

Chapter 15 First Nations

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Chapter 15 First Nations

15.1 Aboriginal Ontario

The water provided to many Métis and non-status Indian communities and to First Nations reserves is some of the poorest quality water in the province. Submissions by the Ontario Métis Aboriginal Association¹ and the Chiefs of Ontario,² as well as the federal government's reports about the quality of water on reserves,³ make it clear that water is not provided for aboriginal people at the standards that generally prevail throughout Ontario. In summary:

- infrastructure is either obsolete, entirely absent, inappropriate, or of low quality;
- not enough operators are adequately trained or certified;
- testing and inspection are inadequate;
- microbial contamination is frequent; and
- distribution systems, especially on reserves, are sized to deliver about half the water available per capita to other Ontarians.

This is not acceptable. Aboriginal Ontarians, including First Nations people living on “lands reserved for Indians,” are residents of the province and should be entitled to safe drinking water on the same terms as those prevailing in other similarly placed communities. Métis and non-status Indian communities are addressed as part of the other recommendations in this report; the focus of the present chapter is on drinking water systems on Indian reserves in Ontario.

¹ Ontario Métis Aboriginal Association, 2001, “Safety of drinking water supplying off-reserve aboriginal peoples in Ontario,” Walkerton Inquiry Submission.

² Chiefs of Ontario, 2001, “Drinking water in Ontario First Nation communities: Present challenges and future directions for on-reserve water treatment in the province of Ontario,” Walkerton Inquiry Submission.

³ Canada, Health Canada and Department of Indian Affairs and Northern Development, 1995, *Community Drinking Water and Sewage Treatment in First Nation Communities* (Ottawa).

15.2 First Nations: The Mandate of This Inquiry

This is a provincial Inquiry under the Ontario *Public Inquiries Act*. There are therefore limits to how far I should comment on matters outside the responsibility of the province and provincially constituted institutions such as municipalities. It might be argued that all matters within the jurisdiction of the First Nations and the federal government should be beyond comment. Other provincial commissions, however, have not adopted so strict a guideline.⁴

In the present case, there are two compelling arguments for making observations and recommendations relating to the quality of drinking water provided on First Nations reserves. First, water is a mobile resource that does not respect political boundaries. One person's sewage disposal system may affect someone else's water supply. Simple geography argues for the joint management of a commonly shared resource. Second, and even more compelling, is the argument of equity. There is no justification for permitting lower public health standards for some residents of Ontario than those enjoyed by others. Members of First Nations are also residents of Ontario. There can be no justification for acquiescing in the application of a lesser public health standard on certain residents of Ontario than that enjoyed by others in the province. This is especially true when there is ample evidence that the water provided in First Nations communities falls well short of the standards of safety and adequacy that are considered acceptable in other parts of the province.

It seems to me, therefore, that recommendations that do not address the social and geographical unity of Ontario would be short of the mark. That said, I recognize the constitutional reality relating to First Nations reserves, and I have tried to craft my analysis and recommendations in appropriate language so as not to tread on the constitutional territory of others.

It is important to note that the First Nations themselves have encouraged me to make certain recommendations relating to their drinking water situations.

⁴ Commissioner J.E.J. Fahlgren, for example, addressed some recommendations to Indian communities, and in another case urged the Government of Ontario to urge the federal government to undertake reforms: Ontario, Royal Commission on the Northern Environment, 1985, *Final Report and Recommendations of the Royal Commission on the Northern Environment* (Toronto). Commissioner the Hon. John P. Robarts, P.C., C.C., Q.C., took account of federal-provincial-municipal fiscal relations and addressed one recommendation to a federal body, the Toronto Harbour Commissioners: Ontario, Royal Commission on Metropolitan Toronto, 1977, *Report*, vol. 2, *Detailed Findings and Recommendations* (Toronto).

In August 2000, the Chiefs of Ontario applied for standing under Part 2 of this Inquiry and subsequently prepared a very helpful paper for the Inquiry. Although the federal government has not participated formally in the work of the Inquiry, it has gone some distance to assist that work, and undoubtedly recognizes the importance of improving drinking water conditions on reserves.

It is difficult to measure precisely the state of drinking water systems on First Nations reserves in Ontario. All indications are that a high proportion of reserves have high-risk systems. For example, in 1995 Health Canada and the Department of Indian Affairs and Northern Development undertook a survey of drinking water quality on Indian reserves across the country.⁵ The results were disturbing – one-quarter of the reserves were not up to basic safety standards. In response, the federal government doubled its allocation to water and sewage capital for reserve water systems to \$250 million per year. A mid-2000 update showed improvement and produced the results shown in Table 15.1.

The survey demonstrates that progress is being made, but slowly. The 22 communities identified as “high risk” in September 2000 do not include those needing capital upgrades, backup equipment, operator training, emergency procedures, safety equipment, or operating manuals. Clearly, much remains to be done.⁶

Table 15.1 Ontario First Nations Water Systems, 2000

Number of systems (1995):	179
Number of high-risk systems in 1995:	40
Number of high-risk systems in September 2000:	22

Source: Canada, Department of Indian Affairs and Northern Development, 2000, memo from P. Chabot to B. Labrador, Ottawa, December 21.

The definition of “high risk” used in the 2000 survey was “systems with potential health and safety concerns such as repetitive water boiling advisories, not meeting the [MAC] parameters specified in the *Guidelines for Canadian Drinking Water Quality*, and other issues of a similar nature. Deficiencies identified under this

⁵ Canada, Health Canada and Department of Indian Affairs and Northern Development.

⁶ Ontario First Nations are not alone: 105 communities were at high risk across Canada in June 2000: Canada, Department of Indian Affairs and Northern Development, 2000, memo from P. Chabot to B. Labrador, Ottawa, December 21.

category may pose an immediate health risk.” The survey provided some examples of deficiencies:

- a main component of water treatment equipment is dysfunctional and requires immediate replacement of a part such as a chlorination unit, filter, or chlorine feed pump; ...
- an operator does not have formal training and, at ... minimum, background knowledge of the system that he or she operates;
- the quality of the raw water source is poor and there is no appropriate treatment in place;
- bacteriological tests of the drinking water indicating the presence of coliform organisms;
- a lack of regular testing and maintenance of records.⁷

15.2.1 The Federal Role

In response to a request from the Inquiry,⁸ the federal government described the roles and responsibilities for drinking water on reserves as follows:

Responsibility for drinking water on reserves is shared among First Nation Band Councils, Health Canada, and Indian and Northern Affairs Canada (INAC). INAC provides funding to First Nations to assist them in the provision of water services within reserve communities and monitors the design, construction and maintenance of the facilities. Funding is provided for capital construction, or upgrading, as well as for the operation and maintenance of the water facilities. Generally, First Nations Band Councils are responsible for ensuring that water facilities are

⁷ Canada, DIAND, Terms of Reference, June 7, 2001.

⁸ A request for a statement of federal compared with First Nations roles and responsibilities was first made to the-then Deputy Minister of Indian Affairs and Northern Development in October 2000 and was followed up in correspondence dated June 5, 2001. A response was received on July 5, 2001. The Inquiry has been informed that a more detailed policy-oriented paper has been prepared but is still under review in the Prime Minister's Office. Informal discussions with federal officials have aided my understanding, however.

designed, constructed, maintained and operated in accordance with established federal or provincial/territorial standards, whichever are the most stringent. Health Canada provides assistance to water quality monitoring and surveillance programs in First Nations' communities.⁹

...

With respect to Indian reserves, the policy of Indian and Northern Affairs Canada (INAC) is that all new or upgraded systems are to be designed and constructed to meet the *Guidelines for Canadian Drinking Water Quality* or provincial/territorial standards, whichever are more stringent.¹⁰

I would make three observations about this situation. First, there are no legally enforceable federal or provincial standards relating to drinking water on First Nations reserves. First Nations band councils have the responsibility for ensuring that water facilities are designed, constructed, and maintained, and operated within the more stringent of the federal or provincial standards. Contracts and funding arrangements may require compliance with these standards. However, absent a band bylaw conferring authority on Health Canada or its officers, who are asked to provide assistance on water quality and surveillance programs, the system must work by goodwill and cooperation. Elsewhere in this report, I recommend legally enforceable standards for all water treatment and delivery systems in the province.

Second, Ontario now imposes higher standards than do the *Guidelines for Canadian Drinking Water Quality* for sampling, testing, and reporting on water quality. It was reported to me that the federal government has not yet adopted these standards for First Nations reserves of applying the more stringent of the federal or provincial standards despite the stated policy. If this is indeed the case, it should be addressed.

Third, other than the possibility of a First Nation band council adopting provincial standards, the position as stated by the federal government makes

⁹ J. Weiner, Health Canada, and J. Mills, Environment Canada, 2001, letter to Dr. H. Swain, Walkerton Inquiry, July 5, p. 1.

¹⁰ Ibid., appendix to letter, p. B-1.

no provision for a role, even a voluntary one, for the province for ensuring the safety of drinking water on First Nations reserves. As I set out below, I believe that the province, if asked, has much to contribute.

15.2.2 Ontario's Views

The provincial government correctly takes the view that “Indians and lands reserved for Indians” are matters for the federal government and the First Nations. It does not assert that Ontario Regulation 459/00 applies to First Nations reserves, and it does not provide training, inspection, mechanisms for joint planning, or (through the Ontario Clean Water Agency) operations and maintenance of on-reserve systems.¹¹ Certificates of Approval are not provided for waterworks, although “if requested, technical comments may be provided by MOE if resources [are] available.”¹² Should a part of the works lie outside the reserve, normal conditions apply, with the exception that the Certificate of Approval will contain a condition that it be revoked if the land on which the facility lies becomes reserve land. If the MOE is aware of a situation that may be environmentally significant, “a request may be made that the Minister of Indian and Northern Affairs consider provincial requirements when issuing a permit.” However, the minister does not issue permits.

In fact, there is some involvement by the province in drinking water matters for some First Nations. For example, the MOE monitors water quality at Walpole Island and at Ohsweken, two substantial Southern Ontario aboriginal communities whose traditional drinking water resources have been seriously polluted by their neighbours. The province has also provided technical advice regarding nitrosodimethylamine (NDMA) pollution at Ohsweken.¹³

Formally, Ontario seeks to avoid new and potentially expensive responsibilities in this area. The opportunities for both aboriginal and non-aboriginal Ontarians are large, however, and I sense that if requested, the province would be willing to assume a much more active role. After all, water does not respect political boundaries. A variety of informal cooperative arrangements already exist in the area of water as well as in broader environmental fields. A good way to start

¹¹ Curiously, OCWA sometimes advertises in the *Bulletin* of the Aboriginal Water Works Association of Ontario. OCWA was reported to be undertaking a survey of reserve water facilities in Ontario for the Ontario First Nations Technical Services Corporation: Chiefs of Ontario, p. 55.

¹² Ontario, Native Affairs Secretariat, 2000, “Water quality on Indian reserves.”

¹³ Ibid.

would be to have First Nations, where appropriate, involved in the watershed-based source protection planning process recommended in Chapter 4 of this report.

15.2.3 First Nations' Views on Government Roles

The view of the Chiefs of Ontario has been set out clearly in their submission to this Inquiry.¹⁴ They point out that the provincial water regulation regime does not apply to Indian reserves. They agree, however, that cross-border issues require “that First Nations cannot afford to be oblivious to provincial requirements.”¹⁵ The Chiefs of Ontario also say that “the question of ‘which law applies’ is inherently uncertain for most activities that take place on reserve because of the judicially undefined scope of aboriginal rights and the vague and subjective tests which govern the division of powers impacting on ‘Indianness.’”¹⁶

There is another view, also referred to in the Chiefs of Ontario brief, that provincial or federal laws of general application apply on reserve to the degree they do not impinge on aboriginal, treaty, or specific statute rights – in other words, on the essence of aboriginality.¹⁷ Thus, for example, the *Criminal Code* applies on reserve lands, as do some other statutes insofar as their provisions do not contradict sections 86 or 88 of the *Indian Act*. There is an argument that the same may apply to public health and other social standards, though the Chiefs of Ontario would disagree.¹⁸

The Chiefs of Ontario also take the position that there is a federal fiduciary obligation to provide resources to the First Nations so that they have the capacity to provide for themselves.¹⁹

¹⁴ Chiefs of Ontario, c. 2.

¹⁵ Ibid., p. 24.

¹⁶ Ibid., p. 28.

¹⁷ Ibid., c. 2; R. Foerster, 2002, “Constitutional jurisdiction over the safety of drinking water,” Walkerton Commissioned Paper 2.

¹⁸ Chiefs of Ontario, pp. 36–37.

¹⁹ Ibid.

The Chiefs of Ontario brief concludes its analysis of responsibilities by saying that nothing prevents

the establishment of an effective tripartite relationship between DIAND, First Nations and provinces such as Ontario which may well be better equipped than the federal government to provide some of the mechanisms to build First Nation capacity to operate and maintain effective water treatment systems. However as a further incident of the fiduciary relationship between Canada and First Nations, capacity-building solutions must not be unilaterally imposed on First Nations, particularly by a federal-provincial agreement to which First Nations are not a party.²⁰

This is a sensible conclusion. The First Nations face a serious public health problem, and nothing should impede all three parties from exercising their best efforts, and their comparative advantages, in together improving conditions on reserves. Accepting for purposes of discussion that the province has no obligation to bear any unrecovered costs, that should be no bar to access on a fee-for-service basis to the training, certification, licensing, laboratory, inspection, and even enforcement resources of the Province. The question as to who – among residents, First Nations, and the federal government – should pay the costs is separate from the question of the willingness of Ontario to offer assistance in helping its First Nations citizens improve their drinking water supplies.

15.3 Issues and Recommendations

There are many areas for improvement with respect to the water supplies of Ontarians living on reserves. My discussion has focused on communities subject to the *Indian Act*, but a number of First Nations are moving toward self-government – in principle, “special Act” status that will define a new relationship between a freestanding First Nation government and the existing orders of government. One commentator suggests that the negotiators’ briefs contain

²⁰ Chiefs of Ontario, p. 39.

nothing specific about the exacting business of delivering safe drinking water, and I note his concern on this point.²¹

Below I set out a number of recommendations. When they are directed to the First Nations or the federal government, these recommendations are simply suggestions that I make respectfully recognizing the constitutional limits of my mandate.

15.3.1 Planning

Recommendation 88: Ontario First Nations should be invited to join in the watershed planning process outlined in Chapter 4 of this report.

Elsewhere I have recommended that multi-stakeholder planning on a watershed basis is the key to source water protection. It is vital that First Nations be at the table when the resources they share with the rest of the community are at issue. Waters flow onto reserve and off, carrying their particular loads of contaminants. No one in a watershed should be required to import a problem from or be able to export a problem to a neighbour.

15.3.2 Standards

On the important issue of what standards should apply on reserve, no one would argue that First Nations should have a lower standard of health-related standards than others in the province.

Recommendation 89: 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.

This suggestion has two parts. The first is the need to have the same or a higher level of standards on reserve as off reserve, including standards such as those found in Ontario Regulation 459/00 relating to the treatment, sampling, testing,

²¹ J. Graham, 2001, "Rethinking self-government agreements: The case of potable water," Policy Brief No. 12, November (Ottawa: Institute on Governance). Graham thinks it unrealistic to expect small, isolated communities to set standards for and deliver on matters that evidently stretch the capacities of much larger entities.

and reporting of water quality. The second part is that the First Nations and the federal government should explore ways to make these standards legally enforceable. In the Part 1 report, I discussed at some length the disadvantages of using guidelines rather than legally enforceable standards in this critical public health area. Because the risks of unsafe drinking water are so high, it is important to have legal mechanisms that will respond to unsafe conditions.

Finally, I would include as a health matter the suggestion that First Nations water systems be constructed to provide the quantities of water normally provided for households in similar geographical conditions. The consequence of too meagre a supply encourages informal arrangements that carry a higher risk.²²

15.3.3 Ensuring Safety

In Chapter 11 of this report, I recommend the development of quality management standards for Ontario drinking water systems. I recognize that adopting these standards on reserves may be problematic in the near future because of the lack of resources and trained operators of sophisticated water supply organizations. However, I consider quality management standards to be at the heart of providing safe drinking water.

Recommendation 90: I encourage First Nations and the federal government to consider moving to a quality management standard over time, even if the consequence is that several communities, perhaps both reserve and non-reserve, might collaborate on a regional basis, or that First Nation communities might choose to contract with others to manage their water supply systems.

I am not suggesting that the attainment of quality management accreditation would be easy. Rather, it is a goal worth striving for – one that might in some situations be more easily approached through the consolidation, regionalization, or outsourcing that is available to other Ontario communities.

There are questions about how reasonable it is to expect small and generally remote communities to exercise powers in technical areas that do not impinge

²² The Inquiry heard informally about one reserve where a consequence of low supply was low pressure, which encouraged residents to connect hoses directly to fire hydrants. The Northern Ontario winter then destroyed the hydrants and allowed contamination to enter the mains.

on community identity.²³ Under the *Indian Act*, the federal government has long assumed both funding and residual responsibility for on-reserve water supplies. However, the most effective way of achieving quality management may lie in engaging in joint management with others with experience and expertise in delivering safe water. Where negotiations for self-government take place, negotiators of these agreements should take care not to impede opportunities for the same sort of consolidation, regionalization, or contracting out that is available to other Ontario communities.

Recommendation 91: The provincial government should require the Ontario Clean Water Agency (OCWA) to offer its services to First Nations band councils for operating on-reserve water systems on a normal commercial basis.

15.3.4 Training

Recommendation 92: The provincial government should actively offer, on a cost-recovery basis, its training facilities and curriculum to First Nations water system operators.

In Chapter 12, I recommend improvements to Ontario's current approach to operator training. I would encourage these facilities to be made available to First Nations operators, perhaps in cooperation with the Aboriginal Water Works Association of Ontario (AWWAO). Competent people and good equipment are necessary for safe drinking water. In regard to the former, I note that Health Canada has been funding the Circuit Rider program operated by the First Nations Technical Institute, which seeks to upgrade the qualifications of the people operating on-reserve water systems. AWWAO is a professional organization seeking the same end. It is not clear, however, that connections between these programs and the resources available to Ontario or such major professional organizations as the Ontario Water Works Association (OWWA) are utilized to the extent possible. I would encourage a closer connection between OWWA and AWWAO and, as mentioned, the full opening of Ontario training and certification processes to operators of on-reserve systems. Band councils,

²³ J. Graham. The author is alarmed at the accelerating pace of self-government negotiations that make no realistic provisions for safe water.

supported by DIAND funding, should take full advantage of these opportunities, as well as those freely available from other sources.²⁴

15.3.5 Testing, Inspection, and Enforcement

Recommendation 93: As a matter of principle, the provincial government should make technical assistance, drinking water testing, inspection, and enforcement available to First Nations communities on a cost-recovery basis, if requested.

Although Canadian Association of Environmental Analytical Laboratories (CAEAL)–certified private laboratories are available to First Nations water providers, many communities are too remote for easy sample preservation. Where Ontario has laboratory facilities available, their services should be available to First Nations on a reasonable cost-recovery basis. It should also be open to First Nations applying the Ontario Regulation 459/00 water quality standards to contract for professional inspection, and possibly even enforcement, from the MOE. Arrangements that would not pose new net costs for Ontario and that preserved the present structure of liability and jurisdictional authority can surely be made among willing parties.

²⁴ The splendid course materials available from the U.S. Environmental Protection Agency are freely available to all through the EPA's Web site <www.epa.gov/safewater/dwa.html>.

