A Legal Guide to Aboriginal Drinking Water

A Prairie Province Perspective

LINDA F. DUNCAN
MARIE ANN BOWDEN

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Disclaimer

The information contained in the handbook is not intended as legal opinion or advice. It is offered only as reference information for use by aboriginal communities who may be seeking information or assistance to protect their water sources and safe drinking water supplies.

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Linda F. Duncan
Marie Ann Bowden

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Water is one of the critical elements to life. If you take care of the water spirit it will remain happy and will provide for your needs. Every living being relies on water for life — insects, fish, birds, wildlife and plants. And we in turn rely on them for our survival.

Many people take water for granted. Yet water serves our every basic need. We drink water to quench our thirst. We need water to grow and cook our food. When we have a fever we are soothed by water. We cleanse our selves and our homes with water.

When we pray we offer water as an offering. Water is needed for our ceremonial sweats.

The elders have told us that a time will come when there will be a scarcity of clean water. Once we were able to drink from any lake or stream. Those days are gone. The prophesy has come to pass.

Violet Poitras

Elder, Paul First Nation

CHAPTER 1

Introduction

1.1 Purpose of the Legal Guide

The purpose of this Guide is to support aboriginal community participation in their pursuit of safe drinking water protection laws. It covers laws related to both First Nation and Métis peoples. While the Guide focusses on the Prairie provinces, much of the information may be equally applicable to other parts of the country. It is important that aboriginal communities have access to basic legal information to enable their constructive engagement in these law and policy making processes.

Chapter One sets out the background and discusses the need for a new law.

Chapter Two provides a brief overview of aboriginal water title and rights.

Chapter Three outlines federal, provincial and aboriginal government powers, responsibilities and laws enacted for the protection of water sources such as rivers, lakes or ground water and provision of safe drinking water.

Chapter Four reviews the actual practice of regulating drinking water supply to aboriginal communities in Alberta, Saskatchewan and Manitoba.

Chapter Five reviews federal and provincial proposals to regulate safe drinking water for aboriginal communities, and identifies a number of additional issues to assist communities in considering alternative legal solutions.

The Appendices refer readers to additional reference materials and contacts for legal and policy information on water.

1.2 Background to the Issue

The state of the law for safe drinking water in Canadian First Nation communities was succinctly described by the federal Commissioner for Environment and Sustainable Development (CESD) in her 2005 report to Parliament:

"When it comes to the safety of drinking water, residents of First Nation communities do not benefit from a level of protection comparable to that of people who live off reserves. This is partly because there is a vacuum of laws and regulations governing the provision of drinking water in First Nation communities, unlike other communities. INAC and Health Canada attempt to ensure access to safe drinking water in First Nations communities through their policies, administrative guidelines and funding arrangements with First Nations. This approach does not cover all the elements that would be found in a regulatory regime for drinking water, and it is not implemented consistently." [1]

The gaps in laws to ensure safe aboriginal drinking water have yet to be remedied, though the federal government recently announced public consultations for a new regulatory framework will take place in the spring of 2009.

Government knowledge of the magnitude of the risk to First Nation drinking water and the lack of laws is not recent.

In 1995 Health Canada and the federal department of Indian and Northern Affairs (INAC) reported that an estimated one quarter of First Nation community water systems posed potential health and safety risks to those communities. Eight years later, in 2003, INAC identified a continued significant

risk to the quality or safety of drinking water in three out of four First Nation drinking water systems[2] based on the federal *Guidelines for Canadian Drinking Water Quality.*[3] Thirty percent of the communities were deemed high risk. Costs to remedy the situation were estimated at that time at close to a billion dollars by INAC based on visual inspections only. INAC also reported that only 10% of people running the water systems met industry certification standards.

In response, the federal government approved the 2003 First Nations Water Management Strategy, which was meant to establish an effective monitoring program to improve the detection of water quality problems, implement integrated water quality management protocols consistent with national performance standards, improve emergency response procedures, and establish clearly defined standards, protocols and policies using a multi-barrier approach.[4]

Yet despite these commitments, the 2005 CESD audit determined that:[5]

- Residents of First Nations communities do not benefit from a level of protection comparable to that of people who live off reserves
- No laws or regulations had been enacted to govern the provision of drinking water for these communities
- Limited evidence exists that water systems meet applicable codes and standards
- Technical assistance to First Nations to support and develop their capacity to deliver safe drinking water is inconsistent and fragmented

"In our view, until a regulatory regime comparable with that in the provinces is in place, INAC and Health Canada cannot ensure that First Nations people living on reserves have continuing access to safe drinking water"

2005 Report of the Commissioner of the Environment and Sustainable Development (p.12)

PHOTO LORNE FITCH

The release of the CESD audit was followed in October 2005 by a well publicized evacuation of the residents of the Kashechewan reserve in northern Ontario, who, after living under a boil water advisory for two years, were ordered to leave their community when their drinking water tested positive for elevated levels of E.coli.

This triggered an action plan by the federal government, which included a Protocol for Safe Drinking Water for First Nations Communities (the "Protocol'), a mandatory training program for operators, remedial plans for high risk communities, and a commitment to report on progress. As part of this plan, INAC also appointed an Expert Panel on Safe Drinking Water for First Nations (the 'Expert Panel'). The Expert Panel held public meetings, commissioned research and issued a report in December 2006 which identified significant gaps in the regulation of safe drinking water for First Nation communities and recommended a new federal law to provide a regulatory framework. The Panel's report examined a number of alternative legal solutions to fill the regulatory gaps and deficiencies, which are discussed in Chapter 6.

Still, problems persist. In March 2007 INAC reported that the water systems in 97 First Nation communities remained classified as high risk. While the Protocol requires that every First Nation community have a certified water system operator, INAC reported that only 37% of the operators were certified. Many communities have no treatment system at all and rely on raw source water, or on delivered supply from truck haulers.

The Standing Senate Committee on Aboriginal Communities undertook a review of these reports and the INAC Plan of Action. The Senate's May 2007 report recommended that INAC first commit sufficient funds to undertake an audit of the water systems facilities and a needs assessment and only then dedicate the necessary funds to finance the provision of drinking water services to FN communities.[6]

The Need for a New Law

Legal experts, including judges appointed to lead inquiries into drinking water tragedies, have repeatedly criticized this glaring legal gap, and have recommended enactment of nationally consistent and legally enforceable federal drinking water quality standards. Other experts agree. The Gordon Water Group of Concerned Scientists and Citizens also endorsed, as a national priority, the need to clarify and address aboriginal drinking water rights and responsibilities.[7] The Expert Panel concluded that development of a comprehensive and modern regulatory framework would "support the goal that people living in a First Nations community benefit from the same level of protection as those living in any other community."[8]

Despite the clear authority of the federal and provincial governments to protect source water and supply safe drinking water little action has been taken to enact or implement a comprehensive legal regime for First Nation and Métis communities. No legislative action has occurred despite strong calls for timely action from the Commisioner of Environment and Sustainable Development, the

PHOTO LORNE FITCH

Canadian Senate, and many others. Until such time as a comprehensive law or co-management arrangement is enacted, any redress sought by aboriginal communities or individuals is limited to: a patch work of federal guidelines and policies prescribing responsibilities for protection of water quality; provincial laws which may or may not apply (or may be voluntarily adopted); municipal laws governing works which may supply some aboriginal communities; bylaws enacted by First Nations or Métis themselves; or, legal actions to assert constitutional or treaty rights and duties.

First Nations Perspective on New Law

First Nation organizations agree that while laws are needed, implementation should be delayed until sufficient resources are in place to ensure the prescribed quality of service is possible, including for treatment facilities and capacity to maintain the systems, and support for capacity to compliance is assured. Their reticence is based on concerns that the law will transfer liability for establishing, maintaining and operating drinking water systems for First Nations without guarantee of financial or technical support orcapacity to operate and maintain the systems. The Alberta Métis Settlement General Council has expressed similar concerns with their ability to comply with drinking water laws as they evolve.

It has been argued that First Nations may be caught in a catch 22 scenario since without legally binding standards First Nation communities will not be afforded the water quality protection assured to other communities. While new laws impose legal duties on First Nations to provide those services,

they may assume liability for deliery of a service they cannot meet without guaranteed resources and training upfront.

Current Schedule for New Law

INAC has published a discussion paper and proposes to adopt the option of incorporating by reference provincial/territorial regulations on safe drinking water. The discussion paper reviews all the elements of the legislative framework proposed by the Expert Panel. Public engagement sessions were held during February-April 2009 and the tabling of a law is expected by the end of 2009.

The paper and information on the sessions are available at http://www.ainc-inac.gc.ca/enr/wtr/h2o/faq-eng.asp

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CHAPTER 2

Aboriginal Water Rights

" Lake Wabamun is our oldest living relative."

Dennis Paul,
Paul First Nation

This chapter provides a brief overview of Aboriginal water rights, emphasizing Aboriginal peoples in the Prairie provinces. A determination of the specific water rights held by individual First Nations or Métis peoples requires a detailed legal opinion.

It is important to discuss constitutionally protected aboriginal water rights because no existing law or new law can infringe these rights unless the government proves that the infringement is justified.

As will be outlined in this chapter, the determination of rights or title to water requires careful consideration of the respective traditions, culture, and practices of each First Nation or Métis community; the specific terms of any treaties or agreements; and, consideration of the nature of the right or interest claimed or the alleged impacts to a particular water source or supply (R. v. Van der Peet).

The Supreme Court has held that a "fair, large and liberal construction in favour of the Indians"[10] should be given to the interpretation of the treaties and Aboriginal rights. (R. v. Simon) What is perhaps less clear is the extent to which aboriginal rights and title extend to right of ownership, control or use of water, and more particularly to the supply of safe drinking water.

Governments have in some instances sought to clarify or limit aboriginal rights to water through policy, practice or legislation. Provinces cannot encroach on aboriginal water rights, in particular in relation to waters located on-reserve.[11] Provincial law making powers are constrained by the unilateral power of the federal government to legislate on

matters related to "the core of 'Indianness'". A provincial law of general application that goes to the core of Aboriginal title or rights is ultra vires (i.e. is an invalid law).

This chapter discusses Aboriginal rights or title to water which may be claimed as:

- an inherent aboriginal right,
- as part of Aboriginal title,
- as a right under a treaty, or
- as a right under a contemporary settlement agreement.

The following sections, s.2.1 to 2.4, discuss each of these topics in greater detail. Then, the chapter discusses infringement of aboriginal rights in s.2.5 and Métis water rights in s. 2.6. The chapter concludes with a discussion in s. 2.7 of the Duty to Consult.

2.1 Aboriginal Rights to Water

The federal government has a duty to protect the rights of aboriginal people arising from the fiduciary relationship between the Crown and aboriginal people. While the federal government may make laws related to Indians and lands reserved for the Indians,[12] where those laws infringe aboriginal or treaty rights they must be reconciled with aboriginal rights.[13]

The Supreme Court of Canada has held that Aboriginal rights are not general and universal. They must be proven on a community by community basis providing evidence of the particular practices, customs and traditions of each each claimant. Those practices, customs and traditions must have been integral to that community. *(R. v. Van der Peet).*

The onus lies with the person(s) claiming the aboriginal right to prove that the practice, custom or tradition was an integral part of the distinctive aboriginal society prior to contact.[14]

Aboriginal rights are activity-based rights, protecting Aboriginal practices, customs and traditions. They cannot be characterized as an ownership right to a particular resource. *(R.v. Sappier)* That said, Aboriginal peoples may possess rights to practices, customs and traditions that involve water use that are "integral to the distinctive cultures of aboriginal peoples".[15]

Aboriginal rights are inherent rights and are not dependent on acts of government or treaties.[16] The courts have held in specific cases that the use of water was an integral part of the historic occupation and possession of territory. Both land based and water based activities are considered central to traditional aboriginal life. The claim of a right to water use has been held to be distinct from a claim of title, ownership or control of the water. *(R. v. Van der Peet)* Regardless, the rights to use and ownership of water may coexist. *(R.v.Sappier)*.

It is apparent that in order to exercise a right to use water, in particular for drinking water, the water source must also be protected. However, in most cases determinations on water rights have been limited to their use for historic or traditional water related practices, including hunting and fishing. The Supreme Court has upheld two water related claims based on a case of a proven Aboriginal right to fish. *(Nikal; Lewis)*

2.2 Aboriginal Title to Water

Aboriginal title as a legal right is derived from First Nations' [Indians'] historical occupation and possession of their tribal

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lands. Aboriginal title has also been described as a right to occupy land and to enjoy the fruits of the soil, the forest and other resources connected to the lands. While the Supreme Court has prescribed the requirements to prove Aboriginal title (Delgamu'ukw), there is limited case law clarifying the application of these principles to Aboriginal claims involving title to water. To date, the determination of water rights has been limited to historic or traditional practices involving water, such as hunting and fishing. A potentially stronger claim to aboriginal title may be possible for water resources located on reserve lands.

An aboriginal title claim requires that a case be made that the lands (and in this case the waters) were exclusively and continuously occupied prior to sovereignty (in other words prior to the arrival of non Aboriginals). *(Delgamuukw.)*

Absent any clear specification of water ownership or title, a determination of whether reserve boundaries also confer title to bodies of water or portions of those water bodies or rights to those waters will also be determined by consideration of certain basic legal principles, such as the presumption of *ad medium filum* whereby water belongs in equal shares to the owners of riparian lands (lands bordering rivers or lakes). While a number of attempts have been made to legislate away these rights, the courts have upheld claims of aboriginal riparian rights.

2.3 Treaty Rights to Water

While the majority of Supreme Court of Canada decisions regarding s. 35 (1) of the *Constitution Act, 1982* have dealt

with Aboriginal rights, the courts have held that the same approach will be applied in cases of alleged infringement of Treaty rights. *(R. v. Badger)*

Treaty rights derive from negotiated agreements set out in treaties or settlement agreements between aboriginal peoples and the Crown.[17] It has been argued that the treaties provide a mantle of protection over existing Aboriginal rights. The treaties and land claim agreements in the prairie provinces used language of surrender of aboriginal title to lands (and potentially water) in exchange for specified rights over the surrendered lands (including rights to hunt, fish and trap and more generally to live off the land). By implication, the exercise of these rights necessitates access to and use of water. Yet the exact meaning and extent of the surrender continues to be debated.

The Supreme Court of Canada has confirmed that the Crown's fiduciary relationship with aboriginal peoples is a guiding principle in interpreting Aboriginal and treaty rights. *(R.v. Badger; Mikisew)* Treaties must be interpreted in a manner that maintains the honor and integrity of the Crown. Where there is any ambiguity in interpreting a treaty or s. 35(1) of the *Constitution* it must be resolved in favour of aboriginal peoples. The Supreme Court of Canada has ruled in an Alberta case that: "The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895."[19] Finally, the onus of proving that a treaty or aboriginal right has been extinguished lies with the Crown.

[A]boriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. … What aboriginal title confers is the right to the land itself.

Chief Justice Lamer, Supreme Court of Canada in Delgamuukw v. British Columbia
3 S.C.R. 1010. (para. 138)

Unlike the earlier treaties signed in eastern Canada, the treaties and agreements for western Canada did not expressly reference rights to water.

Land and water rights which may be derived from the establishment of a reserve depend on the provisions of each individual treaty as well as the particular context, circumstances and undertakings given surrounding the establishment of each reserve.[21] Legal precedent supports the view that the granting of land for a reserve includes those water rights incidental to those lands.[22] However, each claim must be considered on the basis of the particular circumstances of the purpose and terms for each reserve. This includes considerations beyond the written treaty text, such as recorded discussions surrounding the treaty negotiations and oral history testimony related to promises made to First Nations.

Many early western treaties were intended to encourage the settlement of Indians on lands for agricultural pursuits, necessarily requiring access to and use of water for irrigation, and also for domestic use, including drinking water. For the treaties covering more northern parts of the Prairie provinces, any rights to water are more likely associated with traditional practices of hunting, trapping or fishing, a way of life and culture that also necessitates access to water. A number of treaty claims have involved disputes over continued access to water for irrigation purposes.

US Law on Water Rights on Indian Land – the Winters Doctrine

In the United States, the *Winters* doctrine[23] establishes that water rights must be construed in the context of the

general purpose of a reservation to "provide a homeland for the survival and growth of the Indians and their life."[24] *Winters* holds that the right in water vests on the date the reservation was created; that the right is senior to all future claims by others and it is a preemptive right, in other words priority to use is retained despite non-use; and, that the right is a communal right and cannot be divested. The U.S. courts treat reserved rights as a property interest. Opinions differ as to whether the *Winters* doctrine has any application in Canada.

While for the most part the numbered treaties (a series of eleven treaties signed between First Nations and the monarch from 1871 to 1921, which cover most of the prairie provinces) do not expressly refer to the surrender of water rights or expressly confer water rights, many treaties prescribe physical boundaries for Indian reserves referring to the banks of rivers or border of lakes. In some instances boundaries are set as mid-points in water bodies.

Opinions differ on the legal result of the absence of specific reference to water rights. First Nations have generally supported the view that they have a paramount right to water as the treaties did not provide for a surrender of water.[25] Their view is that water rights were not surrendered but rather reserved to Indians. This perspective has generally not been shared by governments or others claiming rights to water. The treaties themselves provide no express language which confirms or denies either opinion.[26] Consequently, similar to any claim of aboriginal rights, it is necessary to look to the circumstances surrounding the establishment of each reserve and the specific cultural and historic context to determine the extent of a water right claimed under treaty.

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Numerous questions remain on the extent to which aboriginal rights or title to water remain outside the scope of Treaty surrender. The courts have ruled that treaties should not be interpreted in their strict technical sense but rather interpreted in the sense naturally understood by First Nations [Indians] at the time of signing. *(R.v. Badger)*

Deciding whether reserve land boundaries also include the title to bodies of water, or portions of those water bodies, or rights to those waters depends on legal principles, such as riparian rights, or proof of reliance on traditional activities.

The courts have upheld claims of aboriginal riparian water rights — the right of an owner of land bordering a lake or river to the continued flow of water past their lands in an unimpeded volume or diminished quality.[27] The presumption of *ad medium filum* means water belongs in equal shares to the adjacent owners of riparian lands (lands bordering rivers or lakes).

Where there is evidence a reserve was established in a specific location based on reliance on traditional activities such as fishing, it may be presumed that the "ownership" of water is also transferred.[28] A right to non-consumptive use of water has been considered an incidental right necessary to the exercise of another valid treaty right. The Supreme Court of Canada has upheld such a claim where the exercise of one right is deemed to be meaningfully related to the exercise other proven treaty rights, for example the right to establish a campsite or build a cabin to enable the exercise of hunting, trapping or fishing rights.[29] *(R.v. Sundom)*

The British Columbia Court of Appeal upheld an interim injunction issued to restrain double tracking of CN rail

along the Fraser River as it interfered with the fishing and water rights attached to the reserve lands of the Jack Creek Band. (*Pasco*) The court decision emphasized that the reserve had been established in contemplation of the presence of the salmon fishery.

Arguably, a case could be made that specific traditional practices by their nature necessitate use of the water bodies for drinking purposes. Protection of water in an uncontaminated state is necessary and incidental to the exercise of valid treaty rights to fish or hunt in or near a water body, or to rely on that water body for drinking water while hunting, trapping or fishing.

2.4 Contemporary Settlement Agreements

In addition to the numerous treaties in place in the Prairie provinces since the late 1800s, more recent agreements have been negotiated between First Nations and the federal and the provincial governments setting terms and conditions for future transfers of lands and other rights and interests, including rights to water. [31]

The more recent agreements are of particular significance to Manitoba, where approximately 50% of First Nations have outstanding treaty land entitlement (TLE) claims, and to Saskatchewan. The *Manitoba Treaty Land Entitlement Framework Agreement* (TLEFA) provides a number of specific references to water in defining interests in lands that may be reserved for a First Nation. These include references to the ordinary high water mark[32] where the reserve extends to the shores of any navigable water or inlet; to the bed of

" First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred..."

Mr. Justice Cory, Supreme Court of Canada
in (R.v. Badger)

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the body of water below the mark where the reserve land borders a body of water; to the use of land necessary for the protection and development or adjacent water power; and, to the right to raise or lower the levels of a body of water adjacent to the land, regardless of the effect upon the land.[33] Other water interests acknowledged and detailed in the *Agreement* include in the case of non-navigable waterways, the right to select or acquire land which includes the bed of non-navigable waterways. Where the boundaries include navigable waterways, ownership of any portion of the bed or banks below the ordinary high water mark is not transferred. In certain instances private water lots may also be acquired.

The Treaty Land Entitlement Committee implements the TLEFA. The TLEFA is is a potentially useful agreement for drinking water protection but is plagued by delays, and underfunding. The agreement is a process for getting additional land into reserve land status. INAC is not generally increasing funding to cover needs that may flow from utilizing the new lands, so some First Nations are concerned about being burdened with more land and less resources. A lack of funding could impact the ability of a First Nation to provide safe water to residents on the new TLE lands.

Similarly, the Saskatchewan *Treaty Land Entitlement Framework Agreement*[34] also includes a number of water related principles for treaty negotiations for future land entitlements. The *Framework Agreement* clarifies rights of ownership of beds and shores of water bodies located wholly within the entitlement lands; rights and duties arising from lands bounded by water including recognition of full common law riparian rights; and the application of the principle of *ad*

medium filium. It also specifies that where water projects may impact riparian rights, notice, meaningful participation in decision making and joint Environmental Impact Assessment are required to ensure First Nation riparian rights and traditional use are considered. Finally, co-management agreements regarding the management and use of a water body adjacent to a reserve may be established between Saskatchewan and any entitlement band. Such agreements must clarify use, management and development of water to mitigate any affects on quality, quantity or rate of flow.[35]

In addition, the *Saskatchewan Watershed Authority Act* incorporates provisions of the *Framework Agreement* related to transfer of water ownership and rights. Twenty five entitled bands in Saskatchewan were signatories to the Framework Agreement in 1992. Four separate, but similar agreements were subsequently signed with other First Nations and negotiations remain in progress.

Aboriginal Water Rights in Nisga'a Agreement, BC

The Nisga'a Final Agreement in northern British Columbia offers an example of modern day approaches to clarifying Aboriginal rights and interest in water resources. The Agreement, which was concluded in 2000, grants significant control over water resources by establishing a water reservation in favour of the Nisga'a Nation for domestic, industrial and agricultural purposes with priority over most other water license holders. The Nisga'a Nation, a Nisga'a Village, a Nisga'a Corporation, or a Nisga'a citizen may, with the consent of the Nisga'a Nation, apply to the province of British

"Water is essential to … economic development and to general subsistence. There is a reserved right to water implied in the creation of the Blood Indian Reserve. This right to water includes present as well as future needs of water, allowing water to be used for all beneficial purposes."[20]

PHOTO LORNE FITCH

Columbia for water licences for volumes of flow to be applied against the Nisga'a water reservation. These licences must conform to provincial regulatory requirements and could be used for drinking water supply. The Final Agreement also allows for hydro power opportunities, and sets specific annual volume percentages for rivers and lakes located in or bordering Nisga'a lands. The province of British Columbia however retains full ownership of the water on Nisga'a lands.[36]

2.5 Infringement of Aboriginal Rights

The Supreme Court of Canada has ruled that a government can validly infringe aboriginal rights if it proves that it is pursuing a valid legislative objective; that the means upholds the honour of the Crown and is consistent with Crown's fiduciary duty to aboriginal peoples; whether there has been as little infringement as possible in order to effect the desired result of the legislation; and whether, in a situation of expropriation, fair compensation is available.[37] The courts have also held that s. 35 (1) did not create aboriginal rights but rather recognized and affirmed the existence of these rights at common law.[38] The onus rests with the Crown to demonstrate that its infringement is justifiable, once a prima facie case of infringement is made.[39]

The courts have held that any attempts to abrogate aboriginal ownership of water beds or to limit common law riparian water rights, on reserve lands or land selected but not confirmed, are outside provincial powers.[40]

" [T]he birds of the air, fish in the sea, the trees, the rivers, the minerals were not given up".

Elders in "Treaty #6, 1976 Report
of the Saskatoon, Saskatchewan Indian Cultural College

Early federal laws abolishing aboriginal riparian rights[41] were later replaced by provincial laws following the transfer of lands and resources to the Prairie provinces under the *Natural Resources Transfer Agreements (NRTA).* The *NRTA* transferred Crown interests in lands and resources to the provinces subject to any existing trust and other interests. Under the *NRTA* the provinces are also required to set aside additional areas for First Nations. The *NRTA* is enshrined in federal and provincial law and cannot be unilaterally altered. Whether the *NRTA* provides for the transfer of water rights continues to be debated. More recent agreements between First Nations and the federal and provincial governments signed in the 1990s set forth additional provisions clarifying water rights under future land grants.

Where an infringement of rights cannot be avoided, compensation must be provided.[42] The issue of compensation must be pursued in good faith, in a transparent way to ensure the Aboriginal community agrees to the manner of addressing the infringed rights.[43] The amount of the compensation depends on the nature of the right affected, the nature of the infringement and the extent to which the aboriginal interests have been accommodated.[44]

Aboriginal Water Rights Lawsuits

Aboriginal water rights have already been the subject of litigation in Western Canada.

In 1986 the Piikani Nation filed suit against the Alberta Government claiming prior and superior water rights based on Treaty 7 and the *Winters* doctrine.[45] The Alberta Government had approved construction of the Old Man River dam despite

recommendations by a federal environmental assessment panel that the water rights of the Peigan band (Piikani First Nation) be first secured. The Peigan Reserve #147 borders the Old Man River. Their legal claim was however not affirmed by the courts as the case was settled out of court. As terms of the settlement the Piikani were granted an assured supply of river water to meet their residential, commercial and agricultural needs, subject to relinquishment of any future claim to prior and superior entitlement to the water.

The Tsuu' Tina First Nation and the Samson Cree First Nation sued the Alberta government alleging failure to consult and accommodate their Aboriginal and treaty rights on the South Saskatchewan River Basin Water Management Plan (2006). In the decision,[xlvi] the Court found that the Crown had not breached its constitutional duty to consult and accommodate with the First Nations. The decision has been criticized on the basis that the court's decision gave an 'inadequate' and 'dismissive' treatment of the First Nations' lengthy submissions.[46]

Mounting concerns with contamination and reduced levels of water in rivers and lakes in the Peace, Athabasca, Slave and McKenzie River basins have triggered wide support by First Nations and Métis to consider legal action to assert their common interest in water rights and protection of this source of water, relied upon as a drinking water source. [48]

2.6 Métis Water Rights

The issue of whether Métis peoples hold aboriginal rights is significant. A 2006 census reports that around 389,785 people

"The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies."

Mr. Justice Binnie, Supreme Court of Canada
in Mikisew at p. 8

in Canada self identify as Métis. The 2006 Census shows that the Métis account for 6% of all people in Manitoba, 5% in Saskatchewan and 3% in Alberta.[49] Of those, 85,000 live in Alberta, of whom 9000 are registered with Alberta Métis Settlements.

In 2003 the Supreme Court of Canada, for the first time, recognized the Métis as distinct Aboriginal peoples and extended to them rights analogous to First Nations and Inuit peoples under s. 35 of the Constitution Act, 1982 *(R. v. Powley)*. This means that the existing aboriginal rights and any future rights acquired through settlement of the Métis are recognized and affirmed. The court set forth a new set of legal principles specific to Métis rights based on the Métis peoples' distinctive historical customs, traditions and practices. The case has implications for the fiduciary duties of the federal and provincial governments to consult and accommodate Aboriginal rights and interests where their proposals or decisions may interfere with Aboriginal constitutional rights to control the use of water sources or drinking water supply.

However, as the *Constitution Act* provides no definition of Métis, disagreement continues over who qualify as Métis peoples. For example, while the Native Council of Canada supports self identification; the Métis National Council asserts existence of a single Métis Nation. Alberta provincial law establishing the Métis Settlements defines Métis as persons of aboriginal ancestry who indentify with Métis history and culture. The Supreme Court of Canada's test in *R. v. Powley* includes both self identification and a history and continuity as a distinctive group of peoples of mixed ancestry practising its own customs, way of life and separate group identity. The courts have confirmed that for Métis peoples, proof of

Aboriginal rights varies from that for other aboriginal peoples giving emphasis to post contact emergence of Métis culture.

There is minimal case law further clarifying Métis rights, including rights to water. While the Manitoba courts have ruled against coverage of the Métis, the Alberta courts have held that Indian rights to hunting, trapping and fishing extend to the Métis. That view is supported by *R. v. Powley*.

It may be noted, that the Alberta law establishing the Métis Settlements land base and governance structure specifically provides that aboriginal rights are not infringed.

The courts have held that the Crown does not owe any fiduciary duty to the Manitoba Métis on the basis they were granted individual not communal land rights.[51] Those determinations may be contested on the basis of Powley.

2.7 The Duty to Consult

"Consultation that excludes from the outset any form of accommodation would be meaningless."

Mr. Justice Binnie, Supreme Court of Canada *in Mikisew*

In addition to substantive aboriginal rights, the Crown also is bound by procedural rights in dealing with aboriginal rights and interests. Presumably this duty applies to any aboriginal interest in water. The Supreme Court of Canada has clearly defined the extent of the Crown's duty for "meaningful consultation" with aboriginal peoples in a number of recent decisions including a precedent setting case brought by the Mikisew Cree First Nation *(Mikisew)*. The Crown is obligated to reconcile any potential impacts and this duty is triggered at a low threshold.

The courts have held that a consultation process compatible with the honour of the Crown requires governments to provide advance notice, directly engage the affected aboriginal peoples, actually consider their concerns and make an attempt

to minimize any adverse impacts on any treaty rights. The duty to consult arises at the earliest stage in contemplation of any conduct that may potentially adversely affect aboriginal title or rights. *(Haida; Guerin; Mikisew)* The aboriginal peoples must be dealt with in good faith with an intention of substantially addressing their concerns *(Delgamuukw)*.

The duty to consult arises regardless of whether any aboriginal right or title is proven. Where a *prima facie* case has been made for an aboriginal claim, the Supreme Court of Canada has held that in some circumstances "deep consulting" aimed at finding a solution to impacted rights may be required. Such circumstances would include where the right and potential infringement is of high significance to the aboriginal peoples and the risk of non-compensable damage is high *(Haida Nation)*. The extent of the consultation process necessary to meet the duty will depend on the context and circumstances of each case.

The onus to consult lies with the Crown. The courts have held that a general public consultation process does not meet the duty to consult a First Nation. *(Mikisew)* The assessment of the extent and nature of the aboriginal rights and how they have been or may be infringed must be carried out in a transparent manner actively engaging First Nations and Métis.

There is as yet no official federal policy on Aboriginal consultation. *Federal Interim Guidelines* outline objectives and guiding principles and provide that federal consultation processes will be adapted to meet rights prescribed under each individual treaty and the character and location of each activity.[52] The Guidelines state that: "In the case of legally based consultation, the final responsibility for consultation and accommodation rests with the Crown as the honour of

" [T]he ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated"

Chief Justice MacLachlin, Supreme Court of Canada
in Haida

the Crown cannot be delegated." However in practice, project proponents often conduct consultation, and the government relies on the results of the industry led consultation.

The Centre for Indigenous Environmental Resources has published a Guide designed to assist communities to more effectively engage in consultations with the Crown, and to enable them to protect their rights and interests. It is titled "Consulting with the Crown: A Guide for First Nations", 2007, and is available on-line at http://www.cier.ca/information-and-resources/publications-and-products.aspx?id=900

The Government of Alberta acknowledges its duty to consult with First Nations where its actions may adversely impact treaty rights and traditional uses and has adopted an official *Policy* and *Guidelines* document which specifies who must be consulted, when the consultation must occur, who is to lead the consultation and how any potential impacts are to be accommodated or addressed.[53] Broad discretion is given to government officers to determine when the Guidelines apply. Possible activities which may trigger the duty include large scale industrial projects, including water diversion or wastewater projects; projects requiring an EIA; and projects off reserve which may adversely impact First Nation rights and traditional uses on Indian reserves. The *Policy* and *Guidelines* apply only to First Nations, not to the Métis. The Guidelines and Policy allow for reliance on industry project proponents to undertake the consultations, although the *Guidelines* do specify government oversight.

Consultation on environment related water matters is led through the Office of Aboriginal Relations in Alberta

Environment. In many instances, consultation with First Nations and Métis peoples on water is delivered through broad consultative or "shared governance" initiatives, such as, for example the Alberta Water Council, Water Basin Councils, the Committee on Inter-basin water transfers and the Cumulative Environmental Management Association (CEMA). Alberta has committed to develop separate agreements with First Nations to dictate the terms of consultation processes.[54]

The Alberta Water Council has prepared policies which posed potential conflicts or inconsistencies with the official consultation policy. These include, for example, the legality or appropriateness of reliance on a multi- stakeholder council to dictate consultation and decision making processes for management of waters which aboriginal peoples may have an interest in. Other concerns include equating aboriginal peoples as equal partners with other "sectors", (such as industry) potentially undermining Constitutionally protected rights, or failing to prescribe legally required consultation procedures.[55]

The courts have held that the duty to consult does not extend to administrative tribunals, including energy or utility boards or environmental appeal bodies.[56] Alberta law now authorizes Alberta energy tribunals to hear and rule on constitutional issues related to any applications before them but their decisions cannot offend the *Constitution Act,* including infringement of Aboriginal and treaty rights, without proper justification. The Alberta Energy Resources

"Aboriginal communities cannot be treated as just another stakeholder … this duty cannot be delegated to an interested third party".

Mr. Justice Binnie, Supreme Court of Canada

in Mikisew

Conservation Board holds the view it does not owe a fiduciary duty to Aboriginal peoples.

Saskatchewan in 2006 adopted the *Government of Saskatchewan Guidelines for First Nations and Métis People: A guide for Decision Makers.*[57] The Guide is now under review based on recent court decisions and rapidly changing consultation practices of other provinces. In May 2008 the province hosted a workshop with First Nations, Métis, government and industry to develop a framework for a new duty to consult and accommodate policy. Consultation was expected in spring 2009 and a final policy in 2009. Until a new policy is approved, the Interim Government of Saskatchewan Guide for Consultation with First Nations and Métis People remains in effect.

Manitoba similarly has a draft *Policy and Guidelines on Crown Consultations with Aboriginal Peoples* (2007) and is seeking feedback. It has formed an interdepartmental working group on consultations which includes representatives from the Ministry of Water Stewardship.

In some instances the duty to consult an affected First Nation is specified in legislation. For example, any changes to the Manitoba Treaty Land Entitlement Framework Agreement must be made in consultation with the TLE Committee on the form of the legislation and recommended to the Parliament of Canada and the Legislature of Manitoba.[58] The *Framework Agreement* also requires notice and consultation with specified First Nations on the potential effects of projects, including hydro electric projects, on water ways on lands transferred or under negotiation.

CHAPTER 3

Constitutional Jurisdiction over Drinking Water and Supply

Jurisdiction and responsibility for the protection and supply of water for aboriginal communities is shared by federal, provincial and to a lesser extent by aboriginal governments. Deciding who is mandated to take action is determined by a number of factors including the location and ownership of the water source, constitutional powers and specific authority or duty imposed by statute or agreement.

This chapter discusses the constitutional powers of these three orders of government. (Municipal governments also have jurisidiction, which they derive from powers delegated by the provinces. Municipal governments supply drinking water, and their land use decisions may affect source protection. This level of government is not discussed in this Guide.)

3.1 Federal Government Powers

The federal government has authority over Indians and Indian reserves. *The Constitution Act 1982* recognizes three distinct groups of Aboriginal peoples: Indians, Inuit and Métis. Regardless, opinions differ however over whether Métis are entitled to the same aboriginal rights as First Nation peoples.[59] The federal government purportedly holds the view that Métis are a provincial responsibility.

The proposed new federal drinking water law is slated to only regulate drinking water for First Nations.

Federal powers to regulate water also arise under its constitutional authority over fisheries, trade and commerce, navigation, health and criminal law. *(R v. Hydro-Quebec).* The federal government has shared jurisdiction over the environment *(Friends of the Old Man River Society v. Canada)*

and health. Another available but rarely utilized federal power is the general power to legislate with respect to "peace, order and good government", in particular where a matter is deemed to be of national concern. *(Crown Zellerbach)*

While the federal government has exclusive constitutional power to make laws governing land related matters on Indian reserves (subject to constitutional Aboriginal or treaty rights) no federal laws have been enacted to provide a legal framework for the comprehensive and consistent regulation of drinking water used by First Nations.

3.2 Provincial Government Powers

Provincial government authority arises from its ownership of resources (including water) within provincial boundaries and the power to regulate local works and undertakings. This includes the siting, construction and operation of industrial facilities, water use licensing and operations of water treatment and supply systems. Provincial laws regulate drinking water treatment and supply for the majority of Canadian communities. Most provinces and territories have enacted laws to regulate surface and ground water use and management, control of municipal and industrial effluent, water diversions and dams, and, water treatment and supply systems.

Provincial powers to develop their energy and natural resources may also significantly impact aboriginal access to clean water sources and supply of safe drinking water. As a general rule, provincial energy and environment agencies and energy and utility boards or commissions are mandated by statute to regulate or address these impacts.

While many First Nations hold the view that provincial water management laws do not apply to their communities, some provincial governments maintain that many provincial laws are, what section 88 of the *Indian Act* refers to as, "laws of general application". A provincial law could still potentially apply if it is a "law in relation to a matter coming within a provincial head of power, does not invade the exclusive federal authority over Indians and lands reserved for the Indians, and is not inconsistent with any federal laws."[60]

Surface waters (lakes, rivers) generally fall within the control of the provinces, although the federal government has shared jurisdiction for interprovincial water bodies. The dispute over provincial powers over waters bordering reserve lands centers on provincial government claims of ownership of beds of rivers and wetlands.

3.3 Aboriginal Government Powers

The powers of aboriginal governments to regulate source water and drinking water are determined by their respective constitutional or treaty rights (as discussed in Chapter 2) and powers accorded by laws or agreement. First Nations have been granted some limited powers to regulate protection of water sources or provision of water treatment and supply through the bylaw making powers under the *Indian Act* and regulatory powers under a land code where issued under the *First Nation Land Management Act*. In some instances First Nation Final Agreements, self government agreements, land agreements and financial contribution agreements extend specific powers and responsibilities to First Nations to regulate source water protection or water treatment.

"… I hold fast all the promises you have made, and I hope they will last as long as the sun goes round and the water flows, as you have said."

Chief Ma-We-Do-Pe-Nais
in his closing address for Treaty #3

The ***First Nation Land Management Act*** provides that a land code must be established for any Framework Agreement. Under this law a First Nation council may make laws under their land code with respect to development, conservation, protection, management and use of First Nation lands. Prior to enacting any law for environmental protection, a First Nation is required to enter into an agreement with the Minister of INAC and Environment. The First Nation law must also impose environmental standards and penalties equivalent to the provincial laws in which the First Nation is situated and provide an environmental assessment process for any projects on the First Nation lands. The act also specifies where other federal laws take precedence.

The greatest level of autonomy rests with First Nations who have negotiated specific agreements and development plans under the First Nations Land Management Agreement. The effect of this Agreement is that once a First Nation ratifies the Framework Agreement and enacts a land code, the community replaces the Minister of Indian and Northern Affairs Canada as the decision-maker in relation to its reserve lands and resources and replaces Parliament as the legislator in respect of those lands and resources.

Muskoday First Nation Land Code and Water Management

In Saskatchewan, the Muskoday First Nation is a signatory to the Framework Agreement on First Nations Land Management (and Act)[61] and

operates under a land code. The Muskoday First Nations Land Code defines land as including the water, beds underlying water, riparian rights, and renewable and non-renewable natural resources belonging to that land, to the extent that these are under the jurisdiction of Canada; and all the interests and licenses granted by Her Majesty in right of Canada listed in the Transfer Agreement.[62] In addition the Land Code provides for expropriation of land for sewage or water treatment—obviously contemplating control over drinking water works and distribution (if not water supply).[63] As a result the Muskoday exercise a good deal of autonomy in relation to drinking water management. The Muskoday obtain their water mainly by pipeline from the Prince Albert Rural Water Utility based on a Memorandum of Understanding between the parties. They are one of the largest end users, servicing over 600 people on reserve.

Métis

There is a considerable difference in the law making powers of the Métis generally and the Métis Settlements established under Alberta law. Alberta is the only province to enact legislation designating eight Métis Settlement lands and establishing Métis self government. The governance structure includes a Métis Settlements General Council and Local Councils who govern individual settlements.

The 1989 Alberta Métis Settlements Accord[64] establishes:

- constitutional protection for 1.25 million acres (528,000 hectares) of Settlement lands,
- the framework for local government and
- provincial financial commitments.

While as a general rule the Settlements are subject to provincial laws, the *Métis Settlements Act* accords a number of water related rights to the Métis including the right to fish for sustenance and a bylaw making power for a local council to control use of water sources to prevent contamination in respect of public health. No specific powers are granted to the Métis to control or prevent contamination of their lands (and waters) by the activities of other parties on lands or waters outside the settlement lands.

A Co- Management Agreement between the Métis Settlements and the Government of Alberta provides for long term management of natural resources under Settlement lands. No specific mention is made of control or management of water resources.

CHAPTER 4

Laws Protecting Drinking Water Sources, and Governing Treatment and Supply

Safe drinking water protection requires governments to exercise their powers to enact and enforce laws to protect drinking water sources, known as source protection, and to treat and supply safe drinking water. Source protection is the power to control and protect sources- rivers, lakes or ground water, and includes the power to make and enforce laws to prevent contamination, to permit water uses, and to ensure the continued flow of a volume of water to meet drinking water needs. Treat and supply includes the power to establish and enforce drinking water standards. This includes the power to make laws to regulate physical systems to treat, store and deliver drinking water; certify facilities and operators; and, monitor and respond to tainted water and where necessary, provide alternative water sources.

No laws have been enacted specifically to regulate drinking water for aboriginal communities. The 2006 federal Protocol for Safe Drinking Water for First Nations Communities sets out standards for the design, operation and maintenance of drinking water systems, but there is no legislative base to ensure compliance with the Protocol. The federal government imposes conditions on the construction and operation of First Nation drinking water systems and operators through conditions to financial contribution agreements.

While the Prairie provinces have enacted laws governing the construction and operation of physical systems to treat and distribute drinking water and for the certification of operators to operate and monitor these systems, it is not clear whether any or all of these laws apply to First Nation systems on reserves. The provincial governments do apply their laws to off-reserve and Métis facilities.

The result is a legal uncertainty, regulatory vacuum and in some cases a variance in legal protection for safe drinking water afforded to aboriginal communities. This chapter reviews some of the key laws regulating protection of drinking water sources and drinking water treatment and supply.

4.1 Federal Laws

Though source protection is often thought of as a provincial responsibility, many federal laws relate to source protection, including: the *Canadian Environmental Protection Act* (CEPA), the *Fisheries Act,* the *Canada Water Act*, and the *Canadian Environmental Assessment Act* (CEAA).

Similarly water treatment and supply is usually thought of as a provincial (or municipal) responsibility but the federal government, through Health Canada, leads a national committee that sets standards for drinking water quality, and administers two laws which are relevant to aboriginal drinking water: the Department of Health Act and the Emergency Preparedness Act.

The Canadian Environmental Protection Act (CEPA) grants extensive powers to Environment Canada to protect water sources by controlling toxins and nutrients which may contaminate water sources. *CEPA* provides a framework for regulating toxic substances and nutrients, issuing interim orders to control any substance which may pose significant danger to human health or environment, pollution prevention planning and emergency response in the case of release or spills of toxins. In developing any guidelines

or rules the department is obligated to offer to consult representatives of aboriginal governments or aboriginal people. However, these regulatory powers are discretionary and few standards have been established.

Part 9 of *CEPA* empowers the Minister of Environment to set environmental objectives, guidelines and codes of practice for aboriginal lands and to make regulations to protect the environment on aboriginal lands including: environmental management systems; pollution prevention; emergency response; and, control or release of substances. To date the only regulations or other measures issued under *CEPA* to specifically protect First Nation lands or waters under this part deal with underground petroleum storage tanks.

CEPA grants many parallel powers and therefore equal responsibilities on the federal Minister of Health to intervene to control toxins which may pose a risk to human health. The Act imposes a *mandatory duty* on the federal Minister of Health to conduct and publicly release research on the role of toxic substances on human health. The Minister is also legally obligated to issue objectives, guidelines and codes of practice where environmental impacts may affect life and health.

The federal ***Fisheries Act*** empowers the Department of Fisheries and Oceans (DFO) to regulate, authorize or compel studies of activities that may harm waters which are fish habitat. The Act prohibits activities which contaminate or harm fish or its habitat, unless specifically authorized. The DFO is authorized to impose broad conditions to approvals necessary to prevent or mitigate harms beyond the fishery or its habitat, which could include potential damage to

"Ironically, a number of the issues surrounding drinking water quality on-reserve have been the result of economic development and other activities that have polluted the source water surrounding First Nations communities."

Report of the Senate Standing Committee on Aboriginal Peoples
May 2007

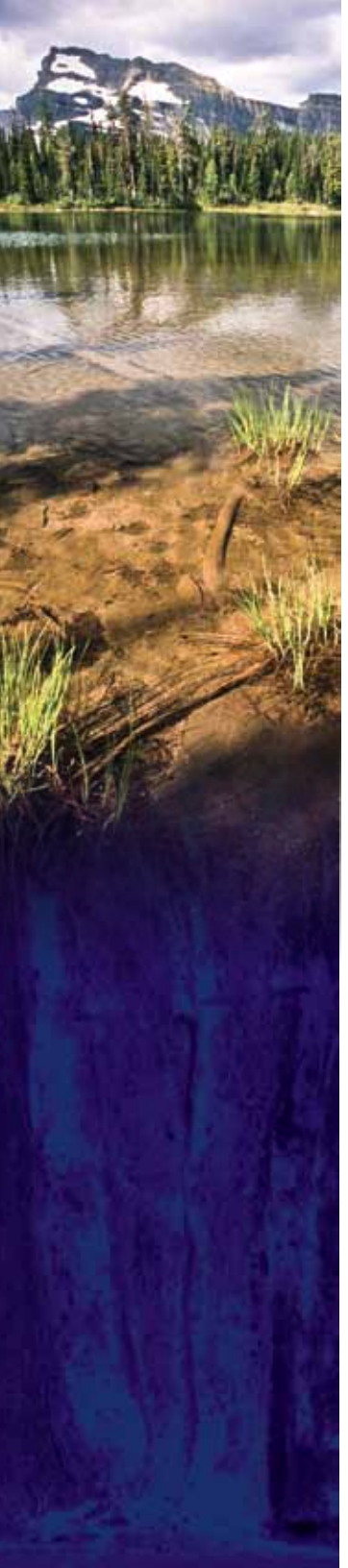


PHOTO LORNE FITCH

a drinking water source. Where a violator is prosecuted and a conviction is obtained, the Crown may seek and the court could potentially require the violator to take actions to protect the waters from future contamination, or order provision of alternate water sources.

Environment Canada is assigned responsibility to enforce the contaminant provisions of the federal ***Fisheries Act.*** However, to date only a limited number of substances have been have been regulated under that act. Environment Canada is developing new federal effluent quality regulations pursuant to the federal Fisheries Act, which would apply to all wastewater facilities in Canada, including those in Aboriginal communities. Consultations on these regulations have occurred, and the government plans to publish draft regulations in 2009.

The ***Canada Water Act*** allows for federal- provincial agreements to plan and implement programs for waters where there is a significant national interest in managing those water bodies. The Act provides at least one avenue for federal intervention to protect a water source considered at risk: the Minister can enter into agreements with provinces for joint designation of a water quality management area where water quality has become a matter of urgent national concern. Regulations can be issued to restrict waste in designated water quality management areas. The Act is little used and no such areas have been established.

The ***Canadian Environmental Assessment Act*** *(CEAA)* establishes the federal regime for assessing and mitigating impacts to federal lands and waters and federal powers.

The CEAA process applies to all oil and gas activities otherwise regulated under the ***Indian Oil and Gas Act.*** Federal authorities are granted extensive powers to prescribe mitigation measures where significant threats to water supplies are indentified.

In addition to duties under CEPA, **Health Canada** is mandated to protect the health of Canadians under a variety of other laws. Duties related to access to safe water assigned to the Minister of Health under the ***Department of Health Act*** include: promotion and preservation of physical, mental and social well- being; the protection against risks to health and the spreading of disease; investigation and research into public health. Health Canada issues the ***Guidelines for Canadian Drinking Water Quality (Guidelines),*** developed by the Federal-Provincial-Territorial Committee on Drinking Water. No First Nation or Métis representatives are appointed to this committee.

The *Guidelines* are advisory and become legal binding only when adopted into a federal or provincial law or a provincial water license or permit. The Guidelines cover 165 microbiological, physical, chemical and radiological contaminants requiring removal or reduction to provide safe drinking water.

Two Branches of **Health Canada** and the **Water, Air and Climate Change Bureau** (Bureau) are mandated to address health and environment issues for First Nation communities. **The First Nations and Inuit Branch** is mandated to assist First Nation and Inuit communities address health barriers, disease threats, and attain health levels comparable to other

PHOTO LORNE FITCH

Canadians. Presumably this includes improved access to safe drinking water as identified by the Auditor General. However it is the **Healthy Environment and Consumer Safety Branch** that is mandated to reduce harm caused by controlled substances and environmental contaminants, address drinking water and assess health risks posed by environmental factors. The Bureau is assigned responsibility for leading Health Canada federal and national programs on the quality of drinking water as well as developing drinking water quality guidelines and objectives, treatment standards and mitigation strategies for the protection of human health. It is noteworthy that no mention is made of regulations.

Health Canada is assigned responsibility for establishing and providing advice on emergency health standards for water and exposure to hazardous environments as well as provision of emergency lodging, food etc in the event of a civil emergency. This responsibility arises under the Departmental Planning Responsibilities for Emergency Preparedness Canada Policy pursuant to the Emergency Preparedness Act. The Policy assigns responsibility for civil emergency plans and response functions for federal departments. This Policy is important and often overlooked.

The Policy was an instrumental factor in obtaining a $10 million settlement from CN Rail for the Paul band for damages following a train derailment that spilled oil and chemicals into Lake Wabamun in 2005. CN Rail has agreed to pay the Paul First Nation to settle a three-year lawsuit.

Health Canada has adopted a strictly advisory role. They may recommend a boil water advisory to a First Nation, who in

turn is considered by the department to hold the authority to issue and lift advisories. Federal audits continue to identify communities remaining under boil water advisories.

No law now requires the monitoring of drinking water quality or safety for First Nation communities. In practice, a duty is imposed on each individual First Nation to assure a certain level of water quality as terms of individual funding arrangements with specific First Nations, as noted in the 2005 report from the Commissioner of Environment and Sustainable Development. The *Drinking Water Guidelines* are made binding on a First Nation as a term of any financial contribution agreement to construct or operate a drinking water system. INAC has issued a *Protocol for Safe Drinking Water in First Nations Communities* which sets "standards" for design, construction, operation, maintenance and monitoring of drinking water systems. However, the *Protocol* is not legally enforceable.

It is noteworthy that the federal government has exercised its regulatory authority to promulgate ***Potable Water Regulations for Common Carriers***[65] to ensure nationally consistent drinking water standards for rail or airline passengers but has taken no regulatory action to ensure consistent protection for First Nation community drinking water safety.

The regulation making powers under the ***Indian Act*** do not include protection of water or any regulatory framework for safe drinking water for First Nation communities. INAC can make regulations to prevent, mitigate, controls diseases on reserves; to provide heath services; and to provide for sanitary conditions.

"What the federal government has is minimum drinking water guidelines. We want to have 21 other criteria that will ensure there is high-quality water."

Eric Large
Acting Chief
Saddle Lake Cree Nation
Edmonton Journal
August 28, 2006

PHOTO LORNE FITCH

4.2 Provincial Laws

There are opposing views on whether the provinces have the power to regulate waters located solely on reserves or water use by First Nations. These matters have yet to be ruled on by the courts. In practice, each provincial government has adopted its own approach to authorizing water use by aboriginal communities and regulating water systems supplying aboriginal communities. The policies and practices of the prairie governments are examined in greater detail in Chapter 5.

With the exception of waters on federal lands, the provinces have claimed ownership and regulatory control over all waters within their boundaries. Provincial laws govern projects and activities that may impact water sources located on aboriginal lands or relied upon by aboriginal communities.

All three Prairie provinces have established a regulatory regime for water use and water management, controlling industrial effluent, water diversions, dam building and water treatment and supply systems. Provincial laws regulate water withdrawals for non-domestic uses and issue licenses for dumping effluent into lakes, rivers or deep-well injection.

Alberta

In Alberta, the *Environmental Protection and Enhancement Act* regulates the protection of water sources including ground water and surface water located within provincial lands. This includes controls on the contamination of water bodies. Alberta Environment applies a "multi-barrier" approach to drinking water which includes source protection planning and evaluation of potential cumulative effects of

development on a watershed to reduce the risk of potential adverse effects.

Water use and withdrawals are regulated by the Alberta Water Act. The Alberta Government does not generally require both First Nations and Métis Settlements to obtain a provincial water license prior to withdrawing surface water.

Alberta does not regulate water use or allocation for industrial activities on reserve lands. In some cases Alberta has issued water licenses to INAC for irrigation water use by a First Nation.

The Alberta Energy and Utilities Board takes the position it has jurisdiction to review and approve energy projects located on First Nation lands (but does not have the mandate to license water use or withdrawals). An Act to amend the Indian Oil and Gas Act is currently before Parliament. This law authorizes the federal government to manage and administer the exploration and production of oil and gas resources on reserve lands. One of the purposes of the proposed amendments is to help ensure environmental protection of First Nation lands.

In practice, the Alberta Government regulates and licenses water use by the Métis settlements. While the *Alberta Métis Settlements Act* empowers local councils to make bylaws to control the use of water sources to prevent contamination to protect public health, there is no specific provision regarding establishment and maintenance of drinking water systems.

Saskatchewan

In Saskatchewan the management of water resources is roughly divided between the Saskatchewan Watershed

Authority (Authority), a Crown Corporation, and Saskatchewan Environment. The Authority deals with source water protection, and the licensing of withdrawals and water use. The department addresses water quality concerns, including drinking and waste water regulation. Although the decisions of these authorities may indirectly impact reserve lands through off-reserve regulation, there is no direct action to control or licence on- reserve works or activities. In spite of this, and with treaty rights as a backdrop, First Nations have been informally involved in programs and activities to promote watershed management. Similarly, First Nations and the province access programs designed to train drinking water technicians according to provincially established standards.

Manitoba

The Manitoba *Water Rights Act* is the primary piece of legislation governing water allocation, riparian rights and water quality issues in that province. It is supplemented by the *Protection of Water Sources Regulation* (under the *Public Health Act*) which addresses surface and ground water supply protection. Although the legal requirement for a water use license on- reserve remains in question, the practice in Manitoba has been to provincially license major withdrawals by First Nations. While Manitoba recognizes federal jurisdiction over First Nation drinking water, there is a significant degree of co-ordination between the province and Health Canada. Similarly although the protection of water sources on- reserve falls under federal jurisdiction, as in Saskatchewan, Manitoba and First Nations are increasingly

recognizing the benefits of adopting more co-operative and comprehensive watershed management approaches.

One suggested response to ensure that equal standards and rules apply to all communities- aboriginal and non aboriginal- within a province is to incorporate into federal law enacted for aboriginal communities, provincial standards and rules to protect source water and drinking water. This is the option preferred by INAC in its current discussion paper and planned consultations and is discussed in Chapter Six.

4.3 Aboriginal Laws

Band councils are granted limited powers under the ***Indian Act*** to make bylaws in areas indirectly regulating safe drinking water including: health of residents and prevention of spread of diseases; construction of water courses … and other local works; and, construction and regulation of use of public wells, cisterns, reservoirs and other water supplies. Council bylaws under the ***Indian Act*** may provide for fines up to $1000 or 30 days in jail for violating any such by-law.

As discussed above, the ***First Nations Land Management Act*** empowers First Nations to enact bylaws to set environmental standards and to regulate local services and impose user charges. Subject to what may be provided under the proposed federal law on safe drinking water, the bylaws could regulate the construction, operation and maintenance of drinking water systems. If enacted under this law, any drinking water standards must be at least as strict as the provincial laws where they are located.

The land management law allows for delegation of control over land use and natural resources (presumably including water use) to individual First Nations. A prerequisite to transfer of authority is the adoption and certification of a **land code** according to specified rules and procedures.

Once in force the First Nation can manage its own lands including: grant interests and rights to the land; manage the natural resources of the lands; enact bylaws regulating development, conservation, protection, management, use and possession of the lands; make rules for environmental assessment and environmental protection; provide for local services and to impose user charges (presumably for water treatment and supply); and, establish enforcement and penalty measures. Only 17 of 36 FN have developed land codes. Even with the existence of such codes, they would apply only to activities which threaten water sources located on each First Nation's lands.

Prior to enacting these bylaws, a First Nation must first enter into an environmental protection agreement with the Ministers of INAC and Environment consistent with any First Nation Framework Agreement.[66]

Where control over the land (and water) is transferred, liability for proper management of the lands and resources is presumably also transferred. This could include responsibility to prevent damage and liability for compensating for harm to source water or failure to maintain a treatment or distribution system.

Métis powers to regulate water on their lands are even less clear. While Métis are included in the definition of aboriginal

peoples under section 35(2) of the ***Constitution Act, 1982,*** they are not specifically referenced under section 91(24) of the 1867 *Constitution Act* relating to federal jurisdiction over Indians and Indian lands. (Kwasniak). As outlined in Chapter 3, Alberta law establishes and regulates Métis settlements. The *Métis Settlements Act* does accord a number of water related rights to the Métis including the right to fish for sustenance and a bylaw making power for a local council to control use of water sources to prevent contamination in respect of public health. Some of the settlements border lakes and rivers.

No specific powers are granted to the Métis to control or prevent contamination of their lands (and waters) by the activities of other parties on lands or waters outside the settlement lands. A Co-Management Agreement has been signed between the Métis settlements and the Government of Alberta providing for long term management of natural resources under Settlement lands. It is not clear if that includes ground water.

CHAPTER 5

Prairie Aboriginal Drinking Water — The Regulatory Reality

Drinking water treatment and supply for the majority of Canadian communities is regulated by provincial laws controlling water standards, monitoring, treatment and supply. Regulation of drinking water sources and supply for aboriginal communities is far more complex. Determining which law applies, or if there is any law at all, depends on many factors including: location of the source water, location of the aboriginal water users; location of the water treatment and distribution system; and ownership of the treatment and distribution system.

Different laws and policies apply to each of three First Nation land designations: numbered treaty reserve land, land within numbered treaty areas; and, treaty land entitlement (TLE) reserve land. Rules for Métis water supplies may vary depending on whether they are living within designated Settlements, as is the case for many Alberta Métis, or if they are sharing water systems with other aboriginal or non-aboriginal communities. Different rules may also apply if the water source relied upon lies within or borders a reserve. Waterworks may be located off reserve or outside a Métis settlement while the distribution system may be on those lands. In other cases on- reserve waterworks may serve a First Nations community that extends beyond the reserve into another.

Rights and responsibilities may also be prescribed in a *Framework Agreement on First Nations Land Management.* Legal liabilities may also be prescribed as terms of a contract for supply of drinking water by pipeline or truck hauling.

"Canada lacks enforceable standards for drinking water quality, unlike the United States and Europe."

Randy Christensen
. Waterproof 2 p17

The rules governing individual Prairie aboriginal community water systems are also established by agreements or informal arrangements made between federal, provincial and aboriginal governments for delivery, treatment, distribution, certification, monitoring and testing of water. Responsibilities may be prescribed as terms of a financial contribution agreement to construct or operate a drinking water system. As discussed in Chapter 4, the federal government has, to date, chosen to impose drinking water standards and rules for construction and operation of water treatment and distribution systems for First Nation as terms of financial contribution agreements, rather than through a law, as the provinces have done. The proposed new federal law, discussed in Chapter 6, will alter this arrangement. Standards for the construction and operation of drinking water systems for the Alberta Métis Settlements have also been imposed as conditions to funding agreements.

Finally, for Prairie aboriginal communities, in the vacuum of clear laws, the actual role of governments in ensuring safe drinking water is less reflective of legal mandates and more a case of practical accommodation to address immediate needs. This chapter reviews the actual practice in the Prairies.

5.1 Federal Policy and Practice

In practice, three federal departments are involvd with drinking water protection for First Nations communities: INAC, Health Canada nd Public Works Canada. The role each department plays is described below.

INAC — Policies and Protocols, New Law Proposed

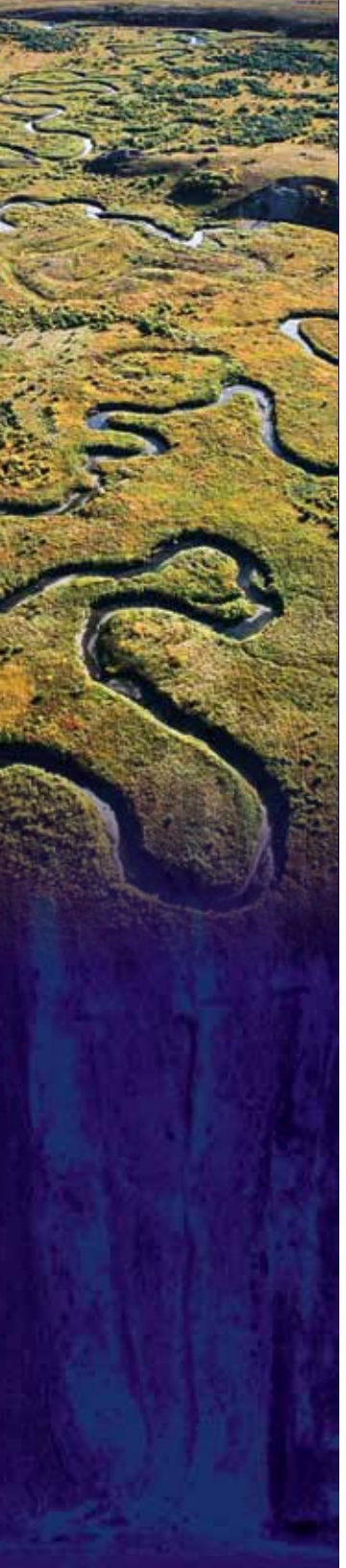
INAC plays the main role with respect to the provision of safe drinking water through contribution agreements, training, the Protocol, compliance, and emergency response.

Contribution Agreements

In lieu of federal regulatory action, Indian and Northern Affairs (INAC) has chosen to impose "standards", directives and procedures for the construction and operation of drinking water facilities for First Nations as conditions to federal financial support. The federal government has entered into contribution agreements with First Nations under the Capital Facilities and Maintenance Program, to provide 80% of the financing for water treatment plants, water intakes, pipes water trucks and costs of design, construction, acquisition, upgrading and major repairs for water services to residential and community buildings. Individual wells and water services serving less than five houses are not covered.

Training

INAC continues to impose "mandatory" training for operators as a term of contribution agreements, not by law. Consequently where no contribution agreement exists, no requirement exists. The Commissioner of the Environment and Sustainable Development voiced concern that training is not mandatory or accessible to all First Nations, and that INAC has not undertaken any consistent audit program to verify if facilities are constructed and operated to standard.[67]



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As a result, both the Commissioner and the Senate found that Parliament is not receiving adequate reports on either the state of the water, or the result of federal expenditures.

INAC has established a 24 hour emergency response hotline and a circuit rider training program. However, these technical experts are reported to spend the majority of their time troubleshooting emergencies rather than delivering any concerted training program for the operators. INAC reported that by spring 2007 81% of operators had been trained but only 37% certified. The Senate recommended establishing regional training centers or partnering with community colleges.

Protocol

In March 2006 as part of the action plan, INAC issued a *Protocol for Safe Drinking Water in First Nation Communities*, based on a combination of Canadian laws and regulatory "best practices". The *Protocol* requires compliance with its terms for any water system that produces drinking water destined for human consumption, that is funded in whole or in part by INAC, and that serves five or more households or a public facility. It requires Chief and Band Councils that sign a financial contribution agreement to meet the minimum requirements set out in the Protocol and to train and retain certified water operators. The *Protocol* provides that the Chief and Council are responsible for operation and maintenance of the facilities in compliance with the terms and conditions of the funding agreements. This includes responsibility for monitoring, reporting, record keeping, annual inspections, remedial action and emergency response planning. The

Chief and Band Council are required to take necessary actions to protect residents and to correct deficiencies in the event of a boil water advisory. The *Protocol* provides that where action is not taken, the band council must reimburse INAC for any action taken.

Compliance

INAC's plans to ensure compliance with the terms of its contribution agreements are questionable, because as these standards are not imposed by law but rather as terms of a contract, enforcement action is precluded. The only response to failure to adhere to the *Guidelines* or *Protocol* is a hold back of funds. Where no contribution agreement exists, no "standards" exist for any facilities located on a reserve.

INAC maintains that First Nation Band Councils are responsible to ensure water facilities comply with federal or provincial standards, whichever are the most stringent.[68] It not clear if these "standards" are the ones imposed as a contract obligation under federal financial contribution agreements, or provincial standards. The issue of applicability of provincial drinking water laws to activities or facilities on First Nation lands remains unclear.

Under this regime, gaps arise in ensuring adherence to drinking water standards where a First Nation is not party to any contribution agreement. The Senate report in 2007 noted that INAC had admitted that problems may arise if responsibility is devolved to First Nations to run their own drinking water systems before the necessary capacity is in place in all communities. To enable compliance, assistance

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must first be assured and provided to build improved capacity to operate and maintain water treatment systems.

Emergency Response

The *1995 Federal Policy for Emergencies* assigns lead responsibility to Indian and Northern Affairs (INAC) for civil emergency plans on Indian and First Nation reserves for which the department has legal responsibility, including arrangements for temporary community evacuations. The INAC 2004 *Water Source for Life policy* recommends that emergency response plans for water systems be developed and implemented.[69] Band councils are assigned this responsibility under the contribution agreements. A lawsuit filed by the Paul First Nation at Lake Wabamun, Alberta against several federal departments claiming damages on among other grounds, alleged failure to inform and assist the First Nation in responding to the 2005 CNR derailment and massive spill of 700,000 litres bunker C oil into the lake bordering their reserve lands was settled in 2008 for $10 million.

Health Canada has adopted a strictly advisory role. They may recommend a boil water advisory to a First Nation, who in turn is considered by the department to have authority to issue and lift advisories. A number of Prairie communities have continuing boil water advisories.[70]

The Drinking Water Safety Program for First Nations communities includes testing and sampling drinking water quality and reviewing, interpreting and disseminating results. While comprehensive protocols are meant to ensure that communities meet the *Canadian Drinking Water Quality Guidelines,* a federal audit revealed that Health Canada had

no comprehensive plan with specific target dates to meet this objective. The audit also found that test results were not available to INAC or to Chiefs and Councils of First Nation communities. INAC reports that they undertake needs assessments which are reported to First Nations along with "actions taken" to remedy the deficiencies.

Health Canada provides funds to First Nations to monitor water supplies and to test drinking water quality. Although, as outlined below, in some provinces these services are also provided by provincial agencies. The Commissioner of the Environment and Sustainable Development has raised concerns that testing is still not being carried out in most First Nation communities and Health Canada has no plan to achieve by 2008 the testing frequency set out in the Guidelines.

Health Canada applies a "multi-barrier approach" to safe drinking water for First Nations, which involves an assessment of threats to source water as well as treatment and distribution systems. It is unclear how Health Canada actually delivers this responsibility where First Nation lands or source waters face threats from developments on or off reserve lands. Health Canada has issued a number of guidelines for implementing this policy (listed in Appendices). Where a First Nation enters into a contribution agreement for federal funding to construct or operate a drinking water system, the First Nation assumes responsibility for the system and the duty to observe these Guidelines.

Health Canada has responded to calls for review of potential links between health problems and industrial contaminants

in water sources serving several northern Alberta aboriginal communities. The concerned First Nations peoples reside on and off reserve, and doctors in the community reported apparent high cancer rates. A follow up review led by Alberta Health Services verified higher than average cancer rates for some types of cancers. The report found 51 cancers in 47 people between 1995 and 2006, instead of the 39 incidents of cancer that would have been expected statistically. The report did not state whether people living in Fort Chipewyan have an increased risk of developing cancer.[71] However the doctors who originally raised the alarm feel that their concerns about elevated cancer rates have been vindicated.[72]

The Department of Public Works and Government Services Canada (Public Works) is the agency that signs the contribution agreements with First Nations for financial support to construct and operate water treatment infrastructure or related operator training through the First Nations Infrastructure Fund (FNIF). Funds are available for infrastructure on reserves, Crown land, lands set aside for the use and benefit of a First Nation, or off-reserve in the case of cost shared projects with non-First Nation partners such as neighbouring municipalities. Public Works also provides technical service support to INAC for drinking water matters. No similar federal fund exists for Métis Settlements or communities.

5.2 Provincial Policies and Practices

Drinking water treatment and supply for the majority of non-Aboriginal Canadian communities is regulated by provincial laws controlling water standards, monitoring, treatment and

supply. The situation is different for First Nation and Métis communities in Albertan, Saskatchewan and Manitoba.

In some cases, gaps remain. For example, there is no legal duty to notify or report to aboriginal water users on the state of the quality of their drinking water. There is no federal law requiring notice to reserve residents of contaminated drinking water.

The following sections summarize the provincial roles in managing source water, regulating water works, and training and assisting facility operators in aboriginal communities in the Prairies.

"We've always voiced our concerns for the environment but it seemed like nobody is at the table to address this. Hopefully a protocol will get us to that table."

Grand Chief Arthur Noskey
Treaty Eight.[Journal May 23, 08)]

a) Source Water Management and Protection

Alberta

Like all provinces, Alberta Environment applies a "multi-barrier" approach to drinking water which includes source protection planning and evaluation of cumulative effects to reduce the risk of potential adverse effects. One of the three proposed outcomes from Alberta's "Water for Life" strategy is a safe and secure drinking water supply. (The other two outcomes are healthy aquatic ecosystems; and reliable, quality water supplies for a sustainable economy.)

The Government of Alberta holds the view that the provincial crown owns the beds and shores of rivers and wetlands bordering reserves and that Aboriginal water use is subject to provincial laws. (Kwasniak 2001) Water use and diversion is regulated under the Alberta Water Act. Though the province has not generally required licenses for water use

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on reserve lands or for reserve use, water withdrawal licenses have been issued to some First Nations including, Janvier and Wabesca- Desmarais and Ft Chipewyan. (However, the water treatment system at Ft Chipewyan is not located on a reserve, and serves both aboriginal and non aboriginal users.)

The *Water Act* also provides for basin wide and watershed specific management plans, which may be made legally binding. Policies on development and implementation of these plans are guided by a multi-stakeholder advisory body, the Alberta Water Council. First Nation and Métis representatives are appointed as government representatives. Some First Nations have chosen to instead form their own watershed councils.

The *Environmental Protection and Enhancement Act* regulates the protection of water sources including ground water and surface water located on provincial lands. This includes the requirement to identify and mitigate impacts on water resources in any environmental impact assessment of a major project. In granting project approvals the government is obligated to consider and may impose conditions related to potential impacts on surface or ground water sources. The Alberta Energy and Resources Conservation Board, the Alberta Electricity Commission and the Natural Resources Conservation Board all have duties to consider impacts on water and powers to deny or condition approvals based on concerns.

Saskatchewan

Provincial authority for source water protection rests with the Saskatchewan Watershed Authority (Authority) — a Crown

corporation reporting to the Minister of the Environment. The mandate of the Authority includes the maintenance and enhancement of the "quality and availability of the water, watersheds and related land resources of Saskatchewan for domestic, agricultural, industrial, recreational and other purposes," as well as the conservation, efficient use, control, development and distribution of such waters and related resources.[73] The Authority promotes watershed and aquifer planning through co-management arrangements with various levels of government and NGOs within the province. It is also responsible for the allocation of ground and surface water rights within the province.The *Environmental Management and Protection Act, 2002* also grants the Minister a broad mandate over the management, use or protection of the environment and the management, administration and promotion of economical and efficient use of drinking water.[74] In practice, the Department addresses water quality, including drinking water and the Authority manages water allocation.

Linkages between the Authority and First Nations are for the most part informal — for example, they have cooperated on groundwater assessments in some instances. As the duty to consult is clarified through court decisions, working relationships between the two are changing, as indicated by the recent flood plains negotiations in the Qu'Appelle River Valley. The Authority recognizes that land negotiations require a co-management agreement as a condition for the flood claim settlement.[75] The Authority also recognizes areas of overlap between Treaty Rights and provincial water management and has developed a community involvement policy to guide consultation with citizens, including First

Nations and Métis peoples.[76] It is fair to say, however, that such efforts are still fledgling.

Manitoba

Source water protection measures are found in several different Manitoba statutes and regulations. The *Protection of Water Sources Regulation* (made under the *Public Health Act*) prohibits a range of acts that may contaminate surface or ground water supplies[77] and empowers medical officers of health, inspectors and Ministers to order violators to desist and clean up any contamination.[78] This law does not apply to water located solely on- reserve.

The *Water Rights Act (Manitoba)* governs water diversion, riparian rights and licensing of water use, and gives the province the power to regulate use and protection of any ground or surface water. As a matter of policy, water use licenses for surface or ground water have been granted to a number of Manitoba First Nations for municipal or other purposes. Applications are most common in the southern part of the province where the bands are engaged in irrigation activities. For example, the Long Plains Reserve (Sioux) near Portage La Prairie have secured such licenses. The Swan Lake Reserve has an irrigation license, allowing tapping the Assiniboia aquifer which was approved some years ago and continues in force.

There was a backlog in processing water use license applications in Manitoba. As a result, Northern community applications were given low priority due to the low water demands of municipalities and the large supply in the region.

Even larger non-native communities in the northern part of the province may operate either without a license or with an expired license. However, more recently the Manitoba government has decided to advance the licensing of Aboriginal and Northern Affairs (ANA) communities using more than the daily domestic limit of 25,000 litres per day, about 40 households or more.

Some reserves, including the Sapotaweyak Cree Nation, hold water licences for municipal use on reserve land. This Nation, which includes both the communities of Pelican Rapids and Shoal River, has held a water rights licence for their municipal water system since 1993, drawing source water from where the Shoal River enters Lake Winnipegosis.

The legal requirement for a license for water use on First Nations lands remains unresolved. INAC holds the view that the province has no jurisdiction to licence these uses. This view appears consistent with the provincial *Water Rights Act* which provides that certain entities do not require a license including withdrawals for domestic use and any person exercising a right under any other Act of the Legislature or any Act of the Parliament of Canada. Arguably this would include First Nations lands which are governed by federal legislation.

As in Saskatchewan a number of hybrid situations exist in Manitoba where an on- reserve work services off- reserve consumers through a distribution system, for example in Seymourville. In addition, bi-lateral agreements may determine the quantity of water available for distribution on the reserve when a regional pipeline is tapped or where a water shortage arises, the use may be guaranteed by the license.

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The Manitoba Water Council, the Water Stewardship Fund and watershed authorities are established under the *Water Protection Act.* This Act regulates the use and consumption of water, the production of waste and wastewater effluent and industrial and agricultural activities that may impair water quality on a watershed-basis. First Nation "stakeholders" are invited to participate in provincial watershed planning initiatives. By way of example, the Swan Lake First Nation has actively participated in the Assiniboine Delta Aquifer Watershed Plan roundtable.

b) Regulation of Water Treatment and Distribution Works

The provinces do not regulate water treatment or distribution facilities wholly situated on reserve. That said, there are co-operative efforts in place to address common water quality problems experienced in provincial and First Nation water works which lie in close geographical proximity. For example, ammonia in ground water affecting both on and off reserve water works has resulted in co-operative efforts between Saskatchewan Environment and the Prince Albert Grand Council (through INAC) as both a courtesy and a problem solving alternative. Similarly in Manitoba (and Alberta), local Health Canada officials and provincial health officers often share information and expertise in relation to any boil water advisories. Engineers in the Manitoba Office of Safe Drinking Water routinely offer technical advice for water works designed by INAC (according to the federal Protocol standards).

Federal requirements under the *Protocol for Safe Drinking Water in First Nations Communities* apply to the construction

and operation of an "on reserve" works, but not to any water supplied by this system to "off reserve" users. Similarly, the federal water quality Guidelines apply to an on-reserve distribution system, but water accessed from a tap located off reserve must meet Manitoba drinking water standards.[81] In practice, a far more flexible and practical approach has been adopted.

Alberta

Alberta considers First Nations to be exempt from provincial drinking water laws. Drinking water for aboriginal communities on reserve is governed only by federal guidelines and protocols. The provincial government has however offered First Nations access to regional water supply systems, subject to provincial rules. These include fee- for- service and consent to apportionment during times of water shortage. Agreements are in place between Alberta and various First Nations enabling First Nation participation in provincial training and certification programs, subject to adherence to provincial standards.

Rules for facility and operator certification, water system construction, operation and monitoring are set out in Part 7 of the *Environmental Protection and Enhancement Act, Potable Water Regulation, Activities Designation Regulation,* and various codes and terms and conditions of facility approvals. The approval holder is obligated to sample, monitor and report water quality. Métis Settlements can seek assistance from regional drinking water operations specialists. Alberta law defines potable water as water supplied by a waterworks system.

An informal arrangement is in place between Alberta Environment and the INAC Technical Group. Alberta is also pursuing formal agreements with INAC and various First Nations on broader issues of water management, including water diversions.

Métis Settlements are deemed by the Alberta Government to be bound by provincial drinking water laws. Alberta regulates each Métis settlement as a provincial hamlet. Since the mid-1990s the majority of the Settlements own and operate a drinking water treatment system. Treated water is trucked to some of the Settlements, and some have water piping systems. Each Settlement has established a public works department trained and certified under the provincial system. No separate bylaws have been issued to regulate drinking water (although they are in the process of drafting environmental guidelines to govern oil and gas development). In the interim, the Settlements rely on provincial laws. The Settlements are pursuing funds to establish one centralized monitoring system to ensure consistent testing and tracking of water quality. The settlements receive technical support from the Alberta Environment regional office. The Métis Settlement Council have an outstanding request to INAC for greater technical assistance.

Saskatchewan

The province does not license water use on reserve. Saskatchewan drinking water management presents a unique challenge for northern communities where water treatment works are shared by on and off reserve consumers. For example, Buffalo Narrows, Isle a La Crosse, Pine House and Stoney Rapids are served by facilities located off reserve.

For Wollaston Lake and Turner Lake the water works are located on reserve but water is also distributed to users off reserve. In both cases there are significant aboriginal populations living off reserve. In these circumstances the borders of the reserve represent jurisdictional boundaries.

In Saskatchewan, the INAC protocol dictates the standard for construction and design of works on reserve and adherence to the standard is assured under infrastructure funding agreements. Older works undergo operational and maintenance inspections annually and once again, operational funding from the federal department is tied to satisfying federal inspection requirements. The "level" of each plant is determined by INAC in consultation with province. INAC follows the provincial designation for various works under the Water Regulations, 2002[82] based upon information they provide to the province.

In Saskatchewan, trained First Nations Water Systems Operators (WSO) test source water entering reserve works (ie raw water) for bacteriological content on a daily basis. In addition daily testing of the treated water occurs at the work for chorine residual, *E. coli,* and coliform bacteria. Additional testing may be required depending on the nature of the work and the quality of the raw water (eg. turbidity).

INAC requires that sample waters from the distribution system be tested at a minimum on a weekly basis.[83]

According to Health Canada officials, all of the reserves in Saskatchewan perform their own testing either through reserve-based operators or through a program of the affiliated tribal councils. Backup testing of samples from both the work

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and distribution systems is also required on a periodic basis by accredited laboratories within the province. Some 70% of the First Nations participate in this latter program — the other 30% of the sampling cannot be reliably tested due to the remote location of the reserve and the consequent unreliability of the tested samples (due to time lag).

Although the federal Guidelines "standard" is somewhat higher than the provincial standard set out in the *Water Regulations, 2002,*[84] to provide consistency, particularly in light of the number of hybrid drinking water systems in the North, Health Canada officials within Saskatchewan apply the provincial standard to drinking water.

In addition to daily and weekly testing, annual "chemical scans," similar to provincial health and toxicity scans are undertaken by Health Canada to provide complete analysis of the raw and distributed water Provincially controlled operations require such testing every two years.

Should the samples fail to meet applicable standards, Health Canada works with the operator to address the problem. This is often accomplished through a circuit rider program whereby INAC or tribal council contracted troubleshooters assist reserve operators with individual problems as they arise. There are, for example, two circuit riders within the Saskatoon Tribal Council jurisdiction and additional riders have been contracted through the Saskatchewan Watershed Authority to serve other areas of the province.

Enforcement options available under provincial statute often have no parallel at the federal level for reserve drinking water systems. Under the provincial Environmental Management

and Protection Act, 2002 the operator of the work has ultimate responsibility to ensure the water is safe for human consumption.[85]

The Act provides for civil remedies to individuals including for First Nation consumers, where the water quality requirements prescribed by the Act for provincial water works are violated. The liability of First Nations, INAC and Health Canada for unsafe drinking water (provided by works and distribution systems wholly on reserve) remain somewhat problematic.

Manitoba

Manitoba faces similar challenges in regulating the treatment and distribution systems that bring drinking water to reserves.
On a small number of Manitoba reserves, under a 1995 agreement between Health Canada and Manitoba Health, the province agreed to provide medical health officers where no federal coverage was otherwise available. The agreement continues although provincial officials have questioned whether health issues relating to drinking water were meant to be included within the scope of the agreement.

For water works that are provincially regulated, Manitoba's *Drinking Water Safety Act* addresses the construction, operation and monitoring of drinking water systems in Manitoba. Supporting regulations, which came into effect on March 1, 2007, set out water system approval requirements, treatment and water quality standards and monitoring and reporting requirements.[86]

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Under the Act, depending on the water system's designation as public, semi-public, or private, the system must meet specified standards and practices set out in the regulations.[88] Every public water supplier must comply with the drinking water quality disinfection, testing standards set out in the regulations. Semi-public water suppliers must comply with the drinking water quality standards set out in the regulations and testing standards. The requirements for disinfection may vary. Private water suppliers must sample and submit samples in accordance with the regulations, if required by the regulations,[89] and are generally held to a lower standard. It is unclear if the law is understood to also apply to consumers on reserves.

The standards required in the *Drinking Water Quality Standards Regulations* are consistent with the *Guidelines for Drinking Water* published by Health Canada. The Regulation requires that standards specified in the operating licenses given for public and semi-public systems must also be consistent with the guidelines.

Thus whether a work is located on reserve or off the quality standards are the same. But the enforcement options differ.

The Office of Drinking Water was set up provincially to enforce the Act and regulations.[90] The Act empowers the director, a medical officer, or a drinking water officer (on certain grounds) to issue drinking water safety orders[91] to require action necessary to deal with the risk, including investigate, conduct tests, monitor, construct, alter, replace, stop delivery of water, provide alternate water[92] or even hire an interim manager.[93] Because of the non-legal nature of the *Guidelines,* no parallel enforcement options exist on reserve.

Although the province does not attend on reserves unless invited to do so, there is a high degree of co-ordination between the province and Health Canada, particularly in sharing technical expertise.

Source water testing at on-reserve works along with testing of treated water at the plant is undertaken. Should a positive test result exceed the federal Health Canada Guideline, a report to the Environmental Health Officer — who is usually a member of the tribal council — follows as well as a follow up report to Health Canada. Additional sampling is then forwarded to a provincial laboratory for analysis. Again, as the federal *Guidelines* are not legally binding, no parallel enforcement response can occur on the reserve .

c) Hauling Water—the Prairie Problem

Many aboriginal communities receive their potable drinking water from trucking of water from off-reserve works to on-reserve distribution centers or to individual users. On prairie reserve lands, around 25% of the houses use cisterns for water supply.

A number of problems may arise with hauled water, including contaminated source water, and contamination during loading, transport and unloading. The cisterns themselves must be made of and coated with safe materials, and require regular cleaning and other precautions to ensure that they do not become contaminated."[94] While regulations governing some aspects of these systems have been developed in some provinces, including Saskatchewan,[95] coverage and protection is limited. The regulation of water haulers is far from comprehensive.

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Water sourced from on-reserve water works will be subject to the federal "standards" applicable to the works and the treated water. However, once the water leaves the work, and is hauled to homes at the request of the consumer the only remedy would be in contract law.

Often on-reserve water hauling is funded by INAC and can be administered by the individual band or contracted out. The proposed new federal law may include standards for these practices. Health Canada encourages First Nation Band Councils who contract water hauling services to include contractual obligations requiring haulers to submit samples for testing, to protect themselves (and other levels of government) from liability, particularly if they are responsible to the consumers as landlords of the property (and cistern) to which the water is delivered.

If cistern construction and maintenance standards can be improved, and a regulated protocol developed for water quality maintenance between the work, through the cistern, and out the tap, this low-tech option could be workable, practicable, and safe. Provincial officials advise that low tech, small plants with regulated haulers, going to new cisterns, with semi-annual checks, filter changes and minor shocking, could vastly improve water quality results and better serve remote communities.

In both Saskatchewan and Manitoba water monitoring programs exist to fund bands for the testing of cisterns. If a cistern is found in need of repair, a "boil water advisory" automatically follows. Ironically, although regulations exist in both provinces for septic tank design and construction,[96] there are neither federal nor provincial regulations governing cisterns.

Alberta

In Alberta community wells, dugouts and cisterns are regulated by Regional Health Authorities under the Alberta Public Health Act, the Nuisance and General Sanitation Regulation and the Environmental Health Field Manual for Private, Public and Communal Drinking Water Systems in Alberta (Health Field Manual). These laws apply to Métis settlements but not reserves. The federal Guidelines apply to both. Métis communities reliant on these sources can seek technical or compliance assistance from provincial regional health authorities.

Saskatchewan

In Saskatchewan, if the source of the water originates off reserve the bulk water carrier is subject to regulation by the province.[97] The hauler is responsible to ensure that the water is potable at the point of delivery, and meets provincial standards for water quality. The controls do not apply if an individual is hauling water for their own use or for a function they are hosting. Provision is also included for a local authority to require sampling and testing of the water in the tankers as they deem necessary.[98]

Manitoba

At present the province of Manitoba is developing standards to address the problem of cistern construction and maintenance. Cisterns are the property of the homeowner and both cistern maintenance and water treatment are the responsibility of the owner/landlord. The Manitoba Office

of Drinking Water, promotes the use of cisterns as a viable alternative for residences far removed from water treatment locations. (Distribution to such sites is prohibitively expensive to establish and maintain, and water quality can be compromised if the water sits in the pipes for extended periods of time.)

In Manitoba, the *Water Supplies Regulation* provides minimal guidelines for water trucking standards, which require water sellers to obtain written permission from the medical officer of health"[99] and to transport the water in tanks or other receptacles that are maintained in sanitary condition and in good repair.[100] It's arguable that the water distributed through trucks and systems may also be covered by regulation under the *Drinking Water Safety Act.* Clearly, the water which is loaded into the hauler's tank must meet provincial standards. If this definition encompasses commercial trucking for delivery on reserve, the water would be required to meet the *Drinking Water Safety Act* standards when dumped into the on reserve cistern, thus indirectly ensuring an additional degree of control over the hauler's tank.[101] The province is obligated to inform water users of any contamination and will accept and tests free of charge samples from water users residing on reserves.

However, any hauling company based on reserve would not likely be subject to the provincial requirements so long as the customer base was also on federal lands.

d) Operator Training and Certification

One of the key barriers to ensuring safe drinking water for aboriginal communities has been the lack of qualified or certified operators.

The Protocol for *Safe Drinking Water for First Nations Communities* requires that "Water System Operator certification requirements will match the requirements of the applicable provincial system. Thus, operators of water treatment plants and distribution systems must be certified to the level specified by provincial operator certification requirements for the classification of system they operate."[102] However, no legally binding federal standards are yet in place to certify operators of on-reserve water works. The Protocol is imposed, through contribution agreements and not by law. Nationally only 37% of First Nations operators were certified in 2007.[103]

Some First Nation communities are being assisted in enhancing their capacity to operate and monitor their water works. One program established specifically for First Nation communities is the Environmental Monitoring Training Program delivered by the Building Environmental Aboriginal Human Resources (BEAHR) Learning Institute,[104] which offers a five week Environmental Monitor Training program incorporating local and traditional knowledge. The curriculum is based on National Occupational Standards. Individuals can be trained as Environmental Monitors who undertake general monitoring of environmental impacts; Regulatory Monitors who monitor the activities of industry to ensure compliance; or Research Monitors who assist researchers in wildlife counts, surveys or sampling.

Action has also been taken to improve training and certification processes for operators of aboriginal water works. In response to the contamination problems in Walkerton and North Battleford, the federal government

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established the Canadian Council of Ministers of the Environment's Water Quality Task Group, who recommended a multi-barrier approach for safeguarding Canada's water supply, and called for qualified operators in water and wastewater treatment plants.

A number of parties established the Water and Wastewater National Occupational Guidelines (NOG) in January 2003, which are statements of applied competencies individuals need to demonstrate they are capable of practicing as an operator.

BEAHR has a community-based learning project. The BEAHR Learning Institute provides Aboriginal communities with access to environmental training opportunities, and through partnerships with industry, employment opportunities. BEAHR conducted research to identify gaps in existing environmental training appropriate to Aboriginal learners. Training for water wastewater operators was identified as a top priority. In Spring 2007, BEAHR reviewed the National Occupational Guidelines for Canadian Water Wastewater Operators to determine competencies for Aboriginal communities, and to identify and evaluate existing training programs against the relevant Guidelines. The intention of the water/wastewater program is to create curriculum and instructional materials to be used for a community-based, Aboriginal-focused Water Wastewater Training Program to be delivered within Aboriginal communities and through community colleges across Canada. It provides a skills-based program (ie. based on relevant competencies in the Guidelines) at a pre-technician level.

Alberta

Métis Settlement facilities and operator certification, water system construction, operation and monitoring are governed by the Environmental Protection and Enhancement Act, Potable Water Regulation, Activities Designation Regulation, and various codes and terms and conditions of facility approvals. The approval holder is obligated to sample, monitor and report water quality. Métis Settlements can seek assistance from provincial regional drinking water operations specialists. The Provincial Laboratory of Public Health provides bacteriological testing of water for Health Canada and provincial agencies and will test samples submitted privately.

Alberta law defines potable water as water supplied by a waterworks system. Operators of drinking water treatment systems must be certified to a level dependent on the size of the water system. These systems are subject to inspection by Alberta Environment. A protocol is in place governing response to emergency situations.

Alberta system operators must comply with the federal Guidelines for Canadian Drinking Water and the Alberta Standards and Guidelines for Municipal Waterworks, Wastewater and Storm Drainage Systems. Certification of Alberta drinking water systems is now delivered by an independent Alberta Water and Wastewater Association. Re-certification is required every three years. Certification standards depend on the size of the water treatment system and specify minimum education and training requirements. System operators must comply with the federal Guidelines

and the Alberta Standards and Guidelines for Municipal Waterworks, Waste Water and Storm Drainage Systems. This applies only to off reserve facilities and facilities on Métis settlements.

In Alberta, while routine water tests, disinfection equipment failures and adverse water results must be reported to the provincial government, there is no legal duty to inform the public. While efforts are underway to post the results on the internet, this method may not be useful to most rural aboriginal communities. Provincial Regional Health Authority Officers may, but are not required, to issue public boil water advisories. No similar duties are imposed by federal law for reserves. First Nations sit at the table developing provincial notification protocols.

The aboriginal community in Ft Chipewyan have formed the Nunee Health Board Society to address concerns with rising cancer rates and possible connection to industrial contamination of their drinking water supply.

Saskatchewan

Operator certification for Saskatchewan waterworks and water distribution systems on reserve began with an aboriginal initiative to participate in the voluntary provincial operator certification process. Frustrated with the lack of federal training opportunities Tribal Councils and individual bands opted into the provincial scheme in order to receive training. With the assistance of the Saskatchewan Water and Wastewater Association training of on reserve operators mirrored provincial requirements.

Following the North Battleford Water Inquiry, fundamental changes to water drinking water and wastewater management were incorporated into a revised *Environmental Management and Protection Act, 2002* and the supporting *Water Regulations, 2002*[107] Mandatory operator training, certification and licensing were notable amendments.[108]

In addition, renewal of an operator certificate requires regular updated training and continuing education.[109] The SWWA, the Saskatchewan Institute of Applied Technology, private contractors and other regional colleges provide one week courses for upgrading and training in preparation for the operator examinations in: waste water treatment, waste water collection, water treatment, and water distribution. SWWA, in particular, co-ordinates their continuing education offerings with tribal councils and affected bands and offers courses in numerous communities throughout the province — including the North. In order to maintain certified operator status on reserve operators must achieve their required hours of continuing education.

Water and wastewater facilities are classified by the province as either a small system or one of four numerical classes, with the level of required certification dependent upon the status of the facility. For facilities on reserve, the practice is to request an assessment of the facility by INAC and the province (by invitation) to determine the level of the operation. Candidates for certification will thereby know the level of training required for their facility.

Much of the training is hands-on which potentially offers some difficulty for more isolated reserves. However,

initiatives have been undertaken by tribal councils (Prince Albert Grand Council for example) to employ "circuit riders" — certified operators act as resource persons to operators in training, moving from band to band, reserve to reserve as needed.

The result of this diligence on the part of the Saskatchewan First Nations is that 82% of on reserve operators are presently certified as primary operators and 63% of plants have backup operators certified. There is no difference in the training and qualifications of operators in Saskatchewan whether on or off reserve and Saskatchewan Water and Wastewater Association maintains that there is a high degree of co-operation between operators throughout the province.

Water suppliers must report violations of provincial water standards and notify the public. Water utilities must report quality results to water users and the government provides annual reports of test results and inspection reports on-line. The Minister has the power but not an obligation to issue boil water advisories or to orders suspension of a water works.

Manitoba

Manitoba law requires an operating license for public or semi-public water systems.[110]

The Water and Wastewater Facility Operators Regulation requires the owner of a facility to ensure that operators are certified and that records are retained. The operator-in-charge is responsible to ensure that the facility is operated in a safe and efficient manner.[111] INAC has adopted the Manitoba operator training requirement as a condition to

funding for on-reserve works. There are 66 First Nations community water systems in the province, more than half of which are level two classification or higher. They require highly skilled operators if they are to meet provincial standards.[112]

INAC funded training for First Nations operators is available through the Manitoba First Nations Waste and Wastewater Instruction Program at Red River College, and is part of the circuit rider program. The program provides on-site training to First Nation communities on the operation and maintenance of water and sewage treatment facilities[113] and graduates provide technical support for all Manitoba First Nations water and wastewater treatment systems According to Manitoba officials there is high demand for the circuit rider expertise because a number of reserves in Manitoba are "downstream" on major interprovincial river systems resulting in challenges to water quality management.

Since the initiative to train more First Nations operators began in 2001, more than 125 operators have gone through the program, and approximately 90% of Manitoba First Nations communities now have certified operators in their plants.[115] Currently, the operators are following provincial standards.[116]

According to Indian and Northern Affairs Canada, the First Nation becomes the owner once construction of federally funded facilities is complete. They are responsible for the daily operation and maintenance of the facility, ensuring compliance with the terms and conditions of INAC funding agreements, and collecting user fees.[117]

"Spurred by the O'Connor case, the general council of the Canadian Medical Association passed a resolution in 2007 urging that doctors be protected from 'reprisal and retaliation' when they speak out as community advocates. Pressure to protect whistle-blowing doctors and nurses in Canada has also come from public health and legal experts, including the SARS Commission"

Miriam Shuchman, MD

Canadian Medical Association Journal

Manitoba law does not require public reporting of water quality tests. Consideration is being made to online reporting and amendments to provincial law to require notice to government of emergencies and violations. Manitoba is the only jurisdiction that provides whistleblower protection to health care workers or medical officers who report health concerns.

e) Private Wells

On reserve private or household water wells are the jurisdiction and responsibility of the federal government. Water wells drilled on Alberta Métis settlements are regulated by provincial law. Less clear are the respective powers of the federal and provincial governments to regulate ground water or water drilling activities.

The federal government committed in its 1987 Federal Water Policy to develop, with provinces and other interested parties, strategies, national guidelines and activities to protect ground water and to develop exemplary groundwater management practices for federal lands, facilities and responsibilities and federally funded projects. No such plan has been completed, and the Federal Policy is inactive. Groundwater withdrawal and use is one of the elements that the federal government plans to regulate in its "Proposed Legislative Framework for Drinking Water and Wastewater in First Nations Communities."

In addition to drinking water safety for residents, the need to regulate groundwater resources on First Nation lands also arises from the development by some First Nations of water

bottling projects on their reserves. For example, the Iroquois Nation in Akwesasne, Ontario through Iroquois Water Ltd. markets spring water and exports the majority of its product to the US.[118] Withdrawals of ground water from aquifers near or under First Nation or Métis lands could impact their use. Water drilling or other activities on or off reserve or Métis settlements could impact aquifers relied on by aboriginal communities.

Alberta

First Nation drinking water sources in Alberta are approximately half ground water and half surface water. Private wells and well drillers are regulated under the *Water (Ministerial) Regulation.* Community wells, dugouts and cisterns are also regulated by Regional Health Authorities (soon to be replaced by one provincial Board) under the *Alberta Public Health Act,* the *Nuisance and General Sanitation Regulation and the Environmental Health Field Manual for private, Public and Communal Drinking Water Systems in Alberta (Health Field Manual).* The federal water guidelines also apply to these drinking water systems. Communities reliant on these sources can seek technical or compliance assistance from regional heath authorities.

While wells drilled on Métis settlements are governed by these laws, is less clear that well drillers operating on reserve lands are bound. Each drilling approval holder must affix a plate noting the authorization for each drilling machine. The approval holder and other unauthorized well drillers must submit reports to the Director including information on water tests. The presence of saline water or gas and any

remedial actions taken must be reported. The Director can declare a well a "problem water well" if s/he deems it may cause an adverse effect on the environment, human health, property or public safety. It is not clear if this power extends to wells on reserve lands.

The regulations also govern the design and construction of wells and pumping equipment and their location and maintenance, including prescribed distances from sewage and effluent systems, and impose rules for disinfection and venting, and testing requirements. Alberta Environment is legally obligated to disclose information on who is an approved water driller.

Saskatchewan

As with most provinces, private domestic water wells once constructed are substantially unregulated in Saskatchewan. The *Ground Water Regulations*[119] define domestic purposes as, "household and sanitary purposes, the watering of stock, the spraying of crops, the watering of noncommercial lawns and gardens adjoining private residences, but does not include the sale or barter of water for such purposes". In order to drill a domestic well any machine used in drilling must be registered with the Saskatchewan Water Resources Commission, and a notice of drilling must be filed with the commission.

Since it is the machine, and not the location of the well that triggers the reporting duty the Saskatchewan Watershed Authority considers notice and reporting requirements to apply to machinery taken onto federal lands, including reserve lands for well digging.

Domestic wells must be tested for yield,[122] cleaned, and disinfected prior to use.[123] The Regulation provides the overarching requirement that wells be constructed in a manner as to prevent pollution or contamination of the source water including the setting and cementing or driving of casings and cribbings as required.[124] As part of the documentation for the well, drillers must submit reports within 30 days of well completion.[125] The drillers report must include a copy of the chemical analysis report on the well water. In reality the well is not chemically tested when the well is dug as the results are not reliable due to high turbidity and oxygen levels.

Once completed, the maintenance of water quality within the well falls to the private owner, although samples may be submitted for testing by the individual owner.

Manitoba

In Manitoba the *Ground Water and Water Well Act*[127] requires well drillers to be licensed. Reasonable precautions must be taken when drilling a well to avoid polluting, contaminating, or diminishing the purity of ground water in the area. Deposits on the land or in the well of any, substance, or thing, that might pollute, or contaminate, or diminish the purity of, water in the well or ground water in the area of the well are prohibited. Regulations under the Act require well construction in a manner to prevent nonpotable[128] or undesirable[129] surface water from entering the well. However no specific parameters for well location are imposed nor is there any legal duty to test the water quality in a private well prior to consumption. The province funds a program which covers 70% of the cost of an annual bacteriological test of

private well samples submitted by water users, including samples from individuals on reserve.

In addition, if an area has a particular chemical problem, the Office of Drinking Water will inform owners that additional testing of the named substance is desirable. The *Drinking Water Safety Act* specifies that where a laboratory analysis of a private water system indicates a serious health risk to the users the lab must inform the owner of the system as soon as practicable.[131] These requirements are considered applicable to analysis of private water systems located on reserve.

CHAPTER 6

Legal Reform

"As long as there are no binding laws in place, there is no legal incentive for the federal government to pursue this policy [of comparable level of health] and uphold its responsibility to maintain adequate drinking water standards on reserves."

Randy Christensen
Water proof 2: Canada's Drinking Water Report Card

The federal government has announced its plans to consult with First Nations communities on a proposed legislative framework for drinking water and wastewater. No specific mention has been made to improving water quality for Métis Settlements. The law establishing standards and rules for safe drinking water is expected to be tabled in Parliament in 2009.

A number of First Nation organizations have requested that new laws not be enacted until support for capacity to comply with new standards is assured. Their reticence is based on concerns that the law may transfer liability for establishing, maintaining an operating drinking water systems to First Nations without guarantees of financial or technical support. The Alberta Métis Settlement General Council has expressed similar concerns with their ability to comply with provincial drinking water laws as the rules evolve.

6.1 What factors should be covered by the drinking water law?

The Expert Panel *Report on Safe Drinking Water for First Nations* recommended that a new law include these elements:

- Clarified roles and responsibilities of government and First Nations
- Coverage of drinking water treatment and distribution, and sewage collection and treatment
- Non-piped water delivery systems
- Wells for individual service
- Water withdrawal and use
- Operator certification
- Monitoring

PHOTO LORNE FITCH

- Enforcement
- Appeals mechanism for regulatory decisions
- Reporting
- Design approvals
- Operating approvals for water and wastewater facilities
- Procurement, construction and commissioning
- Emergency planning and response
- Drinking water source protection
- Third-party audits, and
- Occupational health and safety

The federal government has listed all of these elements as 'a basis for discussion' for the engagement sessions.

The Panel also recommended that any new law specify that the Crown is bound. This means that the federal government could be prosecuted for failure to comply. To provide greater legal clarity, it was recommended the new law specify that federal law prevails over any provincial laws regulating drinking water but that agreements be allowed between First Nations and the provinces to provide training and technical assistance.

The Expert Panel recommended that the law provide for the establishment of two independent entities to provide direction and oversight on drinking water law and policy. A First Nations Water Commission, established with a majority of First Nation members, would be responsible for licensing and operation of water facilities, advising the Minister of INAC, leading consultations on drinking water law and policy, and articulating customary law sand traditional knowledge. A First Nations Water Tribunal would be

appointed to hear appeals on water approvals and to receive and investigate complaints about enforcement and issue orders. It has been suggested this approach provides a bridge to self governance over water.[134]

The Expert Panel report also recommends imposing a mandatory requirement on the federal government to adequately fund the construction, operation and maintenance of drinking water facilities. It has been suggested that federal inspectors and investigators must be authorized under the law and the power be granted to promulgate regulations. A recommended provision to enable inter-jurisdictional agreements on source water protection may prove inadequate absent parallel amendments to federal laws to strengthen and clarify responsibilities to protect aboriginal interests in water.

"Matters as important as safe drinking water and public health should have been covered by regulations which, unlike guidelines, are legally binding."

Justice Dennis O'Connor
Walkerton Inquiry Report

Additional Considerations for the Proposed Law

First Nations communities may wish to propose that any new laws also provide for the following:

1. Legal binding, nationally consistent standards

A new law should impose nationally consistent, minimum quality standards ensuring all First Nations and Métis equal access to safe drinking water. The law should also prescribe legally binding standards for the construction, operation and maintenance of any works for the drinking water treatment and distribution. Legal standards should also be imposed for wells, cisterns and trucking of water. The law should specify standards for certification of water works operators.

PHOTO LORNE FITCH

2 Improved Transparency and Accountability

The law should prescribe a legal duty and legal right to advance notice and consultation with First Nations and Métis in the development of any guidelines, standards, codes of practice, or regulations. It should impose a legal duty to disclose, report and update information on source water, drinking water supplies and water quality problems. It should require the establishment and maintenance of a national registry of federal and provincial water quality tests results, advisories, orders and compliance data.

3. Clarify and Address Liability

The law should specify liability for constructing, operating, maintaining and upgrading drinking water works and specify the right to commence a civil action for damages. First Nation or Métis liability could arise in their role as owners or operators of a water treatment or supply system. Liability may arise due to negligence in failing to comply with any standard imposed by law or agreement. Concerns have been expressed that legal liability not be imposed on First Nations unless and until financial support is assured and in place. Interventions have called for commitment of financial assurance in advance of enactment of any new federal law.

4. Monitoring, Enforcement and Emergency Response

Consideration should be given to incorporating innovative measures adopted by other jurisdictions to accord specific rights and opportunities to First Nation and Métis communities and individuals to compel action by those

responsible for taking protection measures. For example, the new law could include:

- A right of any affected individual or community to compel an investigation of a suspected violation of the law and publicly report on the reslts of that investigation (modeled for example on the Ontario Safe Drinking Water Act and Drinking Water Compliance and Enforcement Regulations);
- A right to file a private prosecution (as provided in the Yukon Environment Act) and the right of the person filing the private information to a prescribed portion of any penalty assessed on conviction (as provided in the federal Fisheries Act);
- Mandatory audits at prescribed times of water works or distribution systems;
- Prescription of powers and process for boil-water and other drinking water advisories.
- Provision for inter-jurisdictional agreements between First Nations, Métis settlements and municipal or provincial governments to clarify shared arrangements for water services, monitoring, testing and emergency response.

5. Impose a Positive Duty on the Federal Government to Protect Source Water

Aboriginal community drinking water sources are at particular risk of contamination from industrial and other developments, as identified in the 2007 Senate Committee report. First Nation and Métis communities reliant on rivers, lakes and ground water for their drinking water supplies, are

PHOTO LORNE FITCH

reporting increased health and environmental concerns associated with contamination of their water supplies. These communities bear the additional costs to test and treat water from contaminated sources, a cost which may or may not be factored into any contribution agreements or grants. It is therefore also important to examine and clarify responsibility for protecting source water and the opportunities available to aboriginal communities to voice concerns or seek redress.

Consideration should be given to adding a provision to any new safe drinking water law to prescribe a duty on the federal government to fulfill its obligations under the "Precautionary Principle" to take proactive measures to intervene to protect source waters under its jurisdiction that are relied upon by aboriginal peoples for their drinking water supply.

6.2 What options are available to enact the new rules?

A number of options have been presented for prescribing rules for aboriginal safe drinking water.

The three options below were identified by the Expert Panel as among possible solutions for a new law. The Panel favoured options one and three as "reasonably strong options across the board".[135] The federal government is proposing to adopt the second approach listed below, incorporating provincial standards by reference.

The three options, and their potential pros and cons are discussed below:

1. **Enact a separate Federal law to establish nationally consistent standards and rules for aboriginal drinking water.**

The first option is (in consultation with First Nations) to enact and implement a new federal law that sets nationally consistent standards and rules for drinking water for all aboriginal communities. Every independent review since 2005 has recommended this as the best path to ensure safe drinking water on a consistent basis to all First Nation communities across Canada. Such a law could incorporate the types of provisions outlined above and mirror the regulatory measures found in provincial drinking water legislation. Such a law should also delineate responsibilities, powers and rights for protection of source waters under federal jurisdiction.

This approach requires that federal authorities be identified to assume the powers and responsibilities to develop and implement the legal regime. As no such federal regime exists it would necessitate major financial and time expenditures to establish the bureaucracy to deliver the standard setting, monitoring and audit programs, in consultation with aboriginal governments.

One result of such an approach may be to provide different drinking water standards and rules for aboriginal and non aboriginal person in the same community or province. Should the decision be made to exclude Métis settlements from the purview of this law, a second result may be different drinking water rules and standards for Métis and First Nations, who in many instances currently share

common water systems. However, it must be kept in mind that any action by the federal government to regulate water rights of the Métis under the Constitutional category of "Indians" may render *ultra vires* any provincial laws or measures (for example the Alberta *Métis Settlement Act*).[136]

2. Enact a federal law to provide for the incorporation by reference of provincial standards and rules.

As discussed in Chapter 3, the Constitution Act, 1867 allows for provincial "laws of general application", including those that regulate drinking water to be incorporated by reference into federal laws. This option would be conditional on a determination that provincial drinking water laws are "laws of general application" and do not affect "Indianness". The law could incorporate by reference provincial laws for construction, operation and maintenance of drinking water facilities and certification of operators, distribution systems, wells, cisterns and trucking of water. The federal law could also establish the recommended First Nations Water Commission to provide an arms length entity to negotiate arrangements between the various governments. A concrete example of this approach is the federal Indian Oil and Gas Regulations made under the Indian Oil and Gas Act which require operators to comply with provincial laws related to the environment or the exploration for, or development, treatment, conservation or equitable production of oil and gas, subject to specified exceptions.[137]

While this legislative option allows for greater flexibility, it also introduces a higher level of legal uncertainty. As the provinces have in some instances adopted different

"You can have the highest standards, but if there is no systematic way to get to them then it will be meaningless."

Testimony of Richard Jock

Chef Executive Officer, Assembly of First Nations to Senate Committee on Aboriginal People, May 2007

approaches to regulation of drinking water and source water, the approach may introduce legal variances in standards, duties, rights and procedures across First Nations. Incorporation by reference of provincial laws regulating drinking water may still leave a legal vacuum in laws to protect source water, as discussed in Chapter 4.

The approach could enable more timely regulatory action since provincial rules are for the most part in place and allows for reliance on a well developed provincial bureaucracy with technical expertise and field experience. This approach would likely necessitate substantial annual transfers of federal resources to the provinces to deliver the necessary technical services and compliance roles for aboriginal water systems, or potentially assigned to a First Nation.

To provide legal certainty it may be necessary to make provision in the law for a formal undertaking for the transfer of financial resources under an administrative agreement, similar to CEPA. However it may not prove a practicable option as it necessitates negotiations with each province and the affected First Nations and not all provinces are apparently keen to assume these expanded responsibilities.[138]

3. Apply First Nations Customary Law

Consistent with the federal government recognition of the right of aboriginal peoples right to self government, in particular matters internal to their communities, rules for drinking water could determined by Each First Nation. There is little precedent for the federal government granting broad powers to First Nations to make their own

environmental or health laws. This would also require clarity on what the customary law for drinking water is for each First Nation. In most instances traditional laws may lack rules governing drinking water standards, or rules on treatment or supply. It has been suggested that the approach most consistent with a transition to self government would be to enable existing or future customary laws to be incorporated into any new laws.

6.3 What additional challenges may arise in implementing a drinking water law for aboriginal communities?

Resourcing a Federal Drinking Water Regime

Where the federal government chooses to establish a separate federal drinking water regime for First Nations, it will face the challenge of resourcing a bureaucracy for each province and territory. This will require technical experts, inspectors and certification staff.

Availability of Qualified Operators

Provinces are forecasting there will be a challenge of replacing retiring drinking water works operators given the pay scale and dearth of trained or certified operators available. For aboriginal communities the challenge may be all the greater. This may present additional liability issues for First Nations and Métis settlements under any contribution agreements or any proposed new law. For example, Alberta requires water work system owners and operators to commit to continuous improvement in their systems. Given their

often limited resources, this presents a compliance challenge for aboriginal communities.

Legal Liability

A new law could clarify liability of a band or band council. Liability of a First Nation or Métis settlement for safe drinking water treatment and supply may vary depending on a number of factors including duties imposed by statute, band council bylaw, self government agreements or contribution agreement and ownership or control of a water treatment, distribution or storage facility. For example, where a Band Council or First Nation issues a bylaw which affects drinking water, the band council may be liable for harm caused by their failure to implement or enforce the bylaw. A contribution agreement between a First Nation and the federal government to transfer federal funds to establish and maintain drinking water treatment and supply systems, may assign legal liabilities. The proposed new drinking water law may impose additional compliance obligations. Liability could arise in a band or band council's role as owners or operators of a water treatment or supply system. Liability may arise due to negligence in failing to comply with any standard imposed by law or agreement. Any new law should not only prescribe standards and rules for construction, operation and maintenance of drinking water facilities, it should also clarify responsibilities, liabilities and standard of care.

Current law provides that the federal government has joint liability for any facilities on reserve land as they retain the underlying title to the land.[139] The INAC Expert Panel

identified the likelihood of increasing liability of bands and band councils where new laws incorporate self government principles. The courts have ruled that a First Nation may be liable for negligence in improper operation of water and wastewater facilities.[140]

Conclusion

Legally binding standards for safe drinking water for First Nations communities in Canada are long overdue. This Guide discusses the history, the variation in approach between the three Prairie provinces and the pros and cons of some legislative options. The authors hope it will prove useful for the consultation process for filling these regulatory gaps, and improving protection of aboriginal drinking water in all communities across Canada.

APPENDICES

APPENDIX I: Sources of Information and Assistance

NON-GOVERNMENT

1. Legal Information, Assistance and Referral

Canadian Environmental Law Association
615 Spadina Ave., Suite 301
Toronto ON M5V 2L4
Tel: (416) 960-2284
Fax: (416) 960-9392
Web: http://www.cela.ca

Canadian Institute of Resources Law
Murray Fraser Hall, Rm. 3353
University of Calgary
2500 University Drive NW
Calgary AB T2N 1N4
Tel: (403) 220-3200
Fax: (403) 282-6182
Email: cirl@ucalgary.ca
Web: ucalgary.ca/cirl.ca

Centre for Indigenous Resources and Environment
3rd Floor, 245 McDermot Ave.
Winnipeg, MB R3B 0S6
Tel: (204) 956-0660
Fax: (204) 956-1895
Web: http://www.cier.ca/

Ecojustice
(formerly Sierra Legal Defence Fund)

Alberta Office
Tel: (403) 830-2032
Fax: (403) 264-8399
Email: brobinson@ecojustice.ca

Vancouver Office
214-131 Water Street
Vancouver BC V6B 4M3
Tel: (604) 685-5618
Toll free: 1-800-9267744
Fax: (604) 685-7813
Email:info@ecojustice.ca
Web: http//:www.ecojustice.ca

Ontario Office
30 St. Patrick Street, Suite 900
Toronto ON M5T 3A3
Tel: (416)-368-7533
Fax: (416)-3632746
Email: Toronto@ecojustice.ca
http://www.ecojustice.ca

Ottawa Environmental Law Clinic
University of Ottawa,
Faculty of Law
35 Copernicus Street, Office 107
Ottawa ON K1N 6N5
Tel: (613)-562 5800, ext. 3397
Fax: (613)-5625319
Email: Ottawa@ecojustice.ca

Environmental Bureau of Investigation
225 Brunswick Ave.
Toronto ON M5S 2M6
Tel: (416) 964-9223
Fax: (416) 964-8239
Email: EBI@nextcity.com
http://www.e-b-i.net/ebi

Environmental Defence Canada
612 Younge Street, Suite 500
Toronto ON M4Y 1Z5
Tel: (416) 323-9521
Fax: (416) 323-9301
Email: info@
environmentaldefence.ca
http://www.
environmentaldefence.ca

Environmental Law Center
800, 10025-106 Street
Edmonton AB T5J 1G4
Tel: (780) 424-5099
Toll free: 1-800-661-4238
Fax: (780) 424-5133
Email: elc@elc.ab.ca
lawyer referral service:
jhierlmeir@elc.ab.ca
http://www.elc.ab.ca

Environmental Law Center
University of Victoria
P.O. Box 2400 STN CSC
Victoria BC V8W 3H7
Tel: (250) 721-8188
Email: elc@uvic.ca
http://www.elc.uvic.ca

Environmental-Aboriginal Guardianship through Law and Education (EAGLE) Head Office
6520 Salish Drive
Vancouver BC V6N 2C7

Branch Office
306 - 1676 Martin Drive
16541 Beach Road
Surrey BC V3S 9R7
Tel: (604) 536-6261
Fax: (604) 536-6282
www.eaglelaw.org

West Coast Environmental Law
1001-207 West Hastings Street
Vancouver BC V6B 1H7
Tel: (604) 684-7378
Toll free in BC: 1-800-330-9235
Fax: (604) 684-1312
Email: admin@wcel.org
http://www.wcel.org

Office of the Metis Settlements Ombudsman
Suite 203, 10525 - 170 Street
Edmonton, AB T5P 4W2
Tel: (780) 427-9828
Toll-free 1.866.427.6813
Fax: (780) 427-9962
Email:
info@metisombudsman.ab.ca
http://www.metisombudsman.ab.ca/main.htm

2. Monitoring and Enforcement

NON-GOVERNMENT

BEAHR Learning Institute Environmental Monitor Training Program
bli@beahr.com
www.beahr.com

c/o Environmental Careers Organization Canada (ECO Canada)
Suite 200, 308 - 11 Ave. S.E.
Calgary AB T2G 0Y2
(403) 233-0748 (Calgary)
(613) 2675814 (Ottawa)
www.ecocanada.com

Compliance Information Search Center
Environmental Law Center
800, 10025 - 106 Street
Edmonton AB T5J 1G4
Tel: (780) 424-5099
Toll free: 1-800-661-4238
Fax: (780) 424-5133
Email: elc@elc.ab.ca
http://www.elc.ab.ca

Alberta Water and Wastewater Operators Association
http://www.awwoa.ab.ca/

Alberta Regional Health Authorities
http://www.health.gov.ab.ca/regions/RHA_map.html

Alberta Provincial Laboratory of Public Health
http://www.provlab.ab.ca/

The Waterkeeper Alliance
http://www.waterkeepers.ca

First Nations Environmental Health Innovation Network
Dr Laurie Chan
BC Leadership Chair in Aboriginal Environmental Health
NSERC Northern Research Chair
Department of Health Sciences
University of Northern British Columbia
Email: lchan@unbc.ca
Tel: (250) 960-5237

Safe Drinking Water Foundation
Dr Hans Peterson
#1 - 912 Idylwyld Drive North
Saskatoon, SK S7L 0Z6
Email: info@safewater.org
Tel: (306) 934-0389
Fax: (306) 934-5289

Manitoba Water and Wastewater Association
Box 1600
Portage la Prairie MB R1N 3P1
Tel: (204) 239-6868

Saskatchewan Water and Wastewater Association
46 Windfield Road
Regina SK S4V 0E7
Tel: (306) 761-1278

GOVERNMENT

Federal Indian and Northern Affairs
Education and Social Development Programs and Partnerships Sector
Community Infrastructure Branch
Strategic Initiatives Directorate
Room 1415
15 Eddy Street
Gatineau PQ K1A 0H4
Toll-free: 1-800-567=9604
Fax: 1-866-817-3977
TTY [1]: (toll-free)
1-866-553-0554
Email:
eau-water@ainc-nac.gc.ca

Regional Director General
Prairie Region
Edmonton AB
Tel: (780) 495-2835
http://www.ainc-inac.gc.ca/ih/index-eng.asp

Alberta
Mervin Clark, Manager
Water Strategy
Tel: (780) 495-2877

Saskatchewan
Larry Luzny
Community
Infrastructure Officer
Tel:(306) 780-6289

Manitoba
Ron Payne, Director
Infrastructure Directorate
Tel: (204) 983-6269
General Office
365 Hargrave St., Room 200
Winnipeg MB R1N 3P1
Tel: (204) 983-4928

Environment Canada
Director Emergency Response
Place Vincent Massey, 15th floor
351 St. Joseph Boulevard
Gatineau PQ K1A 0H3
Tel: (819) 953-0607
Email: tom.foote@ec.gc.ca

Environmental Emergencies
Prairie and Northern Region
Environmental Protection
Tel: (867) 6694736
Toll-free : 1-866-845-6037

Chief Enforcement Officer
Enforcement Branch
Place Vincent Massey, 17th floor
351 St Joseph Blvd.
Gatineau PQ K1A 0H3
Tel: (819) 997-2019
Fax: (819) 997-0086
Email: paul.cuillerier@ec.gc.ca

Hal Sommerstad
Regional Director
Environmental Enforcement Division
Prairie and Northern Region
Room 200, 4999 - 98 Avenue
Edmonton AB T6B 2X3
Tel: (780) 951-8861
Cell: (780) 495-2451
Fax: (780) 910-3826
Email:
Hal.Sommerstad@ec.gc.ca

Enforcement Manager, Alberta
Mike Leboissiere
Tel: (780) 951-8757

Enforcement Manager, Saskatchewan
Rod Slatnik
Tel: (306) 780-6465

Enforcement Manager, Manitoba
Craig Broome
Tel: (204) 983-7582

HEALTH CANADA

David D. Green
Senior Engineering Consultant
FPT CDW Secretary
Water Quality
Water, Air & Climate Change Bureau
Healthy Environments and Consumer Safety Branch
Health Canada
3rd floor, Room 3-110 (4903D)
269 Laurier Avenue West
Ottawa ON K1A 0K9
Tel: (819) 957-3130
Fax: (819) 9532574
Email: dave_green@hc-sc.gc.ca
Website: www.hc-sc.gc.ca/waterquality

Ivy Chan
Director
Environmental Health Division
First Nations Inuit Health Branch
Health Canada
Tel: (613) 948-7773
Ivy_chan@hc-sc.gc.ca
Web: http://www.hc.sc.gc.ca/fniah-spnia/promotion/public-publique/water/eau-eng.php

Health Canada (Manitoba Region)
First Nations and Inuit Health Branch
391 York Avenue
Winnipeg MB R3C 4W1
Tel: (204) 983-2904

Health Canada (Saskatchewan Region)
200, 1 First Nations Way
Regina SK S4S 7K5
Tel: (306) 780-5945 or (306) 780-5392

PROVINCIAL GOVERNMENTS

Alberta Government

Enforcement and Monitoring
Alberta Environment
Hotline: 1-800-222-6514
Web: http://www.gov.ab.ca/env/

Northern Region
Edmonton Office
Suite 111, Twin Atria Building
4999 - 98 Avenue
Edmonton, AB T6B 2X3
Tel: (780) 427-7617
Fax: (780) 427-7824

Central Region
Red Deer Office
3rd Floor, Provincial Building
4920 - 51 Street
Red Deer, AB T4N 6K8
Tel: (403) 340-7052
Fax: (403) 340-5022

Southern Region
Calgary Office
Deerfoot Square
2938 - 11 Street NE
Calgary, AB T2E 7L7

Approvals
Tel: (403) 297-7602
Fax: (403) 297-5944

Compliance
Tel: (403) 297-8271
Fax: (403) 297-8232

Water Quality Section, Water Sciences Branch
Water Management Division
Natural Resources Service
Alberta Environment
10th floor, Oxbridge Place
9820 - 106 Street
Edmonton AB T5K 2J6
Tel: (780) 427-3029
Fax: (780) 422-6712

Hydrogeology Section, Land Branch
Science and Standards Division
Alberta Environment
11th floor, Oxbridge Place
9820-106 Street
Edmonton AB T5K 2J6
Tel: (780) 427-9915
Fax: (780) 422-6712

Saskatchewan Government

Drinking Water Quality Section
Environmental Protection Branch
Saskatchewan Ministry of Environment
3211 Albert Street
Regina SK S4S 5W6
Phone: (306) 787-6504

Environmental Protection
Saskatchewan Ministry of the Environment
4th Floor 3211 Alberta Street
Regina SK S4S 5W6
Tel: (306) 787-6168
Toll-free: 1-800-567-4224

Saskatchewan Watershed Authority Head Office
111 Fairford Street E.
Moose Jaw SK S6H 7X9
Phone: (306) 694-3900

Manitoba Government

Manitoba Office of Drinking Water
1007 Century Street
Winnipeg MB R3H 0W4
Tel: (204) 945-5762

Manitoba Water Stewardship Main Office
Toll free: 1-800-282-8069;
1-800-945-6398
Email: wsd@gov.mb.ca

Office of the Chief Medical Officer of Health
Manitoba Health
4th floor 300 Carlton Street
Winnipeg MB R3B 3M9
Tel: (204) 788-6666

ABORIGINAL

Assembly of First Nations
Treble Building, Room 810
Ottawa ON K1R 5B4
Tel: (613) 241-6789
Toll-free: 1-866-869-6787
Fax: (613) 241-5808
Web: www.afn.ca

Assembly of Manitoba Chiefs Secretariat
200 - 260 St. Mary Ave
Winnipeg MB S3C 0M6
Tel: (204) 956-2109

Athabasca Tribal Council
9206 McCormick Drive
Chief Executive
Fort McMurray, AB T9H 1C7
Telephone: (780) 791-6538
Fax: (780) 791-0946
atc@atc97.org
www.atc97.org

Confederacy of Treaty Six First Nations
Suite 204, 10310 - 176 Street
Edmonton, AB T5S 1L3
Telephone: (780) 944-0334
Fax: (780) 944-0346
www.treaty6.ca

Federation of Saskatchewan Indian Nations
Head Office
Asimakaniseekan Askly Reserve
Suite 100, 103A Packham Ave
Saskatoon SK S7N 4K4
Tel: (306) 665-1215

Keepers of the Athabasca
Cleo Reece, Co-Chair
Fort McMurray First Nation
Tel: (780) 838-7199
Cleo_re@hotmail.com

Peter Cyprien, Co-Chair
Athabasca Chipewyan First Nation
Tel: (780) 747-4683
Peter.cyprien@yahoo.ca

Keepers of the Water
www.keepersofthewater.ca

Kee Tas Kee Now Tribal Council
P.O. Box 120
Atikameg, AB T0G 0C0
Telephone: (780) 767-3285
Fax: (780) 767-2447

Lesser Slave Lake Indian Regional Council
Box 269

Slave Lake, AB T0G 2A0
Telephone: (780) 849-4943
Fax: (780) 849-4975
info@lslirc.ab.ca
www.lslirc.com

Metis Settlements General Council
Suite 200, 10335 - 172 Street
Edmonton AB T5S 1K9
Tel: (780) 822-4096
Fax: (780) 489-9558
Toll-free: 1-888-213-4400
Email: gcunningham@msgc.ca

North Peace Tribal Council
P.O. Box 1889
High Level, AB T0H 1Z0
Telephone: (780) 926-3446
Fax : (780) 926-4075
admin@nptc.ab.ca
www.nptc.ab.ca

Treaty 7 Management Corporation
Suite 400, 9911 Chiila Boulevard
Tsuu T'ina, AB T2W 6H6
Telephone: (403) 281-9779
Fax: (403) 281-9783
ContactUs@treaty7.org
www.treaty7.org

Treaty 8 First Nations Of Alberta
Santa Fe Plaza Chief Executive
18178 - 102 Avenue
Edmonton, AB T5S 1S7
Telephone: (780) 444-9366
Fax: (780) 484-1465
reception@treaty8.org
www.treaty8.org

Western Cree Tribal Council
P.O. Box 2129
Valleyview, AB T0H 3N0
Telephone: (780) 524-5978
Fax: (780) 524-2898
westcree@telusplanet.net

Yellowhead Tribal Council
P.O. Box 150
Enoch, AB T7X 3Y3
Fax: (780) 470-3541
Telephone: (780) 470-3454
admingen@ytcadmin.ca

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Federal

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Saskatchewan

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Manitoba

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Environment Act, R.S.Y. 2002, c. 76

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FOOTNOTES

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8 Expert Panel on Safe Drinking Water for Aboriginal Communities, at pg 61

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11 Woodward at p. 248.5; Bartlett, *Aboriginal Water Rights in Canada,* at p.140

12 Constitution Act, 1982, section 91(24)

13 Woodward at 5&250, p.5-9

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19 Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388 , para 51 Binnie, J.)

20 Blood Tribe/Kainai Submission to the International Joint Commission With Respect to the I909 Boundary Waters Treaty, submitted July 29,2004. available at http://www.ijc.org/rel/pdf/79_stmary-milk_letter.pdf

21 Woodward p. 21

22 Burrard Power Co. v. The King, [1911] A.C. 87 (P.C.)

23 Winters v. United States, 207 U.S. 564 (1908)

24 Winters v. United States, 207 U.S. 564 (1908)

25 Bartlett p28.

26 Bartlett, at p 29

27 In the instance of reserve land bordering a lake or river, the issue may arise whether the riparian owner is the First Nation or the Crown, with an associated fiduciary duty to protect the riparian interests on behalf of the First Nation.

28 Jack v. R. [1980] 1 S.C.R. 294 [B.C.]; Pasco v. Canadian National Railroad (1986) 1 C.N.R.L. 34

29 R. v. Sundom [1999] 2 C.N.L.R. 289 (a Treaty No.6 Saskatchewan case); Saanichton Marina Ltd.v. Claxton, [1987] 4 C.N.L.R. 48 (B.C.S.C.)

31 For example, the 1992 Treaty Land Entitlement Framework Agreement (Saskatchewan; 1997 Treaty Land Entitle Framework Agreement (Manitoba)

32 According to the MTLEFA at s. 65 "Ordinary High Water Mark" means a line defined by the normal high water mark determined by plant growth and soil conditions observed at and in the vicinity of land adjacent to a Navigable Waterway and is the limit or edge of a non tidal body of water, where the bed is the land so long covered by water as to wrest it from vegetation, or as to mark a distinct character on the vegetation where it extends into the water or upon the soil itself.

33 MTLEFA s. 1.01 (21) (d) and (e)

34 Incorporated into the Implementation of Certain Treaty Land Entitlement Settlements Agreements Act http://www.fnmr.gov.sk.ca/documents/lands/TLEFA-Schedule2-6.pdf Act

35 Agreement Articles 6.05 - 6.08

36 The text of the Nisga'a Final Agreement is at http://www.gov.bc.ca/arr/firstnation/nisgaa/chapters/preamble.html

37 R. v. Sparrow, [1990] 1 S.C.R. 1075; See also Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010

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40 Milk River v. McCombs, [1978] 4 W.W.R. 64 (Alta S.C., A.D.)

41 Northwest Irrigation Act S.C. 1894, c. 30 (in effect 1905 to 1930)

42 Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010

43 Mikisew Cree First Nation

44 Woodward, pp 5-32 to 33

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46 Tsuu T'ina First Nation v. Alberta, 2008 ABQB 547

47 Nigel Bankes, Water management planning and the Crown's duty to consult and accommodate, Oct 8, 2008 at http://ablawg.ca/2008/10/08/water-management-planning-and-the-crown's-duty-to-consult-and-accommodate/

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54 Memorandum of Understanding between Her Majesty the Queen in Right of the Province of Alberta and the Grand Council of Treaty 8 First Nations, Feb 10, 1993 (unpublished doc)

55 Draft Shared Governance Framework for Water for Life Collaborative Partnerships and draft Framework for Watershed Management Planning, available on the Alberta Water Council website.

56 See for example Paul First Nation v. Parkland (County), 2006 A.B.C.A. 128 (C.A.)

58 MTLEFA 12.08(5)

59 See, for example, Bell, Métis Constitutional Rights in section 35(1) (1997) 36:1 Alta Law Rev. 180

60 For more information on this topic , see the see Expert Panel report, and the cases of Cardinal v. Attorney-General of Alberta [1974] S.C.R. 695,; Dick v. The Queen [1985] 2 S.C.R. 309

61 First Nations Land Management Act (1999, c. 24)

62 Muskoday First Nation Land Code. Section 7 (s.1.5) http://www.fafnlm.com/content/en/06.%20MuskodayFirstNationLandManagementCode.html#i7

63 Muskoday First Nation Land Code s. 20(1.10)

64 The Accord is implemented through the Métis Settlements Act (S.A. 1990. c. M-14.3), the Métis Settlements Land Protection Act and the Constitution of Alberta Amendment Act

65 C.R.C., c.1105

66 s.21 (1)) Any environmental protection standards or penalties must be at a minimum equivalent to those of the province the First nation is located in. (s.21 (2)) The First Nation bylaws must provide for an environmental assessment process for all projects on FN lands approved, regulated funded or undertaken by the FN. (s.21(3))

67 Commissioner of the Environment, (p.18) 2005 report

68 http://www.ainc-inac.gc.ca/ps/hsg/cih/ci/ic/wq/wawa/rol_e.html

69 http://www.inac-inac.gc.ca/ps/hsg.cih/ci/ic/wq/wawa/conc_e.html

70 Commissioner's Report p.170

71 Cancer Incidence in Fort Chipewyan, Alberta 1995-2006, Alberta Cancer Board Division of Population Health and Information Surveillance Feb 2009

72 "High Cancer Rates Among Fort Chipewyan Residents", Feb. 25, 2009. Canadian Medical Association Journal. http://www.cmaj.ca/cgi/rapidpdf/cmaj.090248v1.pdf

73 Ibid. SWA Act, s.5 (emphasis added)

74 Environmental Management and Protection Act, 2002. S.S.2002. c. E-10.21. s 3(2)

75 Saskatchewan Watershed Authority, 2007-2008 Saskatchewan Provincial Budget—Performance Plan. P.16 available at http://www.swa.ca/Publications/Documents/SwaPerformancePlan2007to2008.pdf

76 Saskatchewan Watershed Authority, 2006-2007 Saskatchewan Provincial Budget—Performance Plan. P.8 available at http://www.swa.ca/Publications/Documents/SwaPerformancePlan2006to2007.pdf

77 The Protection of Water Sources Regulation s. 2. Ground water is additionally protected under the Ground Water and Water Well Act (Manitoba), C.C.S.M., c. G110, see s. 10 (2)

78 The Protection of Water Sources Regulation s. 4

79 Water Protection Act

80 INAC. Protocol for Safe Drinking Water in First Nations Communities. (Gatineau, Quebec: INAC) March 21, 2006. available at http://www.ainc-inac.gc.ca/H2O/sdw/psd_e.pdf

81 Protocol for Safe Drinking Water in First Nations Communities, coupled with Health Canada "Summary of Guidelines for Canadian Drinking Water Quality" (Summary Guidelines) updated and published every spring at http://www.hc-sc.gc.ca/ewh-semt/watereau/index_e.html

82 Water Regulations, 2002. c. E-10.21 Reg 1. s. 62

83 However, if the reserve has a Health Canada monitoring program in place and the weekly Health Canada distribution system test results for chlorine residual and bacteria are reliably delivered weekly to the Water System Operator, then the WSO may use the Health Canada test results in lieu of conducting weekly bacteriological tests. However, if Health Canada distribution system test results for bacteria (which must be accompanied by the chlorine residual results for that time and location) are not reliably delivered weekly to the WSO, then the WSO must collect weekly water samples from the most

remote part of the distribution system and test them for both chlorine residual and bacteria".

84 Saskatchewan Water Regulations, 2002. C. E-10.21. Reg. 1. See also Saskatchewan's Drinking Water Quality Standards and Objectives (summarized) available at http://www.saskwater.com/WhatWeDo/pdfs/Drinking%20Water%20Standards.pdf

85 EMPA, 2002. s.20. see also Saskatchewan Water Regulations, 2002

86 Drinking Water Safety Regulation and Drinking Water Quality Standards Regulation. Download at http://www.gov.mb.ca/waterstewardship/odw/reg-info/acts-regs/index.html

87 These standards and requirements are found in the DWSA s, 3, s. 20, s. 21

88 DWSA s. 21(2)

89 DWSA 4(2)(a)

91 DWSA s. 11(10)

92 DWSA s. 11(3)

93 DWSA s. 13

94 Expert Panel p.19

95 Expert Panel, p.35

96 Manitoba Sewage Haulers and Sewage Disposal are regulated in is ss. 21- 23 of the Onsite Wastewater Management Systems Regulation (under the Environment Act).. Saskatchewan, s. 108(1)(e) of the Northern Municipalities Act.

97 Pursuant to Section 10 of the Health Hazard Regulations, R.R.S. c. P-37.1 Reg. 10, under the Public Health Act, 1994. c. P 37.1

98 A local authority is not defined within the Act but the parent Public Health Act permits the appoint by the Lieutenant Governor in Council of regional health authority, a municipal council or any other person (s.6(1)) as an Authority for the purposes of the Act.

99 Water Supplies Regulation, Man. Reg. 330/88R (under the Public Health Act) s. 4

100 Water Supplies Regulation, Man. Reg. 330/88R (under the Public Health Act) S. 5

101 Drinking Water Safety Regulation s. 1

102 s. 6.0 Operator Certification Requirements. Available at http://www.ainc-inac.gc.ca/H2O/sdw/cert_e.html

103 INAC, Plan of Action for Drinking Water in First Nations Communities -Progress Report March 22, 2007.

104 BEAHR is a partnership between Environmental Careers Organization Canada (ECO Canada) and the Aboriginal Human Resource Development Council of Canada (AHRDCC). It is funded by Human Resources and Skills Development Canada.

107 Water Regulations

108 Specifically, Part VI of the legislation established the Operator Certification Board (Division 1 & 2), outlined the standards and procedures to be met by operators to obtain certificates (Division 3 & 4) by July 15th 2005. The detailed requirements for certification are included in the Saskatchewan Water and Wastewater Works Operator Certification Standards, 2002EPB 139/02/2M.

109 Section 68 of the Environmental Management and Protection Act.

110 Drinking Water Safety Act s. 8

111 Water and Wastewater Facility Operators Regulation s. 26(1), s. 32 details the work entailed.

112 Water Management Overview, Indian and Northern Affairs Canada. Manitoba Region

113 http://www.sdw-eps.gc.ca/inlv/mb_psn_2/MB_INAC.pdf

114 Water Management Overview. Indian and Northern Affairs Canada – Manitoba Region. Available online: www.eps-sdw.gc.ca/inlv/mb_psn_2/MB_INAC.pdf

115 http://www.ainc-inac.gc.ca/nr/spch/2007/fpmp-eng.asp

116 Water Management Overview. Indian and Northern Affairs Canada – Manitoba Region. Available online: www.eps-sdw.gc.ca/inlv/mb_psn_2/MB_INAC.pdf

117 Water Management Overview. Indian and Northern Affairs Canada – Manitoba Region. Available online: www.eps-sdw.gc.ca/inlv/mb_psn_2/MB_INAC.pdf

118 Nowlan, Buried Treasure, p. 21

119 S.R. 172/66 under the Ground Water Conservation Act

122 Ground Water Regulations s. 20(2)

123 Ground Water Regulations s.21

125 Ground Water Regulations s.17

126 RG-133 Record of Completed Well available at http://www.swa.ca/Publications/Default.asp?type=RegulatoryForms

127 CCMS. c..G110

128 Well Drill Regulation G110 — R.M. 228/88 R, s. 17

129 Well Drill Regulation G110 — R.M. 228/88. s.12 & 13

131 Drinking Water Safety Act, C.C.S.M. D101, s.23

133 Expert Panel Report Vol. I, pp 35-38

134 John Graham, Institute on Governance, "Safe Water for First Nations: Charting a Course for Reform", cited in Expert Panel Report Vol II, at p. 28

135 Expert Panel, vol. I, page 59

136 Woodward, Jack

137 See Expert Panel Report Vol II, at p. 32

138 Expert Panel Report Vol II, at p.34

139 s.18(1) Indian Act

140 Wright (Litigation Guardian of) v. Moosomin First Nation, [2003] S.J. No.138

THE AUTHORS

MARIE-ANN BOWDEN

Professor Bowden is a Professor and former Associate Dean of the College of Law, University of Saskatchewan. She has taught and published in the areas of environmental and property law and aboriginal resources management for over three decades. She is editor of the Canadian Journal on Environmental Law and Practice and supports environmental initiatives of numerous First Nations and non government environmental organizations.

LINDA FRANCIS DUNCAN

Ms. Duncan founded the Alberta Environmental Law Center. She served as Chief of Enforcement, Environmental Protection, Environment Canada; Assistant Deputy Minister, Yukon Department of Renewable Resources; and the first Head of Law and Enforcement Cooperation, North American Commission for Environmental Cooperation. She was a professor of environmental law and Co-Director of the Marine and Environmental Law Program (MELP) at Dalhousie Law School. She served as a senior law and enforcement advisor for CIDA, World Bank and Asian Development Bank projects in Jamaica, Indonesia and Bangladesh. She is widely published in the area of environmental law and compliance. She is currently the Member of Parliament for Edmonton Strathcona and New Democrat Critic for the Environment.

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