

No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada

Executive Summary

By David R. Boyd, Ph.D., J.D.

(Please contact author at drboyd@uvic.ca for full 43 page version)

Is there a constitutional right to safe drinking water in Canada? To the vast majority of Canadians, this may be seen as a moot question, since 100% of urban residents and 99% of rural residents have access to improved drinking water and sanitation.ⁱ Although this big picture is generally bright, pockets of darkness remain. As the preceding statistics indicate, there are still rural communities, comprising roughly one percent of Canada's population, where running water, safe drinking water, and indoor toilets are aspirations rather than reality. These rural communities are predominantly, if not exclusively, reserves inhabited by First Nations. Reserves are much more likely to experience high-risk drinking water systems and long-term boil water advisories.ⁱⁱ The disparity between water quality on and off reserve in Canada has been criticized by the United Nations Committee on Economic, Social, and Cultural Rights, the Royal Commission on Aboriginal Peoples, and the Auditor General of Canada.ⁱⁱⁱ

As of 2010, 49 First Nations communities have high-risk drinking water systems and more than 100 First Nations face ongoing boil water advisories (out of roughly 600 First Nations in Canada).^{iv} Many of these deplorable situations have been dragging on for years and in some cases decades.^v The federal government estimates that there are approximately 5,000 homes in First Nations communities (representing an estimated 20,000+ residents) that lack basic water and sewage services.^{vi} Compared to other Canadians, First Nations' homes are 90 times more likely to be without running water.^{vii} Examples of First Nations communities where, as of 2010, the majority of residents still lack running water, access to safe drinking water, and indoor toilets include Pikangikum in Ontario, Kitchisakik in Quebec, St. Theresa Point, Wasagamack, Red Sucker Lake and Garden Hill in Manitoba, and Little Buffalo in Alberta.^{viii} The lack of access to safe drinking water has adverse physical and psychological effects. The federal government admits that "The incidence of waterborne diseases is several times higher in First Nations communities, than in the general population, in part because of the inadequate or non-existent water treatment systems."^{ix} Adverse health effects associated with inadequate water infrastructure include elevated rates of influenza, whooping cough (pertussis), shigellosis, and impetigo.^x

In the past decade, the federal government has established several new initiatives focused on safe water for First Nations and invested several billion dollars in upgrading drinking water and wastewater infrastructure on reserves.^{xi} Despite these positive steps, three major problems remain. First, the Expert Panel on Safe Drinking Water for First Nations concluded in 2006 that "the federal government has never provided enough funding to First Nations to ensure that the quantity and quality of their water systems was comparable to that of off-reserve communities."^{xii} Inadequate funding continues to be a

key obstacle to ensuring universal access to safe drinking water. Second, there are no federal or provincial laws or regulations to ensure safe drinking water for First Nations individuals living on reserves.^{xiii} All other Canadians enjoy legal protection for their drinking water, including federal employees working on reserves.^{xiv}

Third, in 2006 the Expert Panel on Safe Drinking Water for First Nations identified a number of communities that were clearly at high risk, but that “failed to appear as high risk on the Department’s risk assessment because they did not have any water systems at all” or because an existing water treatment plant produces potable water, even if it is not connected to the majority of homes on a reserve.^{xv} For example, the Expert Panel specifically highlighted Pikangikum and Kitcisakik as “urgent situations” that should be dealt with “as soon as possible,” yet INAC never added these communities to its high priority list.^{xvi} Nor did INAC include St. Theresa Point, Wasagamack, Red Sucker Lake, Garden Hill, or Little Buffalo on its high priority list, despite a majority of residents in each of these communities lacking access to running water, safe drinking water, or indoor toilets.

The purpose of this article is to explore whether Canadians possess a constitutional right to water, a legally enforceable right that is being violated for some First Nations people living on reserves. The constitutional right to water is supported by three related provisions:

1. the right to life, liberty, and security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*)^{xvii};
2. the right to equality under s. 15 of the *Charter*;
3. governments’ obligation to provide “essential public services of reasonable quality to all Canadians” under s. 36 of the *Constitution Act, 1982*.

The legal arguments available pursuant to these constitutional provisions are buttressed by the federal government’s fiduciary duty to Aboriginal people and Canada’s obligations pursuant to international human rights law.

It appears likely, based on the analysis presented in this article, that the constitutional rights of the residents of Pikangikum in Ontario, Kitcisakik in Quebec, St. Theresa Point, Wasagamack, Red Sucker Lake and Garden Hill in Manitoba, and Little Buffalo in Alberta are being violated by the government’s failure to provide safe drinking water, an essential service which is vital to life, health, and human dignity. The consequences include serious physical and psychological harms, ranging from waterborne disease to death, and ongoing discrimination vis-à-vis the broader Canadian population for whom safe and abundant drinking water is often taken for granted. As a result, there are ongoing violations of s. 7 and 15 of the *Charter*, guaranteeing the rights to life, liberty, and security of the person and equality respectively, and s. 36(1)(c) of the *Constitution Act, 1982*, committing governments to provide essential public services of reasonable quality to all Canadians.

These constitutional transgressions stem from the federal government’s failures to: provide adequate resources for drinking water infrastructure; prioritize the needs of communities in the most dire and dangerous circumstances; and enact and enforce a

regulatory framework to ensure safe drinking water for First Nations communities. These failures have persisted for decades despite a series of pledges and promises. Thirty-three years have passed since the federal government committed to ensuring that drinking water infrastructure for First Nations would meet commonly accepted health and safety standards, and be similar to that available in comparable communities. Twenty-eight years have passed since that commitment was entrenched in Canada's *Constitution*. Patience may no longer be a palatable option for the residents of the residents of Pikangikum, Kitcisakik, St. Theresa Point, Wasagamack, Red Sucker Lake, Garden Hill, Little Buffalo, and other reserves facing similar problems.

Turning to the courts to resolve complex issues such as the provision of safe drinking water is not an optimal approach, but appears necessary in the current circumstances. Under the current system, governments evade responsibility and cannot be held accountable except through resort to litigation. Ensuring that the right to safe drinking water is a justiciable issue enables individuals to seek remedies and hold their governments accountable for providing this essential service and fulfilling this fundamental right.^{xviii} In the Supreme Court of Canada's *Chaoulli* decision, Justice Deschamps said of public health care waiting times: "it seems that governments have lost sight of the urgency of taking concrete action. The courts are therefore the last line of defence for citizens."^{xix}

In order to remedy the violation of the constitutional rights of First Nations persons living on reserves without access to safe drinking water, the federal government must:

- immediately implement an effective and equitable interim system to provide safe water to reserve residents;
- accelerate the investment of adequate resources to ensure that drinking water infrastructure on reserves reaches a reasonable quality, comparable to similar non-reserve communities;
- work with First Nations to design a mutually acceptable regulatory framework for governing water and wastewater on reserves;
- take steps with First Nations, and where required, provincial and territorial governments, to improve the protection of drinking water sources for reserves and restore water sources that have been polluted or otherwise degraded.

Whether there may also be damages owing as a result of *Charter* violations flowing from the long-term failure to provide adequate drinking water is beyond the scope of this article, although the recent Supreme Court decision in *Ward* raises that possibility.^{xx}

Recognizing the right to water as implicit in the Canadian *Constitution* would provide accountability, offer remedies, and ensure non-discrimination. If Canada's *Constitution*, including the *Charter of Rights and Freedoms*, cannot be extended to provide relief to individuals deprived of their human right to water, a deprivation that causes adverse health effects, violates their dignity, and flouts the principle of environmental justice, then the *Constitution* is not a living tree but is merely dead wood. As the Senate Standing Committee on Aboriginal Affairs concluded "First Nations people in this country have a right to expect, as do all Canadians, that their drinking water is safe."^{xxi}

ENDNOTES

ⁱ WHO/UNICEF. 2010. Joint Monitoring Programme for Water Supply and Sanitation. *Estimates for the Use of Improved Drinking-Water Sources*. WHO/UNICEF. 2010. Joint Monitoring Programme for Water Supply and Sanitation. *Estimates for the Use of Improved Sanitation Facilities*.

ⁱⁱ Polaris Institute, Assembly of First Nations, and the Canadian Labour Congress. 2008. *Boiling Point: Six Community Profiles of the Water Crisis Facing First Nations Within Canada*. www.polarisinstitute.org

ⁱⁱⁱ UN Committee on Economic, Social, and Cultural Rights. 2006. *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*. UN Docs E/C.12/CAN/CO/4 and E/C.12/CAN/CO/5. at paras. 1, 15; Royal Commission on Aboriginal Peoples. 1994. *Public Policy and Aboriginal Peoples 1965-1992: Summaries of Reports, by Federal Bodies and Aboriginal Organizations*, vol. 2. Hull: Canada Communication Group, pp. 226-27. Auditor General of Canada. 1995. *Report of the Auditor General of Canada*. Ottawa: Public Works. Commissioner of the Environment and Sustainable Development. 2005. *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons*. Ottawa: Public Works and Government Services Canada.

^{iv} Indian and Northern Affairs Canada. 2010. *First Nations Water and Wastewater Action Plan, Progress Report April 2009-March 2010*. As of September 30, 2010, there were 117 First Nations with ongoing boil water advisories. Health Canada. 2010. *First Nations, Inuit, and Aboriginal Health: Drinking Water and Wastewater*. <http://www.hc-sc.gc.ca/fniah-spnia/promotion/public-publique/water-eau-eng.php>

^v Polaris Institute with the Assembly of First Nations and the Canadian Labour Congress. 2008. *Boiling Point: Six Community Profiles of the Water Crisis Facing First Nations Within Canada*.

^{vi} Government of Canada. 2004. *Implementation of the International Covenant on Economic, Social, and Cultural Rights: 4th Periodic report to the UN under articles 16 and 17 of the Covenant*, E/C.12/4/Add.15, p. 84.

^{vii} UN Department of Economic and Social Affairs, Secretariat of the Permanent Forum on Indigenous Issues. 2009. *The State of the World's Indigenous Peoples*. New York: United Nations, p. 25.

^{viii} H. Fallding. 2010. "No Running Water," *Winnipeg Free Press*, October 30, 2010, p. A1. <http://www.winnipegfreepress.com/no-running-water/>

^{ix} Government of Canada. 2004. *Implementation of the International Covenant on Economic, Social, and Cultural Rights: 4th Periodic report to the UN under articles 16 and 17 of the Covenant*, E/C.12/4/Add.15, p. 84.

^x T.W. Hennessy, T. Ritter, R.C. Holman, et al. 2008. "The Relationship Between In-Home Water Service and the Risk of Respiratory Tract, Skin, and Gastrointestinal Tract infections Among Rural Alaska Natives," *American Journal of Public Health* 98(11): 2072-78. H. Fallding. 2010. "Disease factory: consequences of living without tap water and flush toilets," *Winnipeg Free Press*, October 30, 2010, p. A1. <http://www.winnipegfreepress.com/no-running-water/>

-
- ^{xi} Indian and Northern Affairs Canada. 2010. *First Nations Water and Wastewater Action Plan: Progress Report April 2009 – March 2010*. Ottawa: INAC. Indian and Northern Affairs Canada. 2006. Ottawa: INAC, pp. 4-5.
- ^{xii} Expert Panel on Safe Drinking Water for First Nations. 2006. *Report of the Expert Panel on Safe Drinking Water for First Nations*, vol. 1. Ottawa: Minister of Public Works and Government Services Canada, pp. 22, 49-50.
- ^{xiii} Commissioner of the Environment and Sustainable Development. 2005. *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons*. Ottawa: Public Works and Government Services Canada, Chapter 5, p. 26.
- ^{xiv} Commissioner of the Environment and Sustainable Development. 2005. *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons*. Ottawa: Public Works and Government Services Canada, para. 5.27.
- ^{xv} The Standing Senate Committee on Aboriginal Peoples. 2007. *Safe Drinking Water for First Nations – Final Report*. <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/abor-e/rep-e/rep08jun07-e.htm>
- ^{xvi} Expert Panel on Safe Drinking Water for First Nations. 2006. *Report of the Expert Panel on Safe Drinking Water for First Nations*, vol. 1. Ottawa: Minister of Public Works and Government Services Canada, pp. 55-6.
- ^{xvii} Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
- ^{xviii} Harvard Law Review. 2007. "What Price for the Priceless? Implementing the Justiciability of the Right to Water," 120 *Harv. L. Rev.* 1067.
- ^{xix} *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, para 96.
- ^{xx} *Vancouver (City) v. Ward* [2010], 2010 SCC 27, July 23, 2010.
- ^{xxi} Senate Standing Committee on Aboriginal Peoples. 2007. *Safe Drinking Water for First Nations: Final Report of the Standing Committee on Aboriginal Peoples*, p. 9.