INDIGENOUS BAR ASSOCIATION IN CANADA

Position Paper on Bill S-11 – Safe Drinking Water for First Nations Act

Submitted to the Senate Aboriginal Peoples Committee

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The Indigenous Bar Association: Background

The Indigenous Bar Association in Canada (IBA) is a non-profit organization representing Indigenous peoples involved in the legal profession across Canada, including judges, lawyers, academics, and students-at-law. The IBA was established in 1988 as a successor to the Canadian Indian Lawyers' Association (CILA). The IBA relies on the voluntary contributions of its members and its goals and objectives include the following:

i) establishing a nation-wide community of Indigenous lawyers;
ii) providing ongoing education to its members with respect to principles rooted in Indigenous law;
iii) providing a forum for the exchange of information and experiences of Indigenous lawyers, academics, and students; and
iv) advancing legal and social justice for Indigenous peoples across Canada by engaging in law and policy reform.

The IBA continues to promote the recognition and respect for Indigenous laws, customs and traditions in carrying out all of its objectives.

Summary

The IBA submits that Bill S-11, the Safe Drinking Water for First Nations Act, potentially violates constitutionally protected Indigenous rights to self-government. If Parliament enacts Bill S-11 in its current form, the legislative framework in relation to Indigenous lands and resources will be fundamentally altered. The implementation of Bill S-11 will disrupt the jurisdiction of Indigenous governments over lands and resources within their communities, many of which have made significant progress on their way to becoming autonomous, self-governing nations in Canada. The rights and obligations arising from Canada's unique relationship with Indigenous peoples must be respected by federal, provincial and municipal governments.

The IBA believes that in order to implement a consistent and functional water management system on reserve lands, Indigenous nations must be equipped with the resources and tools necessary to govern their own on-reserve water management systems. Indigenous participation in the design and administration of water management regimes on reserve lands will ensure accountability and transparency. This approach is consistent with the inherent constitutional right of Indigenous nations to govern waters located within the boundaries of their reserve lands. Finally, when establishing and maintaining an efficient water management system, meaningful consultation must take place whereby all parties acknowledge the legitimacy of Indigenous governance in relation to water resources and the local knowledge of water management/resources is incorporated into the process.

The following submissions will demonstrate that Bill S-11 does not build capacity within Indigenous nations; rather, the bill is merely an attempt to detract from Indigenous jurisdiction without raising any real, pragmatic solutions to the drinking water crisis currently plaguing

several Indigenous communities across Canada. Also, the federal government has failed to meaningfully engage Indigenous nations at all stages of the development of Bill S-11.

Indigenous Self-Government and Jurisdiction over Water on Reserves

It is beyond dispute that prior to the arrival of Europeans, Indigenous nations were self-governing in all respects. The contemporary right of self-government continues to be exercised in a variety of forms. For instance, Indigenous people continue to express their unique forms of nationhood through their languages, oral histories, politics and traditions. The Indigenous right to self-government has been consistently recognized in Canada. The Report of the Royal Commission on Aboriginal Peoples states as follows:

> …[A]s a matter of existing Canadian constitutional law, Aboriginal peoples in Canada have the inherent right to govern themselves. This legal right arises from the original status of Aboriginal peoples as independent and sovereign nations in the territories they occupied...This extensive practice gave rise to a body of customary law that was common to the parties and eventually became part of the general law of Canada.[1]

Indeed, Indigenous nations across Canada continue to assert their inherent right to self-government within the courts, the political arena and within their own communities and territories.

The right of Indigenous self-government also finds support on the international stage. For example, the *United Nations Declaration on the Rights of Indigenous Peoples* states that Indigenous Peoples "in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[2] Finally, the right of self government has been affirmed by numerous reports and studies[3] and federal government policy.[4]

Jurisdiction over lands, water and resources within Indigenous territories is a fundamental component of legitimate governance. The method in which water resources are managed within Indigenous traditional territories will invariably impact Aboriginal and Treaty rights including hunting, fishing and trapping rights as well as water allocation quotas and the use of water treatment mechanisms. Also, there has been an implicit acknowledgment by Canada that

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[1] Canada, Report of the Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Volume 2, online: <http://www.collectionscanada.gc.ca/webarchives/20071211061401/http://www.ainc-inac.gc.ca/ch/rcap/sg/sh76_e.html>.

[2] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61295, at Article 4, online: <http://www.unhcr.org/refworld/docid/471355a82.html> .

[3] *Supra* note 1; House of Commons, Special Committee on *Indian Self-Government, Indian Self-Government in Canada: Report of the Special Committee* ("Penner Report"), 1983.

[4] See: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, online: <http://www.ainc-inac.gc.ca/al/ldc/ccl/pubs/sg/sg-eng.asp#inhrsg>.

Indigenous nations have a right to be meaningfully involved in the management of water resources in their communities as reflected in the fact that Indigenous nations have had water-related bylaw powers under section 81 of the *Indian Act* since 1951. As such, the IBA submits that Indigenous nations have an inherent right of self government under section 35 of the *Constitution Act*, *1982* which extends to water resources within their traditional territories.

Specific Provisions

Bill S-11 does not provide Indigenous nations with the mechanisms necessary to improve drinking water infrastructure, wastewater systems or training opportunities within Indigenous communities. Contrarily, the provisions within Bill S-11 will only weaken Indigenous nations' capacity and access to resources by abrogating and derogating from their constitutionally protected rights.

(i) Infringement of Indigenous Constitutional Rights

Bill S-11 grants to the Governor in Council the ability to infringe Aboriginal and Treaty rights. The Governor in Council may make regulations under section 3 of the Bill. However, Section 4(1)(r) provides as follows:

> The regulations may
>
> …
>
> (r) provide for the relationship between the regulations and aboriginal and treaty rights referred to in section 35 of the *Constitution Act, 1982*, *including the extent to which the regulations may abrogate or derogate from those aboriginal and treaty rights*."

The IBA takes the position that this provision is legally indefensible. With respect to the abrogation or derogation of Aboriginal and Treaty rights, the Supreme Court of Canada in *R. v. Sparrow*[5] and in *R. v. Gladstone*[6] clearly state that the onus is on the Crown to prove that infringements of a Aboriginal or Treaty rights are consistent with the honour of the Crown. As such, the Crown must demonstrate, *inter alia*: (i) that the Indigenous right was infringed pursuant to a valid legislative objective and that the infringement is rationally connected to that infringement; (ii) that the right at stake has been minimally impaired; and (iii) that the duty to consult has been discharged. Moreover, the foregoing cases only deal with retroactive justification of an infringement of an Aboriginal or Treaty right. The question as to whether the Crown can justify the infringement of such rights *prior to the passage of a bill* remains to be seen. Nevertheless in this case, Bill S-11 simply confers upon the Governor in Council the right

[5] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (QL).
[6] *Gladstone v. Canada (Attorney General)*, [2005] 1 S.C.R. 325 (QL).

to abrogate and derogate from constitutionally protected rights without recognizing the Crown's duties and obligations arising where such infringements take place.

Further, this clause is antithetical to numerous federal statutes which expressly preserve Aboriginal and Treaty rights. Non-derogation language is often set out as follows:

> Nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act*, *1982*.[7]

The IBA submits that the foregoing language is acceptable from a political and a legal standpoint and that the same should be inserted into a First Nations drinking water legislation to ensure that the Indigenous right of self-government over water resources is protected.

(ii) Erosion of Indigenous Laws and Customs

Bill S-11 severely undermines the ability of Indigenous governments to govern their citizens within their traditional territories. Section 6(1) of Bill S-11 reads as follows:

> Regulations made under this Act prevail over any laws or by-laws made by a first nation to the extent of any conflict or inconsistency between them, unless those regulations provide otherwise.

This clause constitutes an attempt by the federal government to override the systems of governance that Indigenous nations have exercised over their traditional territories since time immemorial. Further, this clause will have the effect of nullifying Indigenous bylaws which have been validly enacted pursuant to section 81 of the *Indian Act*. The federal government cannot reasonably expect Indigenous nations to accept a federal legislative framework which would allow the Crown to unilaterally impose its laws and regulations upon Indigenous traditional territories without adequate consultation and accommodation.

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[7] See *Sechelt Indian Band Self-Government Act, S.C. 1986, c. 27 at s. 3; First Nations Oil and Gas and Moneys Management Act, S.C. 2005, c. 4 at s. 3; First Nations Fiscal and Statistical Management Act, S.C. 2005, c. 9; Yukon Act, 2002, c. 7 at s. 3; Canada Petroleum Resources Act, R.S.C. 1985, c. 36 (2nd Supp.) at s. 3; Migratory Birds Convention Act, 1994, S.C. 1994, c. 22 at s. 2; Species at Risk Act, 2002, c. 29 at s. 3; Canada National Parks Act, S.C. 2000, c. 32 at s. 2; Mackenzie Valley Resource Management Act, S.C. 1998, c. 25 at s. 5; Canada Marine Act, S.C. 1998, c. 10 at s. 3; Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33 at s. 4; Oceans Act, S.C. 1996, c. 31 at s. 2.1; International Boundary Waters Treaty Act, R.S.C. 1985, c. I-17 at s. 21.1; Canada National Marine Conservation Areas Act, S.C. 2002, c. 18 at s. 2; Canada Wildlife Act, R.S.C. 1985, c. W-9 at s. 2; Firearms Act, 1995, c. 39 at s. 2; Canada National Parks Act, 2000, c. 32 at s. 2; Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, S.C. 1988, c. 28 at s. 50; Canada-Newfoundland Atlantic Accord Implementation Act, S.C. 1987, c. 3 at s. 48.*

(iii) Referential Incorporation of Provincial Laws and Regulations

Section 4(3) of Bill S-11 states that regulations made under the Act "may incorporate by reference laws of a province, as amended from time to time, with any adaptations that the Governor in Council considers necessary." By referentially incorporating provincial laws into the federal legislative framework, the federal government is delegating to the province its exclusive legislative authority over lands reserved for Indians, insofar as water resources are concerned. In the context of water management, the referential incorporation of provincial laws is particularly troubling for Indigenous nations for several reasons.

First, the application of provincial water legislation and regulations on reserve lands is highly controversial. The Indigenous right to use and manage both surface and groundwater is very much a live issue in Canada and, in particular, Alberta. Currently, the Alberta provincial government takes the stance that Indigenous nations do not have any Aboriginal or Treaty rights to water located both on- and off-reserve. The implications of the Alberta's position are far-reaching, particularly in light of the province's ongoing dispute with Indigenous nations with respect to water allocation and Alberta's commodification of water through the introduction of water markets.

To illustrate, a "first-in-time, first-in-right" water allocation regime exists under the Alberta provincial *Water Act*[8] whereby an individual who acquires a water license will have priority over all subsequent water licences. Unfortunately, Alberta Environment is not issuing new licenses in southern Alberta.[9] The province has since granted Indigenous peoples rights to water under the "Crown reservation" – i.e. a limited supply of water which is subordinate to the rights of licence holders. The result is that Indigenous nations in Alberta, many of which have substantial water needs, hold only .1% of water allocations under the provincial water regimes and are "last place" in terms of priority.[10]

To make matters worse, the South Saskatchewan River Basin (SSRB) is severely constrained. For instance, in 2005, allocations in the SSRB accounted for approximately 60% of the water flow in the basin. In some regions in the province, allocations account for 100% of the water flow.[11] In the event of a shortage, Indigenous nations will be required to purchase water in the open market from licence holders with surplus amounts of water. Even small allocations are being bought and sold for millions of dollars.

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[8] *Water Act*, R.S.A. 2000, c. W-3.

[9] V. Beisel, *Do not take them from myself and my children: Aboriginal Water Rights in Treaty 7 Territories and the Duty to Consult* (2008)[unpublished, archived at University of Saskatchewan Faculty of Law Library] at p. 7, online: <http://library2.usask.ca/theses/available/etd-04282008-160247/unrestricted/VBeiselThesisFinal-2.pdf>.

[10] *Ibid* at p. 1.

[11] G. Rangi Jeerakathil and Clayton Leonard, "Watered Down: Issues Surrounding Water Use, Legislation and Policy in Southern Alberta" in Stanley Berger & Dianne Saxe eds., *Environmental Law: The Year in Review 2007* (Ontario: Canada Law Book, 2007) at 98.

Given the foregoing, it is clear that Indigenous nations have very little to gain by permitting provincial legislation and regulations to apply on reserve lands. It is clear that if Parliament enacts Bill S-11, this could jeopardize Indigenous nations' access to water while at the same time extinguishing any enforceable Aboriginal and Treaty rights to water. The application of provincial water regulatory regimes is simply unacceptable.

Second, Bill S-11 is distinguishable from other federal statutes which referentially incorporate provincial legislation in relation to Indigenous traditional territories, namely, the *First Nations Oil and Gas Moneys Management Act*[12] and the *First Nation Commercial and Industrial Development Act*.[13] In those statutes, an Indigenous nation may "opt-in" to the legislative framework. In this case, however, the imposition of provincial regulations will be mandatory and it is entirely uncertain as to what input, if any, Indigenous nations will have with respect to the extent to which provincial laws will apply to their traditional territories. The IBA submits that if provincial laws are to apply to Indigenous lands in relation to water resources, Indigenous nations must have decision making powers as to whether, and to what extent, these laws will apply to such lands. There is no such requirement or commitment in Bill S-11.

Finally, it is clear that if provincial regulations were to apply today, numerous Indigenous nations would be unable to meet provincial standards with respect to certification, compliance, water treatment and reporting. Unless provincial governments phase in many of the regulations or provide a grace period for Indigenous nations to build capacity in relation to water management, Indigenous nations will face penalization. This will only weaken financial capacity of Indigenous nations and possibly require such entities to re-allocate resources directed at other core areas of governance such as health and education.

The IBA acknowledges the fact that Indigenous nations will need to cooperate with federal and provincial governments and other agencies such as watershed management authorities in order to effect an efficient water management system. For instance, the participation of several levels of government will be required in order to draft an effective strategy respecting source water protection.[14] However, this does not necessitate a blanket application of provincial water management laws and regulations to reserve lands. An ongoing dialogue is required between federal, provincial governments and agencies and Indigenous nations which must take place within a structure that recognizes and affirms Indigenous nations' jurisdiction over lands and resources.

[12] *First Nations Oil and Gas Moneys Management Act*, S.C. 2005, c. 48.
[13] *First Nations Commercial and Industrial Development Act*, S.C. 2005, c. 53.
[14] Constance MacIntosh, "Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves"(2007-2008) 39 Ottawa L. Rev. 63-97 at para. 39.

The Duty to Consult

It is well settled that the Crown's duty to consult will be triggered "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it." [15] Accordingly, three elements must be present in order to trigger the duty to consult: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right".[16] Bill S-11 will have a tremendous impact on the Indigenous right to manage water resources within their traditional territories. As such, it is clear that the Crown has a duty to consult with respect to the enactment of Bill S-11.

The federal government insists that it has discharged its duty to consult in relation to Bill S-11. Karl Carisse, a senior director with Indian and Northern Affairs Canada, stated that the federal government "carried out a process of continuous consultation that started in 2006 with a panel of experts going across the country."[17] The "panel of experts" refers to the Panel on Safe Drinking Water for First Nations. Yet, Indigenous nations were clearly told that the Panel's research in relation to the Report would not to be construed as broad consultation.[18]

Next, Indian and Northern Affairs Canada (INAC) alleges that it hosted one-day engagement sessions with Indigenous nations across Canada following the issuance of the Report. Mr. Carisse submitted the following to the Standing Senate Committee on Aboriginal Peoples:

> We spent a number of weeks in the spring and summer of 2008 approaching different First Nations organizations. We attended their annual meetings and made presentations about water legislation and what framework legislation would look like, saying that we would move forward with more formal engagement sessions.[19]

Mr. Carisse argued that during the course of the engagement sessions, over 700 representatives from Indigenous nations from across the country were "consulted".

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[15] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511(QL) at para. 35.

[16] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Councili*, [2010] S.C.J. No. 43 (QL) at para. 31.

[17] The Standing Senate Committee on Aboriginal Peoples: Evidence. (Ottawa: February 2, 2011), online: <http://www.parl.gc.ca/40/3/parlbus/commbus/senate/Com-e/abor-e/48567-e.htm?Language=E&Parl=40&Ses=3&comm_id=1>.

[18] Tonina, Simeone, "Safe Drinking Water in First Nations Communities". Parliament of Canada (Ottawa: May, 2010, online: <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0843-e.htm>.

[19] *Supra* note 16.

However, Indigenous participants were not provided with an opportunity to adequately prepare for and make meaningful submissions at the engagement sessions. Some Indigenous nations received notice of the engagement sessions only hours before they commenced.[20]

Clearly, Indigenous participation in the engagement sessions was frustrated by the Crown's failure to provide adequate notice. Further, during the course of the meetings, several Indigenous groups argued that their submissions were not taken into account and that the meetings were largely designed as a method to promote the application of provincial water regulations to reserve lands.[21] Many Indigenous nations stated that the engagement sessions were rife with inaccurate and incomplete information.[22] Finally, the federal government took the position that the engagement sessions were not intended to address Treaty and Aboriginal rights issues.

The IBA submits that the Report of the Panel on Safe Drinking Water for First Nations and the engagement sessions do not constitute adequate consultation and the Crown has not discharged its duty in these circumstances. This is apparent from the fact that Crown representatives are uncertain as to the nature of consultation required in these circumstances. For instance, Mr. Carisse stated that "[c]onsultation is a loaded word and it is difficult to define at this point. We have done the utmost we could, up to four years now, of engaging."[23] However, as outlined above, the Crown's efforts fail to satisfy even the minimum standards of consultation as set out by the Supreme Court of Canada.

With respect to Bill S-11, the principals regarding the duty to consult set out by the Supreme Court of Canada in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*[24] are instructive:

(i) The Crown must provide notice of the proposed infringement and engage directly with each Indigenous nations at the earliest stages;
(ii) The Crown has a duty to disclose relevant information in its possession regarding the proposed decision;
(iii) The Crown must, in good faith, attempt to *substantially address the concerns of the Indigenous nation*;
(iv) The Crown *cannot act unilaterally*;
(v) Administrative inconvenience is not an excuse for a lack of meaningful consultation;
(vi) The Crown must solicit and listen carefully to the expressed concerns and attempt to minimize adverse impacts on Indigenous interests.

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[20] *A review of the engagement sessions for the federal action plan on safe drinking on safe drinking water for First nations: position statement*, April 14, 2009, at 5, online: Safe Drinking Water Foundation http://www.safewater.org/PDFS/Policy/EngagementSessionsFinalApril15.pdf>.
[21] *Ibid* at 2.
[22] *Ibid* at 8-11.
[23] *Supra* note 16.
[24] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 (QL).

(vii) The concerns of Indigenous nations must be seriously considered by the Crown and "whenever possible, demonstrably integrated into the proposed plan of action." The nature and degree of the duty to consult varies depending on the circumstances of each case.

The IBA submits that the Report of the Expert Panel on Safe Drinking Water for First Nations and the subsequent engagement sessions with Indian and Northern Affairs do not amount to meaningful consultation and as a result, the Crown has failed to fulfil its duty to consult with Indigenous nations.

A comprehensive drinking water solution that respects Indigenous nations' inherent jurisdiction over water resources can only be established with their full participation and involvement. This is the only way that the Crown can fulfill its constitutional duty to consult with Indigenous nations. Consultation is also necessary on a practical level. For instance, in the Federal Court decision in *Samson Indian Nation and Band v. Canada*, Teitelbaum J. stated as follows:

> Implementing an aboriginal right of self-government requires complex negotiations about the scope of authority and areas of jurisdiction… The goal is to make the inherent right of self-government a practical reality. This can only be done through negotiation, not litigation. [25]

As such, if any meaningful recognition and affirmation of Indigenous self-government is to take place in Canada, it must be a joint, concerted effort between the Crown, its agencies and Indigenous nations.

First Nations Water Commission and Tribunal

In the Report of the Expert Panel on Safe Drinking Water for First Nations, the Panel surmised that laws and regulations providing for safe drinking water on reserve could be introduced to Indigenous nations by creating a First Nations Water Commission (the "Commission) and Tribunal (the "Tribunal"). Essentially, the Commission would be an independent entity with the authority to regulate on-reserve certification, monitoring, reporting and investigations in relation to drinking water. In circumstances where provincial standards are imported, the Commission could play a role in overseeing regulation and directing funding to the appropriate provincial agencies. The Tribunal would have the jurisdiction to adjudicate disputes and hear appeals with respect to the regulatory process.[26]

In addition, the Commission would have the ability to make recommendations to the responsible Minister respecting the incorporation of Indigenous traditional laws and customs

[25] *Samson Indian Nation and Band v. Canada*, [2006] 1 C.N.L.R. 100 (QL) at para. 792.
[26] Indian and Northern Affairs Canada, *Report of the Expert Panel on Safe Drinking Water for First Nations* (Ottawa: Public Works and Government Services Canada, 2006) at 30-34.

into the regulatory framework. The Commission's staff and members would be comprised of representatives from Indigenous communities who have expertise in water management.

This approach is consistent with recommendations put forward by the Safe Drinking Water Foundation which state that the following elements must be in place to fully address many of the practical problems relating to on-reserve drinking water:

> (i) a nation-wide, uniform body of enforceable drinking water quality standards that meet or exceed the Canadian Drinking Water Guidelines must be established;
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> (ii) a national, independent regulatory body with the authority to incorporate the views of Indigenous nations, determine and allocate funding to Indigenous communities must be created; and
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> (iii) an analysis must be prepared which will accurately determine which Indigenous communities are capable of producing safe drinking waters for their citizens.[27]

This also echoes the recommendations made by the Assembly of First Nations resolutions which call for the creation of an Indigenous Water Commission to manage on-reserve water resources and to require the federal government to conduct an impact analysis to determine financial and technical needs of each region.[28]

The IBA submits that the establishment of a First Nations Water Commission and Tribunal is its preferred option for establishing a feasible safe drinking water legislative framework. This approach strikes an appropriate balance between the right of Indigenous peoples to govern water resources within their communities with the need for federal and provincial cooperation in achieving the delivery of acceptable drinking water to Indigenous communities.

Recommendations

1. Meaningful Engagement of Indigenous Nations

The IBA submits that the federal government is obligated to engage in meaningful consultation with Indigenous nations across Canada on this Bill. The consultation sessions must be premised upon the notion that Indigenous nations have constitutionally protected Aboriginal and Treaty rights to self-government over water resources on their lands. Adequate consultation will entail, at a minimum, the following components:

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[27] *First Nations Drinking Water Position Paper*, Version 5, August 28, 2008, at 6, online: Safe Drinking Water Foundation <http://www.safewater.org/PDFS/PositionPaper.pdf >

[28] Assembly of First Nations, Resolution no. 43/2010. Online: Assembly of First Nations <http://www.afn.ca/uploads/files/2010-res.pdf>.

(i) provision of adequate notice;

(ii) timely disclosure of accurate and relevant information pertaining to the capacity of Indigenous nations to manage water resources within their own communities;

(iii) good faith efforts on behalf of the federal government to receive and consider proposals put forward by Indigenous nations; and

(iv) where possible, implementation of Indigenous views and perspectives into a safe drinking water legislative framework.

2. Establishment of a First Nations Water Commission and Tribunal

It is imperative that a nation-wide commission be established to monitor and administer safe drinking water regulations within Indigenous communities across Canada. Indigenous nations must have a stake in the decision-making processes respecting the use, distribution and treatment of drinking water on reserve lands. Indigenous participation within a comprehensive legislative structure can be readily facilitated by the creation of a First Nations Water Commission and Tribunal.

3. Amendments to Bill S-11

The IBA submits that Bill S-11 must be amended to reflect Indigenous nations' inherent right to self-government over water resources within their traditional territories. In order to achieve this objective, the following provisions must be modified/removed:

(i) section 4(1)(r):

This must section must be removed as it serves no practical purpose and is a blatant attempt to undermine constitutionally entrenched Aboriginal and Treaty rights.

(ii) section 4(3):

If provincial laws and regulations are to apply to Indigenous territories, provincial powers respecting investigation, monitoring and enforcement policies must be implemented in conjunction with the establishment of a First Nations Water Commission. A First Nations Water Commission could ensure that provincial regulations with respect to monitoring, compliance and certification must be tailored to the unique concerns and circumstances within Indigenous communities. Also, a First Nations Water Commission could help resolve jurisdictional issues such as source water protection, the application of provincial *Occupational and Health* legislation, and water allocation in a way that respects Indigenous jurisdiction over water resources within their traditional territories. Finally, referential incorporation of provincial regulations must be accompanied by sufficient financial resources in order to facilitate the significant regulatory transition that would be undertaken by Indigenous nations.

(iii) section 6(1):

This section must be modified in a way that acknowledges the Indigenous right to self-government over water resources within Indigenous traditional territories and the supremacy of Indigenous laws within such territories to the extent that they conflict with provincial laws and regulations.