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See table of contents

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Article abstract

Many First Nations communities living on reserves in Canada do not have consistent access to one of the most essential requirements for life—clean and safe drinking water. This article analyses the Charter's equality guarantee to determine whether it offers a remedy. The analysis shows that the experience of First Nations communities living on reserve without access to clean water is discriminatory within the meaning of s 15 of the Charter, and that this discrimination would not be saved by s 1. The most significant hurdle to a s 15 claim is the fact that there is no single law which categorically excludes First Nations reserve communities from its protection. While the courts have not considered a case with similar facts, the article argues that the Charter's equality protections extend to the full range of government action (and inaction) regardless of whether the action stems from one law, regulation or policy, or a set of laws that, acting together, creates discrimination. An interpretation that would limit s 15 protections based on a narrow, formalistic interpretation of the word "law" in section 15 would not only run counter to the interpretations of the section in recent decisions, but more importantly would run afoul of the Charter's purpose of promoting substantive equality.

Environmental Discrimination and the *Charter*'s Equality Guarantee: The Case of Drinking Water for First Nations Living on Reserves

NATHALIE J. CHALIFOUR*

ABSTRACT

Many First Nations communities living on reserves in Canada do not have consistent access to one of the most essential requirements for life—clean and safe drinking water. This article analyses the Charter*'s equality guarantee to determine whether it offers a remedy. The analysis shows that the experience of First Nations communities living on reserve without access to clean water is discriminatory within the meaning of s 15 of the* Charter*, and that this discrimination would not be saved by s 1. The most significant hurdle to a s 15*

RÉSUMÉ

Plusieurs Premières Nations qui habitant dans des réserves au Canada n'ont pas accès à l'une des ressources les plus importantes pour la vie : de l'eau potable propre et saine. Cet article analyse le droit à l'égalité garanti par la Charte *en vue de déterminer si un recours pourrait être fondé sur ce droit. L'analyse démontre que l'expérience des Premières Nations qui habitent dans des réserves sans accès à de l'eau saine est discriminatoire selon l'article 15 de la* Charte*, et que cette discrimination ne serait pas légitimée par l'article premier. Le plus grand défi posé à une plainte fondée sur*

* Associate Professor, Faculty of Law, Centre for Environmental Law and Global Sustainability, University of Ottawa. PhD (Stanford); JSM (Stanford); LLB (Western). The author thanks LFO Research Fellows Brandon Stewart and Mark James, along with research assistant Andrew Mason, for their research assistance relating to this project. The author also wishes to acknowledge the invaluable comments provided on earlier drafts by several people, including David Boyd, Sophie Thériault, Larry Chartrand and the anonymous peer reviewers. Any errors or omissions in the text are the author's alone.

claim is the fact that there is no single law which categorically excludes First Nations reserve communities from its protection. While the courts have not considered a case with similar facts, the article argues that the Charter*'s equality protections extend to the full range of government action (and inaction) regardless of whether the action stems from one law, regulation or policy, or a set of laws that, acting together, creates discrimination. An interpretation that would limit s 15 protections based on a narrow, formalistic interpretation of the word "law" in section 15 would not only run counter to the interpretations of the section in recent decisions, but more importantly would run afoul of the* Charter*'s purpose of promoting substantive equality.*

l'article 1 réside dans le fait qu'il n'existe pas une seule loi qui exclut catégoriquement de sa protection les communautés des Premières nations vivant dans des réserves. Bien que les tribunaux n'aient pas considéré un cas présentant des faits semblables, cet article soutient que la protection à l'égalité offerte par la Charte *s'étend à toutes les actions (et inactions) gouvernementales néanmoins le fait que l'action découle d'une loi, règlement ou politique, ou un cadre de lois qui, dans leurs ensembles, crée de la discrimination. Une interprétation qui limiterait les protections de la* Charte *en se fondant sur une interprétation rigide et étroite du mot « loi » contenu dans l'article 15 irait non seulement à l'encontre de l'interprétation de l'article 15 dans les décisions récentes, mais, ce qui est plus important encore, serait contraire à l'objectif de la* Charte *de promouvoir l'égalité substantielle.*

Key-words: *First Nations, drinking water, equality, Charter, environmental discrimination, s 15(1).*

Mots-clés : *Premières Nations, eau potable, égalité, Charte, discrimination environnementale, art 15(1).*

TABLE OF CONTENTS

Introduction 185

I. Drinking Water on First Nations Reserves 188

II. The *Charter*'s Equality Guarantee 190

III. The Legal Benefit of Safe Drinking Water for First Nations Living on Reserves 192

A. Does the law create a distinction based on an enumerated or analogous ground? 192

1. Enumerated or analogous ground 193
2. Creates a distinction 194
3. A distinction created by law 196

a. "Law" interpreted broadly 198
b. "Law" interpreted purposefully 198
c. Omissions from law and section 32 of the *Charter* 199
d. Relevant "law" construed as the regulatory framework versus one particular law 201

B. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? 208

C. Section 1 Justification 212

1. Prescribed by law 213
2. Demonstrably justifiable in a free and democratic society 213

a. A pressing and substantial objective 214

D. The appropriate remedy 217

Conclusion 220

INTRODUCTION

Many First Nations communities living on reserves in Canada are without consistent access to one of the most essential requirements for life—clean and safe drinking water. Many of these communities live under long-term boil water advisories and must find alternative sources of water for drinking, cooking, bathing and other purposes. The effects on

these communities are extensive, with implications at a physical, social, economic and cultural level. While some of the most difficult and tragic situations have been publicized in the media, many remain in the shadows of the public's mind.

There are increasing numbers of reports, publications and policy discussions on the topic.[1] The situation is complex, and thus so are its solutions. Some modest progress has been made, and many resources are being devoted to addressing it.[2] Yet

1. See e.g., Canada, HC, Commissioner of the Environment and Sustainable Development, *Report of the Commission of Environment and Sustainable Development: Chapter 5—Drinking Water in First Nations Communities* (Ottawa: OAG, September 2005) [*CESD*]; David R Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 McGill LJ 81; Constance MacIntosh, "The Right to Safe Water and Crown-Aboriginal Fiduciary Law: Litigating a Resolution to the Public Health Hazards of On-Reserve Water Problems" in Martha Jackman & Bruce Porter, eds, *Reconceiving Human Rights Practice for the New Social Rights Paradigm* (Toronto: Irwin Law, 2013) 1; Polaris Institute, *Boiling Point! Six Community Profiles of the Water Crisis Facing First Nations Within Canada* (Ottawa: Polaris Institute, 2008) [*Boiling Point*]; Jeff Reading et al, *Crisis on Tap: Seeking Solutions for Safe Water for Indigenous Peoples* (Victoria, BC: University of Victoria, Centre for Aboriginal Health Research, 2011), online: <http://www.fnehin.ca/images/uploads/CAHR_WaterBook_2012.pdf> (Note that all online references were accessed 31 July 2013); Mona Shum et al, "First Nations Drinking Water Policies" in Canadian Institutes of Health Research – Institute of Population and Public Health, *Population and Public Health Ethics: Cases from Research, Policy and Practice* (Toronto: University of Toronto Joint Centre for Bioethics, 2012) 92; Ted Schreker, "Case Discussion in Response to First Nations Drinking Water Policies" in Canadian Institutes of Health Research – Institute of Population and Public Health, *ibid* at 97; Michael Mascarenhas, *Where the Waters Divide: Neoliberalism, White Privilege, and Environmental Racism in Canada* (Toronto: Lexington Books, 2012); Laura Eggertson, "Despite Federal Promises, First Nations' Water Problems Persist" (2008) 178:8 Can Med Assoc J 985.

2. There have been recent legislative developments. See footnote 113, *infra*, and accompanying text. See also Marie-Ann Bowden, "A Brief Analysis of Bill S-11: Safe Drinking Water for First Nations Act" (Paper delivered at the National Environment, Energy and Resources Law Summit, Banff, 9 April 2011), online: <http://www.cba.org/cba/cle/PDF/ENV11_Bowden_Paper.pdf>. The Assembly of First Nations, the Chiefs of Ontario, and the Union of British Columbia Municipalities voiced concerns over the potential impact of the bill. They stated that the law would impose new regulatory obligations on First Nations communities and municipal water agencies without providing the federal funding for the infrastructure needed to meet the new standards. Additionally, they stated that the law—by giving new powers to the federal government—may infringe upon the s 35 rights of Aboriginal communities and alter the federal-provincial constitutional balance. See Assembly of First Nations, "Submission to the Standing Senate Committee on Aboriginal Peoples—*Bill S-8 Safe Drinking Water for First Nations Act*" (16 May 2012) online: <http://www.afn.ca/uploads/files/2012-05-16_afn_submission_to_the_senate_standing_committee_on_bill_s-8.pdf>;

the reality is that the situation remains largely unchanged from a decade ago, with over 100 First Nations communities across Canada under boil-water advisories in any given year.[3] In contrast to the rest of Canadians, who are protected by a comprehensive provincial, territorial and federal regulatory framework supported by adequate funding that ensures access to safe, clean water, First Nations communities living on reserves do not benefit from this protective veil. The situation is unfair, unacceptable and discriminatory.

This paper explores whether the *Charter*'s equality guarantee offers a remedy for First Nations communities living on reserve without adequate clean water. Section 15 of the *Charter* has helped numerous claimants address discrimination in many different contexts, and has undoubtedly helped advance equality in Canada. Given recent Supreme Court jurisprudence on the *Charter*'s equality provision, this paper concludes that the experience of First Nations communities' without access to clean water is discriminatory within the meaning of s 15, and that this discrimination would not be saved by s 1.

While this paper offers an analysis of s 15's potential to offer a remedy, it does not purport to make a strategic recommendation to communities in this regard. There are innumerable considerations involved in finding appropriate resolution, including complex questions relating to s 35 rights and the potential for political nation-to-nation negotiations. The analysis is offered as an exercise in deepening understanding of s 15 and its role in cases of environmental discrimination, and shedding light on its application to cases of

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Chiefs of Ontario, "Federal Bill S-8 Fails to 'Protect' Drinking Water for First Nations" (29 February 2012) online: Chiefs of Ontario <http://www.chiefs-of-ontario.org/node/233>; Metro Vancouver, "A Metro Vancouver Position Paper on Bill S-8: *The Safe Drinking Water for First Nations Act"* (19 June 2012) online: <http://www.ubcm.ca/assets/Whats~New/1-Brief%20-%20A%20Metro%20Vancouver%20Position%20Paper%20on%20Bill%20S-8%20The%20Safe%20Drinking%20Water%20for%20First%20Nations%20Act.pdf>.

3. Health Canada, *Drinking Water Advisories in First Nations Communities in Canada—A National Overview 1995-2007* (Ottawa: Health Canada, 2009) online: <http://www.hc-sc.gc.ca/fniah-spnia/pubs/promotion/_environ/2009_water-qualit-eau-canada/index-eng.php>.

First Nations' communities contending with pervasive poor water quality on reserves.

The greatest challenge of the s 15 analysis is the fact that there is no single law which categorically excludes First Nations reserve communities from its protection. Instead, there is a national network of laws which provides clean drinking water to all Canadians—from residents in cities and towns big and small to inmates, passengers on cruise ships and employees working on Aboriginal reserves—with one glaring exception: Aboriginal peoples living on reserves. While the courts have not considered a case with similar facts, this paper argues that the *Charter*'s equality protections extend to the full range of government action (and inaction) regardless of whether the action stems from one law, regulation or policy, or a set of laws that, acting together, creates discrimination. An interpretation that would limit its protections based on a rigid, formalistic interpretation of the word "law" in the section would not only run counter to the interpretations of the section in recent decisions, but more importantly it would run afoul of the *Charter*'s purpose of promoting substantive equality.

The paper is organized as follows. The first section briefly discusses the factual basis for the s 15 analysis. While there is a wealth of information and analysis about the situation, this paper offers only what is necessary for the s 15 analysis. The author refers readers to the many resources which provide more fulsome accounts for additional background.[4] The second section offers a brief overview of s 15, and notably its purpose of promoting substantive equality. The rest of the paper consists of a s 15 analysis, which follows the outline of the two-part test established in Supreme Court jurisprudence.

I. Drinking Water on First Nations Reserves

Substandard drinking water on First Nations reserves is a historical problem[5] that has not significantly improved with

4. See *supra* note 1.

5. Reading et al, *supra* note 1 at 3. In the 1950s, a Manitoba doctor identified access to safe drinking water as the most pressing problem facing First Nations Communities. *Ibid*.

time. First Nations' homes are 90 times more likely than other Canadian homes to be without running water.[6] The incidence of water-borne diseases in First Nation communities is several times higher than that of the general population.[7] As of January 2013, there were 113 drinking water advisories in First Nations communities across Canada, many of these long-lasting.[8] A national survey of the water and wastewater systems in on-reserve communities across Canada conducted in 2011 found that nearly two thirds of the systems were at high or medium risk.[9] A decade ago, only 22% of First Nations' water systems received the high risk rating.[10] The Commissioner for Environment and Sustainable Development's 2005 report on *Drinking Water in First Nations Communities* offers a broad overview of the situation as it existed at the time across the country.[11] The situation has garnered international criticism, with some

6. United Nations, Department of Economic and Social Affairs, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples* (New York: United Nations, 2009) at 25.

7. *Implementation of the International Covenant on Economic, Social and Cultural Rights: Addendum to the Fourth Periodic Reports Submitted by State Parties, Canada*, UNESCOR, 19th Sess, UN Doc E/C.12/4/Add.15 (2004) at 84.

8. See Health Canada, *Drinking Waste and Wastewater—First Nations and Inuit Health Canada—How Many First Nation Communities Are Under a Drinking Water Advisory?* (31 January 2013) online: Health Canada <http://www.hc-sc.gc.ca/fniah-spnia/promotion/public-publique/water-eau-eng.php#how_many>. See also Shum et al, *supra* note 1 at 92.

9. This analysis of risk is based on systems management risk, not water quality or safety. In other words, it is not meant to state that two thirds of water systems have poor or unsafe water quality, only that they are at risk of such. See Neegan Burnside, *National Assessment of First Nations Water and Wastewater Systems: National Roll-Up Report Final* (Orangeville, ON: AANDC, April 2011) online: <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/enr_wtr_nawws_rurnat_rurnat_1313761126676_eng.pdf> [*National Assessment*]. The report states that 60% of the risk is linked with operation and maintenance, operator qualification, and record keeping.

10. High risk rating was defined as being in need of immediate corrective action which varied from implementing a maintenance plan to hiring certified operators to source protection measures. However, in the 2011 AADNC National Assessment, 61% of the high risk rating communities received the rating because of bacteriological contamination. *National Assessment*, *ibid* note 9 at 23.

11. *CESD*, *supra* note 1, n 21.

advocating that Canada's actions are inconsistent with human rights that implicitly recognize a right to safe water.[12]

I will not focus in this paper on the many complexities (geo-spatial, political, cultural, economic, social) surrounding the issue of providing water to First Nations on reserve. While these are important issues and relevant considerations for evaluating the costs of a remedy, there is a lot of excellent scholarship on the topic to which readers are referred.[13] As noted earlier, the purpose of this paper is to clarify the application of s 15. I leave the question of whether it would be desirable for a given group or groups to use the *Charter* to seek a remedy to the wisdom of those communities.

II. THE *CHARTER*'S EQUALITY GUARANTEE

The equality rights section of the *Canadian Charter of Rights and Freedoms*[14] has generated a great deal of litigation since it came into force on 17 April 1985. The Supreme Court of Canada's first interpretation of s 15 in *Andrews v Law Society of British Columbia*[15] made it clear that the section is

12. See *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCR, 36th Sess, UN Doc E/C.12/CAN/CO/4 (Geneva, 1-19 May 2006) at 11(d) and 64, cited in MacIntosh, *supra* note 1.

13. Maya Basdeo & Lalita Bharadwaj, "Beyond Physical: Social Dimensions of the Water Crisis on Canada's First Nations and Considerations for Governance" (2013) 23:4 Indigenous Pol'y J 1; Robert J Patrick, "Uneven Access to Safe Drinking Water for First Nations in Canada: Connecting Health and Place Through Source Water Protection" (2011) 17:1 Health & Place 386; Chiefs of Ontario, *Water Declaration of the Anishinaabek Mushkegowuk and Onkwehonwe in Ontario* (Toronto: October 2008); Linda F Duncan & Marie-Ann Bowden, *A Legal Guide to Aboriginal Drinking Water: A Prairie Province Perspective* (Calgary: Alberta Law Foundation, 2009); Michael Mascarenhas, "Where the Waters Divide: First Nations, Tainted Water and Environmental Justice in Canada" (2007) 12:6 Local Environment 565; Maura Hanrahan, "Water Rights and Wrongs" (2003) 29:1 Alt J 31*; Boiling Point*, *supra* note 1; Melina Laboucan-Massimo, "Rights and Roots: Addressing a New Wave of Colonialism" in Leanne Simpson & Kiera L Ladner, eds, *This is an Honour Song: Twenty Years Since the Blockades* (Winnipeg, MB: Arbeiter Ring Publishing, 2010) 213; Ardith Walkem, "The Land Is Dry: Indigenous Peoples, Water, and Environmental Justice" in Karen Bakker, ed, *Eau Canada: The Future of Canada's Water* (Vancouver: UBC Press, 2007) 303; See also: Canadian Broadcast Corporation "8th Fire: The Tragedy of Pikangikum", *CBC* (15 December 2011) online: <http://www.cbc.ca/doczone/8thfire/2011/12/pikangikum.html>.

14. Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

15. [1989] 1 SCR 143 [*Andrews*].

meant to promote substantive rather than formal equality. While formal equality posits that equality is achieved if the law treats everyone alike, substantive equality recognizes that treating everyone alike could end up perpetuating discrimination and rather seeks to identify and address the roots of inequality.[16]

The Supreme Court has said that substantive equality is grounded in the "promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[17] Elaborating on this point, McIntyre J stated that the main consideration of s 15 "must be the impact of the law on the individual or the group concerned" and that the aim is to accord, "as nearly as may be possible, an equality of benefit and protection."[18]

The Supreme Court's emphasis on substantive equality has remained central in its numerous interpretations of s 15 since *Andrews*. In its two most recent pronouncements on s 15 as of the time of writing, the Supreme Court emphasized the need to analyse s 15 in a holistic, contextual way to see if the law creates discrimination. For instance, in *Withler v Canada (AG)* the Court stated:

> . . . the Court in the final analysis must ask whether, having regard to all relevant contextual factors, including the nature and purpose of the impugned legislation in relation to the claimant's situation, the impugned distinction discriminates

16. There has been extensive writing about what constitutes substantive equality in the context of the *Charter*. See e.g., Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22 Dal LJ 5; Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" in Sandra Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, ON: LexisNexis, 2010) 183; Jonnette Watson Hamilton & Daniel Shea, "The Value of Equality in the Supreme Court of Canada: Ends, Means or Something Else?" (2010) 29 Windsor Rev Legal Soc Issues 125; Sheila McIntyre, "The Equality Jurisprudence of the McLachlin Court: Back to the 70s" in Rodgers & McIntyre, *ibid*, 129; Fay Faraday, Margaret Ann Denike, M Kate Stepheson, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2009); Sandra Rodgers & Sheila McIntyre, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006).

17. *Andrews*, *supra* note 15 at 171.

18. *Ibid* at 165.

> by perpetuating the group's disadvantage or by stereotyping the group.[19]

In *Quebec (AG) v A*, Abella J for the majority reiterated the Court in *Withler*: "[a]t the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?"[20]

III. The Legal Benefit of Safe Drinking Water for First Nations Living on Reserves

I will now turn to the central question in this paper: *how would a s 15 claim by a First Nations community living on a reserve that does not have reliable access to clean drinking water be analyzed by the courts?*[21] In order to determine whether s 15 has been breached, the courts have developed a two-part test. Although the test has evolved through the jurisprudence, its main elements have remained intact. The version of the test currently being used by the Court was articulated by McLachlin CJ and Abella J in the *R v Kapp* decision as follows:

> A. Does the law create a distinction based on an enumerated or analogous ground?
>
> B. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[22]

A. Does the law create a distinction based on an enumerated or analogous ground?

The first part of the test has three distinct components, examined here in turn in order of the least to the most complex (given the facts in question).

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19. *Withler v Canada (AG)*, 2011 SCC 12, [2011] 1 SCR 396 at para 54 [*Withler*].

20. [2013] SCC 5 at 325 [*Quebec v A*] (citing *Withler*, *ibid* at 2).

21. This case study was inspired by the work of *CESD*, *supra* note 1 at 10, and David Boyd's excellent paper on the subject, *supra* note 1.

22. *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*], confirmed in *Quebec v A*, *supra* note 20.

1. Enumerated or analogous ground

To come within s 15, the claimant(s) need(s) to be part of one of the groups enumerated within s 15 or an analogous group. The enumerated groups include: race, national or ethnic origin, colour, religion, sex, age and disability (mental or physical). Several analogous grounds have been recognized by the courts on the basis that they involve immutable characteristics of an individual, or characteristics that are essentially unchangeable, except perhaps at great difficulty or cost.[23] These analogous grounds include citizenship, marital status and sexual orientation.[24] To date, social and economic rights have not been recognized as an analogous ground.[25]

Aboriginal people are protected against discrimination by s 15(1) as they fall within the enumerated grounds of race, nationality and ethnicity.[26] However, it is not all Aboriginal people who do not have reliable access to safe drinking water. It is specifically certain communities living on reserve that are most affected. Those living off reserve are protected by the drinking water laws and regulations of the provinces and territories. The Supreme Court of Canada in general does not recognize place of residence as an analogous ground, since it is not considered an immutable characteristic. However, the Supreme Court distinguished the situation of Aboriginal communities in the *Corbiere* decision, in which it found that

23. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13 [*Corbiere*]. See also Peter Hogg, *Constitutional Law of Canada*, 5th ed, Suppl vol 2 (Toronto: Carswell, 2007) at 55-22.

24. *Ibid* at 55-23-5, n 52.

25. See e.g., *R v Banks* (2007), 275 DLR (4th) 640 (Ont CA); Rosalind Dixon, "The Supreme Court of Canada and Constitutional (Equality) Baselines" (2013) 50 Osgoode Hall LJ 637. This a major issue for environmental justice claims more generally.

26. It is important to recognize that there is an important tension between a race-based characterization and a peoplehood self-determination based characterization of Aboriginal peoples. A critique of race-based characterizations (which group all Aboriginal peoples together) may detract from a post-colonial political analysis that recognizes each Indigenous nation as possessing political sovereignty as a political society or community regardless of race, see Larry Chartrand, "The Aboriginal Sentencing Provision of the Criminal Code as a Protected 'Other Right' under Section 25 of the Charter" (2012), 57 Sup Ct L Rev (2d) 389 at 393; See also Sébastien Grammond, "Disentangling 'Race' and Indigenous Status—The Role of Ethnicity" (2008) 33 Queen's LJ 487.

residence by Aboriginal peoples on reserve is an analogous ground because the choice to live on reserves is part of the identify and culture of the First Nations and not easily changeable.

The fact that not all Aboriginal communities living on reserves experience the problem is also not an obstacle to a s 15 claim. The Supreme Court ". . . has long recognized that differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated."[27] In other words, the fact that some Aboriginal groups living on reserve have access to clean drinking water does not preclude the ability of those who do not to make a s 15 claim. In my view, then, unless the Supreme Court reverses its reasoning, this part of the analysis—the need to prove that the affected people are part of an enumerated or analogous ground—would be easily satisfied.

2. Creates a distinction

Second, s 15 claimants must show that they have been treated differently than others who do not share the personal characteristic of the enumerated or analogous ground.[28] The question of proving a distinction inevitably engages the idea of comparison. Indeed, claimants have often produced evidence of a similarly situated person or group who—but for the immutable characteristics of the enumerated or analogous group—did not experience the distinction in order to prove discrimination. However, jurisprudence in both human rights and *Charter* equality cases has moved away from requiring a formal comparator group.[29] The courts have noted that requiring a formal comparator group in a mechanistic way could prove prejudicial to some claimants. For instance, in *Withler* the Court stated that "[i]t is unnecessary to pinpoint a particular group that precisely corresponds to the

27. *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 SCR 504 at para 76 [*Laseur*].

28. *Withler*, *supra* note 19 at paras 62-63.

29. See *Quebec v A*, *supra* note 20; *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360 [*Moore*].

claimant group" and that a claimant must simply show that "he or she [was] denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1)."[30]

The claimants in our case study would argue that by virtue of living on a reserve, their communities are carrying a burden—lack of a reliable source of safe drinking water—that other communities living off reserve do not bear. This has the effect of imposing a burden—physical, financial, psychological, cultural[31]—and significant disadvantage for these communities. The Court in *Withler* states that claimants can prove discrimination under s 15(1) by showing that the distinction "withholds or limits access to opportunities, benefits, and advantages available to other members of society."[32] It is not difficult to characterize the lack of consistently available safe drinking water in some communities as imposing a burden on the community (i.e. the need to boil or buy water) not experienced by others (in urban areas off reserve, for instance, they can turn on the tap and trust the regulators to ensure the water is safe to drink). Similarly, it is not difficult to characterize the situation as limiting access to a benefit or advantage available to others. Indeed, water is arguably the most basic human need.

A recent claim by First Nations Caring Society (FNCS) and the Assembly of First Nations under Canadian human rights legislation has many similarities to our case study. In that case, the applicants filed a complaint to the Canadian Human Rights Commission alleging that the Government of Canada under-funds child welfare services for on-reserve First Nation children. The Canadian Human Rights Tribunal dismissed the complaint on the basis that there could be no

30. *Withler*, *supra* note 19 at para 62.

31. Water is sacred within many Indigenous cultures and cultural ceremonies often include a water ceremony with important teachings about the place of water in the cosmology of Indigenous societies. See generally Native Counselling Services of Alberta, *Water — The Sacred Relationship,* online: <http://www.sacredrelationship.ca/>; Michael Blackstock, "Water: A First Nations' Spiritual and Ecological Perspective" (2001) 1:1 BC Journal of Ecosystems and Management 1.

32. *Withler*, *supra* note 19 at para 29, quoting *Andrews*, *supra* note 15 at 174-75.

adverse differential treatment in the provision of child welfare services to First Nations children living on reserve since there was no other group to compare them to. Upon judicial review, the Federal Court found this decision to be unreasonable, relying heavily upon *Charter* jurisprudence (notably *Withler*) to reject the notion that comparator groups are required to establish adverse differential treatment. The Court noted in particular that requiring comparisons of this nature to be made in the context of First Nations, "who receive services from the federal government that are not provided to other Canadians at the federal level" would not be reasonable, and would limit the ability of First Nations to seek protection of equality guarantees under human rights legislation or the *Charter*.[33]

In my view, it would not be difficult to prove a distinction based on the facts of the case study. Earlier difficulties that may have arisen due to the need to identify an exact comparator group no longer exist in the context of the Court's clarification that the claimant(s) must simply show that he or she was denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic included within s 15.

3. A distinction created by law

Third, the distinction must have been created by law. Given the Court's purposive approach to Charter interpretation,[34] it has interpreted the meaning of "law" very broadly, essentially deeming regulations, government programs, practices and activities that are executed pursuant to statutory authority as falling within its ambit. For instance, in *Lovelace v Ontario*[35] Iacobucci J said: "[s.] 15(1) scrutiny is not limited to distinctions set out only in legislation. Given the remedial

33. *Canada (Human Rights Commission) v Canada (AG)*, 2012 FC 445 at paras 335-37 [*First Nations Caring Society*], aff'd *Canada (AG) v Canadian Human Rights Commission*, 2013 FCA 75. See also *Quebec v A*, *supra* note 20, and *Moore*, *supra* note 29 (both affirming the general move away from formal comparator analysis in equality cases).

34. *Hunter v Southam Inc*, [1984] 2 SCR 145.

35. 2000 SCC 37, [2000] 1 SCR 950 at para 56 [*Lovelace*].

purpose of s. 15, we must have a broad understanding of how 'law' in s. 15(1) is defined."[36]

Determining what is the discriminatory "law" in question is the most challenging part of the analysis, because there is no single law which supplies clean drinking water on a discriminatory basis. Rather, there is a legal framework for the provision of safe drinking water that has a glaring hole in it. With the exception of First Nations living on reserves, everyone living in the provinces and territories across the country is protected by a set of provincial and territorial laws regulating to drinking water quality, and people living, working or traveling on land or vessels under federal jurisdiction are protected by a series of federal laws providing access to safe drinking water. Aboriginal people living on reserve are the only identifiable group not afforded this same legal protection.[37] This is, in my view, a startling omission in the legal framework for drinking water that is discriminatory. However, most equality jurisprudence deals with a single instrument or government decision, rendering this a novel part of the analysis.

In my view, the jurisprudence supports a broad interpretation of the requirement for a "law," and several arguments outlined below justify the finding that the legal framework for the provision of water is discriminatory for those First Nations communities living on-reserve that do not have consistent access to clean water. Limiting the equality protections of the *Charter* to discrimination created by a single legal instrument, versus a framework of legislation, would be formalistic and run counter to the Supreme Court's consistent interpretations in favour of substantive equality.

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36. *Ibid*. See also *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570 at 585) [*Douglas/Kwantlen*].

37. It is worth noting that rural communities often source their drinking water from wells, rather than municipal drinking water sources. However, these communities still benefit from the provincial regulatory framework for safe drinking water which requires permits before building a well, offers free analysis of the water's potability, governs the licensing of well technicians, and gives the regulator discretion to refuse to issue or renew well construction permits if, for instance, there is likely to be a danger to the health or safety of any person. See *Ontario Water Resources Act*, RSO 1990, c O.40 ss 35-50, and its accompanying regulation, *Wells Regulation*, RRO 1990, Reg 903.

a. "Law" interpreted broadly

I will return briefly to the Court's broad interpretation of the world "law" in s 15(1).[38] When considering the application of s 15(1) to a university's mandatory retirement policy in *McKinney*, LaForest J stated for the majority:

> For section 15 of the *Charter* to come into operation, the alleged inequality must be one made by "law." The most obvious form of law for this purpose is, of course, a statute or regulation. It is clear, however, that it would be easy for government to circumvent the *Charter* if the term law were to be restricted to these formal types of law-making. It seems obvious from what McIntyre J had to say in the *Dolphin Delivery* case that he intended that exercise by government of a statutory power or discretion would, if exercised in a discriminatory manner prohibited by s. 15, constitute an infringement of that provision.[39]

In a dissenting judgment (on another point) in the same decision, L'Heureux-Dubé J stated that:

> The term "law" in s. 15 should be given a liberal interpretation encompassing both legislative activity and policies and practices even if adopted consensually. The guarantee of equality applies irrespective of the particular form the discrimination takes. Discrimination, unwittingly or not, is often perpetuated through informal practices. Section 15 therefore does not require a search for a discriminatory "law" in the narrow context but merely a search for discrimination which must be redressed by the law.[40]

b. "Law" interpreted purposefully

The Court's interpretation of the word "law" in s 15(1) has also been clearly purposeful. At its core, the provision's purpose is to redress discrimination against vulnerable groups by government. Wilson J emphasizes this point in

38. See for instance *Lovelace*, *supra* note 35.
39. *McKinney v University of Guelph*, [1990] 3 SCR 229 at 276 [*McKinney*].
40. *Ibid* at 240 [emphasis added].

Douglas/Kwantlen, quoting from L'Heureux-Dubé' Js comments in *McKinney*:

> I believe, however, that on a purposive interpretation of s 15 the guarantee of equality before and under the law and equal protection and benefit of the law also constitutes a directive to the courts to see that discrimination engaged in by anyone to whom the *Charter* applies is redressed whether it takes the form of legislative activity, common law principles or simply conduct. In other words, s. 15 is, in effect, declaratory of the rights of all to equality under the justice system so that, if an individual's guarantee of equality is not respected by those to whom the Charter applies, the courts must redress that inequality.[41]

Emphasizing the purposive approach to interpreting s 15(1), L'Heureux-Dubé J states: "[g]iven that discrimination is frequently perpetuated, unwittingly or not, through rather informal practices, it would be altogether inconceivable that they should be treated as insufficient to trigger the application of s. 15."[42] Similarly, it would be inconceivable to hold that discriminatory treatment of a group protected by s 15(1) be allowed because they were omitted from the scope of a legal framework providing benefits for all but them, rather than a single instrument.

c. Omissions from law and section 32 of the Charter

The Court has confirmed that omissions from the law will be redressed by s 15.[43] However, to date, the Supreme Court has only confronted an omission from a particular law or program.[44] For instance, in *Vriend v Alberta*, provincial human

41. *Douglas/Kwantlen*, *supra* note 36 at 614 [emphasis added].
42. *Ibid* at 387-88.
43. *Vriend v Alberta*, [1988] 1 SCR 493 [*Vriend*].
44. See e.g., *Brooks v Canada Safeway Limited*, [1989] 1 SCR 1219 at 1240, which involved a claim under provincial human rights legislation that an employee benefits program was discriminatory on the basis that it denied certain benefits to pregnant employees. One of the employer's arguments was that its plan was not discriminatory, but merely a decision to compensate some risks, but exclude others. The Supreme Court of Canada rejected this argument, noting that underinclusion may simply be a back-handed way of permitting discrimination.

rights legislation was determined to be under-inclusive because it did not include sexual orientation as a ground for discrimination. The respondents in that case had argued that omissions are not subject to *Charter* scrutiny because of s 32(1) of the *Charter*, which states that the *Charter* applies to the Parliament and government of Canada and to the legislature and government of each province in respect of matters within their respective authorities. Cory J identified the threshold test of s 32 as:

> demand[ing] only that there is some "matter within the authority of the legislature" which is the proper subject of a *Charter* analysis. At this preliminary stage no judgment should be made as to the nature or validity of this "matter" or subject. Undue emphasis should not be placed on the threshold test since this could result in effectively and unnecessarily removing significant matters from a full *Charter* analysis.[45]

Further, Cory J elaborated that "the language of s. 32 does not limit the application of the *Charter* merely to positive actions encroaching on rights or the excessive exercise of authority."[46] He emphasized that it is only within the context of a s 15 analysis that the courts can interpret whether the legislature's "silence" on a particular question is neutral: "Neutrality cannot be assumed. To do so would remove the omission from the scope of judicial scrutiny under the *Charter*."[47] In response to the argument that a deliberate choice not to legislate should not be considered government action and thus warrant *Charter* scrutiny, Cory J emphasized that "[t]here is nothing in that wording to suggest that a positive act encroaching on rights is required; rather the subsection speaks only of matters within the authority of the legislature."[48] Quoting an article by Dianne Pothier, Cory J writes that "s. 32 is worded broadly enough to cover positive obligations on a

45. *Vriend*, *supra* note 43 at para 52.
46. *Ibid* at para 55.
47. *Ibid* at para 57.
48. *Ibid* at para 60 [emphasis in original].

legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority."[49]

Cory J sums the Court's position up when he states:

> If an omission were not subject to the *Charter*, underinclusive legislation which was worded in such a way as to simply omit one class rather than to explicitly exclude it would be immune from *Charter* challenge. If this position was accepted, the form, rather than the substance, of the legislation would determine whether it was open to challenge. This result would be illogical and more importantly unfair.[50]

In sum, the case-law seems to support Peter Hogg's viewpoint that the word "law" in s 15(1) "does not have the effect of excluding anything from the application of s. 15," but that s 15 applies to the same range of governmental action that is defined in s 32, like the other *Charter* rights.[51]

d. Relevant "law" construed as the regulatory framework versus one particular law

Returning to the facts of our case study, how would the courts interpret the word law in the context of our facts? A court would need to be willing to consider a regulatory framework as the subject of evaluation, rather than one provision or statute. In my view, this approach would be supportable by the Supreme Court's s 15 jurisprudence, and notably its broad and purposeful interpretation of what constitutes "law" in s 15, as discussed earlier. It would be further strengthened by the *Little Sisters* decision in which the Court considered several provisions of the *Customs Act* as the relevant statutory framework.[52] In *Ontario Home Builders' Assn v York Region Board of Education*, the Court examined the constitutionality of education development charges (EDCs) and noted that "EDCs are indeed part of a comprehensive and integrated regulatory

49. *Ibid*, citing from Dianne Pothier, "The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996) 7 Const Forum 113 at 115.

50. *Ibid* at para 61.

51. Hogg, *supra* note 23 at 55-11.

52. *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120 [*Little Sisters*].

scheme, namely, the entirety of planning, zoning, subdivision and development of land in the province."[53] Although it did not have to proceed to a s 15(1) analysis, the Court appeared undeterred by the fact that the charges were part of a broad regulatory scheme, rather than one statute.

Three ways to frame the regulatory framework

In the case study, a court could choose to construe the relevant legal framework in several different ways. It could focus on (a) the federal set of laws that govern drinking water for areas under federal jurisdiction, (b) one particular federal drinking water policy, or (c) the entire legal framework of provincial, territorial and federal laws that govern drinking water in Canada. An argument could also be made that the federal government failed to act at all (d).

Just before examining each in turn, it is worth noting that while responsibility for ensuring safe drinking water is shared between the federal and provincial governments, the provincial and territorial governments have legislative responsibility for providing safe drinking water to the majority of the Canadian public. The federal government is responsible for providing access to safe drinking water in areas under federal jurisdiction, which includes military bases, national parks, federal facilities such as correctional facilities, passenger conveyances such as trains, airplanes and cruise ships travelling interprovincially or internationally, and of course First Nations reserves.[54] The federal government also develops, in partnership with the provincial and territorial governments, the *Guidelines for Canadian Drinking Water Quality* which set out standards for safe drinking water in Canada.

(a) The federal framework for drinking water

What would the s 15 analysis look like if the federal regulatory framework for the provision of safe drinking water

53. *Ontario Home Builders' Assn v York Region Board of Education*, [1996] 2 SCR 929 at para 57.

54. See *CESD*, *supra* note 1, *Chapter 4 – Safety of Drinking Water: Federal Responsibilities* at 1.

was considered the "law" in question? The federal government has created a patchwork of laws, including provisions in the *Canada Labour Code*, the *Occupational Safety and Health Regulations*, and the *Potable Water Regulations for Common Carriers* under the *Department of Health Act*, that ensure that people under federal jurisdiction have access to clean drinking water (defined as water that meets Canadian drinking water quality standards).[55] This federal regulatory framework provides safe drinking water to inmates, employees working on federally managed land, passengers on planes, trains and ships, and all others under federal jurisdiction except Aboriginal communities living on reserves. First Nations living on reserve appear to be the only group under federal jurisdiction that do not have the benefit of regulatory protection for safe drinking water. The Commissioner for Environment and Sustainable Development's report highlights the absurdity of this omission when it points out that Health Canada has installed small water treatment units in areas where federal employees were working on First Nations reserves where there was unsafe drinking water, yet the Aboriginal people on those same reserves did not benefit from the same treatment. The courts would need to take a very narrow and formalistic approach to s 15(1) to find that the form of the legal protection (i.e. a set of laws providing protection for people under federal jurisdiction, versus one single statute or provision), or absence of it, removes it from s 15(1) scrutiny.

(b) One federal policy

Another option would be for the courts to interpret the relevant law or policy as being the federal policy entitled *Guidance for Providing Safe Drinking Water in Areas of Federal Jurisdiction*.[56] Prepared by the Interdepartmental Working Group on Drinking Water, this guidance document is said to be applicable to "all federal government departments,

55. *CESD*, *supra* note 1 at 10.

56. Health Canada, Interdepartmental Working Group on Drinking Water, *Guidance for Providing Safe Drinking Water in Areas of Federal Jurisdiction,* Version 1 (Ottawa: Health Canada, 23 August 2005).

agencies and responsible authorities operating facilities in areas of federal jurisdiction that provide drinking water to consumers," with consumers including federal government employees, inmates, visitors to federal lands and facilities, and residents of First Nations communities.[57] The policy notes that "[t]he goal of the federal drinking water program is to protect the health of consumers by providing them with a clean, safe and reliable supply of drinking water."[58] It states that "[a]s a matter of policy, the onus for making sure these supplies are safe rests with each department."[59] The purpose of the policy is to "give clear, consistent guidance on how to implement the *Guidelines for Canadian Drinking Water Quality* and the *Canada Occupational Health and Safety Regulations* of the *Canada Labour Code*."[60] It mandates that:

> [a]ll affected departments and authorities are encouraged to at least meet the minimum guidance set out in this document in order to protect the health of the people they serve. In some cases, it may be preferable for a department to meet more stringent objectives than those detailed in the document. This decision is left to the discretion of each department or responsible authority.[61]

While this is a policy and not regulation, its goal is to ensure that people under federal jurisdiction meet the minimum standards in the guidance policy in order to provide a source of reliable drinking water. The Court has been clear that it considers both the purposes and the effects of laws in potentially creating discrimination, and the practical effect of this policy is to satisfy its goal for those it covers except many First Nations living on reserves. This would seem to be yet another example of this group not receiving equal protection or equal benefit of the policy. To hold otherwise would be to ignore the repeatedly broad and purposeful interpretations by the Supreme Court of s 15(1). Recall La Forest J's comment that:

57. *Ibid* at 2.
58. *Ibid* at 13.
59. *Ibid*.
60. *Ibid* at 14.
61. *Ibid* at 15.

> . . . it would be easy for government to circumvent the *Charter* if the term law were to be restricted to these formal types of law-making. It seems obvious from what McIntyre J had to say in the *Dolphin Delivery* case that he intended that exercise by government of a statutory power or discretion would, if exercised in a discriminatory manner prohibited by s 15, constitute an infringement of that provision.[62]

In *Auton* the Court held that the role of s 15(1) is, in part, to ensure that "when governments choose to enact benefits or burdens, they do so on a non-discriminatory basis."[63] Providing reliable access to safe drinking water is an exercise of statutory power exercised by the government in a discretionary manner.

(c) The full national framework for drinking water

A final option for construing the "law" would be for the court to consider the full national regulatory framework that provides the benefit of safe drinking water to Canadians. In this context, the court would consider the federal regulatory and policy framework described above, adding to it the comprehensive sets of provincial and territorial drinking water laws.[64] In this context, the argument would be that First Nations on reserves are excluded from the legally enshrined benefit of safe drinking water provided to all other Canadians by an "otherwise comprehensive network of laws".[65] In *Eldridge*, a case concerning the right of deaf clients to access services at a hospital, the Court noted that s 15(1) makes no distinction between laws that impose unequal burdens ("equal protection" of the law) and those that deny equal benefits ("equal benefit" of the law). In *Lovelace*, the Supreme Court noted that:

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62. *McKinney*, *supra* note 39 at 277.

63. *Auton (Guardian ad litem of) v British Columbia (AG)*, 2004 SCC 78, [2004] 3 SCR 657 at 659 [*Auton*].

64. See e.g., Ontario's regulatory framework for drinking water includes source protection (*Clean Water Act, 2006*, SO 2006, c 22), protection against pollutants (*Ontario Water Resources Act*, *supra* note 37) and regulation of drinking water treatment systems (*Safe Drinking Water Act, 2002*, SO 2002, c 32).

65. Boyd, *supra* note 1 at 114.

> . . . this Court has long recognized that the purpose of s. 15(1) encompasses both the prevention of discrimination and the amelioration of the conditions of disadvantaged persons . . . Accordingly, there has been an equally longstanding recognition that an underinclusive ameliorative law, program or activity may violate the constitutional equality interest.[66]

In its defense against a s 15(1) claim, the government would likely argue that there are complex policy reasons why First Nations on reserves do not have the same legal rights to safe drinking water that other Canadians do, including the remote locations of many reserves, the challenges of servicing these areas and the politics of self-governance by First Nations. While these may be legitimate points, they are best considered in a s 1 analysis. As La Forest J notes in *Eldridge*, while there may be policy considerations that limit the "government's responsibility to ameliorate disadvantage in the provision of benefits and services, those policies are more appropriately considered in determining whether any violation of s 15(1) is saved by s 1 of the *Charter*."[67]

(d) Failure to act

If the courts were unwilling to characterize the "law" as one of the regulatory frameworks for drinking water proposed above, a s 15 challenge could still be brought on the grounds that the federal government failed to act in such a way that contributed to discriminatory treatment of First Nations living on reserve. There are only subtle differences between omissions from a single law, what might be considered gaps in the regulatory framework, or a failure to act at all. While the Supreme Court has yet to directly address a case of failing to act, comments in *obiter* have left the door open to such an interpretation: "It is also unnecessary to consider whether a government could properly be subjected to a challenge under s. 15 for failing to act at all, in contrast to a case such as this where it acted in an underinclusive manner."[68] Leaving open the possibility that a government *could* be challenged for

66. *Lovelace*, *supra* note 35 at para 60 [emphasis added].
67. *Eldridge v British Columbia (AG),* [1997] 2 SCR 624 at 77 [*Eldridge*].
68. *Vriend*, *supra* note 43 at para 63 [emphasis in original].

failing to act, Cory J points to examples where certain provisions of the *Charter*, such as the minority language guarantees of s 23, have been interpreted to require the government to take positive action to safeguard those rights.[69] Cory J also cites Wilson J when she says that "[i]t is not self-evident to me that government could not be found to be in breach of the *Charter* for failing to act"[70] and L'Heureux-Dubé J's comments for the majority in *Haig v Canada*[71] noting that: "a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of s 15."[72]

In fact, the Supreme Court has long recognized that failures to act are actionable in the same way that overt acts of discrimination are. As noted earlier, Cory J notes that there is nothing in the wording of s 32 of the *Charter* to suggest that positive acts are required, but that the *Charter* applies to all matters within the authority of the legislature.[73]

Summary

Regardless of how the argument is framed, the reality is that Canadian law, policy and practice provide a legislative framework for safe drinking water to virtually all Canadians, *except* First Nations living on reserves. As David Boyd states, ". . . the roughly half a million Canadians who live on reserves are without the legal guarantee of water quality enjoyed by the other thirty-four million Canadians."[74] The bottom line is that several First Nations communities living on reserves are not receiving the benefit of clean and safe drinking water that is provided to other Canadians by law. The fact that the legal framework which provides this clean drinking water to the majority of Canadian is a patchwork of laws, regulations and policies, versus one particular law, should not be a ground for declaring that s 15 does not apply to this situation. To apply a

69. *Ibid*, citing *Mahe v Alberta,* [1990] 1 SCR 342 at 393 [*Mahe*]; *Reference re Public Schools Act (Man.),* s 79(3), (4) and (7), [1993] 1 SCR 839 at 862-63 and 866.

70. *Vriend*, *supra* note 43 at para 64, citing *McKinney*, *supra* note 39 at 412.

71. [1993] 2 SCR 995 [*Haig*].

72. *Ibid* at 1041.

73. See discussion, *supra* note 49 and accompanying text.

74. Boyd, *supra* note 1 at 114.

strict and formalistic interpretation of the word "law" in this context would run counter to s 15's purpose of promoting substantive equality and to render the *Charter*'s equality guarantee meaningless for one of the most disenfranchised groups in Canada.

B. DOES THE DISTINCTION CREATE A DISADVANTAGE BY PERPETUATING PREJUDICE OR STEREOTYPING?

Analysis is flexible, purpose-driven and contextual

The second part of the *Kapp* test seeks to determine the impact of the distinction created, and notably to see if it creates a disadvantage for the claimant. A decade after *Andrews*, the Supreme Court in *Law* emphasized the impact of an impugned law on the "human dignity" of members of the claimant group, and elaborated four contextual factors for assessing the impact on human dignity: (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected.[75]

While the Court continues to recognize human dignity as an essential value underlying s 15, it has retreated from applying these four contextual factors in *Law* as a legal test to be formally applied noting that the analysis is flexible, purpose-driven and contextual.[76] In *Kapp*, the Court noted that these factors were meant "as a way of focusing on the central concern of s. 15 identified in *Andrews*—combating discrimination, defined in terms of perpetuating disadvantage and stereotyping."[77]

Similarly, while the Court continues to use the concepts of prejudice and stereotyping in this part of the test, the

75. *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 62-75 [*Law*]. Numerous critiques of the human dignity test have been raised. See e.g., Denise G Réaume, "Discrimination and Dignity" (2003) 63 La L Rev 645.

76. *Kapp*, *supra* note 22 at 20 and 24.

77. *Ibid* at 24.

majority in *Quebec v A* emphasized that the use of these terms in *Kapp* was not meant to create a new test. Rather, they are two indicia that help to determine whether the challenged law or government practice violates the norm of substantive equality in s 15.[78] Abella J states that *Kapp* and *Withler* do not establish an additional requirement on s 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them, but rather that the focus of the Court must be on the discriminatory conduct that s 15 seeks to prevent.[79]

The Court's flexible approach to this second branch of the test has also meant that the context of a particular case is important in determining what factors will be considered. It has also noted that, factors additional to those listed may be considered. As Wilson J said in *Turpin*:

> In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context.[80]

In *Withler*, the Court emphasized once more the need for a purpose-driven analysis:

> Whether the s. 15 analysis focuses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.[81]

In that same decision, the Court pointed to historical disadvantage as a relevant factor:

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78. *Quebec v A*, *supra* note 20 at para 435. See also Professor Moreau's critique of the use of prejudice and stereotyping in the *Kapp* test: Sophia Moreau, "*R v Kapp:* New Directions for s. 15" (2009) 40:2 Ottawa L Rev 283.

79. *Quebec v A*, *supra* note 20 at paras 327-28.

80. *R v Turpin*, [1989] 1 SCR 1296 at 1331 [emphasis added].

81. *Withler*, *supra* note 19 at para 37.

> [h]istorical or sociological disadvantage may assist in demonstrating that the law imposes a burden or denies a benefit to the claimant that is not imposed on or denied to others. The focus will be on the effect of the law and the situation of the claimant group.[82]

Applying the contextual factors to the case at hand

The first and fourth contextual factors identified in *Law* are the most relevant to this case, since they deal with disadvantage (versus the second, which addresses stereotyping, and the third, which is relevant to ameliorative programs) in s 15(2). The first factor addresses pre-existing disadvantage. It is difficult to think of a group that has been more historically disadvantaged in Canada than Indigenous peoples. As Boyd underlines:

> The Royal Commission on Aboriginal Peoples described countless examples that demonstrate pre-existing disadvantage, vulnerability, stereotyping or prejudice, ranging from residential schools and denial of the right to vote, to violations of treaty commitments and governments' ongoing failure to recognize or respect Aboriginal title and rights.[83]

The courts have recognized this numerous times, stating in *Kapp* that "[t]he disadvantage of aboriginal people is indisputable."[84] In *Corbiere*, the Court characterized the historical disadvantage as a "legacy of stereotyping and prejudice against Aboriginal peoples"[85] and in *Lovelace*, the Court noted that "Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health and housing."[86] As much as these problems should never been allowed to transpire, the fact is that Aboriginal peoples in Canada must surmount a legacy of pre-existing disadvantages, stereotyping, prejudice, and vulnerability.

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82. *Ibid* at para 64 [emphasis added].
83. Boyd, *supra* note 1 at 115-16.
84. *Kapp*, *supra* note 22 at para 59.
85. *Corbiere*, *supra* note 23 at para 66.
86. *Lovelace*, *supra* note 35 at para 69.

The fourth factor in *Law* examines the nature and scope of the interest affected. The court is more likely to find discrimination in the context of fundamental interests, such as liberty or physical integrity.[87] Safe drinking water is one of the most basic human needs for survival, and lack of access to it undermines health,[88] dignity and standard of living, increases the cost of living, and creates physiological and psychological stress. It can impede one's ability to care for one's family, to have adequate personal hygiene, and otherwise to be on an equal playing field with other Canadians, such as in the labour market.[89]

Although it is not necessary to prove that prejudicial or stereotyping attitudes exist, an argument could be made for both in the context of the case study. Abella J for the majority in *Quebec v A* defined prejudice as "the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member."[90] One can imagine that the limits created by lack of access to safe water (i.e. health problems, financial challenges due to having to purchase water, hygiene issues) could be inappropriately used to buttress pejorative attitudes. Similarly, the effects of not having access to safe water could strengthen stereotypes, defined by Abella J as "a disadvantaging attitude . . . that attributes characteristics to members of a group regardless of their actual capacities."[91] Discriminatory conduct can reinforce these negative attitudes, since "the

87. Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedom,* 4th ed (Toronto: Irwin Law, 2009) at 332.

88. See Patrick, *supra* note 13; Merrell-Ann Phare, *Restoring the Lifeblood: Water, First Nations and Opportunities for Change* (Toronto: Walter and Duncan Gordon Foundation, 2011); Donna Atkinson et al, "Health Inequities in First Nations Communities and Canada's Response to the H1N1 Influenza Pandemic" in Canadian Institutes of Health Research – Institute of Population and Public Health, *supra* note 1, 153, and Nicholas B King, "Case Discussion in Response to Health Inequities in First Nations Communities and Canada's Response to the H1N1 Influenza Pandemic" in Canadian Institutes of Health Research – Institute of Population and Public Health, *ibid*, 158 for a discussion of the vulnerability of First Nations communities to the H1N1 pandemic.

89. See MacIntosh, *supra* note 1 noting that without safe water, basic hygiene practices that underpin health are hampered, and the risks of outbreaks of communicable diseases increase.

90. *Quebec v A*, *supra* note 20 at abstract.

91. *Ibid* at para 326.

very exclusion of the disadvantaged group . . . fosters the belief . . . that the exclusion is the result of 'natural' forces."[92]

In sum, it would be difficult to argue that failing to provide reliable access to safe drinking water for First Nations living on reserve does not perpetuate the historical disadvantage faced by First Nations in Canada, or that it would not add to prejudicial or stereotypical attitudes. Given that water is such a basic human need, the effect of the discriminatory treatment is to give a historically disadvantaged group a serious burden to carry that makes it even more difficult to enjoy equal opportunities and benefits.

Perhaps it is best to sum up the s 15 analysis with Abella J's words for the majority in the most recent Supreme Court analysis of the Charter's guarantee of equality:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.[93]

C. SECTION 1 JUSTIFICATION

The rights guaranteed by the *Charter* are not absolute. If the court found that First Nations on reserves did not receive equal protection or benefit of the law under s 15(1), as I think they would, the government would still have the opportunity to justify this discrimination under s 1. The burden of proof for s 1 is on the government, which has to prove on a balance of probabilities that the discrimination was prescribed by law and justifiable in a free and democratic society.[94]

92. *Ibid*, citing *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1139 [*Action travail des femmes*].

93. *Ibid* at para 332.

94. *Ibid* at para 333, *emphasizing* that the choice of the defendant to confer (or not) a benefit is to be addressed in s 1.

1. Prescribed by law

Although it has not featured prominently in the jurisprudence, the requirement that limits be prescribed by law is quite important. It signals that arbitrary or discretionary limits are subject to the scrutiny of the courts, and that government officials who exercise discretion in applying and enforcing the law must do so in a way that is accountable in a democratic society. In other words, the government cannot justify infringing *Charter* rights unless the law clearly authorizes it to do so.[95] Sharpe and Roach argue that there are important reasons to have a rigorous approach to this requirement in s 1, noting that "limits on *Charter* rights should be clearly stated to encourage democratic debate and accountability about such limitations."[96]

Can an omission from a regulatory framework or a failure to act at all be a limit prescribed by law? A government's failure to provide drinking water to First Nations living on reserve could not, in my view, be reasonably characterized as a limit prescribed by law. The federal government might argue that it has jurisdiction over Aboriginal communities through the Constitution, and that it thus has legislative authority over the situation. However, there is still no act prescribed that governs the conduct. In my view, this means that the s 1 justification would not be available for the government. However, the courts have not assigned this part of s 1 a great deal of importance, so it is worth proceeding to the rest of the s 1 analysis.

2. Demonstrably justifiable in a free and democratic society

The courts established in *R v Oakes*[97] the test for determining whether a limit is demonstrably justifiable in a free and democratic society, and this test has largely remained intact. The *Oakes* test requires that:

95. See *R v Therens*, [1985] 1 SCR 613; *Little Sisters*, *supra* note 52.
96. Sharpe & Roach, *supra* note 87 at 66.
97. [1986] 1 SCR 103 [*Oakes*].

(1) the objective of the limiting measure be important enough to warrant overriding a *Charter* right (a pressing and substantial objective);

(2) the means chosen to attain this purpose must be reasonably and demonstrably justifiable in a free and democratic society, which means that:

a. there must be a rational connection between the limit on the right and the legislative objective;

b. the limit should impair the *Charter* right as little as possible; and,

c. there should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.[98]

a. A pressing and substantial objective

Most of the s 1 jurisprudence centers around discriminatory treatment created by a law or program that applies unevenly. While there is far less jurisprudence dealing with omissions, the case of *Vriend* offers some insights. In the context of an omission, Iacobucci J in *Vriend* held that it is the objective of the omission that must be considered in a s 1 analysis, and that this omission must be considered in the context of the broader scheme of the legislation in question.[99] This part of the *Oakes* test was interpreted by the Court as requiring more than an explanation why the government chose to deny the right—it must be pursuing some objective.[100] The courts are at liberty to consider the effects of the omission in this part of the analysis. In the case at hand, the effects of the omission are clear and very negative. It would be rather preposterous for the government to justify excluding First Nations from drinking water protection as a pressing and substantial objective of the government.

The government would likely try to justify the omission on the grounds that it is costly and complicated to extend

98. Sharpe & Roach, *supra* note 87 at 68. See also *Vriend*, *supra* note 43 at para 63, citing *Mahe*, *supra* note 69 at 393, quoting *Egan v Canada*, [1995] 2 SCR 513 [*Egan*] and *Eldridge*, *supra* note 67 with approval.

99. *Vriend*, *supra* note 43 at paras 110–11.

100. *Ibid* at para 114.

this protection to First Nations on reserves. However, the Supreme Court has made it clear that budgetary considerations are not a pressing and substantial objective that justifies infringing *Charter* rights. The Court in *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* held that budgetary considerations in and of themselves are not a pressing and substantial objective for the purposes of s 1:

> . . . budgetary considerations do not count as a pressing and substantial objective for s. 1. In *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177, at p 218, Wilson J speaking for the three members of the Court who addressed the *Charter* (including myself), doubted that "utilitarian consideration[s] . . . [could] constitute a justification for a limitation on the rights set out in the *Charter*." The reason behind Wilson J's skepticism was that "the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so." I agree.[101]

Relatedly, the Court has made it clear that explanations, including budgetary ones, are insufficient.[102] Again in *Vriend*, the Court distinguished between the government offering an explanation for the omission, versus demonstrating that the omission is *necessary* to meet a pressing and substantial objective of the government.[103]

Even if budgetary considerations were to be accepted as justification for infringing *Charter* rights, there is an argument to be made that the budget for providing First Nations with drinking water is available. For instance, Schrecker questions the ethics of using resource allocation as a justification for delaying the provision of safe drinking water for First Nations. He acknowledges that the costs are high—pointing to estimates of a one-time $1.2 billion price tag for providing safe water and wastewater (as per the official protocols), with annual operating costs of $18.7 million, and an even heftier price-tag for meeting future servicing needs over the next 10 years ($4.7 billion). However, he proposes that this must

101. [1997] 3 SCR 3 at para 281. See also *Laseur*, *supra* note 27 at para 109; *Schachter v Canada*, [1992] 2 SCR 679 at 709 [*Schachter*] [emphasis added].

102. *Vriend*, *supra* note 43 at para 114.

103. *Ibid*.

be set in the context of the $230 billion in total federal government spending in a given year (2011) and suggests that the real issue is not one of any absolute lack of resources, but rather one of the ethical strength of the claim of First Nations communities to the provision of safe drinking water relative to other completing claims on public resources.[104]

Another argument the federal government could raise in its defense is that it is working with First Nations communities on a solution that respects self-governance and Aboriginal autonomy over affairs on reserves. While at first glance this could be viewed as a legitimate and important objective, it would be difficult to justify this as a reason not to provide safe drinking water. There is no reason why the government could not find mechanisms for providing safe drinking water to First Nations on reserves with boil-water advisories, even if on a short-term basis and even if they are costly, while working on a politically viable, and respectful long-term solution.

Rational connection

The second part of the *Oakes* test requires a rational connection between the limit (not providing access to drinking water) and the objective (say, searching for a longer-term solution that respects self-governance). This part of the test has not been very onerous in practice, but might be applied where laws are based on arbitrary or discriminatory assumptions.[105] The government might be able to demonstrate that there is a rational connection between failing to provide safe drinking water to all First Nations on reserve and working on a longer-term solution to do so. However, this part of the test has usually been applied where laws are based on arbitrary assumptions, which is not the context here.

Minimal impairment of the rights

The third factor, which in practice has been the most important, requires minimal impairment of the rights. The

104. Schreker, *supra* note 1. See also *Moore*, *supra* note 29 for a discussion of budgetary reasons as a (failed) justification for infringing human rights legislation.

105. Sharpe & Roach, *supra* note 87 at 72.

Court asks whether there was some other reasonable way for the government to meet its objective without impairing rights, or at least impairing them less. There has been a trend in the Court towards a contextual analysis of this requirement. Assuming the objective is working on finding a long-term solution for self-governance, it would be difficult to say that a failure to provide a short-term solution is minimal impairment. Minimal impairment might be that communities have to deal with coming to a central location on the reserve to fill up their water containers (for instance, from a tanker) or having to contend with using bottled water to drink and wash with, versus the convenience of having access to water from the tap, with some financial remuneration for the inconvenience. However, not having access to clean drinking water at all could not reasonably constitute minimal impairment.

Proportionality

Finally, the fourth step in the *Oakes* test requires that there be proportionality between the effects of the measures that limit rights and their objectives. While this part of the test has rarely been decisive, given the other parts of the test, it was used in the *Thomson Newspapers* case to hold that the benefits of the objective in that case were marginal while the negative effects of infringement were substantial, and that thus the proportionality test was not met.[106] It would unlikely be of much help to the government in this case, which would have to argue that the lack of access to safe drinking water is proportional to the need to work out a longer term solution—an argument that pits a fundamental human right against a logistical, administrative political and economic issue.

In sum, it is unlikely in my view that the government could justify its actions (or inactions) under s 1.

D. THE APPROPRIATE REMEDY

When the *Charter* has been violated, and that violation is not saved by s 1, s 24(1) authorizes the courts to grant the

106. *Thomson Newspapers Co v Canada (AG)*, [1998] 1 SCR 877 at para 129.

remedy that is "appropriate and just in the circumstances." In addition, s 52(1) of the *Constitution Act*, *1982* renders laws inconsistent with the Constitution to be of no force or effect.

Courts have a wide discretion in the remedy they choose to apply in the case of a *Charter* violation. They may issue a declaration of invalidity, award damages or order governments to take remedial action, even issuing orders to supervise the implementation of the remedies.[107] The Supreme Court has held that "courts must be creative in considering different remedial options in order to ensure that remedies are both responsive to particular needs and contexts, and effective."[108] In *Eldridge*, the Court held that "the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services."[109]

While the courts have yet to order the government to take positive actions with respect to providing drinking water, there is nothing in s 24(1) or in the Court's jurisprudence to suggest it could not do so. In fact, the courts have ordered the government to take positive action in the context of minority language rights,[110] and the jurisprudence suggests it could happen in other contexts. For instance, the Court in *Schachter v Canada* stated that "s 15 of the *Charter* is indeed a hybrid of positive and negative protection, and that a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of s. 15."[111] In *Haig v Canada*, L'Heureux-Dubé J, speaking for the majority and relying on comments made by Dickson CJ in *Reference re Public Service Employee Relations*

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107. Martha Jackman & Bruce Porter, "Socio-Economic Rights Under the Canadian Charter" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209 at 226-27. See e.g., *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at para 136 [*Doucet-Boudreau*]. In this case, the Court established deadlines for school districts to submit progress reports.

108. Jackman & Porter, *supra* note 107 at 228 citing *Corbiere*, *supra* note 23 at para 116, n 145 (interpreting *Doucet-Boudreau*, *supra* note 107).

109. *Eldridge*, *supra* note 67 at 77.

110. *Vriend*, *supra* note 43 at paras 63-64 referring to *Mahe*, *supra* note 69 at 393.

111. *Schachter*, *supra* note 101.

Act (Alta),[112] suggested that in some situations, the *Charter* might impose affirmative duties on the government to take positive action to ensure the equality of people or groups who come within the scope of s 15.[113]

What would be an appropriate remedy for a violation of First Nations' right to equally benefit from a regulatory framework for safe drinking water? The courts would be within their rights under s 24 of the *Charter* to mandate the federal government to include First Nations on reserve in its regulatory framework for safe drinking water. The government has moved in this direction, with the passage on 19 June 2013 of the *Safe Drinking Water for First Nations Act*.[114] However there has been a great deal of controversy surrounding this law, including claims that it is insufficient to rectify the situation.[115] A court order under s 24 in relation to a s 15 breach would underline the importance of ensuring the legislation and related regulatory or policy instruments addressed the discrimination created by the lack of regulatory protection with respect to drinking water for First Nations' on reserves. This might include creating the administrative and other mechanisms to support implementation of the legislation's provisions.

The court could also, in my view, order the federal government to provide short-term solutions for First Nations reserves under boil-water advisories. For instance, it could mandate that those communities be provided with clean water to drink, bath and wash with, within a given number of days, in addition to financial compensation for the inconvenience caused. The court could also ask the federal government to

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112. *Haig*, *supra* note 71.

113. *Ibid* at 1038. See also *Eldridge*, *supra* note 67 in which La Forest J left open the question of whether the *Charter* might oblige the State to take positive actions. For a discussion about positive obligations under the *Charter*, see Bruce Porter, "Expectations of Equality" (2006) 33 SCLR (2d) 23 at 34.

114. SC 2013, c 21, online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca/eng/1330528512623/1330528554327>. For an analysis of this Act, see Bowden, supra note 2.

115. Critics have argued that there is no assurance that the government will allocate the resources necessary to effectively implement the law, and that it does little to address the acute, short-term needs of communities. See e.g., First Nations Water Bill Deeply Flawed, Senators Told, ipolitics, online: <http://www.ipolitics.ca/2012/05/10/first-nations-safe-drinking-water-bill-deeply-flawed-senators-told/>.

provide regular reports on progress, and monitor compliance with the remedial order. In my view, this would be not only completely justifiable under s 24 of the *Charter*, but the only remedy that would address the discriminatory treatment these communities have faced in some cases for long periods of time.

CONCLUSION

Section 15 of the *Charter* is meant to promote "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[116] When a given community—especially one that has been historically disadvantaged—has to contend with unsafe water for months or years at a time, it is hard to argue that the legal system that perpetuates the situation recognizes them as equals. At its core, s 15 is about ending the perpetuation of discrimination of those groups protected by the provision.[117] In the Supreme Court's most recent decision on s 15 as of the time of writing, Abella J for the majority states clearly that if "state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."[118]

The situation of those First Nations communities without access to safe water can only widen the gap between them and the rest of society, and as such—in the words of the Supreme Court—it is discriminatory. While there are many explanations for why the situation is what it is, the analysis in this paper demonstrates that these explanations do not justify an infringement of the rights of First Nations communities living on reserve to enjoy the same benefit of clean and safe water that the rest of Canadians experience.

The federal government's main argument in its defense would likely be that of jurisdictional authority, since provision of water to First Nations on reserves falls to the federal government, while jurisdiction over the provision of water generally is within provincial or territorial government

116. *Andrews*, *supra* note 15 at 171.
117. *Quebec v A*, *supra* note 20 at 332.
118. *Ibid*.

authority. This argument would, in my view, fail because the courts have rejected formalistic arguments to justify infringements on equality. While they have held that the *Charter* cannot be used to mandate different levels of service provision in different provinces, they have never held that the federal government can provide a different level of service to a historically disadvantaged population which does not have a counterpart in other jurisdictions. In fact, recent jurisprudence in the Federal Court of Appeal considering differential levels of service provisions to Aboriginal communities on reserves emphasized that there is no need to find comparator populations in the provinces, and that the key issue is whether there is discrimination.[119]

Even if the courts were uncomfortable using the national framework of water quality regulations as the source of discrimination, surely they could not use a formalistic argument to deny equality rights to First Nations under the scope of solely federal laws providing the benefit of safe water to those under federal jurisdiction. The federal government provides drinking water in conformity with national drinking water standards for all people under federal jurisdiction, including passengers on cruise ships, inmates of federal prisons, and even federal employees working on reserves that have water quality problems. The only exception is the First Nations communities under its jurisdiction. Using the fact that the law relating to water quality is created by several legislative and policy instruments (either at the national level, or just at the federal level) rather than one single instrument would be a formalistic defense. The Court has repeatedly emphasized that it is the *effect* of laws, programs and policies, rather than the form of the instrument itself, that is determinative.

The Supreme Court's repeated emphasis on substantive equality, combined with its rejection of the need for comparator groups, suggests that the situation faced by several First Nations communities would be considered discriminatory within the meaning of s 15. The *Charter* is meant to safeguard the fundamental rights and freedoms of all Canadians.

119. See *supra* note 33 and accompanying text. This decision is being appealed to the Supreme Court. The Supreme Court's decision will be very important to the analysis in this article.

This article shows that the tragic situation faced by many First Nations communities living on reserves would be considered discrimination under s 15. If the *Charter*'s equality provision did not offer a remedy for the appalling circumstances faced by First Nations communities trying to survive without equal access to one of life's most basic necessities, we would need to question its purpose and the values underpinning it. Thankfully, recent jurisprudence has confirmed that s 15 can indeed function to ensure that all Canadians—and especially those who have been historically disadvantaged—can experience the full benefit and protection of Canadian laws—regardless of the form of those laws.