THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

May 24, 2013

Via email: AANO@parl.gc.ca

Chris Warkentin, M.P.
Chair
Standing Committee on Aboriginal Affairs and Northern Development
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Warkentin:

Re: Bill S-8, *Safe Drinking Water for First Nations Act*

I am writing for the Canadian Bar Association's National Aboriginal Law Section (CBA Section) about Bill S-8, the *Safe Drinking Water for First Nations Act*. The CBA represents over 37,000 lawyers, law students, notaries and law teachers from across Canada. The Association's primary objectives include improvement in the law and the administration of justice. The CBA Section is comprised of lawyers from all parts of the country with expertise in legal issues relating to Aboriginal people, including Aboriginal treaty rights and land claims, constitutional matters and the administration of justice.

The CBA Section wrote to the Senate Committee on Aboriginal People in February 2011 about Bill S-11, an earlier version of Bill S-8. A copy of that letter is attached for your convenience. Several revisions have been made to the proposed Act since that time and we appreciate the opportunity to comment on Bill S-8.

From a policy perspective, what is still needed is a firm government commitment to provide resources to address water quality issues on reserves, not necessarily new legislation. The Budget 2012 commitment of $330 million for construction of and improvements to water infrastructure and for long-term planning[1] is a step in the right direction.

That said, we appreciate Parliament's interest in legislating a solution to this important issue. However, we have a number of concerns.

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[1] See: http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?source=library_prb&ls=S8&Parl=41&Ses=1&Language=E&Mode=1 under s. 1.5 "Federal Investments"

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In our February 2011 letter, the CBA Section expressed concern about then paragraph 4(1)(r), and its explicit abrogation and derogation from Aboriginal and treaty rights. Paragraph 4(1)(r) in Bill S-11 provided:

> 4. (1) 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; and

Paragraph 4(1)(r) has been replaced with section 3 in Bill S-8:

> **3.** For greater certainty, nothing in this *Act* or the regulations is to be construed so as to abrogate or derogate from any existing Aboriginal or treaty rights of the Aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*, ***except to the extent necessary to ensure the safety of drinking water on First Nation lands***. [emphasis added]

While the wording about section 35 of the *Constitution Act, 1982* in the previous Bill S-11 has been revised, section 3 of Bill S-8 remains problematic. We believe that the qualification "except to the extent necessary to ensure the safety of the drinking water on First Nation lands" is in itself an explicit abrogation or derogation of existing Aboriginal or treaty rights pursuant to section 35 of the *Constitution Act, 1982.* The qualification in section 3 of Bill S-8 does not, in our view, ameliorate the constitutional problems identified in our earlier submissions on Bill S-11.

We have been unable to find any precedent or explanation for this proposal which would still, in our view, abrogate or derogate from section 35 rights under the *Constitution Act, 1982* in order to provide safe drinking water to First Nations. This provision raises two key issues:

- is it necessary to implement the objectives of the bill?
- if so, is it constitutionally valid? Can Parliament use its legislative power under section 91(24) to abrogate or derogate unilaterally from the rights protected by section 35?

The attempt to abrogate and derogate aboriginal and treaty rights by statute or regulation would set a dangerous precedent and should not slip by without full explanation and discussion. Professor Peter Hogg has been clear that section 35 rights cannot be extinguished by federal legislation since 1982.[2] He is also clear that, while Parliament has the legislative competence to regulate a section 35 right, it must do so according to the justification test set out by the Supreme Court of Canada in *Sparrow.*[3] There is no mention of the *Sparrow* test in Bill S-8.

In our view, the proposed provision is too heavy handed for any mischief that the Bill is designed to address. We suspect the exception to non-derogation was included out of an abundance of caution. That in itself does not meet the *Sparrow* test.

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[2] See Hogg, *Constitutional Law of Canada* 5th Edition Supplemented (Toronto: Carswell, 2010) at para. 28.8(h)).

[3] *R. v. Sparrow*, [1990] 1 SCR 1075.

We recommend that the words “except to the extent necessary to ensure the safety of drinking water on First Nation lands”in section 3 be removed from the Bill before it is passed. We also recommend that appropriate resources be allocated to ensure its effectiveness.

Yours truly,

(original signed by Terry Hancock for Aimée Craft)

Aimée Craft
Chair, National Aboriginal Law Section

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THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 15, 2011

Via email: ABORIG-AUTOCH@sen.parl.gc.ca

The Honourable Gerry St. Germain, P.C.
Chair
Senate Committee on Aboriginal Peoples
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Germain,

Re: Bill S-11, Safe Drinking Water for First Nations Act

I am writing for the Canadian Bar Association's National Aboriginal Law Section (CBA Section) in regard to Bill S-11, *Safe Drinking Water for First Nations Act*. The CBA represents over 37,000 lawyers, law students, notaries and law teachers from across Canada. The Association's primary objectives include improvement in the law and the administration of justice. The CBA Section is comprised of lawyers from all parts of the country with expertise in legal issues relating to Aboriginal people, including Aboriginal treaty rights and land claims, constitutional matters and the administration of justice.

From a policy perspective, what is really needed is a firm government commitment to providing resources to address water quality issues on reserves, not necessarily new legislation. That said, but for section 4(1)(r), Bill S-11 is well drafted legislation.

Section 4(1)(r) provides as follows:

> 4. (1) 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; and

We have been unable to find any explanation for the unprecedented proposal to abrogate or derogate from section 35 rights under the *Constitution Act, 1982* to provide safe drinking water to First Nations. This provision raises two key issues:

- is it necessary to implement the objectives of the bill?
- if so, is it constitutionally valid? Can Parliament use its legislative power under section 91(24) to abrogate or derogate unilaterally from the rights protected by section 35?

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The ability to abrogate and derogate aboriginal and treaty rights by way of regulation would set a dangerous precedent and should not slip by without full explanation and discussion. Professor Peter Hogg has been clear that section 35 rights cannot be extinguished by federal legislation since 1982.[1] He is also clear that, while Parliament has the legislative competence to regulate a section 35 right, it must do so according to the justification test set out by the Supreme Court of Canada in *Sparrow*.[2] There is no mention of the *Sparrow* test in Bill S-11.

Further, while "derogate" means to impair, "abrogate" means to annul. The use of "abrogate" seems dangerously close to suggesting an "extinguishment" of rights. In our view, the proposed provision is too heavy handed for any mischief that the bill is designed to address. We recommend that section 4(1)(r) be removed from the Bill before it is passed. We also recommend that appropriate resources be allocated to ensure its effectiveness.

Thank you for considering the views of the CBA Section.

Yours truly,

(original signed by Gaylene Schellenberg for Bradley D. Regehr)

Bradley D. Regehr
Chair, National Aboriginal Law Section

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1 See Hogg, *Constitutional Law of Canada* 5th Edition Supplemented (Toronto: Carswell, 2010) at para. 28.8(h)).

2 *R. v. Sparrow*, [1990] 1 SCR 1075.