown

In contrast to the FNCIDA legislation under which non-treaty First Nations can opt in to the legislative framework (e.g. Squamish Nation), under Bill S-8, all First Nations governed by the *Indian Act* will have to operate under this new legislation. In addition, this legislation may apply to existing treaty First Nations, such as Tsawwassen, as well as potential future treaty First Nations (e.g. Katzie and Tsleil-Waututh). It is not immediately clear whether the Federal government and First Nations across Canada have the proper capacity funding for the proposed infrastructure improvements on Indian Reserves under Bill S-8.

9) An Adequate Implementation Plan Is Lacking:

Bill S-8 outlines a legislative framework for managing drinking water and wastewater on Indian Reserves but still lacks an adequate implementation plan, such as detail and substance required to improve water resource management on First Nations' lands. These are the types of matters that should be thoroughly discussed among all concerned parties, including local governments, before legislation is passed, such that there is a clear vision for protecting drinking water. For example, Section 5(1)(b) states that the regulations may "*confer on any person or body any legislative, administrative, judicial or other power that the Governor in Council considers necessary to effectively regulate drinking water systems and waste water systems.*" This creates significant concern over the generic nature of this clause given that the expertise and professional qualifications of "any person" is undefined. Bill S-8 is too vague to understand its implementation plan and should address, among other important considerations, the following:

- Reliable certification of water and wastewater treatment operators
- Binding and consistent drinking water standards
- Clear oversight and reporting responsibilities
- Clear delineation of the roles of health, environment, water officials including First Nations' officials and their governments
- Clear and comprehensive monitoring and testing of drinking water
- Clear delineation of responsibility for responding to adverse events, as well as clear protocols
- Opportunities for public involvement, disclosure and transparency
- Opportunities for receiving expert third party advice
- Available resources and funding mechanisms
- Proper capital/infrastructure planning over time