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Résumé de l'article

En 1977, le gouvernement fédéral canadien a promis de fournir des réserves qui auraient un accès à l'eau et des installations sanitaires comparables aux communautés non autochtones. En dépit de certains progrès, des milliers de membres des Premières Nations vivant dans des réserves à travers le Canada n'ont toujours pas accès à l'eau courante. Les effets négatifs sur la santé, associés à une infrastructure liée à l'eau inadéquate, inclus des taux plus élevés de maladies contagieuses comme l'influenza, la coqueluche, la shigellose et l'impétigo. Les Premières Nations ont-elles un droit constitutionnel à l'eau ? Cet article suggère que oui, en se basant sur le droit à la vie, à la liberté et à la sécurité de sa personne sous l'article 7 de la *Charte canadienne des droits et libertés* ; le droit à l'égalité sous l'article 15 de la *Charte* ; et l'obligation du gouvernement de « fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels » sous l'article 36 de la *Loi constitutionnelle de 1982*. Les arguments légaux disponibles suivant ces dispositions constitutionnelles sont étayés par les obligations du Canada en droit international des droits de l'homme.

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NO TAPS, NO TOILETS: FIRST NATIONS AND THE CONSTITUTIONAL RIGHT TO WATER IN CANADA

David R. Boyd[*]

In 1977, the Canadian federal government promised to provide reserves with water and sanitation services comparable to similarly situated non-Aboriginal communities. Despite some progress, thousands of First Nations people, living on reserves across Canada, still lack access to running water or flush toilets. The adverse health effects associated with inadequate water infrastructure include elevated rates of communicable diseases such as influenza, whooping cough (pertussis), shigellosis, and impetigo. Do First Nations have an enforceable constitutional right to water? This article suggests that they do, based on the right to life, liberty, and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms*; the right to equality under section 15 of the *Charter*; and governments' obligation to provide "essential public services of reasonable quality to all Canadians" under section 36 of the *Constitution Act, 1982*. The legal arguments available pursuant to these constitutional provisions are buttressed by Canada's obligations pursuant to international human rights law.

En 1977, le gouvernement fédéral canadien a promis de fournir des réserves qui auraient un accès à l'eau et des installations sanitaires comparables aux communautés non autochtones. En dépit de certains progrès, des milliers de membres des Premières Nations vivant dans des réserves à travers le Canada n'ont toujours pas accès à l'eau courante. Les effets négatifs sur la santé, associés à une infrastructure liée à l'eau inadéquate, inclus des taux plus élevés de maladies contagieuses comme l'influenza, la coqueluche, la shigellose et l'impétigo. Les Premières Nations ont-elles un droit constitutionnel à l'eau ? Cet article suggère que oui, en se basant sur le droit à la vie, à la liberté et à la sécurité de sa personne sous l'article 7 de la *Charte canadienne des droits et libertés* ; le droit à l'égalité sous l'article 15 de la *Charte* ; et l'obligation du gouvernement de « fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels » sous l'article 36 de la *Loi constitutionnelle de 1982*. Les arguments légaux disponibles suivant ces dispositions constitutionnelles sont étayés par les obligations du Canada en droit international des droits de l'homme.

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> Water is the essence of life and human dignity.
> World Health Organization[1]

> Access to safe water is a fundamental human need and, therefore, a basic human right.
> Kofi Annan, Former United Nations Secretary-General[2]

> Putting the point bluntly, except for the very poorest nations in the world and for those constrained by military occupation, any government that does not provide the 25 to 50 litres of water per person-day commonly deemed necessary for a minimal quality of life is incompetent or corrupt.[3]

Introduction

Is there a constitutional right to safe drinking water in Canada? To the vast majority of Canadians, this may seem a moot question, since 100 percent of urban residents and 99 percent of rural residents have access to improved drinking water and sanitation as of 2008.[4] Although this big picture is generally bright, pockets of darkness remain. As the preceding statistics indicate, there are still rural communities, comprising roughly 1 percent of Canada's population, where comprehensive access to running water, safe drinking water, and indoor toilets is an aspiration rather than reality. These rural communities are predominantly, if not exclusively, reserves inhabited by First Nations.[5] Reserves are much more likely to experience high-risk drinking water systems and long-term boil water advisories.[6] The disparity between water quality on and off reserve in Canada has been criticized by the United Nations Committee on Economic, Social

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1 Gro Harlem Brundtland & Sergio Vieira de Mello, "Foreword" in *The Right to Water* (Geneva: World Health Organization, 2003), online: World Health Organization at 3 <http://www.who.int>.

2 *Ibid* at 6, citing Kofi Annan.

3 David B Brooks, "Human Rights to Water in North Africa and the Middle East: What is New and What is Not; What is Important and What is Not" (2007) 23:2 International Journal of Water Resources Development 227 at 231 [footnote omitted].

4 WHO/UNICEF, *Progress on Sanitation and Drinking-Water: 2010 Update* (Geneva: World Health Organization and UNICEF, 2010), online: UNICEF <http://www.unicef.org> at 40.

5 The word "reserve" in this article refers to both official and non-official First Nations communities (in relation to designation under the *Indian Act,* RSC 1985, c I-5).

6 Andrea Harden and Holly Levalliant, *Boiling Point! Six Community Profiles of the Water Crisis Facing First Nations Within Canada* (May 2008), online: Polaris Institute <http://www.polarisinstitute.org>.

and Cultural Rights,[7] the Royal Commission on Aboriginal Peoples,[8] and the Auditor General of Canada.[9]

The situation has improved considerably over the past twenty years, but major disparities persist. As of 2010, forty-nine First Nations communities have high-risk drinking water systems and more than one hundred face ongoing water advisories[10] (out of roughly 615 First Nations communities in Canada[11]). Many of these deplorable situations have prevailed for years and, in some cases, for over a decade.[12] The federal government estimates that there are approximately five thousand homes in First Nations communities that lack basic water and sewage services.[13] Compared to other Canadians, First Nations' homes are ninety times more likely to be without running water.[14] 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 On-

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7 Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNESCOR, 36th Sess, UN Doc E/C.12/CAN/CO/4 and UN Doc E/C.12/CAN/CO/5 (2006) 1 at 3-4.

8 National Commission Inquiry on Indian Health & NIB Health Development Program, "National Indian Brotherhood National Indian Health Policy: A Compilation of Health Policy Papers" in *Public Policy and Aboriginal Peoples, 1965-1992: Summaries of Reports by Federal Bodies and Aboriginal Organizations (1994)*, vol 2 (Ottawa: Supply and Services Canada, 1994) 226 at 227.

9 Office of the Auditor General of Canada, *Report of the Auditor General of Canada*, ch 23 (Ottawa: OAG, November 1995) 23-10; House of Commons, Office of the Auditor General of Canada, "Chapter 5: Drinking Water in First Nations Communities" in *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons* (29 September 2005) at 1 ["Drinking Water in First Nations Communities"].

10 Indian and Northern Affairs Canada, *First Nations Water and Wastewater Action Plan: Progress Report April 2009—March 2010* (April 2010), online: Aboriginal Affairs and Northern Development Canada at 11 <http://www.ainc-inac.gc.ca> [*Action Plan: 2009-2010 Progress Report*]. As of 30 June 2011, there were 118 First Nations communities with ongoing drinking water advisories (Health Canada, *First Nations, Inuit and Aboriginal Health: Drinking Water and Wastewater*, online: Health Canada <http://www.hc-sc.gc.ca>).

11 Statistics Canada, *Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census* (Ottawa: Minister of Industry, 2008) at 38 [*Aboriginal Peoples in Canada in 2006*].

12 Harden and Levalliant, *supra* note 6 at 7.

13 *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 [*Implementation of ICESCR*].

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

tario; Kitcisakik in Quebec; St. Theresa Point, Wasagamack, Red Sucker Lake, and Garden Hill in Manitoba; and Little Buffalo in Alberta.[15] The lack of access to safe drinking water has adverse physical and psychological effects. The federal government admits that "[t]he incidence of waterborne diseases is several times higher in First Nations communities, than in the general population, in part because of the inadequate or nonexistent water treatment systems."[16]

The Canadian Government does not recognize the right to water, either internationally or domestically.[17] When the United Nations (UN) General Assembly approved a resolution recognizing water as a human right in 2010,[18] 124 countries supported the resolution while none were opposed.[19] Canada was among forty-two countries that abstained from voting,[20] and it has a history of blocking international efforts to recognize the right to water.[21] The Canadian *Constitution Act, 1982* (*Constitution*)[22] does not explicitly acknowledge a right to water. There is no federal legislation explicitly recognizing the right to water in Canada.[23] To date, no Canadian court has acknowledged the right.[24] In the only reported decision addressing the subject, involving a case where British Columbia residents unsuccessfully sought to stop logging activities in their watershed,

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15 Helen Fallding, "High and Dry: First Nations an Hour from Winnipeg Face Third World Conditions", *Winnipeg Free Press* (30 October 2010) online: Winnipeg Free Press <http://www.winnipegfreepress.com> [Fallding, "High and Dry"]; Amy Steele, "No Deal", *Alberta Views* 10:2 (March 2007) 39 at 39.

16 *Implementation of ICESCR*, *supra* note 13 at 84.

17 Lynda Collins, "Environmental Rights on the Wrong Side of History: Revisiting Canada's Position on the Human Right to Water" (2010) 19:3 RECIEL 351 at 363.

18 *The Human Right to Water and Sanitation*, GA Res 64/292, UNGAOR, 64th Sess, Supp No 49 (vol III), UN Doc A/RES/64/292 (2010) 45.

19 UNGAOR, 64th Sess, 108th Plen Mtg, UN Doc A/64/PV.108 (2010) at 9.

20 *Ibid*.

21 See Collins, *supra* note 17.

22 *Constitution Act, 1982*, s 36, being Schedule B to the *Canada Act* (UK), 1982, c 11 [*Constitution*].

23 See Office of the Auditor General of Canada, "Government of Canada's Response to Environmental Petition 163 Filed by Mr David R Boyd Under the *Auditor General Act* (Received February 16, 2006): Right of Canadians to Clean Air, Clean Water, and a Healthy Environment", (2 June 2006), online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca>.

24 David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 25 [Boyd, *Unnatural Law*].

the judge held that "[t]here is not before me an established case for the concept of a 'right' to clean water."[25]

However, recent developments indicate growing support for legal recognition of the right to water in Canada. Quebec recently became the first province to formally recognize water as a human right in legislation: "Under the conditions and within the limits defined by the law, it is the right of every natural person to have access to water that is safe for drinking, cooking and personal hygiene."[26] In 2007, the Legislative Assembly of the Northwest Territories passed a resolution recognizing that "all peoples have a fundamental human right to water that must be recognized nationally and internationally, including the development of appropriate institutional mechanisms to ensure that these rights are implemented."[27] The Land Claims Agreement of the Labrador Inuit recognizes the right for the Inuit "to enjoy [w]ater that is on, in, under, flowing through or adjacent to Labrador Inuit Lands."[28]

Water is regarded as sacred by many First Nations cultures.[29] As a leading First Nations scholar wrote, "water misuse and pollution across Canada" causes "multiple disruptions of indigenous peoples' cultures, traditions, and economies."[30] The Assembly of First Nations considers access to safe drinking water to be a basic human right.[31]

In the absence of explicit legal recognition of the right to water, the few Canadians who lack access to this essential public service are placed

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25 *Red Mountain Residents and Property Owners Assn v British Columbia (Ministry of Forests)*, 2000 BCSC 250 at para 24, 35 CELR (NS) 127.

26 *An Act to Affirm the Collective Nature of Water Resources and Provide for Increased Water Resource Protection*, RSQ 2009 (1st Sess), c 21, s 2.

27 Northwest Territories, Legislative Assembly, "Motion 20-15(5): Right to Water" in *Hansard*, 15th Assembly, 5th Sess, Day 34 (5 March 2007) at 1168-69 (Hon Paul Delorey).

28 *Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*, s 5(3)(2) (given effect by *Labrador Inuit Land Claims Agreement Act*, RSC 2005, c 27).

29 See Chiefs of Ontario, "Water Declaration of the First Nations in Ontario" (Resolution 08/87 passed at the 2008 Special Chiefs Assembly in Toronto, October 2008), online: Chiefs of Ontario <http://www.chiefs-of-ontario.org>; Cheryl Darlene Sanderson, *Nipiy Wasekimew/Clear Water: The Meaning of Water, from the Words of the Elders: The Interconnections of Health, Education, Law and the Environment* (PhD, Simon Fraser University, 2008), online: Simon Fraser University Institutional Repository <http://ir.lib.sfu.ca>.

30 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 at 313.

31 Assembly of First Nations, "Support for Empty Glass of Water Campaign", Annual General Assembly, Resolution No 19/2009 (21-23 July 2009).

in the untenable position of being "mere supplicants", dependent on the will of federal and/or provincial governments to make safe drinking water a priority. The purpose of this article is to explore the proposition that all Canadians possess a constitutional right to water, a legally enforceable right that the federal and provincial governments are violating for some First Nations people living on reserves. The constitutional right to water derives from three provisions: "the right to life, liberty and security of the person" under section 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*);[32] the right to equality under section 15 of the *Charter*;[33] and the federal and provincial governments' commitment to "providing essential public services of reasonable quality to all Canadians" under section 36 of the *Constitution*.[34] The constitutional right to water is buttressed by Canada's obligations under international human rights law.

Excluded from the scope of this article are questions regarding Aboriginal title, Aboriginal rights, the federal government's fiduciary duty to Aboriginal peoples, and treaty rights related to the use, management, and governance of water. While important, these questions have been addressed comprehensively by other experts.[35]

I. Mixed Progress in Providing First Nations with Access to Potable Water

The disparity between reserves and other Canadian communities in terms of access to safe drinking water and improved sanitation facilities has long been recognized. In 1977, a federal policy report proposed an expanded infrastructure program for reserves with the goal of providing Aboriginal homes and communities with facilities and services that both met health and safety standards and were comparable to neighbouring non-

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[32] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[33] *Ibid*, s 15.

[34] *Constitution*, *supra* note 22, s 36.

[35] See e.g. Monique M Passelac-Ross and Christina M Smith, *Defining Aboriginal Rights to Water in Alberta: Do They Still "Exist"? How Extensive are They?* (Calgary: Canadian Institute of Resources Law, 2010), online: Canadian Institute of Resources Law <http://cirl.ca>; Merrell-Ann S Phare, *Denying the Source: The Crisis of First Nations Water Rights* (Surrey, British Columbia: Rocky Mountain Books, 2009); Walkem, *supra* note 30; Richard H Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary: Canadian Institute of Resource Law, 1986).

Aboriginal homes and communities.[36] In 1991, Indian and Northern Affairs Canada (INAC) committed to achieving equality amongst Canadians with respect to access to safe water by 2001.[37] In 1995, INAC reported that serious problems with drinking water quality existed on one in four reserves, and "committed to remedying all deficient water systems by 2004."[38] Between 1995 and 2003, the federal government spent $1.9 billion to improve water and wastewater infrastructure for First Nations.[39] A national assessment of drinking water systems in First Nations communities published in 2003 revealed that 218 out of 740 systems were considered high-risk.[40] In 2003, the federal government pledged to "address all of the high-risk systems by the end of March 2008," and budgeted $600 million for its First Nations Water Management Strategy.[41] In 2006, the government of Canada announced a plan of action for drinking water in First Nations communities to ensure that all First Nation reserves had access to safe drinking water.[42] From the 2006 budget, the federal government allocated $60 million over two years to help reach the objectives of the 2006 plan of action.[43] In 2008, the government of Canada announced a $330 million, two-year investment in a new plan, the *First Nations Water and Wastewater Action Plan* (FNWWAP).[44] An additional investment of $330 million for 2010-2012 is budgeted for FNWWAP's continued implementation.[45] Canada's 2009 *Economic Action Plan* further

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36 Indian and Northern Affairs Canada, *Report of the Expert Panel on Safe Drinking Water for First Nations*, vol 1 (Ottawa: Minister of Public Works and Government Services Canada, 2006) at 22 [*Report of the Expert Panel*, vol 1].

37 Constance MacIntosh, "Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves" (2007-2008) 39:1 Ottawa L Rev 63 at 67.

38 *Ibid.*

39 "Drinking Water in First Nations Communities", *supra* note 9 at 1.

40 Indian and Northern Affairs Canada, *National Assessment of Water and Wastewater Systems in First Nations Communities: Summary Report* (May 2003), online: Aboriginal Affairs and Northern Development Canada at 10 <http://www.ainc-inac.gc.ca>.

41 Indian and Northern Affairs Canada, *Plan of Action for Drinking Water in First Nations Communities: Progress Report* (7 December 2006), online: Aboriginal Affairs and Northern Development Canada at 2 <http://www.ainc-inac.gc.ca> [*Plan of Action: 2006 Progress Report*].

42 Indian and Northern Affairs Canada, News Release, 2-02757, "Government Announces Immediate Action on First Nations Drinking Water" (21 March 2006) online: Aboriginal Affairs and Northern Development Canada <http://www.ainc-inac.gc.ca>.

43 Indian and Northern Affairs Canada, *Plan of Action for Drinking Water in First Nations Communities: Progress Report* (17 January 2008), online: Aboriginal Affairs and Northern Development Canada at 2 <http://www.ainc-inac.gc.ca>.

44 *Action Plan: 2009-2010 Progress Report*, *supra* note 10 at 2.

45 *Ibid.*

pledged $183 million for building or upgrading eighteen water and wastewater infrastructure projects on reserves.[46] The federal government recently published a comprehensive assessment of drinking water and sewage infrastructure serving 571 First Nations, concluding that 39 percent of water systems continue to pose a high risk.[47]

These actions and investments have resulted in tangible improvements in access to safe drinking water in First Nations communities: 18 of 21 communities identified as "high priority" in 2006 have been removed from the list due to improvements in infrastructure, training, and monitoring, and the number of high-risk drinking water systems has fallen from 193 in 2006, to 49 in 2010.[48] Furthermore, the proportion of certified water system operators has increased from 8 percent in 2003,[49] to 60 percent in 2010 (although still far short of reaching the goal of 100 percent).[50]

Despite these positive steps, three outstanding problems remain. First, the Expert Panel on Safe Drinking Water for First Nations (Expert Panel) 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."[51] Inadequate funding continues to be a major obstacle to ensuring universal access to safe drinking water.[52] Second, there is still no regulatory framework in place to ensure the safety of drinking water for First Nations communities. As the Commissioner of the Environment and Sustainable Development reported in 2005, "[w]hen it comes to the safety of drinking water, residents of First Nations communities do not benefit from a level of protection comparable to that of people who live off reserves. This is partly because there are no laws and regulations governing the provision of drinking water in First Nations communities, unlike other communities."[53] Bill S-11, the *Safe Drinking Water for First Nations Act*, was introduced in the Senate in 2010, but it died on the order paper as a result of

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46 *Ibid*.

47 *National Assessment of First Nations Water and Wastewater Systems: National Roll-Up Report* (Orangeville, Ont: Neegan Burnside for the Department of Aboriginal Affairs and Northern Development, 2011).

48 *Action Plan: 2009-2010 Progress Report*, *supra* note 10 at 4-5.

49 *Plan of Action: 2006 Progress Report*, *supra* note 41 at 4.

50 *Action Plan: 2009-2010 Progress Report*, *supra* note 10 at 9.

51 *Report of the Expert Panel*, vol 1, *supra* note 36 at 22.

52 See Randy Christensen, Nancy Goucher & Merrell-Ann Phare, *Seeking Water Justice: Strengthening Legal Protection for Canada's Drinking Water* (Ecojustice, May 2010), online: Ecojustice at 10-13 <http://www.ecojustice.ca>.

53 "Drinking Water in First Nations Communities", *supra* note 9 at 1.

the federal election in 2011, and has not been re-introduced.[54] Third, in 2006 the Expert Panel identified a number of high-risk communities, but observed that these communities were excluded from the Department of Indian Affairs and Northern Development's assessment because they had no water system at all, or because an existing water treatment plant produced potable water, even if such plants were not connected to the majority of homes on a given reserve.[55] 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 Pikangikum to its high priority list.[56] Nor did INAC include St. Theresa Point, Wasagamack, Red Sucker Lake, Garden Hill, or Little Buffalo on its high priority list, despite the fact that a majority of residents in each of these communities lack access to running water, safe drinking water, and indoor toilets. The severity of the problems facing these seven First Nations communities is outlined in more detail below, to provide a substantive factual context for the subsequent exploration of the constitutional law issues.

A. Pikangikum (Ontario)

In Pikangikum, an Aboriginal community of 2,300 people in northwestern Ontario, 95 percent of homes lack running water and indoor plumbing.[57] Only 20 of the 387 houses on the reserve are hooked up to the water treatment plant that was built by the Department of Indian Affairs and Northern Development in 1995. Many residents collect water from the nearby lake in buckets for drinking. A sewage lagoon serving the RCMP station, the store, and the school is located upstream from the intake for the water treatment plant, leading to contamination of the water supply. Pikangikum became notorious in 2000 when media reports described it as "having the highest suicide rate in the world" with people killing themselves at thirty-six times the Canadian average.[58]

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54 Bill S-11, *An Act Respecting the Safety of Drinking Water on First Nations Land*, 3d Sess, 40th Parl, 2010 (second reading 14 December 2010) [Bill S-11].

55 Senate, Standing Senate Committee on Aboriginal Peoples, *Safe Drinking Water for First Nations: Final Report of the Standing Senate Committee on Aboriginal Peoples* (May 2007) at 4 (Chair: Hon Gerry St Germain) [*Safe Drinking Water*].

56 *Report of the Expert Panel*, vol 1, *supra* note 36 at 51-52.

57 Northwestern Health Unit, *Inspection Report on the Pikangikum Water and Sewage Systems* (Kenora: Northwestern Health Unit, 2006), online: The Water Chronicles at 4, 10 <http://www.water.ca> [*Inspection Report*].

58 Louise Elliott, "Ontario Native Suicide Rate One of the Highest in the World, Expert Says", *Canadian Press*, (27 November 2000) (Canadian Newsstand).

At the request of the community in 2006, the Ontario government's Northwestern Health Unit sent a team of professionals to Pikangikum to assess the drinking water and sewage disposal systems and to evaluate potential water-related health problems. The team included two public health inspectors, a medical doctor, and an epidemiologist. Their report concluded:

> The most basic of twentieth century (ie last century) health-supporting water/sewage infrastructures are not available to Pikangikum First Nation residents. This includes (but is not limited to) housing, air/water/soil contamination control and regulation, drinking/water provision and sewage disposal.[59]

Regarding adverse health effects, the report recorded:

> [T]he prevalence of gastrointestinal infections, skin infections, lice infestations, urinary tract infections and eye/ear infections were increased in this community compared to other regional First Nation communities and non-Aboriginal communities, and that it was probable that some of the increased prevalence could be attributed to the lack of an adequate and safe water supply system.[60]

Doctor Pete Sarsfield, the medical officer of health, commented: "[w]e were startled, upset. It was awful. This was a level of neglect that almost appeared purposeful."[61] Sarsfield added that despite extensive experience with First Nation communities, he had "never seen living like this in Canada—infrastructure so bad people are constantly putting themselves at risk of serious illness."[62] The Expert Panel summarized the testimony of Bill Limerick, Director of Environmental Health and Director of Health Protection at Ontario's Northwestern Health Unit:

> "[E]veryone has basically a five-gallon bucket" to take their water from nearby Pikangikum Lake. In the summer, raw sewage from the community can flow directly into the lake from overburdened septic systems. One sample of this water "was overgrown with coliform bacteria and *E. coli*. It was ... deplorable."
>
> In the winter, Limerick estimated, roughly about half the residents take their water from a hole in the ice of the lake, just offshore of the community, in an area contaminated by animal wastes and fuel from snowmobiles.
>
> Almost all of the community relies on outhouses that are in poor repair and grossly inadequate. Limerick described an open sewage

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59 *Inspection Report*, *supra* note 57 at 14.

60 *Ibid* at 9.

61 "Water Woes a Harsh Reality for Pikangikum", *Kenora Daily Miner & News* (26 October 2006) online: Miner & News <http://www.kenoradailyminerandnews.com>.

62 *Ibid*.

> system at one facility covered with an old table, with children playing nearby as sewage overflowed from the tank.[63]

When, in 2000, then Minister of Indian Affairs Robert Nault visited Pikangikum, it was estimated that that the community's water woes would be fixed in six to eight weeks.[64] In 2006, the federal government offered the community 200 new outhouses, an offer that was summarily rejected by community leaders as inadequate.[65] In 2007, Indian Affairs Minister Jim Prentice announced "$9.7 million for new water and sewer servicing that [would] bring clean, safe drinking water right to [the] homes" of Pikangikum.[66] However, as of 2010, the problems persist.[67] Among the excuses used by the federal government to explain the delays are: the need for further study; frequent changes in band leadership; inadequate supply of electricity to pump the water to homes; and a cultural custom of burying family members in backyards, making the placement of pipes difficult.[68] Pikangikum sued former Minister of Indian Affairs Robert Nault for damages, arguing that water and sewer infrastructure projects previously approved by the government were unlawfully frozen years ago.[69] The Ontario Superior Court rejected the claim, finding that both parties contributed to the unfortunate state of affairs.[70]

B. Kitcisakik (Quebec)

Kitcisakik is an Algonquin village with roughly 300 residents located in the northern part of the La Verendrye Wildlife Reserve in Quebec.[71] The Anicinapek Kitcisakik have never left their ancestral land, yet their

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63 *Report of the Expert Panel*, vol 1, *supra* note 36 at 52.

64 Elliott, *supra* note 58.

65 Bill Curry & Karen Howlett, "Burial Grounds on Reserve Blamed for Lack of Water", *The Globe and Mail* (8 November 2006) online: The Globe and Mail <http://www.theglobeandmail.com>.

66 Jim Prentice, "Speaking Points for the Honourable Jim Prentice, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians" (Speech delivered at the Pikangikum Infrastructure Funding Announcement, Pikangikum First Nation, 10 April 2007), online: Aboriginal Affairs and Northern Development Canada <http://www.ainc-inac.gc.ca>.

67 Fallding, "High and Dry", *supra* note 15.

68 See Karen Howlett, "Remote Ojibwa Reserve Lies in Desperate Limbo", *The Globe and Mail* (6 November 2006) online: The Globe and Mail <http://www.theglobeandmail.com>; Curry & Howlett, *supra* note 65.

69 James Thom, "Decision in Nault, Pikangikum Case Could Take Months", *Wawatay News* (24 June 2010) online: Wawatay News <http://www.wawataynews.ca>.

70 *Pikangikum First Nation v Nault*, 2010 ONSC 5122, 2010 CarswellOnt 9912 (WL Can).

71 Statistics Canada, "Population and Dwelling Counts" in *Census 2006 Community Profiles: Kitcisakik*, online: Statistics Canada <http://www.statcan.gc.ca>.

community has no recognized legal status.[72] Approximately one hundred houses in the village lack running water, indoor toilets, and electricity.[73] According to Statistics Canada, 87.5 percent of dwellings in the community need major repairs, compared to the provincial average of 7.7 percent.[74] Because Kitcisakik is not formally designated an "Indian reserve", it does not qualify for automatic federal funding. In December 2009, the Quebec government announced funding of $1.4 million to begin addressing some of the community's severe infrastructure and housing problems.[75] Community leaders would like to build a new village, in a different location, that includes all of the basic and essential services missing from Kitcisakik.[76] The situation in Kitcisakik is so deplorable that Emergency Architects of Canada, a humanitarian organization that has projects in Pakistan, Afghanistan, and Darfur, intervened in this community.[77]

C. Little Buffalo (Alberta)

Little Buffalo is a Lubicon Cree First Nation community of approximately 225 people, located in a region heavily impacted by Alberta's oil and gas industry.[78] There is no running water at Little Buffalo, local water sources are contaminated and unsafe to drink, houses lack indoor plumbing, and residents are forced to "drive an hour each way to and from Peace River to buy bottled water."[79] Passed over in the westward sweep of treaty-making pursued by the British Crown, the Lubicon Cree have long sought a negotiated settlement of their land rights. In 1984, following unsuccessful negotiations and court actions, the Lubicon filed a complaint with the UN. In 1990, the UN Human Rights Committee ruled that Canada was violating the basic human rights of the Lubicon First Nation.[80]

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72 See Conseil des Anicinapek de Kitcisakik, online: <http://www.kitcisakik.ca>.

73 Rheal Seguin, "Quebec, Ottawa Join Effort to Lift Village out of Third World Conditions", *The Globe and Mail* (15 December 2009) online: The Globe and Mail <http://www.theglobeandmail.com>.

74 Statistics Canada, "Occupied Private Dwelling Characteristics" in *Census 2006 Community Profiles: Kitcisakik*, online: Statistics Canada <http://www.statcan.gc.ca>.

75 Seguin, *supra* note 73.

76 *Ibid*.

77 Kevin Dougherty, "For First Project, Aid Group Looks to Quebec's North", *The* [*Montreal*] *Gazette* (18 October 2009) online: The Gazette <http://www.montrealgazette.com>. See also *Le Peuple Invisible* (National Film Board of Canada, 2008).

78 "County Statistics: Little Buffalo", online: Northern Sunrise County <http://www.northernsunrise.net>.

79 Steele, *supra* note 15 at 39.

80 "Historical Inequities, to Which the State Party Refers, and Certain more Recent Developments Threaten the Way of Life and Culture of the Lubicon Lake Band, and Con-

Twenty years later, despite repeated criticism from the UN, the problems have not been addressed. In a 2006 submission to the UN Committee on Economic, Social and Cultural Rights, the Lubicon First Nation wrote:

> In the midst of multi-billion dollar resource exploitation of natural resources from our unceded traditional Territory, the Lubicon people face severe economic deprivation and live in third world housing conditions with as many as three or four generations living in a small 900 square foot bungalow with no running water or indoor toilet facilities.[81]

D. St. Theresa Point, Wasagamack, Red Sucker Lake, and Garden Hill (Manitoba)

Four Manitoba First Nations communities—St. Theresa Point, Wasagamack, Red Sucker Lake, and Garden Hill—have a combined population of approximately ten thousand people,[82] yet lack basic water and sanitation services. For example, a community profile of the Garden Hill First Nation states: "[t]he community obtains water directly from Island Lake which is chlorinated by a small treatment plant and distributed via a standpipe system. There is one house on a well; eight houses have cisterns; 267 houses have water barrels; and 236 houses have no service."[83] When Garden Hill residents faced an outbreak of tuberculosis in 2006, doctors told them to cough into, and then wash, their hands. According to Garden Hill First Nation Chief David Harper, "[w]e had to tell them that in this community there is no such thing as turning on a tap and having easy access to safe water. Things other Canadians take for granted is not the reality in our community."[84] A University of Manitoba study found that residents of Garden Hill who did not have running water drank lake water, and that those who did not have access to an outhouse were more

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stitute a Violation of Article 27 so long as they Continue" (*Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*, UNHRCOR, 38th Sess, Annex, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (1990) at para 33).

81 Lubicon Lake Indian Nation, *Submission to the 36th Session of the United Nations Committee on Economic, Social and Cultural Rights on the Occasion of the Review of Canada's 4th and 5th Periodic Reports*, (Geneva: 1 May 2006), online: Office of the United Nations High Commissioner for Human Rights at 2 <http://www2.ohchr.org>.

82 Indian and Northern Affairs Canada, *Registered Indian Population by Sex and Residence 2010* (Ottawa: Minister of the Department of Indian Affairs and Northern Development, 2011) at 28-32.

83 "Garden Hill First Nation", First Nation No 297, in *2004-2005 First Nation Community Profiles: Manitoba Region*, online: Manitoba Conservation at 51 <http://www.gov.mb.ca>.

84 Assembly of First Nations, Press Release, "National Chief Denounces Government Inaction in Addressing the TB Outbreak in Garden Hill First Nations" (27 April 2006) online: AFN <http://www.afn.ca>.

likely to suffer from diarrhea.[85] According to former Manitoba Premier Gary Doer, the federal government has been promising to upgrade the water system at Garden Hill since at least 1999.[86]

At the Red Sucker Lake First Nation, newer houses enjoy running water, indoor plumbing, and electric heat while "[a]ll other houses have no running water and indoor plumbing, including the Red Sucker Lake Band Office" and "[m]ost residents utilize pit privies."[87] For the Wasagamack and St. Theresa Point First Nations, "[w]ater delivery services are provided to the few houses equipped with indoor plumbing."[88] Studies indicate that Wasagamack residents suffer from disproportionate exposure to Helicobacter pylori bacteria, which cause ulcers, chronic gastritis, and increased risk of stomach cancer.[89] Contaminated water and inadequate water and sanitation services are known risk factors for Helicobacter pylori.

Even in winter, when the temperatures drop below minus forty degrees Celsius, individuals in these four Manitoba First Nation communities are forced to use outhouses or latrine pails that must be emptied outside. A 2009 newspaper article—paraphrasing Doctor Arlene King, Ontario's chief medical officer of health—noted that "lack of running water, lack of extensive medical facilities and overcrowding ... faced by aboriginal residents in northern and isolated communities make them more susceptible to the H1N1 virus."[90] In response to the H1N1 (swine flu) outbreak, Red Sucker Lake Chief Larry Knott said he was worried that his community wouldn't "be able to heed much of the preventative advice from public health practitioners ... [because] many residents don't have running water and must get fresh water in a pail from the lake."[91] Studies published in

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85 Helen Fallding, "Disease Factory: Consequences of Living Without Tap Water and Flush Toilets", *Winnipeg Free Press* (3 November 2010) online: Winnipeg Free Press <http://www.winnipegfreepress.com> [Fallding, "Disease Factory"].

86 Province of Manitoba, News Release, "Manitoba to Join Other Premiers at National Summit on Aboriginal Health" (24 November 2006) online: Province of Manitoba <http://www.news.gov.mb.ca>.

87 "Red Sucker Lake First Nation", online: Community Futures: Kitayan <http://www.kitayan.ca>.

88 "Wasagamack First Nation", online: Community Futures: Kitayan <http://www.kitayan.ca>. See also "St. Theresa Point First Nation", online: Community Futures: Kitayan <http://www.kitayan.ca>.

89 Samir K Sinha et al, "The Incidence of Helicobacter pylori Acquisition in Children of a Canadian First Nations Community and the Potential for Parent-to-Child Transmission" (2004) 9:1 Helicobacter 59.

90 Aldo Santin, "Officials Bolster H1N1 Strategy for First Nations", *Winnipeg Free Press* (8 August 2009) online: Winnipeg Free Press <http:///www.winnipegfreepress.com>.

91 Jen Skerritt, "Swine Flu Surge Hits Reserve", *Winnipeg Free Press* (4 June 2009) online: Winnipeg Free Press <http://www.winnipegfreepress.com>.

the *Canadian Medical Association Journal*[92] and the *Journal of the American Medical Association* demonstrated that Aboriginal people in Manitoba suffered a disproportionate share of cases of H1N1 influenza during the 2009 outbreak.[93] Although Aboriginal people make up approximately 15 percent of Manitoba's population,[94] 37 percent of the patients who suffered critical illness as a result of H1N1 infection were Aboriginal, and 60 percent of the people who had to be admitted to intensive care units were Aboriginal.[95] The St. Theresa First Nation was particularly hard hit, with many individuals from this community having to undergo transportation to hospitals in Winnipeg.[96]

An earlier study, published in 1997, found that shigellosis—an acute intestinal infection that kills thousands of children in developing countries each year—was three to six times more common on Manitoba reserves without running water than on reserves with piped water.[97] The study found that lack of access to an adequate volume of clean water likely resulted in less frequent handwashing, and suggested that disposal of sewage from indoor pails likely raised the risk of diarrheal diseases.[98]

II. The Legal Framework Governing Safe Drinking Water in Canada

Canada is covered by a complicated patchwork quilt of federal and provincial laws and regulations that govern safe drinking water.[99] Unlike the United States, there are no uniform national standards for drinking water in Canada.[100] Instead, the federal government establishes national guidelines, which are adopted to widely varying degrees by provincial and territorial governments.

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92 Ryan Zarychanski et al, "Correlates of Severe Disease in Patients with 2009 Pandemic Influenza (H1N1) Virus Infection" (2010) 182:3 Can Med Assoc J 257.

93 Anand Kumar et al, "Critically Ill Patients with 2009 Influenza A(H1N1) Infection in Canada" (2009) 302:17 JAMA 1872 at 1874.

94 Philippe Jouvet et al, "Critical Illness in Children with Influenza A/pH1N1 2009 Infection in Canada" (2010) 11:5 Pediatric Critical Care Medicine 603 at 607.

95 Zarychanski et al, *supra* note 92 at 259.

96 Joanne Embree, "Pandemic 2009 (A)H1N1 Influenza (Swine Flu) — The Manitoba Experience" (2010) 88 Biochemistry and Cell Biology 589 at 591.

97 Ted Rosenberg et al, "Shigellosis on Indian Reserves in Manitoba, Canada: Its Relationship to Crowded Housing, Lack of Running Water, and Inadequate Sewage Disposal" (1997) 87:9 American Journal of Public Health 1547 at 1548-49.

98 *Ibid* at 1550.

99 Boyd, *Unnatural Law*, *supra* note 24 at 13-65.

100 David R Boyd, *The Water We Drink: An International Comparison of Drinking Water Quality Standards and Guidelines* (Vancouver: David Suzuki Foundation, 2006) at 7.

A. The Provincial and Territorial Legal Framework for Drinking Water

Every province and territory has passed laws and/or regulations that establish drinking water quality standards, as well as requirements for monitoring, testing, operator training and certification, and public reporting.[101] In the wake of the Walkerton water disaster in 2000, almost every province and territory has strengthened its regulatory framework for drinking water.[102] In general, laws intended to secure safe drinking water apply to all water systems, except very small systems serving only a few buildings or residents. The other exception is that provincial laws governing drinking water do not apply to reserves, because of the federal government's constitutional responsibility for "Indians, and lands reserved for Indians."[103]

B. The Federal Legal Framework for Drinking Water

At the federal level, a variety of legal provisions ensure access to safe water within the limits of federal jurisdiction. The *Canada Labour Code* and associated regulations mandate the provision of potable water at all facilities where there are federal employees.[104] The *Potable Water Regulations for Common Carriers* (under the *Department of National Health and Welfare Act*) require the provision of potable water on aircraft, trains, and ships travelling internationally, interprovincially, in coastal waters, or on the Great Lakes.[105]

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[101] *Potable Water Regulation*, Alta Reg 277/2003; *Drinking Water Protection Act*, SBC 2001, c 9 (5th Sess); *The Drinking Water Safety Act*, SM 2002, c 36; *Potable Water Regulation*, NB Reg 1993-203; *Water Resources Act*, SNL 2002, c W-4.01; *Waste and Wastewater Facilities and Public Drinking Water Supplies Regulations*, NLR 186/2005; *Safe Drinking Water Act*, SO 2002, c 32 (3d Sess); *Drinking Water and Wastewater Facility Operating Regulations*, PEI Reg EC2004-710; *Regulation respecting the quality of drinking water*, OC 647-2001, 30 May 2001, (2001) GOQ II, 2641; *The Water Regulations, 2002*, RRS, c E-10.21, Reg 1, OC 856/2002; *Drinking Water Regulation*, YOIC 2007/139; *Water Supply Systems Regulations*, NWT Reg 108/09; *Public Water Supply Regulations*, RRNWT 1990, c P-23.

[102] Nunavut appears to be the sole exception, with drinking water regulations dating to 1990 that have not been amended.

[103] *Constitution*, *supra* note 22, s 91(24). See also MacIntosh, *supra* note 37 at 80.

[104] *Canada Labour Code,* RSC 1985, c L-2, s 125(1)(j). See also *Canada Occupational Safety and Health Regulations,* SOR/86-304, s 9(24); *Aviation Occupational Safety and Health Regulations,* SOR/87-182, s 4(9); *Maritime Occupational Health and* Safety *Regulations,* SOR/2010-120, ss 73-78; *Oil and Gas Occupational Safety and Health Regulations,* SOR/87-612, s 10(19).

[105] *Potable Water Regulations for Common Carriers*, CRC, c 1105.

A number of federal laws relate to water and First Nations, including the *Canada Water Act*,[106] *Canadian Environmental Protection Act, 1999*,[107] *Department of Health Act*,[108] *Department of Indian Affairs and Northern Development Act*,[109] *Fisheries Act*,[110] *First Nations Land Management Act*,[111] and the *First Nations Commercial and Industrial Development Act*.[112] However, none of these laws provide a regulatory framework for the provision of safe drinking water on reserves.[113] The sole federal legislation relevant to drinking water on reserves is the *Indian Act* provision authorizing band councils to make bylaws governing "the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies."[114] The Expert Panel determined that no bylaws have ever been passed pursuant to this enabling provision.[115] The *Indian Act* does not authorize the protection of source water, which the Walkerton Inquiry highlighted as a critical component of a comprehensive drinking water regime.[116] As Professor MacIntosh concludes, this *Indian Act* provision is "an inadequate basis for a regulatory framework to ensure the safety of drinking water."[117]

The bottom line is that there are no federal or provincial laws or regulations to ensure safe drinking water for First Nations individuals living on reserves. Ironically, because of the *Canada Labour Code*, Health Canada has installed small water treatment systems at nursing clinics and health facilities on dozens of reserves with drinking water quality problems to ensure that employees have access to safe drinking water.[118] The Canadian Commissioner of the Environment and Sustainable Development observed that "because the *Canada Labour Code* applies only to

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106 *Canada Water Act*, RSC 1985, c C-11.

107 *Canadian Environmental Protection Act, 1999*, RSC 1999, c 33.

108 *Department of Health Act*, RSC 1996, c 8.

109 *Department of Indian Affairs and Northern Development Act*, RSC 1985, c I-6.

110 *Fisheries Act*, RSC 1985, c F-14.

111 *First Nations Land Management Act,* RSC 1999, c 24.

112 *First Nations Commercial and Industrial Development Act*, RSC 2005, c 53.

113 See Indian and Northern Affairs Canada, *Report of the Expert Panel on Safe Drinking Water for First Nations*, vol 2 (Ottawa: Minister of Public Works and Government Services Canada, 2006) at 3 [*Report of the Expert Panel*, vol 2].

114 *Indian Act*, *supra* note 5, s 81(l).

115 *Report of the Expert Panel*, vol 2, *supra* note 113 at 25.

116 Ontario, Walkerton Commission of Inquiry, *Report of the Walkerton Inquiry: A Strategy for Safe Drinking Water,* Part Two (Toronto: Queen's Printer for Ontario, 2002) at 73 [*Walkerton Inquiry*].

117 MacIntosh, *supra* note 37 at 69.

118 "Drinking Water in First Nations Communities", *supra* note 9 at 10.

employees and provincial legislation and regulations are not applied on reserves, residents of First Nations communities do not benefit from the regulatory protection for drinking water available in provinces and to federal employees."[119] As Professor MacIntosh concludes, "all populations under federal jurisdiction have their drinking water protected by law, except for on-reserve First Nations people."[120] This is part of a larger pattern of "regulatory abandonment" of reserve lands and waters that also includes an absence of regulation for wastewater treatment, garbage disposal, hazardous waste, air pollution, and other environmental concerns.[121]

INAC has attempted to fill the regulatory gap with guidelines and funding arrangements, but this approach fails to incorporate important elements found in provincial regulatory regimes, including: "approval and licensing of water treatment plants, ongoing monitoring, public reporting requirements, and compliance and enforcement mechanisms."[122]

In 2002, in his report on the Walkerton water disaster, Justice O'Connor wrote: "I encourage First Nations and the federal government to formally adopt drinking water standards, applicable to reserves, that are as stringent as, or more stringent than, the standards adopted by the provincial government."[123] In 2005, the federal Commissioner of the Environment and Sustainable Development recommended the development of a regulatory regime for drinking water in First Nations communities that would "protect the health and safety of First Nations people."[124] In 2006, the Expert Panel identified a number of legislative options and determined that the creation of a single federal regime of drinking water standards for First Nations communities offered the most advantages and the fewest drawbacks. The federal government pledged that it would "choose a regulatory option and propose an appropriate regulatory framework that will ensure safe drinking water in First Nations communities in the Spring 2007."[125] In 2010, the government introduced Bill S-11 into the Senate.[126] Contrary to the recommendations of the Expert Panel and the

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[119] *Ibid*.

[120] MacIntosh, *supra* note 37 at 93.

[121] *Ibid* at 68.

[122] "Drinking Water in First Nations Communities", *supra* note 9 at 10-11.

[123] *Walkerton Inquiry*, *supra* note 116 at 32.

[124] "Drinking Water in First Nations Communities", *supra* note 9 at 12.

[125] Indian and Northern Affairs Canada, *Plan of Action for Drinking Water in First Nations Communities: Progress Report* (22 March 2007), online: Aboriginal Affairs and Northern Development Canada at 10 <http://www.ainc-inac.gc.ca>.

[126] Bill S-11, *supra* note 54.

Assembly of First Nations, Bill S-11 proposed a regime based on the highly variable provincial drinking water laws.[127] The Expert Panel had identified this as the weakest option for three reasons: "gaps and variations in those [provincial] regimes" could lead to uneven results, with some communities benefiting from more comprehensive provincial regimes; First Nations have low records of accepting provincial regulation; and because involving another level of government in water management would add complexity.[128] Bill S-11 also contained provisions that: suggested constitutionally protected Aboriginal rights could be violated;[129] indicated that the regulations would prevail over land claims agreements, self-government agreements, and First Nations laws and bylaws in the event of a conflict;[130] and limited the government's liability for acts and omissions and precluded civil lawsuits.[131]

Perhaps not surprisingly, the reaction of First Nations to the proposed legislation was negative.[132]

III. The Right to Life, Liberty and Security of the Person (Section 7 of the *Charter*)

> Modern sanitation services (potable drinking water and safe wastewater disposal) are a cornerstone of public health progress and have contributed to decreased infectious disease morbidity and mortality.[133]

The Supreme Court of Canada has repeatedly stated that the interpretation of the *Charter* should be "a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for in-

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127 *Ibid*.

128 *Report of the Expert Panel*, vol 1, *supra* note 36 at 59.

129 *Supra* note 54, s 4(1)(r).

130 *Ibid*, s 6.

131 *Ibid*, ss 10-12.

132 Assembly of First Nations, Press Release, "AFN National Chief Calls for Real Action on Safe Drinking Water for First Nations: Need Action to Address the 'Capacity Gap as well as the Regulatory Gap'" (27 May 2010) online: AFN <http://www.afn.ca>.

133 Thomas W Hennessy et al, "The Relationship Between In-Home Water Service and the Risk of Respiratory Tract, Skin, and Gastrointestinal Tract Infections Among Rural Alaska Natives" (2008) 98:11 American Journal of Public Health 2072 at 2072.

dividuals the full benefit of the *Charter*'s protection."[134] Section 7 of the *Charter* states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[135]

The appropriate scope of section 7 is one of the most contested issues in Canadian constitutional law.[136] Many different types of claims have been launched based on the right to life, liberty and security of the person, reflecting concerns about cruise missile testing in Canada, [137] the location of a landfill,[138] the inadequacy of provincial welfare programs,[139] and the legality of a Quebec law prohibiting private health insurance.[140] Although not all of these particular claims succeeded, most of the successful challenges launched under section 7 have been related to government actions that deprive an individual of his or her right to life, liberty and security of the person in the context of the administration of justice, particularly the criminal justice system. Subsequent cases, including *Chaoulli v. Quebec (Attorney General)*,[141] have confirmed that section 7 applies in a broader range of circumstances.

According to the Supreme Court of Canada, the claimant asserting a violation of section 7 must prove two main elements: 1) that a deprivation of the right to life, liberty and security of the person has occurred; and 2) that the deprivation "was not in accordance with the principles of fundamental justice."[142] In *Singh v. Minister of Employment and Immigration*, Justice Wilson emphasized that the "deprivation" can relate to any or all of the three interests identified in section 7—life, liberty, and security of the person—and that "it is incumbent upon the Court to give meaning to

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[134] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344, 18 DLR (4th) 321 [*Big M Drug Mart*]. See also *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016 [*Dunmore*].

[135] *Supra* note 32.

[136] See generally Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38:2 UBC L Rev 539.

[137] *Operation Dismantle Inc v Canada*, [1985] 1 SCR 441, 18 DLR (4th) 481.

[138] *Manicom v County of Oxford* (1985), 52 OR 2d 137, 21 DLR (4th) 611.

[139] *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 205, [2002] 4 SCR 429 [*Gosselin*].

[140] *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*].

[141] *Ibid*.

[142] *Gosselin*, *supra* note 139 at para 205. Steps originally delineated by Justice La Forest in *R v Beare; R v Higgins*, [1988] 2 SCR 387 at 401, 55 DLR (4th) 481.

each of the elements."[143] The right to life has been described as the "right, freedom or ability to maintain one's existence."[144] Liberty under section 7 "encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence."[145] *Rodriguez v. British Columbia (Attorney General)* sets out the parameters of the right to security of the person, including its physical and psychological components, as "encompass[ing] a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress" as well as "the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity."[146]

A highly contentious issue is whether section 7 is, or ought to be, the basis for a positive state obligation to guarantee adequate living standards.[147] Efforts to broaden the application of section 7 to incorporate social and economic rights, as in the *Gosselin* case about reduced welfare payments for young people in Quebec, have generally not succeeded, although the Supreme Court has deliberately left the door open. Chief Justice McLachlin, on behalf of the majority in *Gosselin*, wrote:

> Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to *deprive* people of these. Such a deprivation does not exist in the case at bar.
>
> One day s. 7 may be interpreted to include positive obligations. ... It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. ...
>
> The question therefore is not whether s. 7 has ever been—or will ever be—recognized as creating positive rights. Rather, the question

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143 *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at 204-205, 17 DLR (4th) 422. See also *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536 [*Re BC Motor Vehicle Act* cited to SCR].

144 Deborah Curran et al, *Environmental Law: In the Public Interest* (Vancouver, Continuing Legal Education Society of British Columbia, 2008) at 6.2.11. See also *Canada v Schmidt*, [1987] 1 SCR 500, 39 DLR (4th) 18 [*Schmidt* cited to SCR]; *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779, 84 DLR (4th) 438 [*Kindler*]; *Reference Re Ng Extradition (Canada)*, [1991] 2 SCR 858, 84 DLR (4th) 498 [*Re Ng Extradition*]; *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283 [*Burns*].

145 *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at 893, 152 DLR (4th) 577.

146 *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 587-88, 107 DLR (4th) 342 [*Rodriguez*].

147 Young, *supra* note 136 at 540.

> is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.
>
> I conclude that they do not. ... I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case.[148]

Justices Arbour and L'Heureux-Dubé, dissenting in *Gosselin*, argued that section 7 establishes a positive obligation on the state to provide for everyone's basic needs.[149] In *Schachter*, the Supreme Court clearly stated that sections 7 and 15 of the *Charter* include both negative and positive rights.[150] Given its preeminence within the overall scheme of the *Charter*, "the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7" is, as Justice LeBel suggests in *Blencoe v. British Columbia (Human Rights Commission)*, crucial.[151] So too, as Justice L'Heureux-Dubé asserts in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, is the need to interpret section 7 through an equality rights lens in order "to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society."[152] The majority and concurring opinions in *Chaoulli v. Quebec (Attorney General)* may have marked a new era in judicial interpretation of the Canadian and Quebec charters, indicating more responsiveness to the needs of Canadians.[153] Some commentators have argued that the Supreme Court decision in *Chaoulli*, striking down Quebec's prohibition of private health insurance, created a de facto obligation upon the state to provide timely health care.[154] The 2009 British Columbia Court of Appeal decision dealing with homelessness, *Victoria (City) v. Adams*, is also instructive.[155] The Court of Appeal agreed with the trial judge that a municipal bylaw prohibiting homeless people from establishing temporary structures in parks and other public spaces violated section 7 of the *Charter*. The Court

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148 *Gosselin*, *supra* note 139 at paras 81-82 [emphasis in original].

149 *Ibid* at paras 357-58.

150 *Schachter v Canada*, [1992] 2 SCR 679 at 721, 93 DLR (4th) 1 [*Schachter*].

151 *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 188, [2000] 2 SCR 307 [*Blencoe*].

152 *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at 101, 177 DLR (4th) 124 [*G(J)*]. See also *R v Mills*, [1999] 3 SCR 668 at 689, 180 DLR (4th) 1.

153 *Chaoulli*, *supra* note 140.

154 Stanley Hartt, "What the *Chaoulli* Decision Said About Health Care Rhetoric vs. Health Care Reality", *Policy Options* (February 2006) 44 at 46, online: IRPP <http://www.irpp.org>.

155 *Victoria (City) v Adams*, 2009 BCCA 563, 313 DLR (4th) 29 [*Adams*].

held that its decision did not impose positive obligations on the city to provide adequate shelter or take other specified actions to address homelessness, although it acknowledged that, from a practical point of view, the city would have to undertake some kind of responsive action "to comply with the requirements of the *Charter*, which can involve some expenditures of public funds or legislative action, or both."[156]

A. Deprivation of the Right to Life, Liberty and Security of the Person

According to the Supreme Court of Canada, the right to security of the person is violated when state action or inaction results in serious physical and/or psychological harm.[157] As Chief Justice Lamer stated in *G. (J.)*:

> It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected.[158]

Psychological harm must be greater than ordinary stress or anxiety, but does not have to rise to the level of psychiatric illness. Examples of situations where the right to life, liberty and security of the person will be violated include: extradition to another country to face the death penalty; extradition to another country to face torture; and delays in the provision of medical treatment. In *Chaoulli*, the Court stated that "delays in obtaining medical treatment which affect patients physically and psychologically trigger the protection of s. 7."[159]

Does the federal government's failure to provide adequate funding for basic drinking water and sanitation infrastructure at Pikangikum, Kitcisakik, Little Buffalo, St. Theresa Point, Wasagamack, Red Sucker Lake, Garden Hill, and other reserves deprive First Nations persons in those communities of their right to life, liberty and security of the person? The answer is clearly in the affirmative. It is widely recognized—by health experts, the UN, the World Health Organization, and even the government of Canada—that a minimum supply of potable water is a pre-

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156 *Ibid* at para 96.

157 *Blencoe*, *supra* note 151.

158 *G(J)*, *supra* note 152 at 77. Affirmed in *Blencoe*, *supra* note 151 at para 81.

159 *Chaoulli*, *supra* note 140 at para 118.

requisite for life, adequate human health, and well-being.[160] The federal government seems to acknowledge that "[c]lean, safe water is a basic requirement for life which must be accessible by all peoples of Canada."[161]

There is compelling evidence showing that: First Nations individuals face elevated levels of waterborne disease compared to other Canadians;[162] First Nations individuals living on reserves without running water experienced a higher incidence of H1N1 than the general Canadian population, as well as a higher incidence of illness and death;[163] First Nations children suffered from a disproportionately high rate of H1N1 influenza, due largely to the outbreak on the Manitoba reserves highlighted in this article (St. Theresa Point, Wasagamack, Red Sucker Lake, and Garden Hill);[164] and some First Nations communities that lack access to safe drinking water have disproportionately high suicide rates, indicating high levels of psychological distress.[165]

Other studies indicate that residents of reserves where the majority of homes lack tap water or toilets face elevated risks of: whooping cough (pertussis); infection with a dangerous superbug known as MRSA, or methicillin-resistant Staphylococcus aureus; shigellosis, a deadly illness that affects children; diarrhea; and impetigo, a bacterial skin infection that can lead to kidney problems.[166] A key element of prevention in each of these cases is proper hygiene, including frequent handwashing, which is dependent on the availability of sufficient quantities of water of adequate quality. A study of rural Native villages in Alaska found that residents of

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160 See generally Peter H Gleick, "Basic Water Requirements for Human Activities: Meeting Basic Needs" (1996) 21 Water International 83; Guy Howard and Jamie Bartram, *Domestic Water Quantity, Service Level and Health* (Geneva: World Health Organization, 2003); WHO and UNICEF, *Global Water Supply and Sanitation Assessment: 2000 Report* (Geneva: World Health Organization and United Nations Children's Fund, 2000); *Report of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation Under International Human Rights Instruments*, UNGAOR, 6th Sess, UN Doc A/HRC/6/3, (2007) 1 [*Access to Safe Drinking Water and Sanitation*].

161 Indian and Northern Affairs Canada, News Release, 2-02757, "Government Announces Immediate Action on First Nations Drinking Water Frequently Asked Questions" (21 March 2006) online: Aboriginal Affairs and Northern Development Canada <http://www.ainc-inac.gc.ca>.

162 *Implementation of ICESCR*, *supra* note 13 at 84.

163 Alexia Campbell et al, "Risk of Severe Outcomes Among Patients Admitted to Hospital with Pandemic (H1N1) Influenza" (2010) 182:4 Can Med Assoc J 349 at 354.

164 Jouvet et al, *supra* note 94 at 605, 607.

165 Elliott, *supra* note 58.

166 Fallding, "Disease Factory", *supra* note 85.

homes without piped water and wastewater services faced significantly higher risks of pneumonia, influenza, and skin infections.[167] The same study found that infants in villages lacking basic water services were five times more likely to be hospitalized for lower respiratory tract infections and respiratory syncytial virus, and eleven times more likely to be hospitalized for pneumonia compared to the overall United States population.[168] The authors concluded that this disparity ought to be remedied by improving sanitation infrastructure.[169]

In circumstances analogous to the situation in *Chaoulli*,[170] First Nations persons living on reserves without access to adequate water and sanitation services face elevated risks of serious health problems and may in some cases face an increased risk of death. There is a direct connection between the federal government's failure to provide adequate funding for basic water infrastructure in these communities and deprivation of the right to life, liberty and security of the person. There is an indirect connection between the federal government's failure to ensure legal protection for the drinking water of these communities, as it has done for other persons under federal jurisdiction (for example, federal employees, travellers on planes, trains, and ships, and military personnel), and the deprivation of the right to life, liberty and security of the person. This is analogous to the Supreme Court's finding that Alberta's human rights legislation was under inclusive in *Vriend v. Alberta.*[171]

An argument can also be made that the liberty interests of First Nations individuals who live on reserves without access to basic water or sanitation services may be compromised. The Supreme Court has made it clear that for First Nations people, the choice of whether to live on or off reserve is fundamental to their identity.[172] The federal government's failure to provide access to water and sanitation may effectively compel First Nations persons to leave their reserves and to protect their health by moving to communities where these services are available.

In *Chaoulli*, Chief Justice McLachlin wrote that by "failing to provide public health care of a reasonable standard within a reasonable time, the government creates circumstances that trigger the application of s. 7 of

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167 Hennessy et al, *supra* note 133.

168 *Ibid* at 2076.

169 *Ibid* at 2078.

170 *Supra* note 140. See also *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385 [*Morgentaler* cited to SCR].

171 [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend* cited to SCR].

172 *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere* cited to SCR].

the *Charter*."[173] Similarly, by failing to provide drinking water and sanitation infrastructure "of a reasonable standard within a reasonable time" the government creates circumstances that trigger the application of section 7.

B. Is the Deprivation in Accordance with the Principles of Fundamental Justice?

The second part of the section 7 analysis involves determining whether the deprivation of the right to life, liberty and security of the person is consistent with the principles of fundamental justice. There is ambiguity about the meaning of the phrase "principles of fundamental justice." According to the Supreme Court, to constitute a principle of fundamental justice for the purposes of section 7, a rule or principle must: i) "be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate"; and ii) "be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person."[174]

At least three of the principles of fundamental justice that have been accepted by the Supreme Court of Canada appear to be violated by the federal government's ongoing failure to provide First Nations persons living on reserves with safe drinking water. First, according to Justice Wilson in *Morgentaler*, "a deprivation of the s. 7 right which has the effect of infringing a right guaranteed elsewhere in the *Charter* cannot be in accordance with the principles fundamental justice."[175] The next section of this article provides compelling evidence that the same government failure to provide safe drinking water that violates section 7 also violates the *Charter*'s section 15 equality guarantee by discriminating against First Nations.

Second, if the deprivation of the right to life, liberty and security of the person would "shock the conscience" of Canadians, then it violates the principles of fundamental justice. Typically, "shock the conscience" has involved government decisions to extradite or deport someone who faces the death penalty, torture, or another form of punishment that would be unlawful in Canada. The main "shock the conscience" cases are *Schmidt* (1987), *Kindler* (1991), *Re Ng Extradition* (1991), *Burns* (2001), and

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[173] *Supra* note 140 at para 105.

[174] *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 at para 113, [2003] 3 SCR 571 [*Malmo-Levine*]. See also *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 8, [2004] 1 SCR 76.

[175] *Morgentaler*, *supra* note 170 at 175. See also *Re BC Motor Vehicle Act, supra* note 143.

Suresh v. Canada (Minister of Citizenship and Immigration) (2002).[176] *Schmidt* held that the principles of fundamental justice are invoked by action that "shocks the conscience."[177] In *Suresh*, the Supreme Court articulated the test for determining what shocks the conscience, which asks whether "the conduct [is] fundamentally unacceptable to our notions of fair practice and justice."[178] The failure to ensure that all First Nations communities have running water, access to safe drinking water, and indoor plumbing is surely sufficient to shock the conscience of Canadians.[179]

Third, a law, policy, or program that is arbitrary also violates the principles of fundamental justice. A law, policy, or program is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]."[180] In *Chaoulli*, the Court explained that:

> To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect.
>
> In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.[181]

In identifying priority communities under the First Nations Water and Wastewater Action Plan, the federal government evaluated five aspects of a community's water treatment system: "source water quality, design of the system, operation and maintenance of the system, operator

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[176] *Schmidt*, *supra* note 144; *Kindler*, *supra* note 144; *Re Ng Extradition*, *supra* note 144; *Burns*, *supra* note 144; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*].

[177] *Schmidt*, *supra* note 144 at 522.

[178] *Supra* note 176 at para 49. See also David W Elliott, "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002) 65:2 Sask L Rev 469 at 499.

[179] See generally Andrew Gage, "Public Health Hazards and Section 7 of the *Charter*" (2004) 13 J Envtl L & Prac 1.

[180] *Rodriguez*, *supra* note 146 at 619-20. See also *Malmo-Levine, supra* note 174 at para 136; *Chaoulli*, *supra* note 140 at paras 130-31.

[181] *Supra* note 140 at paras 130-31 [footnote omitted].

training and certification, and reporting and record keeping."[182] This unjustifiably narrow approach led to the exclusion of Pikangikum, Kitcisakik, Little Buffalo, St. Theresa Point, Wasagamack, Red Sucker Lake, and Garden Hill from the list of priority First Nations. This exclusion occurred despite previous government commitments to these communities, media coverage of the acute problems facing these communities, and even the identification of some of these communities by the government's own Expert Panel as requiring urgent intervention. As the Standing Senate Committee on Aboriginal Peoples reported in 2007, "the Expert Panel told the Committee that they had identified communities that were clearly at higher risk, but that *these communities failed to appear as high risk on the Department's risk assessment because they did not have any water systems at all*."[183]

It is likely that a strategy to provide safe drinking water and sanitation that fails to prioritize the communities where these basic services are most urgently required is arbitrary. The seven First Nations communities highlighted in this article are suffering extensive adverse health effects as a direct consequence of the lack of access to a sufficient quantity of adequate quality water. The INAC criteria for ranking priority communities are arbitrary because they ignore whether a treatment plant exists and, if one does exist, whether it is actually serving members of a community. As the Supreme Court held in *Chaoulli* (endorsing the ruling of Justice Beetz in *Morgentaler*) "rules that endanger health arbitrarily do not comply with the principles of fundamental justice."[184]

A fourth legal principle that may be relevant in this discussion is respect for minorities. As the Supreme Court noted in *Reference Re Secession of Quebec*, "there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities."[185] The Court further emphasized that "the protection of minority rights is itself an independent principle underlying our constitutional order."[186] Given that First Nations persons clearly belong to a minority in

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[182] *Debates of the Senate*, 39th Parl, 1st Sess, No 15 (25 April 2007) at 15-49 (Hon Gerry St Germain).

[183] *Safe Drinking Water*, *supra* note 55 at 4 [emphasis in original].

[184] *Supra* note 140 at para 133.

[185] *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at 240, 161 DLR (4th) 385 [*Re Secession of Quebec*].

[186] *Ibid* at 261-62.

the Canadian context,[187] the failure to provide adequate funding for drinking water and sanitation infrastructure on reserves and the failure to legislate protection for safe drinking water could be construed as contrary to the principle of respecting and protecting minority rights.

C. *Justification Under Section 1 of the* Charter

Once a claimant has established a violation of one or more *Charter* rights, the onus shifts to the party seeking to justify the infringement under section 1 of the *Charter*.[188]

The Supreme Court has stated that section 7 violations can rarely be justified by section 1 of the *Charter*.[189] In *Re B.C. Motor Vehicle Act*, Justice Lamer observed that "[s]ection 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."[190] Thus, if depriving residents of First Nations reserves of access to safe water violates their right to life, liberty and security of the person, it is unlikely that the government will be able to justify its actions under section 1 of the *Charter*.

IV. The Right to Equality (Section 15 of the *Charter*)

Section 15(1) of the *Charter* states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[191]

It is a general principle of *Charter* interpretation that section 15(1) is to be generously and purposively interpreted.[192] Courts have been clear in explaining that section 15 applies to more than just statutes. As the Supreme Court ruled in *Lovelace v. Ontario*, government programs and ac-

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187 *Aboriginal Peoples in Canada in 2006*, *supra* note 11 at 6.

188 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes* cited to SCR].

189 *R v DB*, 2008 SCC 25 at para 89, [2008] 2 SCR 3.

190 *Re BC Motor Vehicle Act*, *supra* note 143 at 518.

191 *Supra* note 32.

192 See e.g. *Hunter v Southam Inc*, [1984] 2 SCR 145 at 156, 11 DLR (4th) 641; *Big M Drug Mart*, *supra* note 134 at 336, 344; *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 175, 56 DLR (4th) 1 [*Andrews*].

tivities undertaken pursuant to statutory authority are also subject to *Charter* scrutiny.[193]

The purpose of the equality right guaranteed under the *Charter* has been described by the Supreme Court of Canada in different ways. In *R. v. Turpin*, the Court defined the overall purpose of section 15 to be the remedying or preventing of discrimination against groups suffering social, political, and legal disadvantage in Canadian society.[194] In *Eldridge v. British Columbia (Attorney General)*, the Court held that section 15(1) has two key purposes:

> First, it expresses a commitment—deeply ingrained in our social, political and legal culture—to the equal worth and human dignity of all persons. As McIntyre J. remarked in *Andrews*, at p. 171, s. 15(1) "entails 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". Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups "suffering social, political and legal disadvantage in our society".[195]

The legal test for establishing a violation of section 15 of the *Charter* has evolved through a number of Supreme Court of Canada decisions, beginning with *Andrews v. Law Society of British Columbia*[196] and arising most recently in *R. v. Kapp*.[197] In *Kapp*, the Supreme Court of Canada reiterated the test for potential section 15 violations as involving two questions: "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"[198]

A. Is the Distinction or Differential Treatment Based on an Enumerated or Analogous Ground?

According to Professor Hogg, a section 15 analysis "requires a comparison between the legal position of the claimant and that of other people to

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[193] *Lovelace v Ontario*, 2000 SCC 37 at para 56, [2000] 1 SCR 950 [*Lovelace*]. See also *McKinney v University of Guelph*, [1990] 3 SCR 229 at 277, 76 DLR (4th) 545.

[194] *R v Turpin*, [1989] 1 SCR 1296, 96 NR 115.

[195] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at 667, 151 DLR (4th) 577 [*Eldridge*] [footnotes omitted]. See also *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law* cited to SCR].

[196] *Supra* note 192.

[197] *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*].

[198] *Ibid* at para 17.

whom the claimant may legitimately invite comparison."[199] Thus, all portions of the section 15 test proceed

> on the basis of a comparison with another relevant group or groups, and locating the relevant comparison groups requires an examination of the subject-matter of the law, program or activity and its effects, as well as a full appreciation of the context. Generally, the claimant chooses the relevant comparator, however, a court may, within the scope of the ground or grounds pleaded, refine the comparison presented by the claimant.[200]

Race and ethnicity are enumerated grounds under section 15. In the context of access to safe drinking water, however, it is not Aboriginality per se that is the basis of the impugned distinction. Aboriginal people living off-reserve enjoy the same level of access to safe drinking water and sanitation as other Canadians, and the same legal protection provided by federal and provincial drinking water laws and regulations. It is the combination of Aboriginality with on-reserve residence that is the basis of the distinction, or Aboriginality-residence to use the terminology of the Supreme Court of Canada.[201] In the case of *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, it was held that *Indian Act* provisions requiring residence on reserve in order to vote in band council elections violated the section 15 equality rights of Aboriginal people living off-reserve.[202] Residence on an Indian reserve is an exception to the courts' position that place of residence is not an analogous ground.[203] The Supreme Court unanimously held in *Corbiere* that "Aboriginality-residence" is an analogous ground because the decision to live on- or off-reserve is a "personal characteristic essential to a band member's personal identity" which can be changed "only at great cost, if at all."[204]

Regarding access to safe drinking water, it is First Nations people living on-reserve whose section 15 equality rights are being violated. The Aboriginal communities of Pikangikum, Kitcisakik, Little Buffalo, St. Theresa Point, Wasagamack, Red Sucker Lake, and Garden Hill are remote northern reserves. Relevant comparison groups are therefore remote northern communities, of similar size, that are not reserves. Examples

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199 Peter W Hogg, *Constitutional Law of Canada*, 5th ed, loose-leaf (consulted on 9 August 2011), (Toronto: Carswell, 2007) vol 2 at 55.32.3.

200 *Lovelace*, *supra* note 193 at para 62 [footnote omitted]. See also *Law*, *supra* note 195 at 531.

201 *Corbiere*, *supra* note 172 at 216.

202 *Ibid*.

203 *Ibid*.

204 *Ibid* at 220.

could include Red Lake, Ontario (population 4,526);[205] Aumond, Quebec (population 775);[206] Berwyn, Alberta (population 546); and Flin Flon, Manitoba (population 5,594).[207] Residents of these remote, northern, non-reserve communities enjoy safe drinking water from systems that are provincially regulated. For example, there is a dramatic contrast between access to safe water in Pikangikum and Red Lake despite comparable population sizes and geographic proximity (roughly one hundred kilometres separate the communities). Whereas the residents of the Pikangikum First Nation predominantly lack running water and indoor plumbing, forcing them to collect water in buckets and to rely on outhouses,[208] the residents of Red Lake enjoy safe drinking water from a certified municipal water system and are served by a sewage treatment plant that treats their wastewater.[209] Red Lake's water treatment system must meet the stringent requirements of Ontario's *Safe Drinking Water Act*, which imposes extensive treatment and monitoring requirements in order to ensure that human health is protected.[210] Pikangikum's water treatment plant (which is not connected to 95 percent of the homes in the community) is not subject to a regulatory regime.[211] According to the legally required public annual report, the operator of the Red Lake water treatment system carried out "over 6,000 routine independent in-house water quality tests ... in 2010."[212] In contrast, water quality testing at Pikangikum was described by Ontario's Northwestern Health Unit as sporadic, infrequent, and insufficient.[213]

As discussed earlier, there are no federal or provincial laws that protect the quality of drinking water on First Nations reserves. Every province and territory in Canada has legislation intended to ensure the provision of safe drinking water. However, because the *Constitution Act, 1867*

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[205] Statistics Canada, "Community Profiles: Red Lake, Ontario" in *2006 Census of Population*, online: Statistics Canada <http://www.statcan.ca>.

[206] Statistics Canada, "Community Profiles: Aumond, Quebec" in *2006 Census of Population*, online: Statistics Canada <http://www.statcan.ca>.

[207] Statistics Canada, "Community Profiles: Flin Flon, Manitoba" in *2006 Census of Population*, online: Statistics Canada <http://www.statcan.ca>.

[208] *Report of the Expert Panel*, vol 1, *supra* note 36 at 52.

[209] Municipality of Red Lake, Ontario, *Red Lake Drinking Water System: Annual Report 2010* (Red Lake, Ontario: Northern Waterworks, 2010) [*Red Lake Drinking Water System*].

[210] *Safe Drinking Water Act*, RSO 2002, c 32. See also *Drinking Water Systems*, O Reg 106/10.

[211] *Inspection Report*, *supra* note 57 at 4.

[212] *Red Lake Drinking Water System*, *supra* note 209 at 3.

[213] *Inspection Report*, *supra* note 57.

assigns jurisdiction over Indians and Indian lands to the federal government,[214] these laws do not apply on First Nations reserves. The practical consequence is that the roughly half a million Canadians who live on reserves are without the legal guarantees of water quality enjoyed by the other thirty-four million Canadians. Therefore, First Nations people living on certain reserves have a strong argument that the legal framework intended to ensure safe drinking water for all Canadians has a glaring gap or, in legal terms, is under-inclusive. It is not that safe drinking water laws explicitly exclude Aboriginal Canadians living on reserve, but that is the ultimate result of the otherwise comprehensive network of laws. In *Vriend*, Alberta human rights legislation was held to be under-inclusive because it did not include discrimination based on sexual orientation.[215] In *Dunmore v. Ontario (AG)*, a case dealing with Ontario legislation excluding agricultural workers from the statutory labour relations regime, the Supreme Court held that "legislation that is *underinclusive* may, in unique contexts, substantially impact the exercise of a constitutional freedom."[216] In the context of the right to water, Canadian drinking water legislation is under-inclusive in that it does not apply on reserves. Because of the allocation of constitutional jurisdiction, responsibility for this legal lacuna lies with the federal government.

While some may be encouraged by the allocation of additional resources and the introduction of new legislation, the crises in Pikangikum, Kitcisakik, Little Buffalo, St. Theresa Point, Wasagamack, Red Sucker Lake, and Garden Hill are ongoing. These crises have not been treated with the degree of urgency recommended by the Expert Panel in 2006. The allocation of money in a budget cannot be regarded as a substitute for tangible remedial action in the affected reserve communities. The introduction of proposed legislation that may or may not be passed by Parliament cannot be regarded as a substitute for the enactment, implementation, and enforcement of legislation. In *Vriend*, the Supreme Court held that "groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time."[217]

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[214] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, App II, No 5.

[215] *Supra* note 171.

[216] *Dunmore*, *supra* note 134 at para 22 [emphasis in original]. See also Dianne Pothier, "The Sounds of Silence: *Charter* Application when the Legislature Declines to Speak" (1996) 7:4 Const Forum Const 113.

[217] *Supra* note 171 at 559.

B. Is the Distinction or Differential Treatment Discriminatory?

The focus of the second part of the section 15 analysis has shifted over time, from *Andrews* to *Law v. Canada (Minister of Employment and Immigration)* and, more recently, *Kapp*. Four contextual factors were identified by the Supreme Court of Canada in *Law* as being relevant to the analysis under this last branch of the section 15 test: pre-existing disadvantage, correspondence between the ground of distinction and the actual needs and circumstances of the affected group, ameliorative purpose of the impugned measure for a more disadvantaged group, and the nature of the interests affected.[218] The Supreme Court has clarified that these four factors are non-exhaustive guiding principles rather than a mechanical test.[219]

One of the elements at the heart of section 15(1) is the concept of human dignity. As the Supreme Court observed in *Law*, "[h]uman dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society."[220] The Court elaborated:

> [P]robably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group. ... These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. *It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.*[221]

Whereas *Law* focused on the impairment of human dignity, *Kapp* emphasized discrimination, which it defined as the perpetuation of disadvantage or stereotyping.[222] Under both of these related approaches, it is clear that First Nations persons living on reserves meet the section 15 test. There can be no doubt that Aboriginal Canadians have a long and dismal history of being discriminated against in Canada. The Royal Commission on Aboriginal Peoples described countless examples that demonstrate pre-existing disadvantage, vulnerability, stereotyping, or

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[218] *Law*, *supra* note 195.

[219] *Lovelace*, *supra* note 193 at para 54.

[220] *Law*, *supra* note 195 at 530.

[221] *Ibid* at 534-35 [emphasis added, footnotes omitted].

[222] See Hogg, *supra* note 199 at 55.31-55.32.2.

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.[223] In *Corbiere*, *Lovelace*, and *Kapp*, the Supreme Court of Canada confirmed that First Nations people suffer historical and ongoing disadvantages vis-à-vis the general Canadian population:

> The disadvantage of aboriginal people is indisputable. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, the Court noted "the legacy of stereotyping and prejudice against Aboriginal peoples" (para. 66). The Court has also acknowledged that "Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health and housing" (*Lovelace*, at para. 69).[224]

The Supreme Court has repeatedly stated that "the essence of differential treatment cannot be fully appreciated without evaluating the economic, constitutional and societal significance of the interest adversely affected by the program in question."[225] In *Egan v. Canada*, the Court held that, all other factors being equal, "the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*."[226] Safe drinking water must be recognized as a human right not only because it is fundamental to health and quality of life, but also because it is a critical aspect of people's dignity. The lack of access to safe drinking water that is being experienced by First Nations communities has several adverse health, social, and economic effects. Residents of these communities experience higher rates of waterborne disease[227] and increased risks of diseases such as H1N1 (the swine flu).[228] The lack of access to safe drinking water strikes a blow to human dignity, and may contribute to the significantly higher rates of substance abuse and suicide experienced by some of these communities.[229] The adverse economic effects include both the direct costs of the foregoing problems and the opportunity costs associated with living in conditions that make it difficult to attract or retain skilled workers or businesses.

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[223] *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996).

[224] *Kapp*, *supra* note 197 at para 59.

[225] *Lovelace*, *supra* note 193 at para 88. See also *Law*, *supra* note 195 at 540.

[226] *Egan v Canada*, [1995] 2 SCR 513 at 556, 124 DLR (4th) 609 [*Egan*].

[227] *Implementation of ICESCR*, *supra* note 13 at 84.

[228] See e.g. Santin, *supra* note 90; Zarychanski et al, *supra* note 92; Kumar et al, *supra* note 93.

[229] Elliott, *supra* note 58.

In human rights jurisprudence, it is a widely accepted principle that failing to take positive actions to provide basic public services to disadvantaged groups can constitute discrimination.[230] The Supreme Court has consistently held that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner."[231] In *Eldridge*, the Supreme Court ruled that section 15 may require governments to take special measures to ensure that disadvantaged groups are able to benefit equally from government services, for example by extending the scope of a benefit to a previously excluded group.[232] *Eldridge* was a case of discrimination in which the adverse effects suffered by deaf persons were caused by the government's failure to ensure that deaf persons benefited equally from an essential service offered to everyone. By analogy, it is incumbent upon the federal government to ensure that in the context of access to safe drinking water, First Nations persons living on reserve (members of a disadvantaged group) are provided with the same essential services as the rest of the population. Although the various programs, initiatives, and investments described earlier represent useful steps in the right direction, they are flawed in that they do not direct adequate resources to communities with the most urgent needs. Whether a failure to legislate could be challenged under the *Charter* was mentioned as a possibility in *Vriend*.[233]

C. Justification Under Section 1 of the Charter

Section 1 of the *Charter* reads:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[234]

As the terms of the section make clear, no *Charter* protection is absolute. In the presence of a section 15 violation, the courts therefore undertake a separate section 1 evaluation to determine whether the infringement nevertheless constitutes a reasonable limit on the right to equality. The government bears the burden of establishing that any *Charter* breach is justi-

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[230] *Eldridge*, *supra* note 195 at 681; *Haig v Canada; Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 at 1041, 105 DLR (4th) 577 [*Haig*].

[231] *Eldridge*, *supra* note 195 at 678. See also *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22, 81 DLR (4th) 358; *Haig*, *supra* note 230 at 1041-42; *Native Women's Assn of Canada v Canada*, [1994] 3 SCR 627 at 655, 119 DLR (4th) 224.

[232] *Supra* note 195 at 678.

[233] *Supra* note 171 at 534.

[234] *Supra* note 32.

fied.[235] The governing approach to the section 1 analysis, detailed by the Supreme Court of Canada in *Oakes,* involves a two step process.[236] First, the objective of the legislation or government action must be shown to be sufficiently "pressing and substantial" to warrant overriding a *Charter* right.[237] Second, the means adopted to attain that objective must be reasonable and demonstrably justified.[238] In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective such that the attainment of the legislative goal is not outweighed by the abridgement of the right.[239]

Justification of conduct deemed discriminatory under section 15 "is difficult, because the finding of an impairment of human dignity will involve much of the same inquiry as that required by s. 1."[240] Given the extensive adverse effects of the failure to provide safe drinking water to First Nations people living on reserves (stemming from inadequate resources and the lack of a regulatory framework), the government would be hard pressed to meet the burden of justification. There is no apparent "pressing and substantial" objective, nor is there minimal impairment of the equality guarantee or proportionality between the government objective and the infringement of the right.

V. The Federal and Provincial Governments' Obligation to Provide Essential Public Services of Reasonable Quality to all Canadians (Section 36 of the *Constitution Act, 1982*)

A little-known section of the *Constitution* commits the federal and provincial governments to providing "essential public services of reasonable quality to all Canadians." Section 36, which falls under Part III: Equalization and Regional Disparities, reads:

> (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

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235 *Oakes*, *supra* note 188.

236 *Ibid*.

237 *Ibid* at 138-39.

238 *Ibid* at 139.

239 *Ibid*. See also *Egan*, *supra* note 226 at 605.

240 Hogg, *supra* note 199 at 55.19.

> (a) promoting equal opportunities for the well-being of Canadians;
>
> (b) furthering economic development to reduce disparity in opportunities; and
>
> (c) providing essential public services of reasonable quality to all Canadians.
>
> (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.[241]

There has been little judicial consideration of section 36 and only a modest academic debate about the potential consequences of the provision. The Manitoba, British Columbia, and Nova Scotia Courts of Appeal have indicated that section 36 may be justiciable in certain circumstances.[242] In *Manitoba Keewatinowi Okimakanak Inc. v. Manitoba Hydro-Electric Board*, Chief Justice Scott of the Manitoba Court of Appeal observed: "I am satisfied that in the general sense a reasonable argument might be advanced that the section could possibly have been intended to create enforceable rights."[243] At the British Columbia Supreme Court, Chief Justice Brenner held that section 36 of the *Constitution* "cannot form the basis of a claim since it only contains a statement of 'commitment'."[244] The British Columbia Court of Appeal disagreed, reiterating Chief Justice Scott's comment in *Manitoba Keewatinowi Okimakanak* that the section could create enforceable rights, but deciding that the Canadian Bar Association's statement of claim failed to offer the "[m]aterial facts [that] *must* be pleaded to create an informed environment for consideration of that question."[245]

In the Nova Scotia case, the Cape Breton Regional Municipality (CBRM) argued that section 36 is a legally enforceable constitutional commitment on the part of the federal and provincial governments, and

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[241] *Constitution*, *supra* note 22.

[242] See *Manitoba Keewatinowi Okimakanak Inc v Manitoba Hydro-Electric Board* (1992), 91 DLR (4th) 554, 78 Man R (2d) 141 (CA) [*Manitoba Keewatinowi Okimakanak* cited to DLR]; *Canadian Bar Assn v British Columbia* (2008), 290 DLR 617, 76 BCLR (4th) 48 (CA) [*Canadian Bar Assn* cited to DLR]; *Cape Breton (Regional Municipality) v Nova Scotia (Attorney General)* (2009), 277 NSR (2d) 350, 191 CRR (2d) 273 (CA) [*Cape Breton* cited to NSR].

[243] *Supra* note 242 at 557-58.

[244] *Canadian Bar Assn v British Columbia (AG)*, 2006 BCSC 1342 at para 118, [2007] 1 WWR 331.

[245] *Canadian Bar Assn*, *supra* note 242 at 637 [emphasis in original].

that it was violated by the inadequate provision of funding to Cape Breton.[246] The Nova Scotia Court of Appeal (NSCA) ruled that the only parties capable of litigating a case based on section 36 are the provincial and federal governments themselves, based on the dubious premise that section 36 is akin to a contractual agreement.[247]

One of the key issues regarding section 36 is whether it represents justiciable commitments or a suite of unenforceable objectives. The word "commit" and its French equivalent "*s'engager*" are both subject to several definitions. The Canadian Oxford Dictionary identifies two options: "having a strong dedication to a cause or belief" or "obliged (to take a certain action)."[248] All three courts of appeal agreed that "by its plain meaning 'committed' could, in appropriate circumstances, connote a justiciable obligation."[249] However, the NSCA held that a number of factors weighed against finding that the CBRM could rely on section 36 as an enforceable cause of action, including: the vague language of the three commitments in section 36(1); the absence of the word "right" in the title of the section; the lack of identified beneficiaries; and the opening phrase reiterating the legislative authority of Parliament and the provincial legislatures.[250] With respect, none of these arguments are convincing. It is a reality of constitutional drafting that provisions are vague, with details provided through legislation, regulation, and judicial interpretation. The language of section 36 is neither more nor less vague than other provisions of the *Constitution*, such as the "right to life, liberty and security of the person"[251] or "existing aboriginal and treaty rights."[252] It seems incorrect to suggest there are no identified beneficiaries in light of section 36(1)(c)'s reference to "all Canadians".[253] It is true that the location and wording of section 36 are distinct from the individual rights set forth in the *Charter*. Nevertheless, section 36(1)(c) plainly articulates the commitment of federal and provincial governments to "providing essential public services of reasonable quality to all Canadians."[254]

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246 *Cape Breton*, *supra* note 242.

247 *Ibid* at 365.

248 *The Canadian Oxford Dictionary*, 2d ed, *sub verbo* "committed".

249 *Cape Breton*, *supra* note 242 at 363. See also *Manitoba Keewatinowi Okimakanak*, *supra* note 242 at 557-58; *Canadian Bar Assn*, *supra* note 242 at 637.

250 *Cape Breton*, *supra* note 242.

251 *Charter*, *supra* note 32, s 7.

252 *Constitution*, *supra* note 22, s 35.

253 *Ibid*, s 36(1)(c).

254 *Ibid*.

There are several arguments in favour of finding that section 36(1)(c) imposes a justiciable duty on governments. Canada has stated to the UN Committee on Economic, Social and Cultural Rights that the *Constitution* guarantees social and economic rights in Canada.[255] Canada also stated to the UN Human Rights Committee that the right to life in the *International Covenant on Economic, Social and Cultural Rights* may impose obligations on governments to provide minimum basic necessities for "health or social well being".[256] Section 36(1)(a) and (b) of the *Constitution* refers to "promoting equal opportunities" and "furthering economic development", both of which suggest a progressive quality of improvement over time.[257] In contrast, section 36(1)(c) refers to "providing" essential services, which has a more immediate connotation and represents a more substantive obligation.[258] Section 36(1)(c) plainly provides an unqualified commitment, not a goal or objective.

The French version of section 36 uses the verb *engager*, which lends credence to the interpretation that the commitment is closer to an absolute, binding duty or responsibility.[259] The very fact that the commitment is constitutionalized, rather than contained in a federal-provincial agreement or memorandum of understanding, lends it further legal potency.[260] If governments fail to fulfill this responsibility, section 36 appears to be as justiciable as any other provision of the *Constitution Act, 1982* as long as a claim has "a sufficient legal component."[261] As Nader argues: "[u]nder this provision, it is not enough for governments to 'work towards' providing essential public services. Governments must provide them."[262] Sossin finds

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[255] See e.g. United Nations International Human Rights Instruments, *Core Document Forming Part of the Reports of State Parties: Canada*, HRI/CORE/1/Add.91 (12 January 1998) at para 127; UNESCOR, 8th Sess, 5th Mtg, UN Doc E/C.12/1993/SR.5 (1993) at paras 3, 21; Government of Canada, *Responses to the Supplementary Questions Emitted by the United Nations Committee on Economic, Social and Cultural Rights (E/C.12/Q/Can/1) on Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights (E/1994/104/Add17)*, (November 1998) at question 16.

[256] United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Addendum: Canada*, UN Doc CCPR/C/1/Add.62 (15 September 1983) at 23.

[257] *Supra* note 22.

[258] *Ibid*.

[259] See Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment Under Section 36" (1996) 19:2 Dal LJ 306 at 352.

[260] *Ibid* at 351-55.

[261] *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 545, 83 DLR (4th) 297. See also Nader, *supra* note 259 at 349.

[262] *Ibid* at 357.

Nader's argument, that section 36 is a justiciable provision that could be relied upon to seek declaratory relief in the event that governments fail to provide Canadians with essential public services, persuasive.[263]

Is access to safe drinking water an "essential public service"? Surely the answer must be yes, by any reasonable person's standard. As mentioned earlier, scientists, health experts, international bodies, and governments all describe access to safe drinking water as being essential to life. Canadian laws include the provision of drinking water as an essential service that must be maintained even when unions exercise their constitutionally protected right to strike.[264]

First Nations individuals are Canadian citizens, and they are being deprived of an essential public service of reasonable quality, a violation of section 36 of the *Constitution*. The phrase "of reasonable quality" provides governments with discretion in terms of the method of delivering essential services. It is comparable to the flexibility embodied in section 1 of the *Charter*, in that it ensures that a claim to essential public services is not a right to a specific form of delivery or fulfillment of those services. But it cannot possibly be argued that requiring residents to collect water in a bucket from a lake or a standpipe, or offering 200 outhouses to the residents of Pikangikum, is consistent with "providing essential public services of reasonable quality."[265]

VI. International Law and the Human Right to Safe Drinking Water

There are a number of reasons why it is important to recognize that access to safe drinking water is a legally protected human right, rather than a commodity or a service provided on a charitable basis.[266] Recognition that access to safe drinking water is a human right will: help prioritize and accelerate access to safe drinking water for those who lack it, and thereby decrease inequality; ensure that all Canadian citizens are accorded essential public services of reasonable quality; empower citizens to take part in decision making processes (a procedural aspect that is en-

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[263] Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Thomson Canada, 1999) at 184-91. See also Lorne Sossin, "Salvaging the Welfare State?: The Prospects for Judicial Review of the Canada Health and Social Transfer" (1998) 21:1 Dal LJ 141 at 184.

[264] *The Essential Services Act (Government and Child and Family Services)*, SM 1996, c 23, CCSM c E145, s 5, Schedule.

[265] *Constitution*, *supra* note 22, s 36(1)(c).

[266] The fact that water is a human right does not mean that it should be free, any more than health care is free. Charging a price for water that reflects its full costs is justifiable on grounds of ecology, equity, and efficiency.

hanced by the substantive right); prevent discrimination or neglect of underprivileged or marginalized communities; and provide a means of holding governments accountable.[267] Many experts agree that legal recognition of the human right to water is a significant step toward realization of access to safe drinking water on the ground.[268]

Broadly speaking, international obligations are a "relevant and persuasive" factor in *Charter* interpretation.[269] More specifically, it is well established that international human rights law exerts "a critical influence on the interpretation of the scope of the rights included in the *Charter*."[270] The Supreme Court has held that it is particularly important to view sections 7 and 15 through the lens of international human rights because these rights "embody the notion of respect of human dignity and integrity."[271]

It is increasingly apparent that Canada has an obligation under international law to recognize the right to water, despite Canada's inconsistent position toward recognition of this right. Canada has ratified the *Convention on the Elimination of All Forms of Discrimination Against Women* (*CEDAW*)[272] and the *Convention on the Rights of the Child* (*CRC*),[273] both

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[267] See generally Stephen C McCaffrey and Kate J Neville, "Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries" (2009) 21 Geo Int'l Envtl L Rev 679; Erik B Bluemel, "The Implications of Formulating a Human Right to Water" (2004) 31 Ecology LQ 957.

[268] See e.g. UN Human Development Report 2006, *Beyond Scarcity: Power, Poverty and the Global Water Crisis* (New York, United Nations Development Programme, 2006) at 60; Henri Smets, *The Right to Water in National Legislations* (Paris: Agence Française de Développement, 2006), online: World Water Council at 16 <http://www.worldwatercouncil.org>; Ashfaq Khalfan and Thorsten Kiefer, *The Human Right to Water and Sanitation: Legal Basis, Practical Rationale and Definition* (Geneva: Centre on Housing Rights and Evictions, 2008), online: Water Supply and Sanitation Collaborative Council <http://www.wsscc.org> at 6; Malcolm Langford, "Ambition that Overleaps Itself? A Response to Stephen Tully's Critique of the General Comment on the Right to Water" (2006) 24:3 Nethl QHR 433; Amy Hardberger, "Whose Job is it Anyway? Governmental Obligations Created by the Human Right to Water" (2006) 41 Tex Int'l LJ 533.

[269] *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 348, 38 DLR (4th) 161.

[270] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 861, 174 DLR (4th) 193 [footnote omitted]. See also *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416; *R v Keegstra*, [1990] 3 SCR 697 at 749-55, 117 NR 1.

[271] *R v Ewanchuk*, [1999] 1 SCR 330 at 365, 169 DLR (4th) 193.

[272] *Convention for the Elimination of All Forms of Discrimination Against Women*, 1 March 1980, 1249 UNTS 13, Can TS 1982 No 31 [*CEDAW*].

[273] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 [*CRC*].

of which recognize human rights obligations related to water. Article 14(h) of the *CEDAW* provides for the right "[t]o enjoy adequate living conditions, particularly in relation to ... water supply."[274] Article 24(2)(c) of the *CRC* sets forth signatories' obligation to "combat disease and malnutrition" by ensuring the provision of "adequate nutritious foods and clean drinking-water."[275] It is an established principle of international law that all human rights are universal, indivisible, interrelated, and interdependent.[276]

The right to water is not explicitly included in the *Universal Declaration of Human Rights* (*UDHR*)[277] or in the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*).[278] However, implicit rights to water and sanitation are arguably included in section 25 of the *UDHR* (the right to a standard of living adequate for the health and well-being of himself and of his family), and sections 11 (the right to an adequate standard of living) and 12 (the right to health) of the *ICESCR*.[279] The UN Committee on Economic, Social and Cultural Rights published *General Comment No. 15* on the right to water in 2002, providing guidelines for the interpretation and implementation of the right.[280] *General Comment No. 15* affirms that "the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights," and states that "[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses."[281] *General Comment No. 15* also identifies a suite of core obligations related to the right to water that are to be implemented immediately:

> (*a*) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;

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274 *Supra* note 272.

275 *Supra* note 273.

276 World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UNGAOR, UN Doc A/CONF.157/23 (1993) at art 5.

277 *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71.

278 *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 UNTS 3, Can TS 1976 No 46.

279 Stephen Tully, "A Human Right to Access Water? A Critique of General Comment No. 15" (2005) 23:1 Nethl QHR 35 at 36-38.

280 UN Committee on Economic, Social and Cultural Rights, *General Comment No 15 (2002): The Right to Water (Arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UNESCOR, 29th Sess, UN Doc E/C.12/2002/11 [*General Comment No 15*].

281 *Ibid* at 1-2.

> (*b*) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;
>
> (*c*) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
>
> (*d*) To ensure personal security is not threatened when having to physically access ... water;
>
> (*e*) To ensure equitable distribution of all available water facilities and services;
>
> (*f*) To adopt and implement a national water strategy and plan of action addressing the whole population ... ;
>
> (*g*) To monitor the extent of the realization, or the non-realization, of the right to water;
>
> (*h*) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups; [and]
>
> (*i*) To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.[282]

An earlier General Comment published by the UN Committee on Economic, Social and Cultural Rights confirmed that governments have a core obligation to ensure the provision of, at the very least, "minimum essential levels" of each of the rights enunciated in the International Covenant.[283] In 2007, the UN High Commissioner for Human Rights concluded:

> [I]t is now time to consider access to safe drinking water and sanitation as a human right, defined as the right to equal and non-discriminatory access to a sufficient amount of safe drinking water for personal and domestic uses—drinking, personal sanitation, washing of clothes, food preparation and personal and household hygiene—to sustain life and health.[284]

In 2010, the UN General Assembly passed a resolution recognizing the right to water,[285] with 124 nations voting in favour, none against, and 42 nations abstaining for various reasons.[286] Canada was among the nations

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[282] *Ibid* at 12-13.

[283] *General Comment No 3: The Nature of States Parties Obligations (Art 2, Para 1 of the Covenant*), UNESCOR, 5th Sess, Annex III, UN Doc E/1991/23 and E/C.12/1990/8 (1990) 83 at 86.

[284] *Access to Safe Drinking Water and Sanitation*, *supra* note 160 at 26.

[285] *The Human Right to Water and Sanitation*, *supra* note 18.

[286] See *supra* note 19.

that abstained.[287] Later in 2010, the UN Human Rights Council affirmed, in a draft resolution, that "the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and is inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity."[288] The resolution on the right to water has already had a demonstrable effect. In January 2011, the Botswana Court of Appeal relied on the resolution in ruling that the constitutional rights of the Bushmen of the Kalahari were being violated by the government's refusal to allow them to access a water source within a wildlife reserve where they resided.[289]

Canada has voted against or abstained from recognizing the right to water on several occasions in recent years.[290] At the UN Commission on Human Rights meeting in 2002, Canada was the only country to vote against a resolution recognizing the right to water and sanitation.[291] Canada also played a key role in blocking a motion by Germany and Spain to officially recognize water as a human right at the UN Human Rights Council in March 2008.[292] According to experts, "Canada is internationally viewed as the primary State opposed to the right to water and sanitation."[293]

At the national level, the right to water is also gaining progressively broader legal recognition.[294] The UN High Commissioner for Human

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287 Iain Hunter, "Canada's Cowardly Vote on Right to Water", *The [Victoria] Times Colonist* (1 August 2010) online: Times Colonist <http://www.timescolonist.com>.

288 UNHCR, *Human Rights and Access to Safe Drinking Water and Sanitation: Draft Resolution*, 15th Sess, UN Doc A/HRC/15/L.14 (2010).

289 *Mosetlhanyane v Attorney General* (27 January 2011), Botswana Court of Appeal Civil Appeal No CACLB-074-10, online: Environmental Law Alliance Worldwide <http://www.elaw.org>.

290 Collins, *supra* note 17 at 351, 363.

291 Mike Blanchfield, "Our 'Painful' Vote Against Clean Water", *The Ottawa Citizen* (21 September 2003) online: The Ottawa Citizen <http://www.ottawacitizen.com>.

292 See Mike De Souza, "UN Meeting Rejects Recognition of Water as Basic Human Right", *The Ottawa Citizen* (26 March 2008) online: The Ottawa Citizen <http://www.ottawacitizen.com>; Linda Diebel, "Canada Foils UN Water Plan; Advocates Devastated at Failure of Resolution to recognize Water as a Basic Human Right" *The* [*Toronto*] *Star* (2 April 2008) online: The Star <http://www.thestar.com>.

293 Ashfaq Khalfan and Thorsten Kiefer, *Why Canada must Recognise the Human Right to Water and Sanitation* (Geneva: Centre on Housing Rights and Evictions, 2008) at 3. See also Susan Howatt, "A National Disgrace: Canada's Shameful Position on the Right to Water Needs to Change", *Canadian Perspectives* (spring 2007) 6, online: The Council of Canadians <http://www.canadians.org>.

294 Malcolm Langford et al, *Legal Resources for the Right to Water: International and National Standards* (Geneva: Centre on Housing Rights and Evictions, 2004), online: World Water Council <http://www.worldwatercouncil.org> at 45.

Rights observed in 2007 that "an increasing number of States are recognizing safe drinking water as a human right in their constitutions, as well as national legislation, while national courts are enforcing it as a justiciable right."[295] Constitutional recognition of the right to water is gaining traction around the world. The experiences of other nations illustrate two distinct approaches to constitutional protection of the right to water: explicit incorporation of the right to water, and implicit incorporation of the right to water into national constitutions. In South Africa, the right to water is explicitly articulated in section 27 of the nation's constitution and is enforceable through the courts:

> 27(1) Everyone has the right to have access to ...
>
> (b) sufficient food and water ...
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.[296]

In South Africa, constitutional recognition of the right to water has been translated into legislation, policy, and a major investment in infrastructure; this is credited with spurring the extension of potable water to ten million South Africans in ten years.[297] Nelson Mandela describes the extension of clean drinking water to millions of South Africans (predominantly black, and living in poverty) since the mid 1990s as "amongst the most important achievements of democracy in our country."[298] At least sixteen other nations have constitutional provisions specifically requiring the protection and/or provision of clean water, and such provisions are increasingly common in new constitutions, as demonstrated by Kenya and the Dominican Republic in 2010.[299] There are also ninety nations whose

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[295] *Access to Safe Drinking Water and Sanitation*, *supra* note 160 at 26.

[296] *Constitution of the Republic of South Africa*, 1996, No 108 of 1996, s 27 [*Constitution of South Africa*].

[297] Smets, *supra* note 268 at 92.

[298] Nelson Mandela. "No Water, No Future" (Address delivered at the World Summit on Sustainable Development, Johannesburg, South Africa, 28 August 2002), online: South African Government Information <http://www.info.gov.za>.

[299] *Constitución de 2009* (Bolivia), 2008, art 16(I); *Constitución Política de Colombia 1991 con reformas hasta* 2009, Constitutional Gazette No 116, 20 July 1991, art 366; *Constitution of the Democratic Republic of Congo*, 2005, art 48; *Constitución de la República Dominicana*, 2010, arts 15, 61; *Constitución Política de la República del Ecuador*, 2008, art 12; *Constitution of the Federal Democratic Republic of Ethiopia*, 1994, art 90(1); *Constitution of the Republic of Gambia*, 1997, art 216(4); *Constitution of Kenya*, 2010, art 43(1)(d); *Constitution of the Republic of Maldives*, 2008, art 23(a); *Constitución Política de la República de Panamá*, 1972 (with reforms of 1978, 1983, 1994, and 2004), Official Gazette No 25176, 2004, arts 110, 118; *Constitution of the Kingdom of Swaziland Act*, 2005, arts 215-26; *Federal Constitution of the Swiss Confederation*, 1999, art 76;

constitutions now explicitly recognize the right to live in a healthy environment.[300] The right to clean water is regarded as an integral element of this broader right.[301]

In nations where there is no explicit constitutional right to water—including Argentina,[302] Belgium,[303] Brazil,[304] Costa Rica,[305] Colombia,[306]

Constitution of the Republic of Uganda, 1995, National Objectives XIV(b), XXI; *Constitución Política de la República Oriental del Uruguay de 1967*, 1967 (with reforms of 1989, 1994, 1996, 2004), art 47; *Constitución de la República Bolivariana de Venezuela*, 1999, arts 127, 304; *Constitution of Zambia Act*, Act No 1 of 1991, Acts No 17-18 of 1996, art 112(d). See also *Constitution of South Africa*, *supra* note 296, s 27.

300 David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: University of British Columbia Press) [forthcoming in 2011].

301 *Ibid*.

302 Courts have ordered governments to provide potable water, construct drinking water treatment facilities, treat individuals harmed by contaminated drinking water, and carry out environmental remediation. See e.g. Romina Picolotti, "Argentine Case Study: Using Human Rights as an Enforcement Tool to Ensure the Rights to Safe Drinking Water" (Paper delivered at the 7th International Conference on Environmental Compliance and Enforcement, April 2005), online: International Network for Environmental Compliance and Enforcement <http://www.inece.org>.

303 Constitutional Court (Cour d'Arbitrage), Belgium, 1 April 1998, Justel No F-19980401-8, Docket No 36/98, online: Service Public Fédéral Justice <http://www.just.fgov.be>.

304 Litigation based on the constitutional right to a healthy environment has produced a policy that all Brazilians have the right to a core minimum of environmental services including water and sanitation. See Ingo Sarlet & Tiago Fenstersifer, "Chapter 7: Brazil" in Louis J Kotzé & Alexander R Paterson, eds, *The Role of the Judiciary in Environmental Governance* (The Netherlands: Kluwer Law International, 2009) 249 at 260-61.

305 Constitutional Court (Sala Constitucional), Costa Rica, No 02154 from 09:49 hrs, 16 February 2007.

306 There were nearly 8,000 constitutional cases brought in Colombia between 1991 and 2008 related to the provision of potable drinking water and basic sanitation (Defensoría del Pueblo, Colombia, *Diagnóstico del Cumplimiento del Derecho Humano al Agua en Colombia* (Bogota: Defensoría del Pueblo de Colombia, 2009), online: Defensoría del Pueblo, Colombia at 293-94 <http://www.defensoria.org.co>). For specific examples, see *Rodríguez*, (3 November 1992), Colombia T-1848, Judgment No T-578/92 (Constitutional Court), online: Constitutional Court of Colombia <http://www.corteconstitucional.gov.co>; *Monroy*, (23 March 1994), Colombia T-23159, Judgment No T-140/94 (Constitutional Court), online: Constitutional Court of Colombia <http://www.corteconstitucional.gov.co>; *Parada*, (12 May 1995), Colombia T-54994, Judgment No T-207/95 (Constitutional Court), online: Constitutional Court of Colombia <http://www.corteconstitucional.gov.co>; *Ángel v Alcade Municipal de Versalles—Valle del Cauca*, (22 May 2003), Colombia T-697667, Judgment No 410/03 (Constitutional Court), online: Constitutional Court of Colombia <http://www.corteconstitucional.gov.co>.

Indonesia,[307] India,[308] Israel,[309] and Pakistan[310]—courts have held that the right to water is an implicit, essential, and enforceable constitutional right, usually derived from the right to life. These courts have generally based their decisions on the fact that access to safe drinking water is a fundamental prerequisite to the enjoyment of other human rights. As observed in a recent *Harvard Law Review* note, "[a]lthough justiciability alone is not a panacea, it is a step in the direction of ensuring access to sufficient water."[311] Given that Canada's *Constitution* is silent on the matter of the right to water and sanitation, but includes the right to life, the jurisprudence from these countries is directly relevant.

VII. Constitutional Remedies

"[A] right ... is only as meaningful as the remedy provided for its breach."[312] There is a range of potential remedies available for a breach of the *Charter* (sections 7 and 15) or the *Constitution* (section 36).[313] For *Charter* violations, section 24(1) of the *Charter* authorizes remedies that are "appropriate and just in the circumstances," and the Supreme Court emphasizes that that courts must "issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms."[314] As Professor Roach observes in the context of socio-economic rights, such as the right to water, it is a challenge "to strike the right bal-

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[307] *Munarman*, (13 July 2005), Indonesia 058-059-060-063/PUU-II/2004 (Constitutional Court), online: Mahkamah Konstitusi Republik Indonesia <http://www.mahkamahkonstitusi.go.id>.

[308] *AP Pollution Control Board v MV Nayudu*, AIR 1999 SC 812 (India). See also Vrinda Narain, "Water as a Fundamental Right: A Perspective from India" (2010) 34 VT L Rev 917.

[309] Tomer Zarchin, "Court Rules Water a Basic Human Right", *Haaretz* (6 June 2011) online: Haaretz <http://www.haaretz.com>.

[310] The Supreme Court of Pakistan held that "the right to have water free from pollution and contamination is a right to life itself" and that "[t]he right to have unpolluted water is the right of every person wherever he lives" (*General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewra, Jhelum v The Director, Industries and Mineral Development, Punjab, Lahore*, 1994 SCMR 2061 at 2070 (Pakistan)).

[311] "What Price for the Priceless?: Implementing the Justiciability of the Right to Water", Note, (2007) 120: 4 Harv L Rev 1067 at 1069 ["What Price for the Priceless?"]. See also David Marcus, "The Normative Development of Socioeconomic Rights Through Supranational Adjudication" (2006) 42:1 Stan J Int'l L 53.

[312] *R v 974649 Ontario Inc*, 2001 SCC 81 at para 20, [2001] 3 SCR 575.

[313] See generally Kent Roach, *Constitutional Remedies in Canada* (Aurora, ON: Thomson Reuters Canada, 2010) [Roach, *Constitutional Remedies*].

[314] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 87, [2003] 3 SCR 3 [*Doucet-Boudreau*].

ance between individual and systemic relief, remedies that attempt to repair the harms of past violations and remedies that aim to achieve compliance with the constitution in the future."[315]

Violations of the right to life, liberty and security of the person, and of the right to equality would most likely result in a declaration that the federal government's actions are contrary to the *Charter*.[316] A declaration would not generally specify positive actions to be taken by a government, but would allow the government to exercise its discretion regarding the means employed to comply with the law. The Supreme Court has repeatedly articulated its preference for declarations rather than injunctive relief "because there are myriad options available to the government that may rectify the unconstitutionality of the present system."[317] Declarations are also "more flexible, require less supervision, and are more deferential to the other branches of government."[318] On the other hand, declarations may also be vague and inadequate for ensuring compliance.[319]

Because section 24(1) of the *Charter* gives the courts broad remedial powers, more ambitious and creative remedies are also possible.[320] The Supreme Court has confirmed that courts have the authority to supervise compliance with a mandatory remedial order (that is, a mandatory injunction) under section 24(1).[321] For example, in *Doucet-Boudreau*, a judge ordered the Nova Scotia government to build French language schools in five districts and to develop curricula for these schools by specified dates, in order to comply with the minority language educational rights in section 23 of the *Charter*.[322] The court subsequently held periodic hearings to review the government's progress on construction and curriculum devel-

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315 Kent Roach, "The Challenges of Crafting Remedies for Violations of Socio-Economic Rights" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 46 at 58 [Roach, "The Challenges of Crafting Remedies"].

316 See *ibid*.

317 *Eldridge*, *supra* note 195 at 691. See also *Mahe v Alberta,* [1990] 1 SCR 342, 68 DLR (4th) 69.

318 *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 258, [2000] 2 SCR 1120 [*Little Sisters*].

319 See e.g. Lorna McGregor, "Are Declaratory Orders Appropriate for Continuing Human Rights Violations? The Case of *Khadr v Canada*" (2010) 10:3 HRLR 487; Roach, "The Challenges of Crafting Remedies", *supra* note 315; *Little Sisters*, *supra* note 318 at para 258.

320 See generally Roach, *Constitutional Remedies*, *supra* note 313.

321 *Doucet-Boudreau*, *supra* note 314.

322 *Ibid*.

opment.[323] A similar order, requiring the federal government to build adequate drinking water and wastewater treatment infrastructure on a specific reserve by a specified date, would appear to be an equally appropriate and just remedy in the context of a *Charter* violation related to non-provision of safe drinking water on the specific reserve. Professors Roach and Budlender argue that mandatory relief and supervisory jurisdiction are more likely to be necessary in cases "where governments are incompetent or intransigent with respect to the implementation of rights."[324] The federal government's longstanding and ongoing failure to provide access to safe drinking water in specific First Nations communities reflects both governmental incompetence and intransigence. In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, Justice Iacobucci held that declarations can be inadequate, and place an unfair burden on litigants in cases of "grave systemic problems" where the government has proven itself "unworthy of trust".[325] Again, these comments are germane to the plight of First Nations communities that lack safe drinking water, suggesting that mandatory remedial orders would be the preferred remedy.

Finally, based on the recent Supreme Court decision in *Vancouver (City) v. Ward*, there may also be damages owing as a result of *Charter* violations flowing from the federal government's long-term failure to provide adequate drinking water to certain First Nations communities.[326] The availability and appropriateness of damages will turn on the specific facts of an individual case.

Remedies available for a violation of section 36 of the *Constitution* include declarations (analogous to those described above for *Charter* violations), as well as remedies pursuant to section 52 of the *Constitution*.[327] The Supreme Court has held that section 52 allows courts to strike down legislation, sever portions of legislation, or read provisions into under-inclusive legislation.[328]

From a practical perspective, 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 needs to: immedi-

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[323] See Debra M McAllister, "*Doucet-Boudreau* and the Development of Effective Section 24(1) Remedies: Confrontation or Cooperation?", Case Comment (2004-2005) 16:1 NJCL 153.

[324] Kent Roach and Geoff Budlender, "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?" (2005) 122:2 SALJ 325 at 327.

[325] *Supra* note 318 at paras 257, 265.

[326] *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28.

[327] Nader, *supra* note 259 at 351.

[328] *Schachter*, *supra* note 150.

ately 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 that available in comparable non-reserve communities; work with First Nations to design a mutually acceptable regulatory framework governing water and wastewater on reserves; and 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. Responsive and effective judicial remedies should aim to increase the likelihood that these steps will be taken in a timely fashion, without dictating the specific implementation details. As in the Victoria homelessness case, achieving compliance with the *Charter* may require investing public money and/or taking legislative action.[329]

Conclusion

All Canadians have the right to safe drinking water, an essential service that is vital to life, health, and human dignity. 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 federal government's failure to provide safe water. The consequences include serious physical and psychological harm, 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. This constitutes an ongoing violation of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, guaranteeing the right to life, liberty and security of the person, and the right to equality, respectively, and section 36(1)(c) of the *Constitution Act, 1982*, committing governments to providing essential public services of reasonable quality to all Canadians.

These constitutional transgressions stem from the federal government's failure 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-four 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 would be similar to

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[329] *Adams*, *supra* note 155 at para 96.

infrastructure available in comparable communities. Twenty-nine years have passed since that commitment was entrenched in Canada's *Constitution*. Patience may no longer be a palatable option for 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 it is an approach that appears necessary in the current circumstances. Under the current system, the federal government evades responsibility and cannot be held accountable, except possibly through litigation. Ensuring that the right to safe drinking water is a justiciable issue enables individuals to seek remedies and to hold their governments accountable for providing all Canadians with the essential service of access to drinking water, and for thus fulfilling this fundamental right.[330] In *Chaoulli,* 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."[331]

Canada's *Constitution* is often described as a living tree, which the Supreme Court of Canada affirms "must be capable of growth to meet the future."[332] Yet the Supreme Court has been heavily criticized for its timid approach to recognizing governments' positive obligations under sections 7 and 15 of the *Charter* with respect to fulfilling social and economic rights.[333] In the words of Justice Arbour:

> Whichever avenue Canada takes to ensure full protection of economic and social rights, whether through a constitutional amendment, a more progressive interpretation of the current *Charter* text, a modification of other (federal and provincial) human rights instruments, or otherwise, this is the next step which must be taken if Canada wants to ensure that the most disadvantaged members of society will truly benefit from the immense promise of the *Charter*. As one author put it five years ago, on the 20th anniversary of the *Char-*

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330 See generally "What Price for the Priceless?", *supra* note 311.

331 *Supra* note 140 at para 96.

332 *Reference Re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at 180, 81 DLR (4th) 16 (citing *Edwards v Attorney-General for Canada*, [1930] AC 124 at 136).

333 See generally Martha Jackman & Bruce Porter, "Socio-Economic Rights Under the Canadian Charter" in Langford, *supra* note 315 at 209; Sheila McIntyre and Sanda Rodgers, eds, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, Ontario: LexisNexis Canada, 2006).

> *ter*—and we believe it more acutely now—social and economic rights are the "next frontier" of *Charter* rights protection.[334]

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 human dignity, and flouts the principle of environmental justice, then the *Constitution* is not a living tree but is merely dead wood. As the Standing Senate Committee on Aboriginal Peoples concluded: "First Nations people in this country have a right to expect, as do all Canadians, that their drinking water is safe."[335]

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[334] Louise Arbour and Fannie Lafontaine, "Beyond Self-Congratulation: The *Charter* at 25 in an International Perspective" (2007) 45:2 Osgoode Hall LJ 239 at 270.

[335] *Safe Drinking Water*, *supra* note 55 at 9.