



**CELA ANALYSIS AND COMMENTARY OF SOURCE WATER PROTECTION ASPECTS OF
BILL C-37, 45TH PARLIAMENT: THE PROPOSED ACT RESPECTING WATER, SOURCE
WATER, DRINKING WATER, WASTEWATER AND RELATED INFRASTRUCTURE ON
FIRST NATION LANDS**

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Introduction:

Canadian Environmental Law Association (CELA) is a legal aid clinic dedicated to environmental equity, justice, and health. Founded in 1970, CELA is one of the oldest advocates for environmental protection in the country. With funding from Legal Aid Ontario, CELA provides free legal services relating to environmental justice in Ontario, including representing low-income and vulnerable or disadvantaged communities in litigation. CELA also works on environmental legal education and reform initiatives. CELA has a long and extensive track record of providing expertise and legal services in relation to safe drinking water laws, including analysis of proposed Ontario and Canadian federal laws related to drinking water safety.

CELA has a deep background in the legal and regulatory framework related to source water protection, both before, and arising out of the Walkerton Inquiry. CELA represented the Concerned Walkerton Citizens in the inquiry and were extensively involved in the development of the Ontario framework for source water protection. We also have an extensive record of working with several First Nations, as well as associations advising and working with First Nations specifically on source water protection approaches.

In this brief, CELA reviews the proposed Bill C-37, an “Act respecting water, source water, drinking water, wastewater and related infrastructure on First Nation lands,” which received First Reading on June 16, 2026, in the First Session of the Forty-fifth Parliament. This Brief reviews the Bill, provides our perspective, with special attention to those provisions related to source water protection, and makes certain recommendations. A full summary of the Recommendations is found at the end of this Brief.

A. PREAMBLE

While legislative preambles are not themselves binding law, they are useful indicators of the intent of Parliament once a Bill is adopted. They assist with interpretation and implementation of a Bill and are thus important. The preamble in Bill C-37 is extensive, reflecting both the complex history preceding the introduction of Bill C-37 and the importance of the Bill’s substantive provisions. While this CELA Brief will not detail the preceding context, which is well described in many other sources, we do note that it essentially “replaced” another previous Bill, Bill C-61, which had been introduced, reviewed by Committee and reported back to Parliament in the Parliament immediately preceding this one. However, as Parliament was pro-rogued, Bill C-61 did not reach a third reading vote.

In terms of the preamble to Bill C-37, CELA approvingly notes that it includes concept of health, traditions of First Nations, stewardship, and the importance of safe water beyond human consumption. It supports the principle of substantive equality and recognizes that many First Nations persons have been

inequitably impacted by unsafe water. Notably, it states that regulatory, policy and funding gaps have contributed to “social and health conditions that are not equal to those of other people in Canada,” with one result being long term drinking water advisories.

CELA also notes and agrees that the Preamble recognizes the need for “broad, concurrent action by all levels of government,” and that the types of pollution that must be addressed includes “persistent, toxic and bioaccumulative substances.”

CELA particularly points to a significant statement in the Preamble that should have long-term influence in improving the state of safe drinking water on First Nations lands, namely the following, which we set out in full:

“Whereas Parliament recognizes that jurisdiction over water services by First Nations is a primary means of achieving self-determination by First Nations and that there is a need for a transparent and clear process for First Nations to exercise that jurisdiction.”

CELA encourages the adoption of this preambular statement, along with concrete steps to support its realization, including by way of the substantive implementation of Bill C-37 if and when it is adopted

Another highly notable statement in the preamble, which again is influential although not in itself an implementing statement, is that the inherent right of self-government (which Parliament recognizes) is an existing right under section 35 of the *Constitution Act, 1982*. It goes on to affirm that this right includes “for First Nations, jurisdiction in relation to water, source water, drinking water, wastewater and related infrastructure on, in and under First Nation lands.” We will address further in this commentary the question of such waters and infrastructures beyond the defined term “First Nations lands.” The preamble continues in that section, importantly, to affirm that “First Nations have authority to make and enforce laws in relation to water, source water, drinking water, wastewater and related infrastructure.”

We emphasize that these preambular statements reflect an understanding and confirmation of existing inherent rights of First Nations, and that Bill itself does not create these rights and jurisdictional authorities. Modern treaties and self-government agreements are acknowledged with the recognition that those rights are available and exercised as per the terms of those instruments, and as they may evolve.

From CELA’s perspective, it is a reality today that jurisdiction over safe drinking water is shared among jurisdictions; the Preamble importantly acknowledges that First Nations are one of those jurisdictions. The preamble goes on to emphasize the need for continual collaboration among all jurisdictions, and CELA strongly supports this statement as it is consistent with our experiences with development of effective long term source water protection systems.

CELA also strongly approves the preambular statement that “the protection and sustainable use of source water is critical for the cost-effective and efficient provision of water services on First Nation lands,” (Emphasis added). CELA notes that this framing is also consistent with the internationally recognized Precautionary Principle. The major drinking water inquiries of the early 2000s at Walkerton and North Battleford thoroughly canvassed the point that it is far more effective, and far less expensive, to keep contaminants and threats to safe drinking water out of the sources of that water in the first place, rather than to attempt to treat or remove them in the water infrastructure system or to have to find alternative sources.

Importantly, the preamble states that the Government of Canada acknowledges the obligations under the United Nations Declaration on the Rights of Indigenous Peoples and Canada’s implementing legislation

in relation to UNDRIP, specifically in relation to “water, source water, drinking water, wastewater and related infrastructure on, in and under First Nations lands.” It is also important that the preamble indicates the Government of Canada acknowledges that the UN General Assembly and the UN Human Rights Council have both passed resolutions recognizing the “right to safe and clean drinking water and sanitation as a human right.” These powerful statements by those bodies support the fact that it is already far past time for Canada to collaborate with First Nations in appropriate ways to ensure these human rights are given effect for First Nations persons. The importance of collaboration by the government with First Nations, and the high importance of First Nations sovereignty over data and traditional knowledge, as well as to take such knowledge into account, is repeated in the preamble and situated within the context of the necessity of reconciliation with First Nations. These are deeply meaningful commitments that must be respected and pursued once the Bill is passed.

CELA Recommendation 1: The full proposed Preamble to Bill C-37 set out in the First Reading version of the Bill should be adopted without omission.

B. RIGHT TO CLEAN AND SAFE DRINKING WATER

Section 3 of Bill C-37 states that “it is the policy of the Government of Canada to further the progressive realization, for individuals on First Nation lands of the human right to safe drinking water, as protected by the International Convention on Economic, Social and Cultural Rights.”

The Bill itself does not purport to create the right. It can be argued that the right to safe drinking water as a human right exists independently of whether or not this Bill is adopted. As noted above, it is recognized in the Preamble as an already existing inherent right of First Nations persons and is already recognized and declared as a right by the international instruments above described. In other words, the question becomes how the Bill assists in the exercise and realization of that right given that it is pre-existing.

Accordingly, CELA recommends that the phrase “further the progressive realization,” should be strengthened; albeit effort, time, resources, collaboration, and development of systems and infrastructure are required, the government of Canada should nevertheless make a more assertive and definitive statement of the right to safe drinking water for First Nations peoples and this section should read as follows, as it appeared in the previous Bill C-61:

“It is recognized and affirmed that it is a human right of every individual on First Nations land to have access to clean and safe drinking water in accordance with this Act.”

CELA Recommendation 2: Section 3 of Bill C-37 should be deleted and replaced with the following language: “It is recognized and affirmed that it is a human right of every individual on First Nations land to have access to clean and safe drinking water in accordance with this Act.”

C. PURPOSE

A purpose statement in Bill C-37 is extremely important since it affects the implementation, interpretation, and decision making under that legislation. All government action under the legislation must be consistent with its purpose statement. While a purpose statement is not the implementation or operational provisions of a Bill, they are integrally connected and the later operational sections must be read in the context of and in conjunction with the purpose statement.

Accordingly, CELA provides the following comments in relation to the Purpose statement. Not surprisingly, many of the themes from the Preamble are appropriately found in the Purpose statement, which gives them even more import in any question of interpretation of the Bill. The question of how the Bill meets these purposes is addressed later in the Bill, and in this analysis.

Section 4 a) sets out a purpose as to ensure that First Nations have reliable access to sufficient, adequate and safe quantity and quality of drinking water. CELA approves of the use of the term “ensure” in this portion of the purpose. The terms “sufficient, adequate and safe” will require much more elaboration in the implementation of the Bill and will require the type of collaboration with First Nations that the preamble called for. It will be highly important that these terms not result in a situation where a different jurisdiction defines the content and meaning of these qualitative terms without input and collaboration with First Nations. For example, when the federal government develops drinking water guidelines, or provincial governments develop drinking water standards for their populations, it is essential that they do so in full consultation with First Nations since it is anticipated that one group of guidelines or standards or the other will be selected by the various First Nations across Canada as the applicable standards for their drinking water systems.

Sections 4 b) (inherent right to self-government and jurisdiction) will be further addressed in CELA’s commentary on the substantive jurisdiction provisions below. Section 4 c) echoes the preamble statements as to ensuring applicable federal law related to water services is consistent with Canada’s constitutional and international obligations.

Section 4 d) includes as a purpose the establishment of “principles applicable to decision making regarding water services on First Nation lands... minimum national standards... and a federal regulatory regime respecting those services.” A principled approach to First nations safe drinking water is appropriate; as to the principles themselves, CELA comments on these in another section of this commentary below.

Section 4 e) states an explicit purpose is to “facilitate the closing of the gaps,” with respect to infrastructure, socio-economic status, governance and health and well-being between First Nations persons and persons in non-Indigenous communities. CELA recommends that this purpose statement be strengthened to aim for “elimination” of the said gaps, and to add more definitive targets or time frames or a purpose as to the development of targets and time frames in collaboration and consultation with First Nations.

Section 4 f) states as a purpose to “ensure” Canadian government, First Nations and inter-governmental collaboration “through transboundary source water protection planning and the entering of agreements,” to protect source water. CELA recommends that the purpose in this respect be modified to increase precisions and state “to protect sources of water accessed by First Nations communities’ drinking water surface water intakes or drinking water wells.”

CELA recommendation 3: Section 4(e) of Bill C-37 should be modified to read: “facilitate the elimination of the gaps with respect to infrastructure, socio-economic status, governance and health and well-being in relation to water services.”

CELA recommendation 4: Section 4(f) of Bill C-37 should be modified to read “and the entering into of agreements to protect sources of water accessed by First Nations communities for drinking water surface water intakes or drinking water wells.”

D. PRINCIPLES

The format of Bill C-37 provides layers of guidance for decision making under the Act. We have already reviewed the Preamble, the Declaration of a Right to Clean and Safe Drinking Water, and the Purpose sections. The Bill contains an additional section setting out Principles to guide decisions under the Act. The Principles outlined in section 5 are stated to be applicable to “the making of decisions under this Act.” The principles are set out in three categories: Principles related to decisions in support of “Reliable access to water services,” Principles related to decisions supporting “Substantive Equality” and Principles related to decisions supporting the “United Nations Declaration.”

Section 5(1) states that decisions are to be guided by the principle “that First Nations are to have reliable access to water services on First Nations lands,” with the subsequent principles clarifying the concepts within that statement as being inclusive of clean and safe drinking water, effective treatment and disposal of wastewater. It states that this is fundamental to community wellness, public health and a healthy environment.

CELA approvingly notes that “the protection of source water,” is explicitly named within further elaboration of this principle in section 5(1)(b) (Emphasis added). It is stated that source water protection, along with other aspects of management of water services, “is necessary to ensure reliable access to clean and safe drinking water,” (Emphasis added). CELA agrees and strongly supports this point of principle, that protection of source water is integral to any system that purports to provide drinking safe water. Treatment and monitoring systems alone are often not able to deal with all of the threats that may impede safe drinking water.

As a crucial part of this principled approach, section 5(1)(c) (i) states that effective water services include “a multi-barrier approach,” which is further described in the section, along with asset management, risk assessment and management, training and certification of water operators (Emphasis added).

CELA agrees with and stresses the importance of taking a multi-barrier approach to the provision of safe drinking water. As indicated, a multi-barrier approach includes source water protection, systems related to safe operation of treatment, distribution and monitoring activities, stringent training and follow-up programs. This was the ultimate finding in both the Walkerton and North Battleford Inquiries in the early 2000s.

Both inquiries found that the resulting events leading to severe, extensive illness and deaths arose due to multiple failures of what should have been “lines of defence,” (which we note also include standards, oversight, reporting to the public, alerting systems, and remedial actions among others). Informed by those tragedies and the findings and recommendations of the ensuing Public Inquiries, no credible drinking water system should fail to incorporate a rigorous multi-barrier approach. Those Inquiries also stated that First Nations community members deserve the same level of protection as their neighbouring non-Indigenous communities, and we stress that this legislation is being considered more than twenty-five years after the published findings of both of those Inquiries and is long past due.

Section 5 (2) is stated to “guide” decisions under the Act based on the principle of substantive equality. There are important concepts outlined in this section based on “the distinct needs” of First Nations access to reliable water services, stating that they “must” be addressed in a way that affects the First Nations rights and their access “must” be comparable to that in non-Indigenous communities (Emphasis added). The section further specifies that First Nations are to have control over their water services “without discrimination,” and may deliver water services through delivery models “designed by them to suit their needs.”

Section 5(2) specifically adds that such delivery of water services may be “through adoption of innovative approaches and technology.” This ability to be innovative is important, since elsewhere in the legislation is provided the potential that First Nations will opt into water standards of a province or territory, so long as they meet the minimum standards developed by Canada’s drinking water guidelines. However, there may be circumstances where new innovative technology is appropriate and effective, suitable to the scale of the community or its geographic context, but not yet “approved” by a federal or provincial / territorial government. That latter fact should not prevent First Nations from pursuing appropriate innovation to provide safe water to their communities and is an important way that they may choose to exercise their independent jurisdiction over safe water.

Section 5(3) provides the principle that decisions under the Act are to be guided by the UNDRIP which CELA of course supports, including free prior and informed consent. The section explicitly calls out the applicability of the requirement for FPIC in relation to the rights not to be unwillingly removed from their lands or territories and not to be subject to storage or disposal of hazardous materials nor the imposition of resource projects affecting their lands or territories including water and mineral extraction. The applicability of FPIC along with transparency principles outlined elsewhere in section 5 are important principles to be included in Bill C-37.

CELA recommendation 5: The provisions providing for a multi-barrier approach to protection of First Nations Drinking water, as proposed in Bill C-37 should be adopted, inclusive of protection of source waters.

CELA recommendation 6: The approach to providing for adoption of innovative approaches and technology by First Nations for water delivery, recognizing distinct needs of First Nations, should be retained explicitly in Bill C-37.

CELA recommendation 7: The transparency provisions and the various express requirements for free, prior informed consent outlined in section 5 of Bill C-37 should be adopted.

E. JURISDICTION

In addition to the statements included in the Preamble, in the Purpose Statement, and in the Principles as discussed earlier, there is an explicit affirmative jurisdiction section in Bill C-37. Section 6 (1) explicitly states that the “inherent right of self-government,” recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to:

- (a) Water, source water, drinking water, wastewater and related infrastructure on, in and under First Nations lands; and
- (b) Water and source water in a protection zone that is adjacent to the First Nation lands of a First Nation, if the First Nation governing body, the Government of Canada and the government of the province or territory in which the protection zone is located have agreed on an approach to coordinate the application of the First Nation laws of that First Nation, federal laws and the laws of that province or territory in respect of the water and source water in the protection zone.

CELA will examine this jurisdictional affirmation in more detail. Firstly, for the water “on, in and under” First Nations lands, the jurisdiction is affirmed in relation to all aspects of water that are necessary to consider in a multi-barrier approach to protection of drinking water, inclusive of source water. As

described earlier, this approach that encompasses the full scope of the water and its pathway to those who are in the end relying on it, is essential. This includes the essential aspect of source water.

Secondly, for water beyond that water (i.e. not “on, in and under” First Nations land), the approach of the section is to apply and recognize First Nations’ section 35 inherent right of self-government to those waters that are adjacent, and that are within a coordination agreement regarding the applicability of the First Nations’ laws, federal laws and provincial / territorial laws in a water and source water protection zone.

CELA recommends that the term “adjacent” be removed from this section, since it is well known that source water may originate from lands and waters that are beyond the immediately adjacent lands and waters. Surface water sources may be impacted by a source of contaminants “upstream” beyond the adjacent properties. Similarly, groundwater sources accessed by wells may be impacted by a source of contaminants reaching the sub-surface aquifers through a pathway originating on a property beyond those that are adjacent.

On the other hand, CELA is supportive of the approach that would see coordination agreements developed so that First Nations laws / requirements may be applicable and affect the activities that are impacting the safety of their source water, and that those agreements may contain the regulatory or enforcement mechanisms to apply said requirements as needed.

To give an example that is already in use in the province of Ontario, a source water protection plan approved by Ontario may require a municipality to amend its permitted land uses to avoid risky contaminants to the water source and/or to pass bylaws requiring landowners to avoid certain activities that are risky in the context, such as storage of chemicals near a vulnerable aquifer. A similar mechanism could be incorporated in coordination agreements involving whatever risks / threats to the drinking water of the first Nation that need to be protected against in the specific context. CELA has worked in the past with a number of Ontario First Nations and such threats could include federally regulated activities such as transportation of hazardous goods, or provincially regulated activities such as permits for pollution to water; these governments could agree to modify their permits to restrict such activities by way of the coordination agreements so as to collaboratively and jointly protect the First Nation’s drinking water source just as happens already for municipal drinking water in Ontario and several other provinces under their respective legislated approaches to protecting municipal water.

Section 6(2) defines the scope of the jurisdiction outlined above as inclusive of legislative authority, as well as administration and enforcement of First Nations laws thereunder, and dispute resolution. It provides explicitly that the jurisdiction includes ongoing development of First Nations laws “based on the distinct traditions, customs and practices of First Nations.” CELA supports this latter clarification, to ensure that interpretation under the Bill does not take a “frozen in time” perspective of First Nations laws.¹

Section 7 applies the Canadian Charter of Rights and Freedoms to the exercise of the jurisdiction under section 6.

Section 8 is a section that provides that certain federal legislation prevails in case of any conflict or inconsistency over the provisions of a First Nation law. CELA recommends that this section be modified

¹ Howes, Emma C., “Living Tree Doctrine of the Canadian Constitution and Indigenous Law”, 2022 31 Dal J Leg Stud 31 and the scholars reviewed therein.

to add to the end of that paragraph, the words “unless otherwise provided in a coordination agreement described in section 6(2).”

Section 9 is an important transparency provision which provides access to First Nations members, members of the public and other governments to First Nations law made in respect of the Jurisdiction recognized under Bill C-37. CELA lauds the government for the inclusion of reference to *the First Nations Gazette* in Bill C-37, recognizing that the federal Canada Gazette deals with federal made law and would not be an appropriate location for public access to First Nations laws.

Section 10 provides authority for delegation of roles and authorities by a First Nation government to any public body, not for profit corporation or province or territory, with the proviso that the delegate must consent to the delegation. This is an optional provision, and its recognition is “for greater certainty” since arguably the delegation power exists independently of this section as a matter of self government. Nevertheless, this is a useful and practical mechanism that some First Nations or groups of First Nations may wish to use. For example, in Atlantic Canada, the existing Atlantic First Nation Water Authority has been delegated responsibility to operate drinking water systems for their communities on behalf of the member First Nations participating in the Authority, which has been established as a Not-for-Profit corporation for that purpose.

CELA recommendation 8: The phrase “that is adjacent to the First Nation lands of a First Nation” should be deleted from section 6(1)(b) of Bill C-67 and replaced with the word “for” such that the provision would read:

6(1)(b) “Water and source water in a protection zone **that is for** a First Nation, if the First Nation governing body, the Government of Canada and the government of the province or territory in which the protection zone is located have agreed.”

CELA recommendation 9: The approach of the using coordination agreements for the application of First Nations law, federal law, and provincial law in a manner agreed among the parties for source protection planning and protection of sources of water supplying First Nations drinking water systems should be retained in Bill C-67 as set out in section 6(1)(b) of the Bill as an important option to address drinking water threats that are not “on” First Nation lands.

CELA recommendation 10: The provision set out in section 6(2) of Bill C-37 that First Nations jurisdiction over water includes the ongoing development of First Nations laws should be adopted.

CELA recommendation 11: Section 8 should be modified to add to the end of that paragraph, the words “unless otherwise provided in a coordination agreement described in section 6(2).”

F. CONFLICTS

A set of “conflicts of laws” provisions are provided in Section 11 of Bill C-37. It provides a mechanism for First Nations laws passed under that Act to prevail over other federal law, except as otherwise provided. We noted earlier that there is a list of federal legislation earlier in the Bill under section 8, which are stated to prevail. CELA made a recommendation earlier in this brief that there might be a case where protection of the First Nations’ water might require a different approach to a decision under those

statutes as reflected in a coordination agreement under section 6(1)(b) and that there should be room for that outcome in the Act and the conflicts provisions.

The conflicts laws are otherwise appropriate, reflecting Canada's obligations under international agreements, the rights and protections of the Charter and the already agreed provisions of modern treaties and self-government agreements. CELA notes that the Act recognizes that the latter types of agreements could be modified if necessary to manage threats to First Nations water and allow for the operation of a First Nations law in that respect, which is appropriate. CELA notes that the Bill calls for consultation between the Minister and First Nation governing bodies before developing regulations under section 19(1) of the Act. This is an important proviso if the conflict provision will otherwise assert that those regulations prevail in case of conflict with a by-law made under the *Indian Act*.

G. STANDARDS

Bill C-37 addresses the current gap whereby there are no applicable binding standards for water quality for First Nations community members. Under section 14, the First Nation has the choice as to the application of federal water quality guidelines (the Guidelines for Canadian Drinking Water Quality) or the standards in place in the province or territory where the First Nations lands are located, or the First Nation may choose to exceed those standards. This approach is one that has practical merit, as it would be impractical and highly resource intensive for First Nations to have to develop their own drinking water and wastewater effluent standards. However, as CELA noted earlier, it is crucial that First Nations' representatives be robustly involved in the processes of developing these standards, both federally and provincially / territorially, since their communities will be among those affected by them. Doing so will give further effect to the principle of reconciliation in addition to the value of bringing additional First Nations perspectives to the national and provincial / territorial standard setting process.

Section 15 sets out an aspirational provision related to water quantity standards, albeit stating that "the quantity of water available on the First Nation lands of a First Nation must meet "the drinking, cooking, sanitation, hygiene, safety, fire protection and emergency management needs of the First Nation." It also adds that those needs are to take account of the First Nations' cultural, spiritual needs, and current and projected water usage needs. This provision would benefit from a consultation process with First Nations as to its implementation as it is not clear on its face as to what decisions are directly affected by this section. Water quantity is just as crucial as water quality, but there is no provision as to what the remedy or response would be if there was not adequate water quantity available on the First Nations lands. Furthermore, the water historically, currently and prospectively utilized by the First Nation may not be "on" the First Nation lands, and this phrase creates an ambiguity that is probably not intended, since CELA presumes the drafters have contemplated that the water needs may be from a proximate water body or source or even further afield in the case of a joint water supply. CELA recommends that the phrase be modified to read "The quantity of water available to supply the needs of the members of a First Nation must meet."

A similar drafting issue affects section 16, regarding wastewater effluent. The section should be modified to read, "wastewater effluent to surface water from a First Nations operated wastewater system must at least meet." In addition to the practical ambiguity caused by the use of the term "effluent on" the First Nation (where in fact the effluent may be to a water body proximate to the First Nation or be part of a larger system further afield), the clause as currently drafted may give rise to compliance issues related to small systems serving First Nations members such as household level septic systems and other systems in common use. This concern is especially relevant since clause 17 asserts that "for greater certainty" sections 14 to 16 apply to both public and private water systems on First Nations lands.

Section 18(2) provides a time limit for the Minister to “make best efforts” to begin the consultation and cooperation on the choices applicable to drinking water standards and effluent standards. CELA is supportive of a short timeline as provided here (90 days after the section is in force) to begin the consultations. CELA does not object to the phrase “best efforts” used here and elsewhere in the Bill, as we have conducted and published research that this phrase is a high legal standard as interpreted by case law and is akin to a fiduciary duty, such as the duty of corporate directors to their shareholders. Accordingly, any use of that phrase should not be construed as an option for the Minister or government to make only half-hearted efforts; they will be required to make diligent, robust efforts to conduct the obligations outlined (commence consultations).²

CELA recommendation 12: Section 15 should be amended to read: “15. The quantity of water available to supply the needs of the members of a First Nation must meet...the drinking, cooking, sanitation, hygiene, safety fire protection and emergency management needs.”

CELA recommendation 13: Section 16 should be amended to read “16. Subject to the choice...wastewater effluent to surface water from a First Nations operated wastewater system must at least meet.”

H. REGULATIONS

The provisions providing for Regulation making powers and constraints under the Act are important since they will shape much of the implementation under the Bill.

An important proviso is provided in Section 19 (2) that “A First Nation law may exclude the application of any regulations made under subsection (1) to First Nations lands in respect of which the law applies.” This preserves important autonomy, jurisdiction and choice for First Nations as they decide how to move forward with drinking water protection. Despite this, section 19(3) provides that the minimum standards provided are consistent with sections 14 to 16 (recall those are the sections providing that the First Nation choose whether their drinking water and effluent standards follow the federal guidelines or the applicable provincial or territorial standards).

Among the regulation making powers are the potential for the Minister to make regulations “respecting the protection of source water, including source water protection plans and the maintenance and clean-up of source water.” CELA takes note of the importance of this provision in support of the overall inclusion of source water protection in the Bill. Other regulation making powers are those appropriate to a multi-barrier approach to drinking water protection such as funding consultations, water services operator training, emergency planning response and other matters.

There is a specific, mandatory regulation making requirement on the part of the Minister to define “protection zone” for the purposes of the Act under section 21. Before doing so, the Minister must consult and cooperate with First Nation government bodies, federal ministers and the provincial and federal governments. This will be very important work and there is an extensive body of experience in the provincial laws that followed the Walkerton and North Battleford Inquiries, as well as the extensive work undertaken by many First Nations, researchers and others such as CELA to undertake source protection initial planning and assessment, threats assessment and potential approaches which can provide substantial basis on which to move ahead quickly with this essential aspect of source protection. There

² Cho, Ryan, *The Limits of “Best Efforts” - Bill C-61, Legislative Failure, and First Nations Water Rights*, Canadian Environmental Law Association Publication #1626 (2025)

should be no quarreling with the need for the First Nations systems to be protected as to their sources, just as are municipal systems in Ontario, for example. The existing body of work in that province contains detailed and well-founded guidance as to size of surface water or groundwater protection zones for example.

There is an enforcement provision contained in section 22 which includes the potential for designation of officials for enforcement of the First Nation laws under the Act and, appropriately, the requirement for the First Nation governing body to provide FPCI to such a regulation. Agreement powers under section 23 and 24—the potential for agreements to provide for fiscal arrangements for the First Nation in exercising its jurisdiction and for First Nation agreements with other levels of government for administration and enforcement of First Nation laws, respectively—are consistent with the earlier provision for cooperation agreements in respect of source water that we discussed above. Beyond First Nations’ own laws, there is also a provision for agreements between the Minister and a First Nation and/or various jurisdictions for the protection of source water, water services and enforcement of regulations. The Minister may not make such an agreement with other jurisdictions unless the affected First Nation is a party to the Agreement or must be consulted prior to the Agreement.

I. POWERS, DUTIES AND FUNCTIONS OF MINISTER

Sections 26 to 28 provide an express obligation on the Minister to make “best efforts to ensure that access to clean and safe drinking water,” is provided to all users of buildings located on First Nation lands. As noted earlier in another context, “best efforts” is a high requirement and requires robust effort and diligence on the part of the Minister. A framework for assessing funding needs, including capital needs, operations and maintenance and other fiscal aspects of a water system, must be developed under section 27(2). That framework must include “standards applicable to water services received by First Nation persons compared with the most stringent standards applicable to water services received by persons in non-Indigenous communities.” Section 27(3) requires funding allocation decisions to be responsive to needs, achieve long-term health outcomes and be predictable and sustainable over time, among other things. Funding needs, including to a level of comparable services to non-Indigenous communities, and the establishment of a First Nations Water Commission are also set out in sections 30 to 32. Additional obligations of the Minister and the Government of Canada are provided in sections 33 to 35 dealing with the Settlement Agreement defined in the Act. CELA leaves it to others to comment on these sections as we have not represented any clients nor been involved in that Settlement Agreement and so it is most appropriate to leave the analysis of these sections to those who were.

Further provisions under the Bill provide for long term grants and funding arrangements, immunity provisions, and establishment of a First Nations Water Commission under the Canada Not for profit Corporations Act. This is to be led by First Nations, a purpose of which is to support the purpose and principles set out in the Bill. Additional options for the new First Nations Water Commission include the ability to support monitoring, provide advice to First Nations, provide water services certifications, make recommendations to governments and other matters as detailed in section 39(3).

The Bill contains various timelines not specifically addressed in this commentary, as well as requirements for annual Reports by the First Nations Water Commission and by the Minister in respect of their respective duties and powers. The Bill also provides for a five-year review after its in-force date. The Bill comes into force one year after the day on which it receives Royal Assent.

CELA encourages study and passage of Bill C-37 on an expedited basis, especially since Bill C-61 already received study at Committee. CELA makes the following recommendations for consideration during the study process. CELA would be pleased to attend provide comments to a Committee of Parliament or the Senate during their respective studies and consideration of the Bill.

CELA recommendation 14: CELA recommends and encourages the Parliament of Canada, both House of Commons and the Senate, to study and adopt Bill C-37 on an expedited basis, especially since Bill C-61 already received study at Committee in the previous Parliament.

SUMMARY OF CELA RECOMMENDATIONS:

CELA Recommendation 1: The full proposed Preamble to Bill C-37 set out in the First Reading version of the Bill should be adopted without omission.

CELA Recommendation 2: Section 3 of Bill C-37 should be deleted and replaced with the following language: “It is recognized and affirmed that it is a human right of every individual on First Nations land to have access to clean and safe drinking water in accordance with this Act.”

CELA recommendation 3: Section 4(e) of Bill C-37 should be modified to read: “facilitate the elimination of the gaps with respect to infrastructure, socio-economic status, governance and health and well-being in relation to water services.”

CELA recommendation 4: Section 4(f) of Bill C-37 should be modified to read “and the entering into of agreements to protect sources of water accessed by First Nations communities for drinking water surface water intakes or drinking water wells.”

CELA recommendation 5: The provisions providing for a multi-barrier approach to protection of First Nations Drinking water, as proposed in Bill C-37 should be adopted, inclusive of protection of source waters.

CELA recommendation 6: The approach to providing for adoption of innovative approaches and technology by First Nations for water delivery, recognizing distinct needs of First Nations, should be retained explicitly in Bill C-37.

CELA recommendation 7: The transparency provisions and the various express requirements for free, prior informed consent outlined in section 5 of Bill C-37 should be adopted.

CELA recommendation 8: The phrase “that is adjacent to the First Nation lands of a First Nation” should be deleted from section 6(1)(b) of Bill C-67 and replaced with the word “for” such that the provision would read:

6(1)(b) “Water and source water in a protection zone **that is for a First Nation, if the First Nation governing body, the Government of Canada and the government of the province or territory in which the protection zone is located have agreed.”**

CELA recommendation 9: The approach of the using coordination agreements for the application of First Nations law, federal law, and provincial law in a manner agreed among the parties for source protection planning and protection of sources of water supplying First Nations drinking

water systems should be retained in Bill C-67 as set out in section 6(1)(b) of the Bill as an important option to address drinking water threats that are not “on” First Nation lands.

CELA recommendation 10: The provision set out in section 6(2) of Bill C-37 that First Nations jurisdiction over water includes the ongoing development of First Nations laws should be adopted.

CELA recommendation 11: Section 8 should be modified to add to the end of that paragraph, the words “unless otherwise provided in a coordination agreement described in section 6(2).”

CELA recommendation 12: Section 15 should be amended to read: “15. The quantity of water available to supply the needs of the members of a First Nation must meet...the drinking, cooking, sanitation, hygiene, safety fire protection and emergency management needs.”

CELA recommendation 13: Section 16 should be amended to read “16. Subject to the choice...wastewater effluent to surface water from a First Nations operated wastewater system must at least meet.”

CELA recommendation 14: CELA recommends and encourages the Parliament of Canada, both House of Commons and the Senate, to study and adopt Bill C-37 on an expedited basis, especially since Bill C-61 already received study at Committee in the previous Parliament.

All of which is submitted by the Canadian Environmental Law Association

Per

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Executive Director and Counsel

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