



CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

**NOTE D'INFORMATION CONCERNANT LE PROJET DE LOI S-11  
LOI SUR LA SALUBRITÉ DE L'EAU POTABLE DES PREMIÈRES NATIONS  
5 octobre 2010**

Le projet de loi S-11, une « Loi concernant la salubrité de l'eau potable sur les terres des Premières Nations », est accueilli favorablement alors qu'il vise à améliorer la santé et la sécurité des Premières Nations par des règlements fédéraux qui régissent le traitement de l'eau potable et des eaux usées dans les communautés des Premières Nations.

Les parlementaires devraient toutefois être conscients que ce projet de loi peut potentiellement porter atteinte aux droits des peuples autochtones et aux droits conférés par traités, sans pour autant améliorer l'accès à l'eau potable. Il est urgent d'améliorer l'accès à l'eau potable dans plusieurs communautés des Premières Nations. En 2009, les systèmes d'approvisionnement en eau de 48 communautés ont été classés à haut risque. En date du 31 août 2010, des avis concernant la qualité de l'eau potable ont été émis dans 117 communautés des Premières Nations, un chiffre qui est resté relativement constant au fil des années malgré les efforts du Canada pour mieux gérer l'accès à l'eau potable dans ces régions.

Nous recommandons de ne pas appuyer le projet de loi S-11 dans sa forme actuelle. Celui-ci doit être amendé afin de tenir compte des préoccupations soulevées par les groupes des Premières Nations (voir les résolutions ci-jointes) et d'être cohérentes avec les recommandations du gouvernement qui se retrouvent dans le rapport annuel de 2005 du commissaire à l'environnement et au développement durable et dans le rapport du groupe d'experts sur la salubrité de l'eau potable dans les collectivités des Premières Nations paru en 2006.

Ce document ébauche trois considérations essentielles qu'il est nécessaire d'intégrer dans le projet de loi préalablement à sa troisième lecture au Sénat :

- 1) Les droits des peuples autochtones et les droits conférés par traités qui sont assurés par la Constitution doivent être protégés;
- 2) La gestion des ressources hydriques des Premières Nations selon une perspective à long terme devrait être incorporée;
- 3) Les structures de gouvernance des Premières Nations doivent être respectées.

### **1. Droits des peuples autochtones et droits conférés par traités**

Dans sa forme actuelle, le projet de loi S-11 ne respecte pas les droits constitutionnels que sont ceux des peuples autochtones et ceux conférés par traités.

- Allant directement à l'encontre de la section 35 de la Constitution, la section 4(1)(r) confère au Canada le pouvoir de déterminer dans quelle mesure la Couronne peut abroger les droits conférés par traités ou y déroger. Il est inacceptable d'énoncer simplement que des droits seront affectés sans toutefois indiquer lesquels, de quelle manière ceux-ci seraient affectés et quelles seraient les mesures d'arbitrage possibles. Le gouvernement du Canada n'a pas consulté les communautés des Premières Nations ni les organisations concernées afin de déterminer l'ampleur de ces impacts et de répondre préalablement aux préoccupations.
- La Couronne n'a pas rempli sa tâche consistant à consulter et à prendre en considération les préoccupations des Premières Nations entourant cette Loi. En outre, elle n'a pas procédé à l'analyse des trois recommandations faites par le groupe d'experts sur l'eau.

Décréter une loi qui semble négliger, voire tolérer les conséquences négatives sur les droits des Premières Nations sans préalablement tenir compte des préoccupations formulées par celles-ci constitue une violation directe des obligations et responsabilités fiduciaires du gouvernement ainsi que des déclarations de la Cour suprême du Canada en ce qui a trait aux protections accordées aux droits des Premières Nations en vertu de la section 35(1) de la Constitution canadienne.

## 2. Perspective pour améliorer l'accès des Premières Nations à la gestion des ressources hydriques

Le projet de loi S-11 trace les premières lignes d'un cadre législatif pour la gestion de l'eau potable et des eaux usées dans les réserves des Premières Nations, sans toutefois mener de consultation valable sur les choix législatifs ou sans qu'il n'y ait de plan de mise en œuvre adéquat. La Loi n'est pas suffisamment détaillée, manque de ressources affectées et n'a pas la substance nécessaire pour améliorer la gestion des ressources hydriques sur les terres des Premières Nations.

- La section 4(1)(b) prévoit que les règlements peuvent notamment « conférer à toute personne ou à tout organisme tout pouvoir, notamment législatif, administratif ou judiciaire » afin de mettre la Loi et les règlements s'y rattachant à exécution. Le caractère générique de cette clause ne va pas sans soulever de sérieuses préoccupations puisque l'expertise et la qualification professionnelle de « toute personne » restent indéfinies. Il s'agit là d'une importante perte potentielle de la capacité des Premières Nations à contrôler et gérer leurs terres et leurs infrastructures sans savoir qui pourrait s'accaparer ces pouvoirs (i.e. les compagnies privées).
- Plusieurs règlements ont une portée outrancière, conférant un pouvoir sans précédent à la Couronne quant au contrôle qu'elle exerce sur les ressources hydriques des Premières Nations. La section 3 donne explicitement au Canada le pouvoir d'établir des règlements en matière « d'alimentation en eau potable », une phrase trop vague pour bien saisir les intentions sous-jacentes (i.e. cela comprend-t-il une nouvelle autorité sur l'utilisation du territoire dans les réserves?).
- Le projet de loi S-11 déploie une approche qui est contraire aux recommandations que le commissaire à l'environnement et au développement durable et que le groupe d'experts ont fait dans leurs rapports respectifs. Ces rapports mettent tous deux l'accent sur la nécessité de renforcer les capacités des Premières Nations (i.e. en prodiguant la formation, l'éducation et les ressources nécessaires aux dirigeants des Premières Nations) afin d'assurer qu'elles puissent avoir accès aux ressources financières et aux cadres de gouvernance nécessaires à une mise en application efficace.

### 3) Autonomie gouvernementale

Le projet de loi S-11 retire le droit des Premières Nations à jouer un rôle central et significatif en matière de gouvernance de l'eau sur les territoires des réserves :

- Le préambule allègue que les Premières Nations n'ont pas l'autorité nécessaire pour régir l'eau dans les réserves, ce qui va à l'encontre des systèmes de gouvernance des Premières Nations.
- La section 6 indique que le projet de loi S-11 et les règlements qui en découlent « l'emportent, en cas d'incompatibilité, sur tout accord sur des revendications territoriales ou tout accord sur l'autonomie gouvernementale ». Ainsi, le gouvernement canadien pourrait être permis d'abroger les termes des traités modernes et d'y déroger, de même que de réduire de manière notoire les pouvoirs qu'exercent actuellement les régies et commissions des eaux des Premières Nations selon les termes de tels accords. Cela pourrait également amenuiser les pouvoirs que les Premières Nations ont acquis depuis 1951 grâce à la *Loi sur les Indiens* de même que toute forme d'autorité qu'elles ont sur l'eau en vertu des droits inhérents à l'autonomie gouvernementale.

#### Pièces jointes

- Résolution 43/2010 de l'Assemblée des Premières Nations
- Résolution 2010-36 de l'Union des chefs indiens de la Colombie-Britannique
- Résolution AUG-08.02 de l'Assemblée des chefs du Manitoba
- Résolution 09/19 des Chefs de l'Ontario

CELA publication 753

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**TITLE:** Impact Analysis of Proposed Federal Legislation Bill S-11

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**SUBJECT:** Safe Drinking Water

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**MOVED BY:** Ron Lameman, Proxy, Beaver Lake Cree Nation, AB

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**SECONDED BY:** Chief R. Don Maracle, Tyendinaga Mohawk Territory, ON

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**DECISION:** Carried by Consensus

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**WHEREAS:**

- A. 115 First Nation communities are under Drinking Water Advisories and another 49 have water facilities under high risk.
- B. First Nations lack adequate resources for training, operations, and management of their water resources.
- C. The regulations contained in proposed Bill S-11 will require significant financial and technical resources to implement for each region.
- D. The total cost to implement the regulations is not known.
- E. The federal Government has stated they are facing a capital crisis.
- F. First Nations are concerned that there will not be adequate resources to support the implementation of the regulations developed under Bill S-11.

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Certified copy of a resolution adopted on the 22nd day of July, 2010 in Winnipeg, Manitoba

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**THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly:**

1. Mandate the AFN to advocate that the Government of Canada provide adequate financial resources to each region to conduct a thorough impact analysis to determine the financial, technical, and policy development needs for each region.
2. Direct the AFN to urge Canada that any further discussion on Bill S-11 be suspended until the estimated full economic impacts of this Bill are identified and presented to Parliament.

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# OUR LAND IS OUR FUTURE

UNION OF BRITISH COLUMBIA INDIAN CHIEFS

FOUNDING HEAD OFFICE  
209 - 345 Yellowhead Highway  
Kamloops, B.C. V2H 1H1  
Tel: 250-828-9746  
Fax: 250-828-0319



VANCOUVER OFFICE  
5th Floor, 342 Water Street  
Vancouver, B.C. V6B 1B6  
Tel: 604-684-0231  
Fax: 604-684-5726  
1-800-793-9701  
Email: [ubcic@ubcic.bc.ca](mailto:ubcic@ubcic.bc.ca)  
Web: [www.ubcic.bc.ca](http://www.ubcic.bc.ca)

UNION OF BC INDIAN CHIEFS  
42<sup>ND</sup> ANNUAL GENERAL ASSEMBLY  
SEPTEMBER 15<sup>TH</sup> - 17<sup>TH</sup>, 2010  
VANCOUVER, BC

**Resolution no. 2010-36**

**RE: Action on Bill S-11, "Safe Drinking Water for First Nations"**

**WHEREAS** as Indigenous Peoples, we have a sacred relationship with water, and have exercised our inherent jurisdiction over water since time immemorial. Our rights to water are included in our Aboriginal Title, Rights, and Treaty Rights. Water is the source of all life, and we must act to ensure its protection and ensure that all First Nations have access to safe drinking water;

**WHEREAS** the *United Nations' Declaration on the Rights of Indigenous Peoples* states:

**Article 25**

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

**Article 32**

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources;
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources;

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**Certified copy of a resolution adopted on the 15<sup>th</sup> day of September of 2010 in Vancouver, British Columbia**



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**Grand Chief Stewart Phillip, President**

**2010-36**  
*Page 1 of 3*

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact;

**WHEREAS** on July 28, 2010, the United Nations General Assembly declared that safe and clean drinking water and sanitation is a human right to the full enjoyment of life and all other human rights;

**WHEREAS** First Nations recognize that there is currently a crisis in drinking water in First Nations communities; in March 2010, 115 First Nations communities were under Drinking Water Advisories, and 49 First Nations water systems were classified as “high risk;”

**WHEREAS** by Resolution 2010-03, the Union of BC Indian Chiefs Council supports the right of a First Nation to protect their territory and the health of their community and directed the UBCIC Executive and staff to work with First Nations and/or like-minded Indigenous Nations who are actively involved in defending or working to protect this precious natural resource;

**WHEREAS** Bill S-11 “Safe Drinking Water for First Nations” was introduced in Parliament on May 25, 2010, and stands to create a regulatory framework for First Nations drinking water, and will potentially infringe on Aboriginal Title and Rights and Treaty Rights;

**WHEREAS** the regulations in Bill S-11 will require significant financial and technical resources to implement for each region, and the total cost is not known. First Nations are concerned that there will not be adequate resources to support the implementation of the regulations developed under Bill S-11;

**WHEREAS** by Resolution 08/2010 the Assembly of First Nations (AFN) Chiefs-in-Assembly mandated the AFN to advocate that the Government of Canada provide adequate financial resources to each region to conduct a thorough impact analysis for each region, and directed the AFN to urge Canada that any further discussion on Bill S-11 be suspended until the estimated full economic impacts of this Bill are identified and presented to Parliament;

**THEREFORE BE IT RESOLVED** that the Union of BC Indian Chiefs-in-Assembly direct the UBCIC Executive and Staff to work with First Nations and/or like-minded Indigenous Nations or organizations including the national Assembly of First Nations that are actively working to protect safe drinking water for First Nations;

**THEREFORE BE IT FURTHER RESOLVED** that the Union of BC Indian Chiefs-in-Assembly call on the federal government to either abandon Bill S-11, or severely amend Bill S-11 by incorporating input from First Nations as well as the recommendations from the Expert Panel on Safe Drinking Water and a full impact analysis for each region;

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**2010-36**  
*Page 2 of 3*

**THEREFORE BE IT FINALLY RESOLVED** that the Union of BC Indian Chiefs-in-Assembly direct the Executive to communicate opposition to Bill S-11 in its current form to the federal government, and specifically contest Bill S-11's potential to infringe on Title and Rights and Treaty Rights.

**Moved:** Chief Jonathan Kruger, Penticton Indian Band  
**Seconded:** Maureen Chapman, Proxy, Lew'a:mel First Nation  
**Disposition:** Carried  
**Date:** September 15, 2010

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**Grand Chief Stewart Phillip, President**

**2010-36**  
*Page 3 of 3*

**ASSEMBLY OF MANITOBA CHIEFS  
20<sup>th</sup> ANNUAL GENERAL ASSEMBLY  
BROKENHEAD OJIBWAY NATION  
AUGUST 12, 13 & 14, 2008**

**CERTIFIED RESOLUTION**

**AUG-08.02  
Page 1 of 2**

**RE: CANADA'S PROPOSED DRINKING WATER LEGISLATION**

**Moved by:**

Chief Glenn Hudson  
Peguis First Nation

**Seconded by:**

Chief Dennis Meeches  
Long Plain First Nation

**CARRIED**

**WHEREAS**, the Expert Panel identified three options: introducing a statute incorporating by reference existing provincial regulatory regimes; setting out uniform federal standards and requirements; and recognizing First Nations customary laws regulating water; and

**WHEREAS**, in 2006 Indian and Northern Affairs Canada (INAC) launched the Plan of Action to address the most serious water quality problems on reserve, establish national standards for the operation of treatment facilities, and ensure mandatory training for all water operators; and

**WHEREAS**, the Plan of Action established an Expert Panel on Safe Drinking Water for First Nations to hold regional hearings and provide in a final report options to the Minister of Indian Affairs that would enhance First Nations drinking water safety; and further recommended before moving forward on any of the options, that the federal government must provide adequate resources to close the resource gap; and

**WHEREAS**, the Government of Canada has indicated its support and received mandate for incorporating by reference existing provincial and territorial regulations and adapting them, as required, to meet the needs of First Nation communities; and

**WHEREAS**, INAC proposes to engage First Nations this Fall on the elements of a legislative framework in accordance with the incorporation by reference, the results of which will be provided to the Minister of Indian Affairs along with the recommendation for moving forward with legislation; and

**WHEREAS**, a preliminary Impact Analysis for each region is to be completed prior to INAC's engagement session with First Nations; and

**ASSEMBLY OF MANITOBA CHIEFS  
20<sup>TH</sup> ANNUAL GENERAL ASSEMBLY  
BROKENHEAD OJIBWAY NATION  
AUGUST 12, 13 & 14, 2008**

**CERTIFIED RESOLUTION**

**AUG-08.02  
Page 2 of 2**

**RE: CANADA'S PROPOSED DRINKING WATER LEGISLATION  
(cont'd)**

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**WHEREAS**, Assembly of First Nation (AFN) resolution *Canada's Proposed Water and Wastewater Legislation* expresses concern on the federal government approach that has extensive impacts on First Nation rights, including land rights, the inherent right to self government, water regulation and environmental protection and the process does not meet the Crown's duty to consult and accommodate Aboriginal and Treaty Rights.

**THEREFORE BE IT RESOLVED**, that the Chiefs-in-Assembly demand the Government of Canada conduct meaningful consultations with First Nations prior to development of any legislation or regulations regarding First Nations' water resources.

**FURTHER BE IT RESOLVED**, that the Chiefs-in-Assembly demand that the Government of Canada review all of the options identified in the Expert Panel report and to consider other potential options that First Nations may identify as part of the process to establish a new Government of Canada mandate for water legislation.

**FINALLY BE IT RESOLVED**, that the Chiefs-in-Assembly demand the Government of Canada provide adequate resources to First Nations to enable their full participation in all stages of a consultation process.

**CERTIFIED COPY  
of a resolution adopted  
on August 12, 13 & 14, 2008  
Brokenhead Ojibway Nation, Manitoba**

  
\_\_\_\_\_  
**Grand Chief Ron Evans**

**ASSEMBLY OF MANITOBA CHIEFS  
20<sup>TH</sup> ANNUAL GENERAL ASSEMBLY  
AUGUST 12, 13, 14, 2008 – BROKENHEAD OJIBWAY NATION**

<b>RESOLUTION, TITLE AND DECISION:</b>	<b>STRATEGY:</b>
<p><b>AUG-08.02 CANADA'S PROPOSED DRINKING WATER LEGISLATION</b></p> <p><b>THEREFORE BE IT RESOLVED</b>, that the Chiefs-in-Assembly demand the Government of Canada conduct meaningful consultations with First Nations prior to development of any legislation or regulations regarding First Nations' water resources.</p> <p><b>FURTHER BE IT RESOLVED</b>, that the Chiefs-in-Assembly demand that the Government of Canada review all of the options identified in the Expert Panel report and to consider other potential options that First Nations may identify as part of the process to establish a new Government of Canada mandate for water legislation.</p> <p><b>FINALLY BE IT RESOLVED</b>, that the Chiefs-in-Assembly demand the Government of Canada provide adequate resources to First Nations to enable their full participation in all stages of a consultation process.</p> <p><i>Updated June 23, 2009 by Melissa Hotain, Environmental Policy Analyst.</i></p>	<p><b>Responsible:</b> Melissa Hotain, Environmental Policy Analyst / Darcy Wood, Sr. Housing Policy Analyst</p> <p><b>Action Required:</b> As set out in Resolution.</p> <p><b>Action Taken:</b> August 14/08 Chiefs in Assembly Presentation on water update delivered by Chief Hudson and Melissa Hotain outlining INAC's plans to propose drinking water legislation, regional impact analysis, national water and wastewater assessment.</p> <p>Update provided at January 2009 Chiefs in Assembly. Ongoing updates with AFN and regional organizations via the First Nations Water Technical Advisory Group.</p> <p>INAC national engagement process with First Nations on drinking water legislation was held in Winnipeg February 24, 2009. Summary of session was prepared by Institute on Governance (independent body contracted by INAC).</p> <p>Impact analysis of proposed legislation on First Nation's communities was prepared by R4B Consulting. Regional reports were rolled into a national report by IOG.</p> <p>IOG to draft final report with recommendations to Minister of Indian Affairs who will determine next steps of proposed legislation.</p> <p>On May 25th, 2009 Minister Strahl announced the awarding of a contract to Neegan Burnside Ltd. (Winnipeg) to conduct a national engineering assessment of existing public and private water and wastewater systems providing services to First Nation communities. The assessment will take 2 years to complete.</p> <p><b>Status:</b> Ongoing.</p>



## CHIEFS OF ONTARIO

**35<sup>th</sup> All Ontario Chiefs Conference**  
**July 7-8-9, 2009**  
**Batchewana First Nation**

**INAC'S PROPOSED LEGISLATIVE  
FRAMEWORK FOR DRINKING WATER  
AND WASTEWATER IN FIRST NATION  
COMMUNITIES**

**RESOLUTION 09/19**  
**Page 1 of 3**

**WHEREAS:**

- The Government of Canada conducted "consultations" on the Development of a Proposed Legislative Framework for Drinking Water and Wastewater in First Nation communities
- The Government of Canada funded regional First Nation organizations to carry out Impact Analysis reports on the Impacts of a Proposed Federal Legislative Framework for Drinking Water and Wastewater in First Nation Communities;
- The Institute on Governance (IOG) *Summary Report of the Impact Analyses of the Proposed Federal Legislative Framework for Drinking Water and Wastewater in First Nations Communities* roll-up report submitted to INAC on April 17, 2009 concluded that "First Nations generally are no where near meeting provincial standards. Therefore, applying these standards now would be calamitous."
- During the "consultation" sessions First Nation leadership and technical participants voiced their objections very clearly to the process that was followed and concluded that:

**MOVED BY:**

Chief Joel Abram  
Oneida Nation of the Thames

**SECONDED BY:**

Chief Isadore Day  
Serpent River First Nation

**CONSENSUS**

**Certified Copy of a Resolution adopted on July 8, 2009.**

Angus Toulouse,  
Ontario Regional Chief

1. The Crown failed to engage in any meaningful consultation with First Nations regarding the options and recommendations in the Report of the Expert Panel on Safe Drinking Water for First Nations dated November 2006.
  2. The 2006 *“Report of the Expert Panel on Safe Drinking Water on First Nations”* recommended three options which First Nations have not had benefit of consideration in this current round of engagement session – one of which begins to respect the jurisdictions of First Nations over Water and the other considers national standards as the more appropriate basis for new First Nation water regulations;
  3. The Crown breached its duty to consult and accommodate First Nations by making a unilateral decision to proceed with the engagement sessions and impact analysis solely on the basis of incorporation by provincial/territorial reference.
  4. The Crown did not genuinely listen to the concerns of First Nations regarding a process for the development of a new drinking and wastewater legislative framework.
  5. The Crown failed to provide adequate time and resources to enable meaningful consultation.
  6. The Crown has clearly communicated that it is unwilling to engage in discussion of any inherent, Treaty and Aboriginal rights related issues. This is an infringement of inherent, Treaty and Aboriginal rights, the right to self-determination, and is a fundamental flaw in Canada’s attempted efforts to consult.
- This process does not respect the legal duty to consult, accommodate and seek prior consent on matters that impact First Nations’ inherent, treaty and aboriginal rights.

**THEREFORE BE IT RESOLVED that:**

**Resolution 09/19  
Page 3 of 3**

1. We do not accept the government's legislation to the development of drinking water and waste water
2. We demand that Canada co-develop a meaningful consultation process with First Nation communities
3. Direct the Chiefs in Ontario office to seek resources to take immediate legal action if deemed necessary.