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

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Legislative Summary of Bill S-8

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL S-8: THE SAFE DRINKING WATER FOR FIRST NATIONS ACT

1 BACKGROUND

Bill S–8, An Act respecting the safety of drinking water on First Nation lands (short title: Safe Drinking Water for First Nations Act), was introduced in the Senate on 29 February 2012. The bill provides for the development of federal regulations governing the provision of drinking water, water quality standards and the disposal of waste water in First Nations communities. Importantly, the bill also establishes that federal regulations developed in this regard may incorporate, by reference, provincial regulations governing drinking water and waste water in First Nations communities.

Bill S-8 is the second legislative initiative to address safe drinking water on reserves. Its predecessor, Bill S-11, was introduced in the Senate on 26 May 2010, and it was referred to the Standing Senate Committee on Aboriginal Peoples for examination on 14 December 2010. From 2 February to 9 March 2011, the committee held nine meetings on the proposed legislation. As a result of widespread concerns about the bill, the legislation did not proceed to third reading, in order to allow for further discussions between government officials and First Nations representatives on proposed changes. Bill S-11 subsequently died on the *Order Paper* when Parliament was dissolved on 26 March 2011.

While Bill S-8 retains several of the features of former Bill S-11, particularly in areas to be covered by eventual federal regulations, the proposed legislation would address the application of those regulations as they relate to, among other things, source water; the liability of First Nations for non–band-owned water systems; the application to self-governing First Nations; and agreements with, and powers of, third parties. Non-derogation language is also included in the proposed legislation. Key differences between bills S-8 and S-11 are identified more precisely in section 2, "Description and Analysis," in this document.

The delivery of safe drinking water to on-reserve First Nations communities is critical to the health and safety of the communities' residents. Access to safe, clean, potable water is also closely tied to the economic viability of individual communities. For more than a decade, research has indicated that many First Nations communities lack adequate access to safe drinking water. A 2001–2002 assessment found that the quality of almost three quarters of drinking water systems in First Nations' communities were at significant risk. In recent years, with the intention of addressing on-reserve water quality issues, the federal government has implemented a number of initiatives, including plans to bring forward water standards legislation to fill the existing regulatory gap governing the provision of drinking water on reserves. Progress reports suggest that, since 2006, there has been a steady reduction in the number of high-risk community water systems and priority communities.[1]

1.1 Jurisdictional Considerations

In Canada, water and waste water operations and systems are generally the responsibility of provincial and territorial governments.[2] Over the years, the different jurisdictions have developed comprehensive regulatory regimes for the "protection of source water, water quality standards, and the oversight of water treatment plants and water delivery services."[3] However, because section 91(24) of the *Constitution Act, 1867* grants to the federal government exclusive jurisdiction over "Indians and lands reserved for the Indians," provincial regulatory water standards do not apply to on-reserve First Nations communities.[4] To date, there has been no federal legislative framework governing drinking water and waste water in First Nations communities beyond what is set out in federal policies, administrative guidelines, and funding arrangements.[5]

1.2 Roles and Responsibilities

Federally, three departments are primarily responsible for delivering safe drinking water on reserves: Aboriginal Affairs and Northern Development Canada, Health Canada, and Environment Canada. Their roles can be summarized as follows: [6]

- *Aboriginal Affairs and Northern Development Canada* provides funding – including funds for capital construction, upgrading and a portion of operating and maintenance costs (80%) – to First Nations for the provision of water services to First Nations communities. It also oversees the design, construction and maintenance of water facilities.
- *Health Canada* ensures the delivery of drinking water monitoring programs on reserves located south of the 60th parallel, either directly or in an oversight role.
- *Environment Canada* is involved in source water protection through its powers to regulate waste water discharge into federal waters or into water generally where water quality has become a matter of national concern, and to enforce effluent discharge standards into water throughout Canada.

First Nations communities, through their chiefs and councils, are responsible for the design, construction, operation and maintenance of their water systems, for which they assume 20% of the costs. They are also responsible for ensuring that water systems are operated by trained operators, for monitoring drinking water quality and for issuing drinking and boil water advisories.

1.3 Some Key Challenges

Some of the challenges experienced by First Nations communities are similar to those in rural communities with small water systems.[7] However, many First Nations experience other difficulties as well. In addition to the absence of a regulatory framework and the lack of clarity regarding roles and responsibilities as discussed above, core issues relating to the provision of safe drinking water on reserves include the high costs of equipment for, and construction and maintenance of, facilities in remote locations; infrastructure that is either obsolete, entirely absent or of low quality; limited local capacity and ability to retain qualified or certified operators; and

the lack of resources to properly fund water and waste water system operation and maintenance.[8]

1.4 Federal Policy Initiatives

Federal policies, programs and funding related to drinking water on reserves were initiated in the 1960s and 1970s, as were parliamentary appropriations in this regard. The overall federal policy objective was to ensure that on-reserve residents had access to water facilities comparable with those for other Canadians living in communities of a similar size and location. However, comprehensive plans (including targets and resources) through which these objectives might be achieved were not yet in place.

In March 2003, following the results of the national on-site assessment of water treatment plants, the federal government launched the First Nations Water Management Strategy (FNWMS) to improve the quality and safety of drinking water on reserves. The Strategy – as well as its successor, the First Nations Water and Wastewater Action Plan (FNWWAP), which was launched in April 2008 to coincide with the termination of the FNWMS – represented a more focused and comprehensive multi-barrier approach (source to tap) to addressing the issues identified in the national assessment.[9] The FNWWAP added several program enhancements to the original plan, including a national engineering assessment to determine the state of existing water and waste water facilities; consultations on a new federal legislative framework for safe drinking water; and investments in a national Waste Water Program. Budget 2010 extended the FNWWAP for two years, with funding ending on 31 March 2012. In addition to these initiatives, in March 2006, the federal government announced a “plan of action” to address drinking water concerns in First Nations’ communities, including a commitment to report to Parliament regularly on progress.

1.5 Federal Investments

Federal funding commitments relating to First Nations water and water systems for the fiscal periods from 2003 to 2012 are as follows:

- In Budget 2003, $600 million in new funding for the First Nations Water Management Strategy was committed to improving the quality of water and waste water treatment in First Nations communities.
- In Budget 2006, the federal government committed $60 million over two years to support the Plan of Action for Drinking Water in First Nations Communities.
- In Budget 2008, an additional $330 million over two years was committed for the First Nations Water and Wastewater Action Plan to improve access to safe drinking water on reserves (coinciding with the termination of the FNWMS).
- In Budget 2009, $165 million was committed to build or upgrade 18 water and waste water infrastructure projects on reserves.

- In Budget 2010, $330 million over two years was committed to continue the First Nations Water and Wastewater Action Plan to improve access to safe drinking water on reserves.
- **In Budget 2012, $330 million was committed over two years to build and renovate on-reserve water infrastructure and to support the development of a long-term strategy to improve water quality in First Nations communities. However, the First Nations Water and Wastewater Action Plan, which ended on 31 March 2012, was not formally renewed.**

1.6 Report of the Expert Panel on Safe Drinking Water

The Expert Panel on Safe Drinking Water for First Nations, established in June 2006, was one of the principal components of the federal government's March 2006 Plan of Action for Drinking Water in First Nations Communities. The Panel held a series of public hearings across Canada throughout the summer of 2006 and tabled its report in November 2006.

In its report, the Expert Panel favoured the creation of a new federal statute establishing a single water standards regime for First Nations communities.[10] The Panel noted that applying customary law could create "uncertainty, both in terms of how to get a comprehensive modern water regime and how long the process might take."[11] It also expressed concern with the option of incorporating provincial regimes into new federal legislation. In particular, it noted that this appeared to be the weaker option owing to gaps and variations in those regimes which could lead to uneven results, with some reserve communities receiving the benefits of a more elaborate provincial regime than others; First Nations' low acceptance of provincial regimes; and the complexity of involving another level of government in water management.[12]

According to the report, regulation alone would not ensure safe drinking water. The report indicated that regulations governing the provision of on-reserve drinking water must be accompanied by adequate investment in human resources and physical assets. It suggested that it is not "credible to go forward with any regulatory regime without adequate capacity to satisfy the regulatory requirements."[13] Further, it stressed "regulation without the investment needed to build capacity may even put drinking water at risk by diverting badly needed resources into regulatory frameworks and compliance costs."[14]

1.7 Parliamentary Examination

In May 2007, the Standing Senate Committee on Aboriginal Peoples released a report concerning the delivery of drinking water on reserves.[15] The Committee's report recommended that the following two actions be undertaken by the Department of Indian Affairs and Northern Development: an independent needs assessment of both the physical and human resource needs of individual First Nations communities' water and waste water systems, and comprehensive consultations on the legislative options proposed by the Expert Panel on Safe Drinking Water and the Assembly of First Nations.

The report echoed the view of the Expert Panel that sustained investment in the capacity of First Nations water systems, and in those operating those systems, is essential to ensure the delivery of safe drinking water on reserves.[16] It also expressed concern that the Department was proceeding with a legislative approach that could create an uneven patchwork of regulations across the country.

1.8 Federal Engagement Sessions

Budget 2008 included an announcement that the federal government would undertake consultations with First Nations and provincial and territorial governments on the development of a regulatory regime to oversee water quality on reserves.[17] Subsequently, in January 2009, a commitment to launch a consultative process on the "scope and elements of a proposed legislative framework" on water and waste water systems in First Nations communities was announced.[18] From February to March 2009, the government held 13 engagement sessions across the country on the development of a proposed legislative framework for drinking water and waste water in First Nations communities.[19] According to departmental documents, 544 individual First Nations members participated in these sessions. A discussion paper prepared for the engagement sessions indicated that participants would be "encouraged to discuss and provide input on the federal government's preferred option of incorporating by reference (reproducing) provincial/territorial regulations."[20]

In addition to these engagement sessions, and as a result of concerns expressed during committee examination of former Bill S-11, government officials and First Nations organizations held further discussions on proposed changes to the legislation between October 2010 and October 2011.[21]

1.9 National Assessment of First Nations Water and Wastewater Systems

In July 2011, Aboriginal Affairs and Northern Development Canada released the findings of the National Assessment of First Nations Water and Wastewater Systems. The purpose of the assessment was to define current deficiencies and operational needs of water and wastewater systems, to identify long-term needs for each community and to review sustainable infrastructure development strategies for the next 10 years.[22]

Based on an inspection of the water and wastewater systems of 587 First Nations communities across the country (97% of all First Nations communities), the report found that of the assessed water systems:

- 39% were at high overall risk;
- 34% were categorized as presenting medium overall risk; and
- 27% were considered to present low overall risk.

The report further noted that the majority of high-risk water systems tend to serve smaller populations, affecting roughly 25% of on-reserve residents. The findings of

the National Assessment suggest that training and retaining certified operators is critical to having well-run water and wastewater systems.

Of the 532 wastewater systems assessed, the report found that:

- 14% were classified as presenting high overall risk;
- 51% were at medium overall risk; and
- 35% were considered to present low overall risk.

The National Assessment report estimates that the cost to upgrade existing water and wastewater systems to meet federal protocols and guidelines, as well as provincial standards and regulations, is $1.08 billion. It estimates that an additional $79.8 million is needed for non-construction costs, including, among other things, operator training and the development of emergency response and source water plans. Nationally, over 10 years, the combined projected capital and operating costs to meet the water and wastewater servicing needs of individual First Nations communities are estimated to be $4.7 billion, plus a projected operating and maintenance budget of $419 million annually.

2 DESCRIPTION AND ANALYSIS

As introduced, Bill S-8 contains 15 clauses. The bulk of the bill relates to the Governor in Council's power to make regulations governing the provision of drinking water and the disposal of waste water on First Nations lands. The following review considers selected significant features of the legislation.

2.1 INTERPRETATION

Clause 2(1) defines the following terms as they are used in the bill: "drinking water," "drinking water system," "First Nation," "First Nation lands," "Minister," "provincial body," "provincial official" and "waste water system." The definition of "First Nation" may, under certain conditions set out in clause 14(1) of the bill, include those First Nations with settled self-government and comprehensive land claims agreements. Clause 2(2) establishes that the Governor in Council may make regulations for the purposes of this Act with respect to First Nations lands.

Clause 3 provides, for greater certainty, that the bill and its regulations do not have the effect of abrogating or derogating from the existing Aboriginal or treaty rights of Aboriginal peoples under section 35 of the *Constitution Act, 1982*, "except to the extent necessary to ensure the safety of drinking water on First Nation lands." This clause appears to replace clause 4(1)(*r*) of the previous Bill S-11, which had more broadly contemplated that the regulations may define the relationship between the regulations and constitutionally protected Aboriginal and treaty rights, "including the extent to which the regulations may abrogate or derogate from those aboriginal and treaty rights."

2.2 Regulations (Clauses 4 to 6)

Clause 4(1) establishes that the Governor in Council, on the recommendation of the Minister, may make regulations governing the provision of drinking water and the disposal of waste water on First Nations lands. In particular, regulations may be made respecting the following items, provided for in clauses 4(1)(*a*) to (*h*):

- the training and certification of operators of drinking and waste water systems;
- source water protection;
- the location, design, construction, modification, maintenance, operation and decommissioning of drinking water systems and waste water systems;
- drinking water distribution by truck;
- the collection and treatment of waste water;
- the monitoring, sampling and testing of waste water and the reporting of test results; and
- the handling, use and disposal of products of waste water treatment.

Clause 4(2) further establishes that the Governor in Council, on the recommendation of the Minister of Health, may make regulations respecting standards for the quality of drinking water on First Nations lands. On the recommendation of the Minister and the Minister of Health, regulations may be enacted respecting:

- the monitoring, sampling and testing of drinking water and the reporting of test results (clause 4(3)(*a*));
- remediation orders where standards respecting standards for the quality of drinking water on First Nations lands have not been met (clause 4(3)(*b*)); and
- emergency measures in response to contamination of water on First Nations lands(clause 4(3)(*c*).

These regulations may "confer any legislative, administrative, judicial or other power on any person or body" that the Governor in Council considers necessary to effectively regulate drinking water systems and waste water systems (clause 5(1)(*b*)). Regulations may also incorporate laws of the province by reference (clause 5(3)).

Clause 5(1) enumerates a long list of powers that may be included in the regulations (clauses 5(1)(*a*) to (*r*)). In this respect, among other powers, regulations may:

- specify the classes of drinking water systems and waste water systems to which they apply (clause 5(1)(*a*));
- confer any kind of power, including legislative, administrative or judicial, on any person or body that the Governor in Council considers necessary to effectively regulate drinking water systems and waste water systems (clause 5(1)(*b*));
- confer on any person or body the power to:
  - make orders to cease any work, comply with any provision of the regulations or remedy the consequences of a failure to comply with the regulations;

  - to do any work considered necessary and to recover the costs of that work; or
  - to appoint a manager independent of the First Nation to operate a drinking water system or waste water system on its First Nation lands (clause 5(1)(*c*));
- fix, or establish a manner of calculating, the fees to be paid for the use of drinking water or of a waste water system (clause 5(1)(*d*));
- fix the interest to be charged on amounts owing under the regulations (clause 5(1)(*e*));
- subject to clause 5(2), establish offences punishable on summary conviction for contraventions of the regulations and set fines or terms of imprisonment or both for such offences (clause 5(1)(*f*));
- confer on any person the power to verify compliance with the regulations, including the power to seize and detain things found in the exercise of that power (clause 5(1)(*h*));
- confer on any person the power to apply for a warrant to conduct a search of a place or to audit the books, accounts and records of persons or bodies that exercise powers or perform duties under the regulations (clauses 5(1)(*i*) and (*j*));
- prescribe rules respecting the confidentiality, or the disclosure, of any information obtained under the regulations (clause 5(1)(*l*));
- prescribe rules of procedure for hearings to be held in relation to a drinking water system or waste water system (clause 5(1)(*m*));
- require permits to be obtained as a condition of engaging in any activity on First Nations lands that could affect the quality of drinking water (clause 5(1)(*p*));
- for the purposes of this Act, deem a First Nation, or any person or body, to be the owner of a drinking water system or waste water system of a prescribed class, and prescribe classes of drinking water systems and waste water systems for that purpose (clause 5(1)(*q*)); and
- require that an environmental assessment of drinking water systems or waste water systems be conducted and the procedures under which it is to be conducted, in circumstances where the *Canadian Environmental Assessment Act* does not apply (clause 5(1)(*r*)).

It should be noted that whereas the French version of clause 5(1) suggests that the list of regulation-making powers is not exhaustive (it states, “Les règlements pris en vertu de l’article 4 peuvent notamment …”), the English version suggests an exhaustive list of possible types of recommendations.[23]

Clause 5(2) of the bill provides that fines imposed under article 5(1)(*f*) of the Act may not exceed the amounts set by provincial law where a contravention would be an offence if it occurred outside First Nations lands.

Clause 5(3) of the bill provides that the regulations made under section 4 may adopt – or “incorporate by reference” – laws of a province. This clause also provides that the Governor in Council, when making regulations under the Act, may make such adaptations to the provincial regulations as it considers necessary. It is important to

note that it is uncommon for provincial laws to be incorporated by reference into federal statutes, although one legislative level's adoption by reference of the legislation of another legislative level is constitutional.[24] Section 88 of the federal *Indian Act*, for example, incorporates by reference provincial "laws of general application," thus making the provincial laws applicable, with some exceptions, as part of federal law. Among these exceptions are that such provincial laws may not conflict with any federal laws, and must yield to the terms of any treaty.[25]

As discussed earlier, the Expert Panel on Safe Drinking Water for First Nations that was created in June 2006 stressed the problems associated with incorporating provincial laws into federal law by reference, since variations in provincial standards might lead to unequal results at the national level in that some reserves would have an undue advantage because of provincial schemes that are more advanced than others.[26]

On that point, clause 5(4) specifically provides that the regulations may vary from province to province and may be restricted to specified First Nations.

Clause 5(5) stipulates that clause 4 does not authorize the making of regulations respecting the allocation of water supplies or the issuance of permits for the use of water for any purpose other than the provision of drinking water.

Clauses 6(1), (2) and (3) allow the Minister of Indian Affairs and Northern Development and the Minister of Health to enter into agreements with a province, corporation or other body for the administration and enforcement of regulations made under clause 4.

Clause 7 states that unless otherwise provided, regulations made under the bill prevail over any laws or by-laws made by a First Nation.

2.3 Other Acts (Clauses 8 to 10)

Clause 8 of the bill provides that the *Statutory Instruments Act* will not apply to an instrument made by a provincial official or body under the authority of a provincial law incorporated by reference into the regulations.

Clause 9(1) of the bill provides that a provincial official or body that exercises a power or performs a duty under the regulations is not a federal board, commission or other tribunal for the purposes of the *Federal Courts Act*. Under clause 9(2), however, the exercise of a power conferred by provincial law that is incorporated by reference into the regulations made under the bill is subject to review by, or appeal to, the courts of the province in the same manner and to the same extent as if the provincial law applied of its own force.

Clause 10 of the bill provides that fees, charges, fines or other payments collected by a person or body pursuant to the regulations made under the bill will not be considered to be "Indian moneys" for the purposes of the *Indian Act* or "public money" for the purposes of the *Financial Administration Act*.

2.4 Limits on Liability, Defences and Immunities (Clauses 11 to 13)

Clause 11 of the bill limits the liability of various actors for certain acts or omissions that occur in the performance of their duties.

To that end, clause 11(1) provides that should a minister of the Crown or a federal employee commit an act or omission in a given province in the exercise of a power or the performance of a duty under the regulations, the Government of Canada and the minister or employee are entitled to the limits on liability, defences and immunities provided under the *Crown Liability and Proceedings Act*. In addition, the federal government is also entitled to the same limits on liability, defences and immunities as would apply to a provincial government in the exercise of such a power or the performance of such a duty under the laws of the province. The minister or federal employee is entitled to the same limits on liability, defences and immunities as those that would apply to a provincial official exercising such a power or performing such a duty under the laws of the province, unless otherwise provided by the regulations.

Clause 11(2) deals with acts or omissions by a provincial official or body that occur in the exercise of a power or the performance of a duty under the regulations. In such cases, the Government of Canada is entitled to the same limits on liability, defences and immunities as those that would apply in the exercise of such a power or the performance of such a duty under the laws of the province. The official or body is also entitled to the limits on liability, defences and immunities as those that would apply under the laws of the province, unless otherwise provided by the regulations.

Clause 11(3) states that in the case of an act or omission that occurs in a given province in the exercise of a power or the performance of a duty under the regulations by a person or body other than the Government of Canada, a minister of the Crown in right of Canada, an employee in the federal public administration or a provincial official or body, no one has a right to receive any compensation, damages, indemnity or other relief from the federal government. The person or body in question is entitled to the same limits on liability, defences and immunities as those that would apply to a person or body exercising such a power or performing such a duty under the laws of the province, unless otherwise provided by the regulations.

Clause 12 of the bill provides that no payment may be made under an appropriation authorized by Parliament to satisfy any claim arising out of an act or omission referred to in clause 11(3).

Clause 13 of the bill indemnifies the Government of Canada. Under that clause, no civil proceeding may be brought, no order may be made and no fine or monetary penalty may be imposed against the federal government under the regulations.

2.5 Amendment of Schedule (Clause 14)

Under clause 14(1) of the bill, any Aboriginal body that is a party to a land claims agreement or self-government agreement with Canada given effect by an Act of Parliament and the disposition of whose lands is not subject to the *Indian Act* or the

First Nations Land Management Act may request that the Governor in Council make regulations:

- adding the name of the Aboriginal party to, or deleting it from, column 1 of the schedule; and
- adding to or deleting from column 2 of the schedule a description of the lands that are subject to the Aboriginal body's jurisdiction.

Clause 14(2) of the bill provides that for an Aboriginal body named in column 1 of the schedule to the Act, the bill and the regulations made under the bill prevail over any land claims or self-government agreement to which the Aboriginal body is a party, in the event of a conflict or inconsistency between the bill and any such agreement. This clause appeared as clause 6(2) in the previous Bill S-11.

2.6 Coming into Force (Clause 15)

Clause 15 of the bill provides that the provisions of the bill come into force on a day or days to be fixed by order of the Governor in Council.

3 COMMENTARY

To date, commentary on Bill S-8 has been limited. However, a number of First Nations organizations, notably the Chiefs of Ontario, the Nishnawbe Aski Nation, the Assembly of Manitoba Chiefs, and Treaty Seven nations in Alberta have signalled continued concerns with the proposed legislation, citing, among other things, the need to address infrastructure and capacity issues before introducing federal regulations.[27]

Previously, several First Nations participating in the engagement sessions on the government's proposed legislative approach expressed concern that the introduction of water standards legislation, without adequate investment to build capacity, could place First Nations drinking water at further risk by increasing costs associated with monitoring, reporting and compliance, as well as with potential financial penalties related to enforcement.

NOTES

1. Aboriginal Affairs and Northern Development Canada defines "priority communities" as those communities that have both high-risk drinking water systems and a drinking water advisory. To consult the progress reports, see Aboriginal Affairs and Northern Development Canada [AANDC], Progress Reports.
2. *Report of the Expert Panel on Safe Drinking Water for First Nations*, Vol. 1, Department of Indian Affairs and Northern Development, November 2006 [Expert Panel], p. 16.
3. Dean Watt, "Water, water everywhere: nor any drop to drink," *LawNow*, September/October 2008.

4. For additional information on jurisdictional issues, see Tonina Simeone, *Federal-Provincial Jurisdiction and Aboriginal Peoples*, Publication no. TIPS-88E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 1 February 2001.

5. A 2005 report by the Commissioner of the Environment and Sustainable Development found that while the Department of Indian Affairs and Northern Development attempts to fill this regulatory gap by referencing provincial standards and regulations in its policies and guidelines, important elements are missing and the guidelines are not consistently implemented.

6. AANDC, "Improving Water Quality On-reserve: Roles and Responsibilities," *Fact Sheet*, 21 March 2006.

7. Watt (2008).

8. Senate, Standing Committee on Aboriginal Peoples, *Minutes of Proceedings*, 1st Session, 39th Parliament, 2 May 2007, 15:43–15:59 (Christine Cram, Associate Deputy Minister, Socio-economic Policy and Regional Operations Sector, Department of Indian Affairs and Northern Development). For additional information relating to challenges facing the delivery of safe drinking water in First Nations communities, please see: Institute on Governance, *Safe Water for First Nations Communities: Learning the Lessons from Walkerton*, 15 September 2002; and Dennis R. O'Connor, *Report of the Walkerton Inquiry: A Strategy for Safe Drinking Water*, Part Two, Ministry of the Attorney General [Ontario], 2002 [Walkerton Inquiry], p. 486.

9. Additional information on the First Nations Water and Wastewater Action Plan is available at AANDC, "Government Of Canada Announces Next Important Steps To Improve Drinking Water In First Nations Communities," News release, 15 April 2008.

10. The Expert Panel explored five legislative options as possible routes to regulating drinking water on reserves. The last three options were considered the most viable ones. They are:
    - applying provincial laws of general application;
    - introducing federal regulations pursuant to existing federal statutes, including federal laws that authorize First Nations to pass laws on water;
    - passing a new federal act;
    - incorporating provincial water laws into new federal legislation; and
    - applying asserted First Nations jurisdiction and customary laws.

11. Expert Panel (2006), p. 59.

12. Ibid.

13. Ibid., p. 49.

14. Ibid., p. 18.

15. Senate, Standing Committee on Aboriginal Peoples, *Safe Drinking Water for First Nations*, Final Report of the Standing Committee on Aboriginal Peoples, May 2007.

16. Ibid., p. 9.

17. Department of Finance Canada, *Budget 2008*, 26 February 2008, p. 158.

18. AANDC, "Government of Canada Takes More Action to Clean Up Drinking Water in First Nation Communities," News release, 20 January 2009.

19. See Assembly of First Nations, *Water*, for summary reports of the regional engagement sessions. These reports do not appear to be available on the AANDC website.

20. Government of Canada, *Discussion Paper: Engagement Sessions on the Development of a Proposed Legislative Framework for Drinking Water and Wastewater in First Nation Communities*, Winter 2009, p. 3.

21. AANDC, *Frequently Asked Questions – Safe Drinking Water for First Nations Act*, February 2012.

22. Neegan Burnside Ltd., *National Assessment of First Nations Water and Wastewater Systems: National Roll-Up Report*, Prepared for the Department of Indian Affairs and Northern Development, April 2011.

23. It should be noted that this formulation has been used at least once before. In fact, section 3(2) of the *First Nations Commercial and Industrial Development Act* uses the same formulation.

24. See H. Brun and G. Tremblay, *Droit constitutionnel*, 4th ed., Yvon Blais, Cowansville, Que., 2001, p. 414.

25. *Indian Act*, R.S.C., 1985, c. I-5, s. 88.

26. Expert Panel (2006), p. 16.

27. See, for example, Chiefs of Ontario, "Federal Bill S-8 Fails to 'Protect' Drinking Water for First Nations," News release, 1 March 2012; and Nishnawbe Aski Nation, "Water legislation fails to address critical lack of infrastructure in NAN First Nations," News release, 1 March 2012.