

Proposed Recommendations for Walkerton Part II Public Hearing #1

Submitted on behalf of Chiefs of Ontario by Blake, Cassels & Graydon LLP

I. Guiding Principles for the Future Safety of Ontario's Drinking Water

i. Water Quality on Reserve Lands in Ontario is Unacceptable and Merits Immediate Attention

In 1996 the Royal Commission on Aboriginal Peoples reported that there was “authoritative evidence that community services in First Nation communities are a direct threat to health”, citing as evidence a 1995 Health Canada report on the state of water and sewage treatment plants on reserve. Evidence gathered by Chiefs of Ontario suggests that, five years later, on-reserve water treatment facilities are still failing to produce safe water, many operators lack basic training on the operation of these facilities and First Nations still lack the necessary resources to provide for proper operation and maintenance. As of December 2000, at least 28 facilities were incapable of delivering water that would meet the *Canadian Drinking Water Guidelines*. Inadequate maintenance and insufficient capacity of facilities to service their communities make the problem more extensive.

ii. Safe Drinking Water Should Be Ensured for All Ontario Residents, Including those Residing on Reserves where the Ontario Regulations Do Not Apply.

In granting party standing to Chiefs of Ontario for Part II of the Inquiry, the Commission implicitly recognized that the goal of ensuring the future safety of drinking water in Ontario should not be limited to those parts of Ontario which are directly within the regulatory jurisdiction of the provincial government. Although on-reserve First Nations operating water treatment plants are not issued provincial Certificates of Approval for their facilities and are not governed by Ontario's new Drinking Water Regulation, water itself does not respect the jurisdictional boundaries which separate First Nations from the rest of Ontario. Substandard water and sewer infrastructure on reserve creates a concern for all Ontario residents. As a general principle, Chiefs of Ontario submits that the recommendations put forward by the Commission for the overall enhancement of drinking water safety should also be addressed to the federal government which has primary constitutional responsibility for drinking water on reserve.

iii. A Lower Standard of Drinking Water Quality On Reserve is Not Acceptable. On-Reserve Facilities Must Be Brought Up to Ontario's Higher Standards and the Federal Crown Must Renew its Commitment to Building Capacity Within First Nation Communities.

It was a specific recommendation in the 1996 Report of the Royal Commission on Aboriginal Peoples, that the government of Canada dedicate adequate resources towards ensuring that adequate water and sewage treatment facilities and operating systems were in place in First Nation communities within five years. The Health Canada report upon

which this finding was based stated that building capacity within First Nation communities to provide safe drinking water should be a federal priority. Five years after the RCAP report, however, water treatment plants on reserve are still failing to produce safe water, many operators still lack basic training and First Nations still lack the necessary resources to provide for operation and maintenance of water treatment facilities. Responsibility for water is being downloaded on to Band Councils without ensuring their capacity to deliver these vital services, and this has exacerbated an existing problem. In the fall of 2000, an Ontario Region Task Team of First Nations and federal civil servants found that it might be “too costly” for First Nations to implement Ontario’s higher water safety guidelines. The Chiefs of Ontario submit that the federal government must put a stop this negative trend and renew its commitment to ensuring that basic needs of First Nation people are met. It is submitted that capacity-building within First Nation communities, is not only a desirable end, but a fiduciary responsibility which the federal government must not neglect.

iii. *Meaningful Consultation with First Nations About Water Safety Concerns and the Resources Needed to Ameliorate These Problems Must Commence Immediately.*

Program delivery for water treatment, testing and delivery on reserve is uncoordinated and has been developed largely without consultation with those most directly affected, namely the First Nations and their leadership, tribal councils and operators. Funding is based on formulas which bear no relation to communities’ actual needs, and although operations and maintenance funding is known to be inadequate, neither First Nations nor the on-the-ground federal civil servants have been able to influence change to these formulas. Information gathered by Health Canada through testing of water is not effectively communicated to DIAND’s funding branch. Training initiatives are underfunded and cannot meet all of the communities’ needs. There are access barriers (education levels, funding) for First Nation operators to attend provincial certification programs. Multi-party discussions are needed to come up with comprehensive solutions as is a financial commitment from the federal government to commit the necessary resources to make the needed changes.

iv. *Tripartite Discussions with the Province of Ontario, First Nations and the Federal Government on Safe Drinking Water on Reserve Should be Considered.*

The federal government may currently lack the human resources and expertise to come up with a comprehensive program to build capacity within First Nation communities to deliver potable, safe drinking water on the short term. For example, nothing comparable to the certificate of approval process exists at the federal level for water treatment facilities on reserve. An option to ameliorate this situation which might be considered would be for First Nation leaders and the federal government to work with the Province of Ontario towards a tripartite solution for safe drinking water in Ontario First Nation

communities. Such a program would have to respect the aboriginal right of First Nations to fully participate in the development and implementation of projects affecting their communities. The federal government would also have to stand behind the initiative with a commitment of adequate financial resources. Nevertheless, because solutions are urgently needed, it is incumbent on all parties involved to consider all of the options which are available, including accessing the resources and expertise which are being developed by the Province of Ontario in response to the Walkerton tragedy.

v. *Aboriginal Knowledge Should be Cultivated, Respected and Included in Water Stewardship Initiatives Both On and Off Reserve.*

First Nations have a unique and deep appreciation for the value of water, not as a commodity, but as a dynamic and living thing. First Nations have demonstrated stewardship over water for centuries and continue to actively “speak for water”, including with non-First Nations audiences when given the opportunity. The activism of First Nation groups in Bkejwanong First Nation of Walpole Island, and the voluntary participation of Six Nations in the watershed protection activities of the Grand River Conservation Authority are but two of numerous examples of First Nations’ demonstrated commitment to the protection of water. It would be wrong and counterproductive for jurisdictional boundaries or commitment to current “scientific” approaches to keep Ontario policy makers from listening to and learning from the accumulated wisdom of First Nations Elders and traditional people. Wherever possible, the unique cultural perspective of aboriginal knowledge holders should inform activities around water stewardship, whether on or off reserve.

II. Government Responsibility: Federal, Provincial and First Nations

i. *The federal government has an overarching responsibility to provide for safe drinking water for Canadians residing on reserve.*

Provincial law is not applicable to on-reserve water treatment infrastructure. The federal government has the jurisdiction to fund and to set standards for on-reserve treatment plants, and the fiduciary responsibility to ensure that what is provided is adequate.

ii. *A purported transfer of responsibility for water infrastructure to Band Councils and Tribal Councils, without a transfer of adequate resources to construct and maintain that infrastructure, is unacceptable. Unilateral downloading of liabilities by the federal government is not a “self government” initiative.*

Federal funding agreements purport to transfer liability and responsibility for water and sewage infrastructure to First Nation governments. However, while Band Councils acknowledge and accept their responsibilities towards their residents, the reality is that *de facto* control over water treatment remains with the federal government because of its ultimate control over the “purse strings”. Few First Nations have adequate resources to

provide these services without substantial financial support from government transfers. Many also lack the properly trained operators to run these facilities. When federal government transfers and capital grants for water and sewage infrastructure fail to keep pace with the cost of building and operating plants, of hiring and training operators, the fiduciary responsibility to First Nations is breached. A unilateral withdrawal by the federal government from service provision to First Nations is not in keeping with the ends of aboriginal self-government – it is simply an exercise in budget slashing and downloading which is inimical to the federal fiduciary responsibility. Genuine self-government initiatives must be aimed at building capacity within First Nation communities to provide vital services.

iii. *Federal Level Of Service Standards (“LOSS”) for First Nation facilities are inadequate, and must be raised to Ontario’s higher provincial standards.*

Federal funding policy is a barrier to attaining clean and safe drinking water on reserve. DIAND’s capital infrastructure funding policy dictates that without compelling evidence of a drinking safety threat, only “conventional” treatment will be funded. The policy also fails to provide funding support for the necessary study of source waters to determine if conventional treatment will be adequate. As an example, the substandard capacity figure of 180L/person governs plant construction. Adherence to this LOSS (established unilaterally by the federal government) is one root cause of the failure, even of some recently constructed water treatment plants in First Nation communities, to provide clean and reliable drinking water. The LOSS used in building and maintaining First Nation facilities are lower than the standards employed in the rest of Ontario. The Chiefs of Ontario submit that the LOSS must be updated to reflect sound, safety-based guidelines and to include items like source water studies and bench testing of new water treatment plant designs to ensure that technologies are appropriate. In particular, the LOSS must be revised to eliminate provisions which undermine the ultimate objective of providing safe drinking water, such as a provision which stipulates that “capital projects must be reviewed from the point of view of their O&M requirements to ensure that community facilities and services do not exceed DIAND’s level of service standards unless the First Nation can demonstrate that long term funding is available from other sources”.

iv. *Principles of “full cost accounting” should govern federal funding of on-reserve water treatment infrastructure.*

In the Part II expert meetings on financing water infrastructure, there was consensus on the desirability of “full cost accounting” – by which the participants meant ensuring that the full cost of providing water infrastructure is accounted for and paid for. While the Chiefs of Ontario do not endorse full cost pricing – and would strongly suggest that the economic conditions of First Nations people living on reserve and the size and remoteness of many First Nations makes this impossible – full cost accounting is supported. It is submitted that it is necessary for the funding of water infrastructure to be brought into line with the real costs of building and maintaining reliable systems. One of

the problems with the current federal transfer for operations and maintenance for water and sewage treatment systems is that it is entirely unrelated to the actual costs for these services, particularly in remote communities, and is “lumped in” with transfers for other programs and services. Making water treatment a separate funding item, and basing transfers on current data about what it actually costs to produce and deliver safe drinking water to small and remote communities, would help to prevent inadequacies in water infrastructure funding levels from being “buried” in transfers for a number of programs. Part of the “full cost accounting” for water treatment should include provision for the training of operators and the creation of emergency reserves, particularly for remote communities where weather conditions can significantly escalate the cost of operating a water treatment plant in some years.