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Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves

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Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves

CONSTANCE MACINTOSH*

Cet article examine, dans une perspective politique et juridique, le pourquoi de la disparité dans la qualité de l'eau sur les réserves des Premières nations versus dans la majorité des autres communautés canadiennes. Une étude est faite de la convergence des attributions de pouvoirs, des politiques gouvernementales, des mandats législatifs ou politiques délégués ainsi que des pratiques de fonctionnement. Cette analyse révèle deux tensions interdépendantes. Premièrement il existe une tension entre les aspirations des autochtones à l'autonomie gouvernementale et les aptitudes de la communauté à prendre des mesures de gouvernance efficaces. La seconde tension a trait au rôle et aux responsabilités convenables du Canada dans la résolution des problèmes de gouvernance et des capacités de gouverner et dans la résolution des problèmes liés à la qualité de l'eau.

En bout de ligne il ressort que le gouvernement fédéral a échoué à la tâche en omettant d'établir des normes législatives, libérant ainsi toutes les parties potentiellement responsables d'une obligation d'agir exécutoire. En reconnaissant la nécessité d'un régime législatif, l'article examine et réfute les propositions que la compétence incertaine ou le besoin pressant des gouvernements autochtones de développer les capacités et d'exercer un rôle plus grand dans la gouvernance constituent des obstacles à la création d'un régime de protection adéquat. L'article considère un régime législatif qui tient compte de ces questions et y répond.

This paper considers why, from a policy and legal perspective, there is such a disparity between the water quality on First Nations reserves, and that experienced in the majority of other Canadian communities. This involves engaging with how jurisdictional allocations, governmental policies, statutory or policy-delegated mandates, and operational practices converge. In this discussion, two inter-related tensions emerge. The first is between Aboriginal aspirations to self-govern and community capacity to effectively engage in governance activities. The second is Canada's proper role and responsibilities in resolving the governance/capacity tension, and in resolving the water quality problems.

This paper ultimately concludes that the federal government has erred in failing to legislate standards, which has allowed all potentially responsible parties to avoid an enforceable obligation to act. In finding that a legislative regime is required, this paper considers and refutes the propositions that jurisdictional uncertainty or the pressing need for Aboriginal governments to develop capacity and take on fuller governance roles are barriers to creating the required protective regime. That is, this paper contemplates a legislative regime which accommodates and addresses these issues.

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Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves

CONSTANCE MACINTOSH

I. INTRODUCTION

This paper is motivated by my concern with understanding why, from policy and legal perspectives, there is such a disparity between the water quality on First Nations reserves, and that experienced in the majority of other Canadian communities.¹ This disparity has been observed by a Royal Commission, as well as a United Nations committee, both of which urged Canada to remedy the situation.² My ultimate conclusion is that the federal government has erred in failing to legislate standards, which has allowed all potentially responsible parties to avoid direct liability and so an enforceable obligation to act. Although I believe the federal government has made poor decisions, I do not believe that these decisions would found a successful cause of action. Finally, I do not accept that jurisdictional uncertainty, or the pressing need for Aboriginal governments to develop capacity and take on fuller governance roles, are barriers to creating the required protective regime, as I visualize a regime which accommodates and addresses these issues.

This paper commences with an overview of on-reserve water quality. It then turns to the question of how water quality is governed on reserves. This involves ana-

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1. This is not to suggest that drinking water in non-Aboriginal communities is perfectly protected. For a discussion of drinking water problems generally, see David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Toronto: UBC Press, 2003).
 2. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada 10/12/98*, UN ESCOR, 1998, UN Doc. E/C.12/1/Add.31 at para. 17 [UN Committee, 1998 Report]; United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN ESCOR, 36th Sess., UN Doc. E/C.12/CAN/CO/5 (Advance Unedited Version) (2006) at paras. 11, 15 [UN Committee, 2006 Report]; Royal Commission on Aboriginal Peoples, *Public Policy and Aboriginal Peoples 1965-1992: Summaries of Reports by Federal Bodies and Aboriginal Organizations*, vol.2 (Hull: Canada Communication Group, 1994) at 226-27 (although there have been relative improvements between 1981 and 2001, they will not result in standards of living converging "in the near future"). See also Martin Cooke, Daniel Beavon & Mindy McHardy, *Measuring the Well-Being of Aboriginal People: An Application of the United Nations' Human Development Index to Registered Indians in Canada, 1981-2001* (Ottawa: Strategic Research and Analysis Directorate, Indian and Northern Affairs Canada) at 22, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/ra/mwb/mwb_e.pdf>; National Aboriginal Health Organization (NAHO), "Drinking Water Safety in Aboriginal Communities in Canada, Brief" (21 May 2002) at 2, online: National Aboriginal Health Organization <http://www.naho.ca/english/pdf/re_briefs5.pdf>.

lyzing how jurisdictional allocations, governmental policies, statutory or policy-delegated mandates and operational practices converge. In this discussion, two inter-related tensions emerge. The first is between Aboriginal aspirations to self-govern and community capacity to effectively engage in governance activities. The second is the proper role and responsibilities of Canada in resolving the governance/capacity tension, and in resolving the water quality problems.

I close by considering the 2006 *Protocol for Safe Drinking Water in First Nations Communities*. Although other factors, such as remoteness,³ contribute to the complexity of delivering safe water, these dimensions are beyond the scope of this paper. I also limit my analysis to “south of 60” reserves, located within provinces, because reserves within territories are subject to a constitutionally distinct legal framework.

II. WATER QUALITY ON FIRST NATION RESERVES

In this section, I first describe data to illustrate the character of the water quality problems. I then describe various federal initiatives which were and are directed to remedying the problems.

A. Empirical Data

The Commissioner of the Environment and Sustainable Development (Commissioner of the Environment) reached the following conclusion in her 2005 audit of drinking water safety on reserves: “[w]hen it comes to the safety of drinking water, residents of First Nations communities do not benefit from a level of protection comparable with that of people living off reserves.”⁴ The results of this lack of protection are quantifiable, and data on “boil water” orders or advisories provides one helpful measure. Water advisories are primarily issued on evidence that there is an “unacceptable level of disease-causing bacteria, viruses or parasites in the water system anywhere from the source to the tap.”⁵ Data over a recent 11 month period indicates the number of communities under orders or advisories fluctuates, but remains high, at about 12-13% of all reserve communities at any one time,⁶ with orders often persisting for long peri-

3. *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons* (Ottawa: Public Works and Government Services Canada, 2005) at para 5.10 [Commissioner of the Environment, 2005 Report].

4. *Ibid.* at para. 5.76.

5. Health Canada, *Drinking Water Guidelines: Boil Water Advisories and Boil Water Orders*, online: Health Canada, Environmental & Workplace Health <http://www.hc-sc.gc.ca/ewh-semt/water-eau/drink-potab/boil-ebullition_e.html> (drinking water advisories are warnings that are typically issued locally, whereas boil water orders are usually ordered by a public health official).

6. Health Canada, *How Many First Nations Communities Are Under A Drinking Water Advisory?*, online: Health Canada, First Nations & Inuit Health <http://www.hc-sc.gc.ca/fnih-spni/promotion/water-eau/advis-avis_concern_e.html#how_many> (as of March 24, 2006, 79 of Canada's 630 Indian Reserves had advisories or orders in place. By July 7, 2006, the number had risen to 88 drinking water advisories, and by February 16, 2007, the number had decreased slightly to 85 reserve communities).

ods of time. Of the 76 communities with boil water orders in March 2006, 50 had been in place for over a year, and seven for more than five years.⁷ Boil water advisories and orders typically reflect the *actual quality* of the water coming out of the tap.

Another measure is the state of water treatment facilities and infrastructure, as these flag situations where water is likely to become unsafe to consume. Based on a file review, in 1995 Indian and Northern Affairs Canada (INAC) and Health Canada estimated that about one-quarter of First Nations water systems “posed potential health and safety risks to the people they served.”⁸ On-site studies by INAC in 2001⁹ and 2003¹⁰ both concluded that about three-quarters of reserve communities were at risk for drinking water becoming unsafe due to facility conditions. The 2003 study also found that about 10% of operators for water and wastewater treatment facilities met industry certification standards,¹¹ so nearly all communities had operators who could not work in a provincially regulated facility.

B. Political Will

Although these outcomes would suggest state apathy, political will to remedy the situation has been expressed repeatedly. In 1991, INAC committed to achieving equality with respect to water by 2001.¹² In 1995, INAC committed to remedying all deficient water systems by 2004.¹³ Obviously these goals were not met. Current initiatives include the First Nations Water Management Strategy (FNWMS). Its key objectives are to address all at-risk facilities, to bring on-reserve water treatment infrastructure in line with industry standards, to train and certify all water treatment plant operators and to create multi-barrier quality standards by 2008. Based on its reports, these goals will not be realized. For example, the FNWMS aimed to address one-third of “high risk” systems each year starting in 2003, so that they would all be corrected by 2006. However, the number of high risk systems decreased only minimally each year (i.e. from 22% of all systems in 2002, to 21% in 2003-04, and then to 20% in 2004-05).¹⁴ Efforts to ensure operator certification have similarly resulted

7. “Cleaner Water for Natives” *The National Post* (6 March 2006).

8. Commissioner of the Environment, 2005 Report, *supra* note 3 at para. 5.12.

9. *Ibid.* at para. 5.13.

10. Indian and Northern Affairs Canada, *National Assessment of Water and Wastewater Systems in First Nations Communities: Summary Report* (Indian and Northern Affairs Canada, 2003) at 10 [INAC 2003 Assessment].

11. *Ibid.*

12. Office of the Auditor General of Canada, *1995 Report of the Auditor General of Canada* (Ottawa: Minister of Public Works and Services Canada, 1995) at para. 23.21 [Auditor General 1995].

13. Royal Commission on Aboriginal Peoples, *Gathering Strength: Report of the Royal Commission on Aboriginal Peoples*, vol. 3 (Ottawa: Minister of Supply and Services Canada, 1996) at 380-81 [Royal Commission Report].

14. Treasury Board of Canada, Secretariat, *First Nations Water Management Strategy: Plans, Spending and Results for 2004/2005*, online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/rma/eppi-ibdrp/hrdb-rhbd/fnwms-sgepn/2004-2005_e.asp>; Treasury Board of Canada Secretariat, *First Nations Water Management Strategy: Plans, Spending and Results for 2003/2004*, online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/rma/eppi-ibdrp/hrdb-rhbd/fnwms-sgepn/2003-2004_e.asp>.

in improvements, but are not proceeding at a pace where goals will be met before the funding expires. A concurrent initiative was the *Kelowna Agreement* of 2005, which planned to close “the gap in the quality of life” within 10 years¹⁵ through, in part, \$400 million in new money for on-reserve water issues, and developing “multi-jurisdictional/departmental strategies to address . . . water . . . safety.”¹⁶ However, political commitments, or at least the vision of fulfilling commitments, shifted with the change in federal government in early 2006, and recent budgets do not reflect this agreement.

Most recently, as part of the FNWMS, a panel was struck to advise government on the regulation of drinking water on reserves, which reported in 2006.¹⁷ Its report assessed regulatory possibilities primarily in terms of legal certainty and enabling adequate regulatory scope. Unfortunately, its mandate largely excluded addressing the socioeconomic and political contexts in which a regulatory framework would operate. In particular, the panel’s mandate excluded addressing the “implications of the ongoing devolution of responsibilities and authority to First Nations,” the federal government’s “internal policy issues” with respect to water policy and the “human, financial and infrastructure resources required by First Nations” to implement any regulatory proposal.¹⁸ My analysis of the situation in this paper suggests that an understanding of these factors is essential for any initiative to succeed, and so these exclusions limit the value of the report. Regardless, as demonstrated by the initiatives and commitments of the last 20 years, the Commissioner of the Environment in 2005 reported, despite federal spending, “the risk level of the drinking water [on reserves] was still substantial.”¹⁹

III. REGULATORY ABANDONMENT AND JURISDICTIONAL IMPASSES

In this section, I link the poor water quality on First Nations reserves with the finding that reserve lands have largely been subject to regulatory abandonment. Instead of enacting protective legislation, the federal government has released unenforceable protocols and guidelines. Although provinces have legislated protective drinking water

15. Indian and Northern Affairs Canada, News Release, “First Nations Implementation Plan” (28 November 2005), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/nr/prs/s-d2005/02749bk_e.html>.

16. The Meeting of First Ministers and Leaders of National Aboriginal Organizations, *Blueprint on Aboriginal Health: A 10-year Transformative Plan* (24-25 November 2005) at 11, s. 3.3(c), online: Health Canada <http://www.hc-sc.gc.ca/hcs-sss/alt_formats/hpb-dgps/pdf/pubs/2005-blueprint-plan-abor-auto/plan_e.pdf>.

17. *Report of the Expert Panel on Safe Drinking Water for First Nations* (Ottawa: Minister of Public Works and Government Services Canada, 2006), online: Government of Canada <http://www.eps-sdw.gc.ca/rsrsc/volume_1_e.pdf> [Expert Panel Report].

18. *Ibid.* at 68.

19. Commissioner of the Environment, 2005 Report, *supra* note 3 at para. 5.21.

regimes, my analysis of jurisdictional reach supports the conclusion that these regimes are largely inapplicable to reserve lands, and so cannot close the regulatory gap.

A. The Federal Approach to On-Reserve Water Governance: Protocols and Contracts

Under the distribution of powers in section 91(24) of the *Constitution Act, 1867*,²⁰ Canada has jurisdictional authority over “Indians, and Land reserved for the Indians,” and thus the reserve communities which it created. INAC and Health Canada take the position that this jurisdictional assignment precludes the operation of provincial water regimes over reserve lands.²¹ Assuming, for now, the accuracy of this position (which I return to below), the mere fact that Canada has jurisdiction does not usually result in a legal obligation upon Canada to act.²² In this instance, the only federal legislative gesture has been to grant band councils authority, under the *Indian Act*, to make bylaws respecting “the construction and maintenance of watercourses . . .” and “of public wells, cisterns, reservoirs and other water supplies.”²³ Breach of the bylaws can result in a fine of up to \$100 or imprisonment for a term not exceeding 30 days or both,²⁴ unless the Minister of Indian Affairs and Northern Development disallows the bylaw.²⁵ These powers are an inadequate basis for a regulatory framework to ensure the safety of drinking water.

In lieu of a legal regime, Canada has addressed reserve water as a matter of internal administration. For example, in the 1970s, INAC’s project managers directly oversaw all aspects of on-reserve capital projects and facilities, such as water and sewage treatment plants, largely without the involvement of the affected First Nation community.²⁶ Their activities were, however, not measured against any statutory standards.

20. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No.5 [*Constitution Act, 1867*].

21. Constance MacIntosh, “Law and Policy Regarding the Population Health of Aboriginal Canadians” in Tracey M. Bailey, Timothy Caulfield & Nola M. Ries, eds., *Public Health Law and Policy in Canada* (Toronto: Butterworths, 2005) at 345-46 [MacIntosh, “Population Health”]. See also Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, University of Saskatchewan, 2001) at 309 (observing that provinces tend to shy away from claiming jurisdiction over Aboriginal issues). But see Constance MacIntosh, “Jurisdictional Roulette: Constitutional and Structural Barriers to Aboriginal Access to Health” in Colleen M. Flood, ed., *Just Medicare: What’s In, What’s Out, How We Decide* (Toronto: University of Toronto Press, 2006) 193 [MacIntosh, “Jurisdictional Roulette”] (discussing how provinces are unlikely to mount a challenge against this claim of jurisdictional authority).

22. See e.g. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1. But see *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016 at para. 20, 207 D.L.R. (4th) 193, per Bastarache J. for the majority (where the Court found that “the *Charter*” may impose “a positive obligation on the state to extend protective legislation . . .” to make the protected freedom in question meaningful).

23. *Indian Act*, R.S.C. 1985, c. I-5, s. 81(f)(l) [*Indian Act*].

24. *Ibid.* s. 81(r).

25. *Ibid.* s. 82(2).

26. Auditor General 1995, *supra* note 12 at para. 23.45.

Beginning in the 1980s, and coinciding with efforts to devolve governance activities to First Nations, Canada introduced agreements—contracts—under which First Nations would be responsible for operating and maintaining capital facilities on their reserves, such as water treatment plants. These contracts began the introduction of non-judiciable protocols and quality guidelines. The protocols are typically based on “best-practices.” However, like the contracts, the protocols provide no chain of lawful accountability for reserve residents to call upon, nor do they ensure a remedy if water is unsafe or the infrastructure shows signs of failure.

As discussed below, the timing of this transition can be read in several ways. What is indisputable is that this contractual devolution of assumed responsibilities was not, and is not, dependent upon bequeathing a system which already produces safe water, or upon ensuring that a working system is established and maintained. As a result, tensions have emerged over governance goals, the roles of First Nations versus those of Canada, as well as First Nations’ capacity to safely deliver capital projects.

By 1995, INAC had come to describe its role in ensuring safe drinking water “as primarily that of a funding agency.”²⁷ The authors of a report prepared for INAC on the well-being of Aboriginal peoples wrote that “[i]n Canadian public policy debates, interest in the economic and social well-being of Aboriginal people is often framed in terms of public expenditures.”²⁸ This comment certainly resonates with INAC’s self-described role. The fact of funding, not success, has served as an index of support, effort, commitment, and good will.

However, given an operating context in which there is no statutory assignment of responsibility for quality, INAC’s self-description suggests a choice to build distance between itself and actual outcomes. Intriguingly, other branches of the federal government have flagged INAC’s self-characterization as a wrongful one. The Auditor General’s 1995 report chastised INAC for having failed to assess the capacity of First Nations to administer these facilities, and for failing to ensure that First Nations had appropriate technical support.²⁹ This criticism was later echoed by the Royal Commission, which characterized the contractual devolution process as having created a “vacuum.”³⁰ Perhaps in response to INAC’s own estimates, at the time, that 25% of on-reserve water systems had serious safety issues, the Auditor General opined that regardless of devolution, INAC “continues to be responsible and accountable,”³¹ a position which the Auditor General reiterated in her May

27. *Ibid.* at para. 23.46.

28. Cooke, *supra* note 2 at 1.

29. Auditor General 1995, *supra* note 12 at para. 23.99.

30. The Royal Commission Report, *supra* note 13 at 379, further observed that “[d]evolution of service delivery to communities appears to have left a vacuum: the government withdrew without ensuring that communities had the awareness, resources or skills to take over.”

31. Auditor General 1995, *supra* note 12 at para 23.45-46. In the 1997 Auditor General Report, the Auditor General was dismayed to report that there had been no substantive changes made by INAC (at para 35.252).

2006 report.³² As discussed above, given that the Crown is under no statutory obligation to act, the Crown would only seem to be responsible where it has chosen to shoulder responsibilities.

In its website publications, INAC describes its primary role in providing safe water as one of offering funds,³³ while band councils have “primary responsibility for ensuring that water facilities are designed, constructed, maintained and operated in accordance with established federal or provincial standards”³⁴ What does this mean (especially given that provincial and federal standards may vary)? The term “responsibility” could mean anything, from day-to-day administration, to accountability for the outcome. If a facility is poorly operated and places the well-being of reserve residents at risk, this leaves open the question of whether INAC could sue the operating band council to require change, or if reserve residents could sue either INAC or the operating band council. Instead of clear lines of statutory accountability, which would enable immediate action and a timely remedy to alleviate the risk, one is forced to turn to an uncertain analysis of tort, contract and constitutional interpretation. Lacking statutory lines of accountability and terms of responsibility, we are left with cloudy policies and practices. Reserve communities have no answers about how the quality of their living standards will be assured, how their well-being fits into the governmental regime, and who is responsible for what, should problems arise. Although these contracts are compatible with First Nations governance goals, which are essential to realizing their political rights, it is not clear that they further the goal of providing safe drinking water to members of the communities.

B. INAC’s Funding Policies and Community Resources Under Devolution Contracts

To return to the terms of these contracts, a central matter is, of course, money. INAC’s policy is to agree to entirely fund the building of drinking water system components, such as water treatment plants, water intakes, pipes, etc.³⁵ However, INAC

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32. *A Status Report of the Auditor General of Canada to the House of Commons* (Ottawa: Minister of Public Works and Government Services, 2006), online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/06menu_e.html#06may> [Auditor General 2006]. See also Royal Commission Report, *supra* note 13 at 379 (where the Royal Commission further observed that “[d]evolution of service delivery to communities appears to have left a vacuum: the government withdrew without ensuring that communities had the awareness, resources or skills to take over”). See also Health Canada, *Interdepartmental Working Group on Drinking Water: Guidance For Providing Safe Drinking Water in Areas of Federal Jurisdiction: Version 1* (Health Canada, 2005) at 25, online: Health Canada, Environmental & Workplace Health <http://www.hc-sc.gc.ca/ewh-semt/pubs/water-eau/guidance-federal-conseils/index_e.html> [Interdepartmental Working Group on Drinking Water] (where, taking a position similar to the Auditor General, the federal Interdepartmental Working Group on Drinking Water has adamantly asserted that INAC can lawfully contract out *duties* to First Nations, but the responsibility for meeting drinking water program objectives remains with the department).
33. INAC 2003 Assessment, *supra* note 10 at 5. See also Indian and Northern Affairs, *Safe Drinking Water on First Nations Reserves: Roles and Responsibilities* (Ottawa: Indian and Northern Affairs Canada, 2001) at 1.
34. Indian and Northern Affairs, *Background—Water Quality and First Nations Communities* (2003), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/nr/prs/m-a2003/02304bk_e.html>.
35. Commissioner of the Environment, 2005 Report, *supra* note 3 at para. 5.5 (individual wells and systems that serve fewer than five houses are not eligible for funding).

will only agree to fund 80% of the estimated operation and maintenance costs for drinking water systems.³⁶ Where the federal Interdepartmental Working Group on Drinking Water has concluded that drinking water safety requires there be “adequate funds and program management controls in place,”³⁷ INAC’s practices fall short of this rather obvious federal policy recommendation. To make matters worse, in 2005, the Commissioner of the Environment found that the cost estimates underlying the 80% funding figure had not been updated for several years,³⁸ and, shockingly, that in setting the terms of the contract “*INAC ignores whether First Nations have other resources to meet this requirement [to fund 20%] and has no means to enforce it.*”³⁹

Given INAC’s knowledge of the current state of on-reserve water systems and quality outcomes, and the poor economic conditions experienced on many reserves which limit their ability to generate revenue,⁴⁰ the Commissioner’s second finding begs for an explanation. Were INAC itself operating the water systems under these intentionally under-funded terms, it would clearly be in breach of federal protocols and knowingly be placing reserve residents at risk. So, how does the fact that First Nations have agreed to operate under these terms change things? Why would Canada deliberately under-subsidize something that is necessary to well-being, despite knowledge of actual operating deficits?

One possibility is that these agreements are to “teach” fiscal responsibility, so reserve governments will know their communities will suffer the consequences if they spend irresponsibly, or fail to exercise governance responsibilities by generating revenue. Such an approach would deem the political culture and economic will of the reserve community responsible for its success or failure in providing safe water. Indeed, if state responsibility is achieved entirely through expenditures, as INAC appears to be promoting, then local capacity and actual outcome are outsourced liabilities.

Although promoting self-sufficiency and fiscal responsibility are appropriate state goals and ones which align with the interests of First Nations, this manifestation of these goals (if that is what it is) would be questionable given INAC’s knowledge that many communities will necessarily fail to engage in proper maintenance and operation activities under these conditions. Because of the impoverished state of many reserve communities, the Commissioner of the Environment found that

36. *Ibid.* at para. 5.6. INAC only covers 80% of the costs where a First Nation must buy its drinking water from a neighbouring municipality.

37. Interdepartmental Working Group on Drinking Water, *supra* note 32 at 14.

38. Commissioner of the Environment, 2005 Report, *supra* note 3 at para. 5.59.

39. *Ibid.* at para. 5.62 [emphasis added].

40. Poor economic conditions, with few jobs and extremely low incomes, are common to many First Nations reserves. See e.g. Cooke, *supra* note 2; Indian and Northern Affairs Canada, *Socio-Economic Indicators in Indian Reserves and Comparable Communities, 1971-1991* (Gatineau: Department of Indian and Northern Affairs, 1997); Indian and Northern Affairs Canada, *Comparison of Social Conditions, 1991 and 1996* (Gatineau: Ministry of Public Works and Government Services Canada, 2000); Health Canada, *A Statistical Profile on the Health of First Nations in Canada* (Ottawa: Health Canada, 2003).

INAC's policy created a "built-in shortfall in funding available for operation and maintenance."⁴¹ The likely result is the compounding of drinking water problems as facilities run with inadequate operating and maintenance budgets, or else First Nations choosing to divert funds that were allocated to other sources, such as housing or primary health care, creating an operating deficit in those areas.

Apart from the consequences for human well-being, the outright wasteful consequences of failing to attend to matters of operations was observed by the Royal Commission a decade ago, when it commented that the "[p]hysical infrastructure is built at considerable expense to the federal government—more than \$90,000 per dwelling unit in some cases—but subsequently systems may not perform adequately because of insufficient attention to effective operating systems and procedures"⁴² which in turn shortens the life span of facilities resulting in premature expenditures on new facilities. Moral chastisement and waste aside, is there any aspect of unlawfulness to such contractual arrangements? My answer is "no." One can analogize from the decision of the Supreme Court of Canada in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*.⁴³ Here, one of the questions put before the Court was whether one of INAC's predecessor ministries, the Department of Indian Affairs (DIA), had a responsibility to have prevented a band from agreeing to sell reserve land to another federal agency. The question arose because, pursuant to the *Indian Act*, the band could not sell reserve land unless DIA consented to the transaction. This necessarily thrust DIA into a position analogous to that of a fiduciary. In this instance, the sale eventually turned out not to be in the best interests of the band. Even in this situation, where one arm of Canada signed off on a contract to sell a band's land to another arm of Canada and even negotiated on behalf of the band, its responsibility to oversee the band's decision to sell, or the terms of the contract itself, was limited to preventing the band from foolishly or improvidently entering into an exploitative bargain.⁴⁴ The Court was clear that even where a statute requires Canada's consent for a band's contract to be valid, unless the contract is completely reckless, Canada is under no obligation to assess the wisdom or practical outcome of the arrangement. Rather, Canada is to follow the "guiding principle that the decisions of aboriginal peoples should be honoured and respected"⁴⁵

The only other exception noted by the Court as to when the Crown ought to look past the fact of band consent to an agreement, would be if there were grounds to find that the "[b]and's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it

41. Commissioner of the Environment, 2005 Report, *supra* note 3 at Exhibit 5.1.

42. Royal Commission Report, *supra* note 13 at 379.

43. [1995] 4 S.C.R. 344, 130 D.L.R. (4th) 193 [*Blueberry River* cited to S.C.R.].

44. *Ibid.* at para. 35 per McLachlin J. for Cory and Major JJ., concurring.

45. *Ibid.* at para. 14 per Gonthier J. for La Forest, L'Heureux-Dubé, Sopinka JJ.

unsafe to rely on the Band's understanding and intention."⁴⁶ Although there may be specific incidents in which such a case could be made, there is no evidence that such situations have generally arisen with the formation of these contracts.

C. The Contractual Devolution of Responsibilities and Self-Governance Challenges

Operating under these unsatisfactory agreements, the legacy of having inherited an inadequate water system is perpetuated. In 2003 only 11% of water treatment plant operators on reserves had proper certification. Indeed, the lack of a certified operator appears to have contributed to the situation at Kashechewan, where parts of the water system had never been properly installed, and the facility was not being properly maintained.⁴⁷ The disjuncture between what INAC expects a community to achieve with its funding, and what a community can actually achieve given the constraints under which it is operating point to one of the failings of Canada's approach to enabling Aboriginal capacity. The last 20 years of water plans and policies have shown that the goal of achieving parity in living standards will not be achieved merely through the transfer of resources, in this case, funding. What is necessary, in the words of postcolonial theorist Duncan Ivison, is to put in place "the means for the effective conversion of those resources"⁴⁸ That is, a corrective policy must consider not just how much funding a community receives, but what the community can actually derive from the resources and what is necessary for the community to maximize those resources towards the ends of resolving issues.⁴⁹ Here, control seems to have preceded capacity, instead of developing in tandem, and with control came fiscal and governance obligations for which Aboriginal communities needed, but did not have, more support.

Earlier in this paper, I queried whether and how quality standards apply and operate under these agreements. Much as Canada uses transfer payments to impose health and social service standards upon provinces (an area where it would otherwise be rendered silent due to a lack of jurisdiction), "INAC and Health Canada use funding arrangements with First Nations and administrative documents as the means to set and enforce requirements for water quality and safety."⁵⁰ These requirements are all procedural; if the First Nation that has signed a contract to take responsibility for maintenance and operations does not follow guidelines and perform standard testing then future funding for water testing is cut.⁵¹ Disturbingly, there is no indication that

46. *Ibid.*

47. Ontario, Ministry of the Environment, *Technical Report: Drinking Water System at the Kashechewan First Nation* (2005) at 7-11, 13-14

48. Duncan Ivison, *Postcolonial Liberalism* (Cambridge: University Press, 2002) at 160.

49. *Ibid.* at 122.

50. Commissioner of the Environment, 2005 Report, *supra* note 3 at para. 5.25.

51. *Ibid.* at para. 5.34.

the cut funds are redirected to hire a company to perform the testing, nor an investigation into the cause of the failure and what would enable the First Nation to meet the standards in the future. The policy underwriting the contract, therefore, is one which punishes the First Nation if it fails due to its maintenance capacity falling short of the benchmark, despite the fact that Canada sets no standards for certifying the operators. This remedial response has a troublingly Foucaultian disciplinary character, as it is disconnected from the goal of remedying the problem by improving capacity or otherwise investigating the failure.

Whereas the Royal Commission characterizes the devolution process as flawed through inadvertence and poor planning, the Assembly of First Nations (AFN) characterizes INAC's actions even more harshly. The AFN says Canada's motivation to devolve authority over various operations "was principally a deficit-fighting measure."⁵² This accusation, even if accurate, may make the agreements unwise, but does not render them unenforceable, no more than the numbered treaties that Canada entered into to obtain land. However, what of "the honour of the Crown," and "good faith dealing," features which adhere to Crown agreements with First Nations as a matter of law?⁵³ I see little room for these arguments founding a legal claim against Canada here, as devolution coincides with First Nations' aspirations to self-govern, and the agreements were entered into on the basis of community consent and presumably full-disclosure (conditions which were far less obviously met in early treaties but which nonetheless stand).

It is arguable that if First Nations made the decision to enter these agreements while lacking basic capacity or a strategy for making up the shortfall, then INAC is correct and the Auditor General is wrong: First Nations, not Canada, are entirely responsible for their own situation.

This analysis is troubling in several ways. On a practical level, First Nations inherited a plethora of problems which Canada had itself not seemed able to remedy. Therefore, although a state motive which includes cutting costs is not in itself problematic, a motive which also includes downloading persistent problems and, with that, perhaps liability for those problems does become problematic, especially given the urgency which First Nations may experience to take advantage of any governance-type opportunity that Canada offers them.

In his theorizing on what it means for Canada as a liberal state to engage in a postcolonial relationship with Aboriginal peoples, Duncan Ivison cautions against placing too much weight upon the fact of consent as justifying or shielding the outcome in specific state-Aboriginal agreements. In particular, and drawing upon classic

52. Assembly of First Nations, *Federal Government Funding to First Nations: The Facts, the Myths, and the Way Forward* (Ottawa: Assembly of First Nations, 2004) at 11.

53. See e.g. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, 245 D.L.R. (4th) 33, [*Haida* cited to S.C.R.].

feminist thought, he points to the limit of consent as a legitimating factor, because the conditions under which people give consent have enormous constraining influence.⁵⁴ Aboriginal communities already living in poor conditions may see little promise in, and be deeply frustrated by, the continuing status quo, and so be drawn to the possibility that they may be able to provide themselves with a better standard of living by taking control over various operations. The willingness, if not eagerness, of First Nations to exercise powers which Canada is prepared to devolve without a court battle does not justify abandoning First Nations communities to administer their own inordinately different, historically-inherited situation.⁵⁵ I see a difference between Canada negotiating with a First Nations community to determine what the community actually needs to take on these powers and Canada putting forward an unresponsive, contractual template of take-it-or-leave-it where communities govern on Canada's terms or not at all. Although a sustainable position in law, it is hardly sustainable in terms of the goal of protecting water. And indeed, it does raise tentative questions about good faith dealing after all.

D. Provincial Jurisdiction and On-Reserve Drinking Water

This entire operative system rests upon INAC's claim that only the federal government has jurisdiction to legislate in this area, and so provincial laws and regulations are impotent to impose standards or protocols.⁵⁶ This claim is not universally accepted. In *The Walkerton Inquiry* report, the Honourable Dennis R. O'Connor observed the lack of legislation to protect the water of reserve residents, and queried whether provincial law could play this role.⁵⁷ In particular, he believes that section 88 of the *Indian Act* could potentially referentially incorporate provincial water systems law, making it applicable on First Nations reserves despite their clear status as federal lands. Section 88 of the *Indian Act* deems provincial laws of general application "applicable to and in respect of Indians in the province . . ." except laws which are inconsistent with the *Indian Act*, federal law, or "any matter for which provision is made" under the *Act*.⁵⁸ Whereas the doctrine of inter-jurisdictional immunity dictates that

54. Ivison, *supra* note 48 at 82-83.

55. See MacIntosh, "Jurisdictional Roulette," *supra* note 21 at 208 (for similar experiences in communities who had participated in the Health Transfer Program, under which First Nations assumed responsibility for some aspects of health programming. They too inherited an under-funded system and a largely unworkable bureaucratic framework. One person described the agreement's real result as the community administering its own misery).

56. See Commissioner of the Environment 2005 Report, *supra* note 3 at para. 5.26 for a statement of INAC's position.

57. Ministry of the Attorney General, *Part Two: Report of the Walkerton Inquiry: A Strategy for Safe Drinking Water* by Dennis R. O'Connor (Toronto: Queen's Printer, 2002) at 491 [Walkerton Inquiry] (where O'Connor questions, but reaches no conclusion on, whether provincial water quality law could apply to reserves through the operation of section 88 of the *Indian Act*).

58. *Indian Act*, *supra* note 23 at s. 88 reads:

Subject to the terms of any treaty and any other Act of the Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to

provincial laws of general application which impair the “core” of section 91(24) of the *Constitution Act* must be read down, section 88 of the *Indian Act* extends the effect of provincial laws of general application which do touch the “core” as long as they do not impair “Indianness.”⁵⁹ Justice O’Connor’s proposal is an intriguing one: can provincial laws of general application which regulate water quality apply on “lands reserved” either by their own force, or through section 88 of the *Indian Act*? If so, this would provide a strong statutory basis for standards and practices, eliminating the uncertain backdrop to the protocols and contracts.

There is no Supreme Court of Canada case which is directly on point. Litigation over the interplay between section 91(24) of the *Constitution Act*, section 88 of the *Indian Act*, and provincial laws has produced some guiding principles which are of assistance. These principles are fairly straightforward: as long as a provincial law of general application is in relation to a matter coming under a provincial head of power, does not invade the exclusive federal authority and is not inconsistent with federal laws, then the provincial law is indeed applicable to Indians on lands reserved.⁶⁰ In instances where the law does invade federal authority, but does not touch on the core of “Indianness,” it may be made applicable nonetheless through referential incorporation by section 88 of the *Indian Act*. So there is a presumption that provincial laws of general application apply, with a number of exceptions.⁶¹

How far could provincial law go in terms of regulating drinking water on reserves by virtue of being a law of general application? A law of general application is one which does not single out or target a federal head of power, but rather applies generally across the province⁶²: water quality laws are clearly laws of general application. The only federal law which even remotely touches on water quality on reserves is the delegation of power to band councils to pass bylaws regarding the construction and maintenance of watercourses, public wells and cisterns.⁶³ This is a power which, to the author’s knowledge, no band council has acted upon. As a consequence, there are no conflicting federal laws which already occupy the field.

the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

59. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 at para. 182, Lamer C.J.C. [*Delgamuukw* cited to D.L.R.].

60. See *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 at para. 12, 231 D.L.R. (4th) 449, Bastarache J. [*Paul* cited to S.C.R.]; *R. v. Francis*, [1988] 1 S.C.R. 1025, 85 N.B.R. (2d) 243, La Forest J. [*Francis* cited to S.C.R.].

61. See generally Kerry Wilkins, “‘Still Crazy After All These Years’: Section 88 of the *Indian Act* at Fifty” (2000) 38 *Alta. L. Rev.* 458; Kent McNeil “Aboriginal Title and Section 88 of the *Indian Act*” (2000) 34 *U.B.C. L. Rev.* 159; Nigel Bankes “*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights” (1998) 32 *U.B.C. L. Rev.* 317.

62. See e.g. Peter W. Hogg, *Constitutional Law of Canada*, 2006 Student ed. (Toronto: Thomson Carswell, 2006) at 27.3(b).

63. *Indian Act*, *supra* note 23.

The question then remains whether such laws and regulations nonetheless touch the “core” of section 91(24) of the *Constitution Act*, and so invade exclusive federal authority. Most of the jurisprudence regarding the “core” of section 91(24) has focused upon the “Indians” branch of this section. The legal test turns on whether the provincial law affects Aboriginal people in their “Indianness,” or in their “status or capacity” as “Indians.”⁶⁴ The test is *prima facie* met if a provincial law affects Aboriginal or treaty rights or an Aboriginal person’s right to claim registered status under the *Indian Act*.⁶⁵ The “core” of lands reserved has been the subject of some scholarly and judicial discussion. Although no test has been defined, courts and scholars have both listed matters which they conclude fall within this core. In the 1986 Supreme Court of Canada case of *Derrickson v. Derrickson*, the Court adopted with approval the conclusion of K.M. Lysyk that “the matters contained within exclusive federal authority over Indian reserve lands include regulation of the manner of land-holdings . . . and how reserve lands may be used (e.g., zoning regulations).”⁶⁶ These conclusions were echoed some 15 years later by Kerry Wilkins in his extensive analysis of “the scope of the provinces’ power . . . to control what happens to lands reserved for the Indians.”⁶⁷ Wilkins’ survey of judicial decisions leads him to conclude that the “core” of lands reserved, to which provincial law of general application does not apply, “encompasses ownership, use, possession, occupation, and disposition of lands subject to Aboriginal interests.”⁶⁸ Nigel Bankes has similarly concluded, following an analysis of how *Delgamuukw* augments our understanding of division of power issues regarding “lands reserved,” that the “core [of] lands reserved . . . includes the disposition, administration, use, possession and control of lands reserved.”⁶⁹ Many aspects of provincial water law regimes,⁷⁰ including regulating the intake of water and zoning for drinking and sewage water treatments, thus fall within the “core” of “lands reserved,” as defined both by the courts and pursuant to scholarly analysis.

These conclusions would preclude the operation of most aspects of provincial water regimes. Some elements of provincial water regimes may fall outside of these parameters, such as those which set terms or criteria for training and qualifications of operators, or may establish regimes for sampling and testing water quality. While

64. See e.g. *R. v. White and Bob* (1965), 52 W.W.R. 193, 50 D.L.R. (2d) 613; *Dick v. The Queen*, [1985] 2 S.C.R. 309, 23 D.L.R. (4th) 33, Beetz J.; *Kruger et al. v. The Queen*, [1978] 1 S.C.R. 104, 75 D.L.R. (3d) 434, Dickson J.; *Francis*, *supra* note 60.

65. *Delgamuukw*, *supra* note 59.

66. [1986] 1 S.C.R. 285, 26 D.L.R. (4th) 175 at 295 [*Derrickson* cited to S.C.R.] at 295 (quoting with approval K.M. Lysyk, “Constitutional Developments Relating to Indians and Indian Lands: An Overview” (1978) LSUC Special Lectures 201 at 227, note 49).

67. Kerry Wilkins, “Negative Capacity: Of Provinces and Lands Reserved for the Indians” (2002) 1 *Indigenous L.J.* 57 at 67.

68. *Ibid.* at 71.

69. Bankes, *supra* note 61 at para. 70.

70. See e.g. *Safe Drinking Water Act*, S.O. 2002, c. 32; *Drinking Water Protection Act*, S.B.C. 2001, c. 9; *Potable Water Regulation*, Alta. Reg. 122/93.

these sorts of features could be characterized as administering “lands reserved” and so excluded, they could also be characterized as merely establishing credentials or safety standards, and so not invade the core of section 91(24). As acknowledged in the *Report of the Expert Panel on Safe Drinking Water for First Nations*, the law on this point is uncertain and so presents something of a quandary.⁷¹ Even if courts were to endorse this distinction, it would only result in *some* provincial laws applying, while others would be firmly excluded. The outcome would remain highly unsatisfactory with considerable gaps. I return to this point below.

As well as the federal shield established by section 91(24) of the *Constitution Act*, doubt is also cast upon the applicability of provincial laws to reserve lands because Aboriginal interests in lands include a governance aspect.⁷² This aspect is intimately tied to Aboriginal peoples themselves having authority or decision-making powers over how land in which they have an interest, be it reserve land or Aboriginal title land, may be used.⁷³

What of section 88 of the *Indian Act*? Once again, there is no Supreme Court of Canada jurisprudence on point. There is, however, general consensus among lower courts that section 88 of the *Indian Act* does not extend to referentially incorporate laws which specifically touch on “lands reserved.”⁷⁴ The Court came closest to speaking to this issue in *Derrickson* where Justice Chouinard, in *obiter*, described the general argument on this issue as follows:

[t]he submission that s. 88 does not apply to lands reserved for Indians is quite simple. It is to the effect that not one but two subject matters are the object of s. 91(24) of the *Constitution Act, 1867*, namely: “Indians” and “Lands reserved for the Indians.” Since only Indians are mentioned in s. 88, that section would not apply to lands reserved for the Indians.⁷⁵

This argument is clearly consistent with the classic “plain meaning rule” of statutory interpretation as well as the “modern” contextual approach articulated by Justice L’Heureux-Dubé in *2747-3174 Quebec Inc. v. Quebec (Régis)*.⁷⁶ Were this question put to the Supreme Court of Canada, it would likely find section 88 of the *Indian Act* is of no assistance here.

71. Expert Panel Report, *supra* note 17 at 47-49.

72. *Delgamuukw*, *supra* note 59.

73. *Ibid.* Although the land under consideration in *Delgamuukw* was Aboriginal title land, the interest in title lands and reserve lands is comparable. See *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [*Guerin* cited to S.C.R.].

74. See McNeil, *supra* note 61 at paras. 21-30 (providing a detailed description of the jurisprudence).

75. *Derrickson*, *supra* note 66 at 298. See also *Paul*, *supra* note 60, rev’g (2001), 89 B.C.L.R. (3d) 210, 201 D.L.R. (4th) 251 (C.A.) (where the Court of Appeal found that section 88 of the *Indian Act* did not enable provincial forestry legislation to have application on reserve lands. On appeal to the Supreme Court of Canada, the Court found there was no need to consider section 88 (at para. 6), and so did not write on this point).

76. [1996] 3 S.C.R. 919, 140 D.L.R. (4th) 577 at paras. 159-77.

77. Commissioner of the Environment, 2005 Report, *supra* note 3 at para. 5.26.

The overall outcome is that, although there is no federal law in place to protect the drinking water of reserve residents, provincial law is jurisdictionally inapplicable and so cannot fill the gap.⁷⁷ We are left with a confusing array of practices and protocols. Below, I turn to some less obvious aspects of the unique jurisdictional situation of reserve residents that have consequences on the quality of drinking-water.

IV. TEASING OUT THE JURISDICTIONAL COMPLICATIONS

In this section of the paper, I shift from considering the lack of enforceable regimes to produce safe drinking water on reserves, to looking at general jurisdictional issues which impede efforts to improve on-reserve water quality. In particular, I survey difficulties in making on-reserve water quality legally relevant for up-stream (provincially-regulated) entities, and the difficulties caused by jurisdictional assignments as between the federal and provincial governments, their ministries, departments and agencies when specific water quality issues arise.

A. Water Flows Within Watersheds, not Political Boundaries

The first point about jurisdiction and water quality reflects the principle that “[g]iven the physical nature of water, the most appropriate planning unit for many purposes is the watershed.”⁷⁸ But, watersheds often do not conform to political boundaries as water passes from one jurisdiction to the next. The result is that downstream communities may live with the consequences of decisions made upstream under a different governing authority.⁷⁹ As stated by the Walkerton Inquiry, “[o]ne person’s sewage disposal system [may be] . . . someone else’s water supply.”⁸⁰

In 2003, INAC observed that reserve watersheds were often affected by off-reserve sources of contamination. INAC concluded that local municipalities, provincial agencies and reserve communities ought to coordinate to create source water protection plans.⁸¹ Although the *Canada Water Act* could support such cooperative

78. J. Owen Saunders, *Interjurisdictional Issues in Canadian Water Management* (Calgary: Canadian Institute of Resources Law, 1988) at 1.

79. See *Interprovincial Co-operatives Ltd. v. Dryden Chemicals Ltd.*, [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321 (the leading case regarding the inability of one jurisdiction to affect the lawfulness of decisions in another jurisdiction regarding trans-jurisdictional water). The Supreme Court of Canada found Manitoba could not enforce legislation that was intended to rein in the polluting activities of upstream companies operating in Ontario. The legislation deemed permits to discharge contaminants to not provide a defense for damage outside the jurisdiction of the issuing authority. The majority found that Manitoba could certainly bring a common law action in tort for damages, but that it could not legislate as to the legal relevance of the permit in its jurisdiction, and that the permit may well serve as a defence to the common law charge. See also Jamie Benidickson, “Public Health and Environmental Protection in Canada,” in Tracey M. Bailey, Timothy Caulfield & Nola M. Reis, eds., *Public Health Law and Policy in Canada* (Markham: Lexisnexis Butterworths, 2005) 369 at 374.

80. Walkerton Inquiry, *supra* note 57 at 487.

81. INAC 2003 Assessment, *supra* note 10 at 18.

endeavours, it has not been drawn upon.⁸² In practice, when provincial authorization is sought for an upstream project which may impact upon a reserve's watershed, Aboriginal communities are often left out of the planning process or canvassed ineffectively. This outcome may reflect the fact that most provincial environmental assessment legislation fails to require general consultation with Aboriginal communities.⁸³ This is in stark contrast to state actions to consider authorizing activity that may affect a constitutionally protected Aboriginal right, such as fishing, in which case consultation and accommodation must occur for state action to be lawful.⁸⁴ As a result, if an upstream company's activities have the potential to poison fish, and the Aboriginal community has a proven or alleged Aboriginal right to fish, then consultation would be constitutionally mandated. However, if the company's activities would merely give the water a foul taste and smell, increasing the cost of purifying it and decreasing the lifespan of a water treatment facility, then Aboriginal groups would not be singled out for consultation. In John Borrows' case study of First Nations and environmental planning, he observed that:

when Indigenous peoples have environmental interests off the reserve, the federal government is reluctant to expand their jurisdiction to protect these rights. With no federal legislation or policy to compel others to consider their interests, Indigenous peoples have little power to oblige parties that may affect their environment to consider them.⁸⁵

Without statutory law to force recognition of non-constitutional interests off-reserve and no judicially recognized right to clean water,⁸⁶ the legal tools for protecting Aboriginal water needs are reactive, such as pursuing actions for damages or applications for injunctions should identifiable harm occur. Such remedies, sought after water quality has already been compromised, are difficult to realize, due to the

82. R.S.C 1985, c. C-11, ss. 4-15. Several multi-jurisdictional watershed plans, known as "ecosystem initiatives" have been launched under this legislation. See e.g. Environment Canada, Atlantic Coastal Action Program, online: Environment Canada <<http://atlantic-web1.ns.ec.gc.ca/community/acap/>>; Environment Canada, The Ecological Monitoring and Assessment Network, online: St Lawrence Action Plan and St Lawrence Vision 2000 <<http://www.eman-rese.ca/eman/reports/publications/SECOND/part26.html>>.

83. See e.g. *Environmental Assessment Act*, S.B.C. 2002, c. 43 (which provides that the Executive Director of the Environmental Assessment Office can order consultation with First Nations as part of an environmental assessment (s. 11(2)(f)), but does not indicate when to make such an order. The Lieutenant-Governor in Council is authorized to make regulations under the Act prescribing procedures for consulting First Nations (s. 50(2)(e)), but has not done so). See also *Environmental Assessment Act*, R.S.O. 1990, c. E.18; *Environment Act*, S.N.S. 1994-95, c. 1 (which are silent as to Aboriginal peoples); John Borrows, "Living between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47 U.T.L.J. 417 at 444.

84. See *Haida*, *supra* note 53 (discussing the Crown's duty to consult when its actions may infringe an existing Aboriginal or treaty right). Although Patrick Macklem has canvassed whether section 35 rights may entail social and economic rights, his foray into this question was extremely speculative. See Patrick Macklem, "Aboriginal Rights and State Obligations" (1997) 36 Alta. L. Rev. 97.

85. Borrows, *supra* note 83 at 444-45.

86. See *Red Mountain Residents and Property Owners Assn. v. British Columbia*, 2000 BCSC 250, 35 C.E.L.R. (N.S.) 127 at para. 24, 98 A.C.W.S. (3d) 749 (where McEwan J. concludes, in the context of a motion to stay the approval of road and cutting permits pending a judicial review, that even if harm to a water supply is irreparable, that "there is not before me an established case for the concept of a 'right' to clean water").

onerous challenges involved in making out a case for harm where the polluter has a license to pollute and has respected provincial environmental standards.⁸⁷ Alternately, lacking formal tools and frustrated by exclusion, Aboriginal peoples may turn to more “blunt” instruments as their avenues of communication, such as property destruction and blockades.⁸⁸ In neither case are their interests accorded legitimate and meaningful space in the decision-making process.

The movement of water thus presents, quite literally, geo-political jurisdictional difficulties. With continuing federal reluctance to make reserve residents' interests legally relevant in provincial decision-making, and little interest from provinces in pulling Aboriginal communities into their framework, there is little to ensure that a reserve's drinking water interests are considered, much less protected as rights, in decisions by provincial or other local authorities. The vulnerability of their water supply to becoming (or remaining) unsafe, and so requiring remedial action, thus increases.

B. Understanding the Interplay Between Federal and Provincial Authority

As discussed above, there are no federally or provincially legislated water regimes that comprehensively address providing and protecting water for reserve communities. However, there are a plethora of federal and provincial laws and regulations and departmental and agency mandates that may prove relevant when specific types of water problems arise. For example, if drinking water has been polluted by arsenic, it can be argued that the provincial agency that administers contaminant regulations, which are laws of general application, or the federal agency with a mandate to protect public health have had their authority triggered. Identifying the right state body is hardly uncomplicated: within the federal government alone, over 20 departments and agencies have responsibilities relating to freshwater. Sometimes the assignment of responsibility reflects use; sometimes the connection is topical.⁸⁹ Environment Canada has acknowledged this dispersal of authority is complicated to manage as “all levels of government hold key policy and regulatory levers which apply to water management, [so] a central challenge is to ensure that these levers are developed and used collaboratively.”⁹⁰ Although this complex institutional arrangement may be man-

87. See e.g. Anastasia M. Shkilnyk, *A Poison Stronger than Love: The Destruction of an Ojibwa Community* (New Haven: Yale University Press, 1985) at 190. See also Kate Harries, “Grassy Narrows: Still fighting to live” *The Toronto Star* (1 December 2003) A8 (discussing the dragged-out lawsuit brought against Abitibi by Grassy Narrows regarding its logging activities).

88. Borrows, *supra* note 83 at 445.

89. For example, although Environment Canada would normally address issues regarding water quality, especially with regards to pollution, the Department of Fisheries and Oceans also has a mandate under federal fisheries legislation regarding pollution in fish habitats. See Saunders, *supra* note 78 at 40-41.

90. Environment Canada, “Water Policy and Legislation: Introduction,” online: Environment Canada <http://www.ec.gc.ca/water/en/policy/federal/e_intro.htm>.

ageable when mobilized and overseen by the state, for First Nations it is potentially a hit-or-miss process, since much will turn on how the various individual state actors themselves believe the issue ought to be characterized. These actors are likely to be cautious in considering whether their mandate is triggered. Not surprisingly, then, the Royal Commission on Aboriginal Peoples concluded that when First Nations have a water problem, “they must struggle to make sense of a confusing map of governmental departments and agencies that might (or might not) have that responsibility . . . [w]ith responsibility divided between governments and among government departments, there is ample opportunity for buck-passing and failure to act.”⁹¹

Such confusion clearly arose in the well-documented Grassy Narrows example, where that community’s efforts to stop the mercury contamination of their water system and to remedy its consequences spanned decades.⁹² This inordinate time span reflected considerable intergovernmental disputes over who was constitutionally responsible for what aspects of the community’s situation. When Justice Hartt delivered his report on Grassy Narrows to the Ontario cabinet, he described reserve residents’ deep sense of “frustration with the inability of the federal and provincial governments to work together to ease their desperate situation.”⁹³ The Royal Commission on Aboriginal Peoples similarly found that “[t]he combination of federal responsibility for public health on reserve and provincial responsibility for environmental protection and the regulation of industry off-reserve (where the problem originated) left the communities with no defined authority to appeal to or work with.”⁹⁴ The communities encountered what I have labelled elsewhere as “a kind of jurisdictional roulette”⁹⁵ where the fact that the authority of various state actors may be involved results in prolonged delay as each state actor makes an independent assessment of how the problem ought to be characterized and therefore, whose authority is rightly triggered.

Over two decades after the Royal Commission made its observations concerning the effects of jurisdictional uncertainty on Aboriginal communities, the issue remains unresolved. One of the three experts appointed to the federal panel to propose solutions to reserve water problems commented in July 2006, that unacceptable delays in dealing with water problems persist in part because different levels of government look after water quality and so “there is a problem . . . in knowing who’s responsible for what.”⁹⁶ A more recent illustration of the inertia and frustration fos-

91. Royal Commission Report, *supra* note 13 at 199.

92. *Ibid.* at 192-93.

93. Shkilnyk, *supra* note 87 at 224-25 (quoting Hartt J. in his report to the Ontario Cabinet on Grassy Narrows).

94. Royal Commission Report, *supra* note 13 at 191.

95. MacIntosh, “Jurisdictional Roulette,” *supra* note 21 at 193-94.

96. “Reserves’ water quality fix won’t be easy: expert” *CBC News* (6 July 2006), online: *CBC News* <<http://www.cbc.ca/canada/story/2006/07/06/reserve-water.html>>.

tered by the jurisdictional parsing of responsibilities, as well as one route out of it, can be drawn from the experiences of the residents of the Kashechewan reserve. After the toxicity of the water supply became public knowledge through extensive media coverage, the Ontario government expressed horror that a community of people located within its bounds lived in such conditions, but was also very clear that it saw no responsibility to act, other than petitioning Canada to airlift reserve residents out.⁹⁷ Meanwhile, the federal government maintained that the power to declare the need for an evacuation was provincial.⁹⁸ As a result, the residents of Kashechewan became witnesses to, and victims of, jurisdictional wrangling. The matter only moved forward when Canada pointed to an agreement signed in 1992, under which Ontario had agreed to provide emergency assistance to First Nations communities, upon request from either Canada or the First Nation in question.⁹⁹ The agreement contains a comprehensive list of which federal or provincial department, agency or ministry is to act in various types of on-reserve emergencies. In other words, in this agreement, the state parties put a practical arrangement into play, under which jurisdictional delineations of responsibilities would not need to be worked through in the face of an emergency. Had the parties remembered the agreement earlier, the inefficiencies of debating jurisdictional scope could have been by-passed. I will return to the effectiveness of such instruments in the concluding section of this paper.

The Royal Commission's observation regarding "buck-passing" understates the complexity of the situation. State actors have good cause to be uncertain as to the scope of their authority (and responsibilities) in this area. Moreover, they are restricted to acting and spending within their lawful mandates. Thus, when jurisdiction is not clear, it is in principle entirely appropriate for decision-makers to respond with caution, rather than risk an unlawful action and/or misspend their budget. While there is this intricate dispersal of responsibilities through levels and branches of government, Canada has failed to develop any responsive mechanism to shepherd water issues through its bureaucracy. Typically, problems are bounced back to the petitioning First Nation. Common sense dictates that the government should take it upon itself to ensure that an unwieldy bureaucracy does not prevent water safety problems and threats to human health and lives from being addressed. But is there any legal obligation on Canada to act any differently than it has thus far?

97. See e.g. Karen Howlett & Bill Curry, "Tempers Flare with Ottawa as Airlift of Natives Begins" *The Globe and Mail* (27 October, 2005) A1; Karen Howlett & Bill Curry, "Polluted Reserve to be Evacuated" *The Globe and Mail* (26 October 2005) A1.

98. "Ottawa Offers to Move Northern Ontario Reserve Plagued by Bad Water" *The Globe and Mail* (27 October 2005), online: *Globe and Mail* <<http://www.theglobeandmail.com/servlet/story/RTGAM.20051027.wnatives1027/EmailBNStory/National/>>.

99. Agreement, Indian and Northern Affairs Canada and Ontario Ministry of the Solicitor General, online: Indian and Northern Canada <http://www.ainc-inac.gc.ca/pr/agr/ona/ona_e.pdf>.

C. Judicial Authority to Address the Ineffective Status quo

In general, Canadian courts do not have the authority to pass judgment on the quality or wisdom of government policies, decisions, or laws, but only the authority to evaluate the lawfulness of such schemes.¹⁰⁰ In the context of explaining the scope of its authority to assess government action under the *Canadian Charter of Rights and Freedoms* (*Charter*),¹⁰¹ the Supreme Court of Canada has been clear that the right to assess lawfulness is limited. Even a *Charter* challenge “does not give the courts a license to evaluate the effectiveness of government action”¹⁰² Thus, the mere fact that various protocols and management decisions have proven less than satisfactory does not normally support a successful cause of action.

Exceptions to this rule arise in the context of the unique legal and historic relationship between the Crown and Aboriginal peoples. In some instances, the Crown’s actions and decisions affecting the interests of Aboriginal peoples are guided by fiduciary duties that have been imposed to “facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples.”¹⁰³ When these fiduciary obligations arise, they place a measuring stick into the hands of courts, and permit assessment of whether the Crown has met its obligations to act with “loyalty, good faith, [and] full disclosure appropriate to the matter at hand and . . . what it reasonably and with diligence regards as the best interest of the beneficiary.”¹⁰⁴ As a consequence, when the duties arise, the judicial analysis does indeed go to assessing factors which are normally outside of judicial scrutiny, such as whether the Crown failed to act as “a man of ordinary prudence in managing his own affairs.”¹⁰⁵

The most recent exposition by the Supreme Court of Canada on the Crown’s fiduciary duty vis-à-vis Aboriginal communities took place in *Wewaykum Indian Band v Canada*.¹⁰⁶ Justice Binnie, writing for the Court, carefully delineates when Crown actions that affect First Nations are subject merely to a “political trust” (i.e. in exer-

100. See *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1142, 4 W.W.R. 481 [*Reference re ss. 193* cited to S.C.R.] (where Dickson C.J.C. states “[t]he issue is not whether the legislative scheme is frustrating or unwise but whether the scheme offends the basic tenets of our legal system”).

101. Part 1 of the *Constitution Act 1982* (U.K.) 1982, c.11, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

102. *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at para. 72, 111 D.L.R. (4th) 385 [*RJR-MacDonald* cited to S.C.R.]. See also *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3 at para. 9, 258 D.L.R. (4th) 275 (where in considering whether the federal policy of assimilation through the Aboriginal residential school system supported a cause of action, the Court wrote that “government policy by itself does not create a legally actionable wrong. For that the law requires wrongful acts causally connected to damage suffered”).

103. *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 at para. 79, 220 D.L.R. (4th) 1 [*Wewaykum* cited to S.C.R.].

104. *Ibid.* at para. 94.

105. *Blueberry River*, *supra* note 43 at para. 104 (cited with approval in *Wewaykum*, *supra* note 103 at para. 94).

106. *Wewaykum*, *supra* note 103.

cising the majority of its legislative and administrative functions, and which does not place it in the role of a fiduciary), and when Crown activities take on a fiduciary character.¹⁰⁷ Significantly, Justice Binnie explained that these unique fiduciary obligations are imposed upon the Crown because “the degree of economic, social and proprietary control and discretion asserted by the Crown” over the interests of Aboriginal people leave “aboriginal populations vulnerable to the risks of government misconduct or ineptitude.”¹⁰⁸ This articulation of why fiduciary obligations arise resonates with respect to water quality on Aboriginal reserves, where a case for inept discretionary policies and practices could possibly be made out.

However, Justice Binnie specified that this duty “does not exist at large but in relation to specific Indian interests.”¹⁰⁹ Consequently, in determining whether or not fiduciary duties arise in any given context, one must identify: “the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.”¹¹⁰ These threshold tests are met in the case of water quality in Aboriginal communities. As discussed above, the federal Crown has asserted and exercised discretionary control over the provision of drinking water on reserves by enacting policies and delegating responsibility among a variety of federal ministries and agencies. As a consequence, the character of Crown actions regarding the provision of drinking water on reserves is subject to judicial scrutiny against fiduciary standards. But has the Crown breached its fiduciary duties? In most cases where a breach of its fiduciary duties is found to have occurred, the Crown has taken an action which either impairs a constitutionally or treaty protected Aboriginal right pursuant to section 35 of the *Charter* (which is not evident here) or changes the situation of an Aboriginal community in a manner which is irreversible and not in the community’s best interests. Successful actions were brought in *Guerin*¹¹¹ and *Blueberry River*.¹¹² In *Guerin* the Crown ignored its mandate from a First Nation regarding the terms of a lease for certain lands, and committed the First Nation to a long-term lease with terms highly detrimental to the First Nation. Similarly, in *Blueberry River*, the Crown was given discretion by a First Nation to sell off its reserve land, but was careless and erroneously transferred the underlying mineral rights to a third-party instead of reserving them to the First Nation as was the usual practice. Once again, the Crown’s actions resulted in irreversible loss.

In the case at hand, there is no loss of a legal interest or right. Instead, Canada has acknowledged the existence of problems, and has made policy decisions about

107. *Ibid.* at paras. 72-77.

108. *Ibid.* at para. 80.

109. *Ibid.* at para. 81.

110. *Ibid.* at para. 83.

111. *Guerin*, *supra* note 73.

112. *Blueberry River*, *supra* note 43.

how to address them. In discussing the difficulties that courts face when they are asked to assess the reasonableness of policy choices, Justice LeBel wrote for the Quebec Court of Appeal in *RJR-MacDonald v. Canada (Attorney General)*: “[i]t is often difficult to forecast the future and to anticipate the beneficial or negative consequences of government policy. A well-conceived policy may be poorly applied. The necessary institutional resources may fail; unforeseen obstacles may intervene.”¹¹³ As a consequence, Justice LeBel cautioned against courts attempting to scrutinize policy decisions too closely. The fact that Canada has changed course numerous times works against finding a breach, as it suggests Canada is responding to its own failures. A further complication is that the policies have been successful in some communities, mitigating against a general claim against the Crown. What of individual claims brought by specific communities? They may indeed be able to make out a case that the Crown has taken control over their water, and has acted with ineptitude or inconsistently with the obligations of a fiduciary. But what then? Fiduciary breaches sound in damages, but what is the appropriate monetary compensation for inept and wasteful policies? At most, all that would ensue is a declaration of a breach of the fiduciary obligations to act as a reasonable person, looking after his or her own interests.

In summary, incidences of jurisdictional uncertainty and hesitation are all the more prevalent in a federal system where powers are divided between provincial and federal governments and those further divided into departments and specialized agencies. Issues such as water conditions, from off-reserve to reserve territories, are particularly vulnerable to jurisdictional uncertainty either physically or conceptually in terms of potential provincial legislative reach. With each governmental agency operating under its own budget, the question of fiscal responsibility—who ought to pay—must normally be resolved before action can be authorized. Though basic well-being is at issue, in such bureaucratic and jurisdictional uncertainty, the problems in reserve communities are structurally pre-disposed to stagnation, leaving people at risk.

D. Jurisdictional Stove-Piping

In contrast to situations where state actors hesitate to act due to uncertainty over the distribution of authority, a problem also arises when state actors do act, but are constrained in their effectiveness due to a phenomenon that the Auditor General has labelled “jurisdictional stove-piping.”¹¹⁴ Here, various levels of government or agencies acknowledge that they have relevant powers, but their actions or responses lack coordination because each agent’s plan is tied to their specific responsibilities. That is, their plan or response is defined (or “stove-piped”) to exactly reflect their specific mandate and budget. As a result, the plan may be technically sound but operational-

113. *RJR-MacDonald v. Canada (Attorney General)*, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289 at 312 (Q.C.A.).

114. Auditor General 2006, *supra* note 32 at para. 5.52.

ly ineffective or inefficient.¹¹⁵ Officials within INAC have acknowledged that they struggle with this issue.¹¹⁶

A provincial/federal example of this type of problem can be drawn from the Gull Bay reserve. Here, Canada approved an application from the Gull Bay First Nation to construct a new \$5 million water treatment plant. Although completed in 2002, this plant has not yet been put into operation. Ontario claims Canada may not lawfully operate the plant, despite its location on "lands reserved," until it is issued a permit pursuant to provincial law. Such a permit may not be forthcoming as the plant design, although approved for funding by Canada, may not meet provincial standards. This rare instance of provincial assertion of on-reserve jurisdiction has not been well-received, and the federal government appears to have walked away from the situation in frustration. When the fact that the plant had sat idle since 2002 was last raised in Parliament in October of 2005, then Minister of Indian Affairs and Northern Development Andy Scott responded "as soon as the community and the province that inspects the water treatment facility come to terms, we will be able to operate it."¹¹⁷ The consequences of this lack of coordination by different levels of government in a situation where state actors each claim a distinct role, is clear enough: three more years of bringing in bottled water, and a plant which may never be turned on.

Jurisdictional and departmental parsing of responsibilities, and thus funding and coordinating responses, can also undermine remedial action. The complete social breakdown of the community of Grassy Narrows in the years following their forced relocation and then the mercury poisoning of their river system, has been attributed by some to the jurisdictional parsing of their recovery needs at the time these needs were first articulated. This community was in an acknowledged state of environmental, social and economic crisis, which manifested itself in suicides, violence, arson and alcohol abuse. In its request for assistance, the band council asked for "experts . . . not civil servants" who could help the community find a way for "coping with social upheaval."¹¹⁸ The community clearly recognized the complexity of its situation.

As the relocation of the band was a federal project, and the province was involved with the industrial mercury discharge, a provincial task force recommended severing the consequences of the relocation, and any programming or price tag associated with remedying those consequences, from those addressing the consequences of mercury poisoning. The fact that these incidents were intermeshed and necessarily had a cumulative impact on the social well-being of the community was

115. *Ibid.*

116. *Ibid.*

117. *House of Commons Debates*, No. 141 (25 October 2005) at 1445 (Hon. Andy Scott).

118. Shkilnyk, *supra* note 87 at 212.

overshadowed by divisions of jurisdictional interests and separate pocketbooks. In terms of provincial obligations, the task force drew a direct link between the mercury and the community's loss of its food fishery, the resulting dependence upon commercial food, and the lost employment for guides as fishing lodges shut down. Although it is technically difficult to draw a further linkage between the mercury poisoning, the undermining of the community's social system as a fishing culture, and the elevated levels of suicide, substance abuse and violence, such a connection is not hard to make on a more conceptual level. Nonetheless, the task force recommended the province's role be limited to shipping in replacement food, locating non-polluted lakes that could be used for new lodges, and paying compensation for lost employment. Only the first recommendation (on replacement food) was implemented when the province purchased commercial sized freezers for the reserve and stocked them with frozen fish.¹¹⁹ The provincial response, although following a narrow, if technically accurate calculation of jurisdictional responsibility, edited out addressing the broader social symptoms which plagued the community.

The federal government set up its own task force. After determining that the most serious harms of mercury pollution to the community were economic, social, and cultural, rather than medical, the federal government then struck a standing committee to create an action plan. The committee is considered to have accomplished little, due to internal disputes regarding which federal department held the relevant mandate, and financial responsibility.¹²⁰ Quite simply, "neither the government of Ontario nor the government of Canada was prepared to . . . undertake coordinated and comprehensive measures toward social and economic reconstruction."¹²¹

The phenomenon of jurisdictional stove-piping creates a second impediment to the realization of adequate standards of living for reserve communities, as multiple but unilateral action plans fail to come together to comprehensively address the substantive issues. An example in the context of housing conditions is documented in the Auditor General's 2006 Report. The Auditor General found that the problem of mould contamination in reserve housing, a serious health and safety problem, persists because, although three federal entities acknowledge their mandates are implicated, "no federal organization has taken responsibility for . . . developing a comprehensive strategy for addressing it."¹²² Instead, Health Canada sees its role as research, on-site

119. *Ibid.* at 213.

120. *Ibid.* at 213-14.

121. *Ibid.* at 213. It took another 10 years for Canada to seriously commit to assisting through economic and social service development, and for Canada and Ontario to create a joint board to compensate those individuals who could prove mercury poisoning. See *Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act*, S.C. 1986, c. 23; Indian and Northern Affairs Canada, "Fact Sheet: English-Wabigoon River Mercury Compensation," online: Indian and Northern Affairs Canada <http://www.ainc-inoc.gc.ca/pr/info/ewr_e.html>. See also Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 40 (26 June 1986) at 2022; Shkilnyk, *ibid.* at 224.

housing inspections, and recommendations. Canada Mortgage and Housing sees its role as providing education and training workshops. INAC sees its role as providing financial contributions for any housing renovations.¹²³ Although lines of responsibility have been delineated, there is no single party driving a master plan, no umbrella mechanism in place to coordinate the activities of federal organizations or monitor progress, and no one authority to turn to for accountability purposes. When plans are strictly parsed along jurisdictional lines or internal mandates, and levels of government fail to bring their power and resources together, actions may be costly, but seldom do they address the issue adequately or comprehensively. This jurisdictional wrangling, so inherent to federalism, sheds more light on why water problems persist in general, and why resolving identified problems can be so difficult.

The above sections have identified how jurisdictional and statutory fragmentation, gaps, and crossovers currently complicate the delivery of clean drinking water, and may frustrate the effectiveness of state action in response to specific situations. They also illustrate how the on-reserve drinking water regime operates in practice, including the protocols and guidelines, and state/band council practices that reserve residents depend upon on a daily basis to provide them with safe drinking water. Clearly emerging from this analysis is the fact that these ineffective practices are already mired in unresolved jurisdictional questions owing to unclear or non-existent statutory terms of reference. I turn now to the latest water protocol, to consider how it advances or perpetuates the current situation.

V. THE 2006 *PROTOCOL FOR SAFE DRINKING WATER IN FIRST NATIONS COMMUNITIES*

As noted in the introduction, the federal government under Prime Minister Stephen Harper has initiated actions to address on-reserve drinking water problems. Former Minister of Indian Affairs and Northern Development Jim Prentice appeared to be following up on comments he made while in opposition: “[t]he federal government has failed to ensure that this basic right [to safe drinking water] is provided to all Aboriginal Canadians. The health and safety of up to half a million Canadians in 600 First Nations communities have been threatened. That is not acceptable.”¹²⁴

In late March 2006, Minister Prentice announced the *Protocol for Safe Drinking Water in First Nations Communities* (the *Protocol*),¹²⁵ one of the products of the FNWMS.

122. Auditor General 2006, *supra* note 32 at para. 5.36.

123. *Ibid.*

124. Jim Prentice, News Release, “Prentice demands safe drinking water for First Nations Communities” (29 September 2005).

Although the *Protocol* refers to standards, it is a policy document, not law, and so does not fill the legislative void. Rather it sets out a set of eight legally unenforceable guidelines, and INAC's policy position on terms for agreements with First Nations who operate and maintain their water systems. Much of the *Protocol* replicates and consolidates existing practice and policy. As a result, only certain aspects of the *Protocol* are addressed here. In particular, how the *Protocol* might address some of the jurisdictional and bureaucratic impediments discussed thus far, and how it might modify the terms of existing agreements with First Nations.

The *Protocol* is responsive to the watershed factor, the natural fact that water courses over jurisdictional boundaries, and establishes a requirement to address this fact.¹²⁶ In particular, it states that “[p]ersons responsible (i.e. First Nations operating authorities) for drinking water systems covered by the *Protocol* must participate with stakeholders . . .” to develop a source water protection plan, and to do so are to bring in team members who represent all parties with regulatory or stakeholder interests.¹²⁷ The *Protocol* identifies these parties as including municipalities, government departments, agricultural interests, industry including resource-based companies, utilities and manufacturers and other commercial enterprises.¹²⁸ As noted earlier, when INAC identified the generalized watershed problem in 2003, it recommended finding an effective route for bringing reserve interests to the table in discussions with provincial and municipal regulatory bodies, which could be accomplished under the *Canada Water Act*.

The *Protocol*, however, appears to make First Nations responsible for coordinating and bringing these governmental parties and industry players to the table, and for developing a plan to protect source water. Given that the *Protocol* states that “INAC will ensure compliance with this protocol via ongoing funding conditions,”¹²⁹ it would appear that the failure to accomplish this daunting governmental task could result in operating budgets being withheld from noncompliant First Nations.

Reserve communities are highly motivated to form a collaborative watershed plan, both because it bears on their water quality, and because their funding may be cut if they fail to do so. What of other parties? One must ask why any upstream industrial or commercial body, or provincial or municipal body for that matter, would voluntarily agree to enter discussions with a First Nation. If a company or a municipality is complying with current provincial law, providing local employment and provincial

125. Indian and Northern Affairs Canada, *Protocol for Safe Drinking Water in First Nations Communities (Standards for Design, Construction, Operation, Maintenance and Monitoring of Drinking Water Systems)* (Gatineau: Indian and Northern Affairs Canada, 2006), online: Indian and Northern Affairs Canada <<http://www.inac-ainc.gc.ca/h2o>> [*Protocol*].

126. *Ibid.* at 2.

127. *Ibid.* at Appendix B.

128. *Ibid.*

129. *Ibid.* at 15.

and municipal tax dollars, why would it choose to attend meetings to hear arguments that it ought to change its practices due to down-stream impact on non-constituents? Stepan Wood's extensive analysis of voluntary environmental codes demonstrates the unwillingness of industry to "voluntarily" agree to substantive changes unless there is a real threat of regulation,¹³⁰ and Jamie Benidickson's commissioned research for the Walkerton Inquiry similarly examples how provincial interest in encouraging industrial activity has resulted in a "willingness to sacrifice ambient water quality."¹³¹ When Grassy Narrows put up logging blockades in 2003 to prevent Abitibi-Consolidated from exercising its rights under logging permits, Abitibi's contribution to meetings with community representatives was to point out that the permits were lawfully issued, and to state that they would only act in accordance with these permits.¹³² The fact that Grassy Narrows believed logging would cause erosion that would compromise their watershed had no legal or persuasive relevance from the perspective of either the province or the industry stakeholder.

To follow the apparent intentions of the *Protocol*, which would assign the complex task of leading the formation of watershed plans to First Nations, is to shift a persistent and difficult problem in governmental responsibility onto what are usually small communities, with limited capacity or expertise. First Nations may well wish to take on this governance role, but the *Protocol* does not create conditions conducive to cooperative planning or joint management. It does not address conflicting interests, nor does it create any incentives for other stakeholders to alter their practices. Including First Nations drinking water interests in watershed plans is essential. And while it is promising that the *Protocol* recognizes this fact, this specific strategy is replete with pitfalls.

Another troubling aspect of the *Protocol* is the provisions on public health risks. A requirement for funding is that First Nations must agree that if there is a risk to public health due to operation or maintenance issues, and the First Nation "lacks the ability" to address the issue, "INAC has the right to intervene and [temporarily] engage third-party service providers" to remedy the situation.¹³³ Although vague, and potentially permissive as opposed to obligatory, this term seems to inject a promise of a remedy when certain crisis situations arise. It appears, at least, that reserve residents may at last be able to call for a remedy when their health is at risk due to operational or maintenance problems, although not if the water is contaminated for other

130. Stepan Wood, "Voluntary Environmental Codes and Sustainability" in Benjamin Richardson & Stepan Wood, eds., *Environmental Law for Sustainability* (Oxford: Hart Publishing, 2006) 229 at 271-72.

131. Jamie Benidickson, *Water Supply and Sewage Infrastructure in Ontario, 1880-1990s: Legal and Institutional Aspects of Public Health and Environmental History (Walkerton Inquiry Commissioned Paper 1)* (Ontario: Queen's Printer) at 151.

132. Harries, *supra* note 87.

133. *Protocol*, *supra* note 125 at 15.

reasons, such as up-stream pollution which the community lacks the ability to address. The difficulty here is the *Protocol* does not suggest a meaningful way to return the operations to the hands of the reserve community. That is, there is nothing in the *Protocol* requiring INAC to assist the First Nation in developing its own capacity and management abilities so that the First Nation will be more capable of handling or preventing similar future problems under its own governance activities. So where failure arises due to lack of capacity, the capacity problems remain after the specific crisis is resolved. The *Protocol* thus acknowledges some key problems, but retains many of the flaws of current practices.

VI. MOVING ON

A. The Risk of Merely Coupling Spending With Guidelines

How does it happen that we are still only working with policies and guidelines, and not with results-oriented legislation, when health has continuously been threatened? When standards manifest in laws, then a specific minimal outcome is required. Guidelines, on the other hand, “reduce accountability and responsibility. Guidelines are interpreted as goals to be aspired toward, whereas [lawful] standards provide certainty because they must be met.”¹³⁴

In theory, legislated standards would force a resolution, as they do for federal employees whose worksite is on reserve. In 2002 alone, the *Canada Labour Code* and *Occupational Safety and Health Regulations* compelled Health Canada to install water treatment units in 20 on-reserve nursing clinics for use by its employees, as the local water did not meet federal safety standards.¹³⁵ The community residents, for whom the federal standards are merely guidelines, must boil, disinfect and bring in water. Indeed, all populations under federal jurisdiction have their drinking water protected by law, except for on-reserve First Nations people.¹³⁶

Is it just a matter of political voice that distinguishes the situation of on-reserve federal employees and reserve residents? A more positive proposition is that the lacuna may relate to deference, or political sensitivity, to First Nations’ aspirations to regulate their own lives,¹³⁷ coupled with anticipation that such matters will be addressed as part of comprehensive self-government agreements. Such a show of deference, if that is what it is here, may be politically appropriate, but is irresponsible

134. Boyd, *supra* note 1 at 22.

135. See Commissioner of the Environment Commissioner, 2005 Report, *supra* note 3 at para. 5.27; *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 125(1)(j). See also *Occupational Safety and Health Regulations*, S.O.R./86-304, s. 9.24.

136. See *Aviation Occupational Safety and Health Regulations*, S.O.R./87-182, s. 4.9; *Marine Occupational Safety and Health Regulations*, S.O.R./87-183, s. 7.24(1); *Oil and Gas Occupational Safety and Health Regulations*, S.O.R./87-612, s. 10.19.

137. Commissioner of the Environment, 2005 Report, *supra* note 3 at para. 5.36 (reflecting Health Canada’s comments about the political sensitivity of working with band councils).

where the regulatory space has been left empty for so long that a sub-standard situation which impacts human health has become the status quo. The situation is analogous to Canada's decision to exclude band council actions from the operation of the *Canadian Human Rights Code* in 1977, due to the expectation that negotiations with the National Indian Brotherhood would result in a new Aboriginal-endorsed *Indian Act*, complete with human rights protections.¹³⁸ The negotiations failed, and, 30 years later, band councils remain, apparently, outside the ambit of the *Human Rights Code*.¹³⁹

This is all to say that, regardless of funding levels, the risk of coupling expenditure only with guidelines is that it may continue to deflect attention from outcomes. In the case of federal employees, there is a line of legislated accountability which results in on-reserve nurses having access to safe water, even if the workplace water systems turn out to be more expensive to purchase, operate or maintain than anticipated. In the case of reserves, Canada's choice not to impose a legislative regime has allowed all potentially responsible bodies, including band councils, to avoid direct legal liability or the imposition of a judiciable directive to act.

B. The Limits of Law

Legislation remains the clearest answer, with an obvious approach being that Canada harmonizes standards on reserves with each province and identifies a line of accountability, an overseer, and remedial mechanisms. Laws which only harmonize, however, would at best provide partial respite. As the above discussion illustrates, serious jurisdictional questions bog down state action in this area, and would limit the effectiveness of any unilateral attempt by the federal government to legislate a solution. The approach proposed above would address some issues, but it would also perpetuate many of the identified impediments to effective on-reserve water management. Imposed from above, it may also have questionable legitimacy from the Aboriginal perspective, and be seen as counter to Aboriginal political goals. How might governmental legitimacy and practical effectiveness be achieved at the same time?

C. By-Passing Jurisdictional Problems and Creating Political Legitimacy

Iverson offers insight for answering these questions. In his vision of the contemporary Aboriginal-state relationship, his conception of legitimate agreements requires evidence that those who have consented have the continuing possibility to contest and alter the arrangements. This approach, which seems to resonate with the notion of a relationship more than a contract, has not been directly incorporated in arrange-

138. Wendy Cornet, "First Nations Governance, the *Indian Act*, and Women's Rights" in Judith F. Sayers *et al.*, eds., *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 2001) 117 at 124-26.

139. There continues to be debate and conflicting jurisprudence regarding whether band council decisions are subject to *Charter* restrictions.

ments surveyed to date, although it has been alluded to.

In the hearings held as part of the Walkerton Inquiry, the Chiefs of Ontario advocated for a tripartite relationship between INAC, First Nations and specific provinces. They concluded that such a relationship “may well be better equipped than the federal government to provide some of the mechanisms to build First Nations capacity to operate and maintain effective water treatment systems.”¹⁴⁰ I suggest taking this one step further, to consider the nexus between cooperative endeavours and the resolution of jurisdictional problems, a nexus which I have explored elsewhere, in the context of improving Aboriginal public health programming.¹⁴¹

At present, the extent and interrelation of federal and provincial responsibilities has to be fought out on a case-by-case basis, with the answer varying from province to province due to differences between their statutory and common law regimes. Any debate about constitutional interpretation and assignment is likely to be lengthy, complicated, and unlikely to result in agreements unless questions are referred to the courts. Alternately, in the context of a cooperative nexus, governmental parties and First Nations can attempt to reach compromise-based agreements, similar to the agreement between Canada and Ontario for addressing emergency situations on Indian reserves. Tripartite agreements can bypass jurisdictional questions, which would otherwise be serious impediments. As Justice Abella stated in *Fédération des producteurs de volailles du Québec v. Pelland*, Canada and the provinces have successfully entered agreements “designed to weave together the legislative jurisdiction of both levels of government to ensure a seamless regulatory scheme.”¹⁴² When the constitutionality of the delegation of regulatory powers and referential incorporation of provincial law under such an agreement was challenged in *Pelland*, the Court found the agreement stood both in law and in policy. Justice Abella also commented that “I see no principled basis for disentangling what has proven to be a successful federal-provincial merger.”¹⁴³ Indeed, Justice Abella described such referential incorporation as “a useful technique when there is overlapping constitutional jurisdiction and it is necessary to dovetail federal and provincial legislation.”¹⁴⁴

Although difficulties engendered by the division of powers under the Constitution can be worked through, there is still the question of funding. Formulas for mutual contributions are not impossible. The very general terms in the *Canada Water Act*¹⁴⁵ have enabled the negotiation of cross-jurisdictional and multiple party funding arrangements for ecosystem initiatives. Motivation to resolve the funding question has two key sources. First, such agreements could circumvent the jurisdic-

140. Walkerton Inquiry, *supra* note 57 at 493.

141. MacIntosh, “Population Health,” *supra* note 21 at 365-66.

142. 2005 SCC 20, [2005] 1 S.C.R. 292 at para. 4, 251 D.L.R. (4th) 577 [*Pelland* cited to S.C.R.].

143. *Ibid.* at para. 38.

144. *Ibid.* at para. 53.

145. *Supra* note 82 at s. 8.

tional complications of uncertain authority and stove-piping, with their wasted expenditures, inefficiencies, and failed outcomes. Second, without such agreements, it seems likely that reserves will continue to experience water problems, and the resulting crises which often ensue.

A broader benefit to Canada, the provinces, and First Nations is that agreements which effectively erase jurisdictional divisions and harmonize standards would also facilitate regional collaborations and joint management between proximate Aboriginal and non-Aboriginal communities, who could share a water treatment facility, infrastructure or other resources. Commissioner O'Connor recommended such collaboration in the Walkerton Report, where he found it unreasonable and unrealistic to expect small communities to individually shoulder water responsibilities.¹⁴⁶

These sorts of cross- and inter-jurisdictional relationships would benefit from a statutory foundation. Environmental scholar Jamie Benidickson has observed that “[t]ensions between departmental agendas are sufficiently common . . . especially when health and environmental issues intersect with natural resource development and the economy that an effort to underline common purpose [by statute] is not entirely unwelcome.”¹⁴⁷ Benidickson thus calls for some statutory expression of obligations, which mandate interdepartmental cooperation.

Intriguingly, the Auditor General recently acknowledged the value of legislating rules to anchor relationships between government bodies and First Nations. In her 2006 audit of the federal government's progress in addressing her office's 2000 and 2003 recommendations on First Nations issues, the Auditor General identified factors associated with successful initiatives. Like my conclusions, these factors include: sustained attention by senior managers to following a plan's implementation, coordination among departments, creating internal capacity to administer programs, and, pertinent to the specific point at hand, developing a “legislative base for programs [that] clarifies respective role and responsibilities”¹⁴⁸ The Auditor General found that where a legislative base was missing, and parties proceeded based on policy, this “caused confusion among government officials and clients about the jurisdiction, allocation of responsibilities, and rights of the Department and clients.”¹⁴⁹

Ultimately, law can play a key role at two points in resolving the impasse over water quality on First Nations reserves. First, law can create, shape and support inter-governmental relationships, which by virtue of agreements can bypass jurisdictional impediments. This relationship must involve federal, provincial and Aboriginal governments. One element of the structure would include assigning responsibility to a

146. Walkerton Inquiry, *supra* note 57 at 495-96.

147. Benidickson, *supra* note 131 at 404-05.

148. Auditor General 2006, *supra* note 32 at paras. 5.50-5.59.

149. *Ibid.* at para. 5.57.

single authority to oversee or shepherd all elements of the relationship, so that problems do not simply stagnate as bureaucratic orphans. Second, law can dictate minimum outcomes through water quality standards. Standards and responsibilities cannot continue to exist as policy guidelines moored to an elastic political will. Nor can the standards differ from those of the provinces in which the reserves are located, for such variation will undermine efforts to form cooperative on-reserve/off-reserve watershed or community based relationships. Within such a legislated framework there is ample room for dynamic local agreements and arrangements that take advantage of local strengths and accommodate local weaknesses or complications. There is also space for First Nations that wish to further develop their capacity to take a stronger governance role. This flexible governmental relationship evokes Ivison's conception of legitimate liberal post-colonial Aboriginal-state relationships, because it ensures that although First Nations have consented to the agreement, giving consent to an agreement is not a final act, but rather part of forming a relationship as they remain able to meaningfully alter the terms of the agreement in response to changing circumstances and capacities. Such a model, where multi-jurisdictional relationships have both legislative underpinnings as well as measurable legislated outcomes, holds promise for many other areas, such as health and housing, where Aboriginal communities suffer comparative deprivation due, in large measure, to the political and bureaucratic complexities of Canada's fluid jurisdictional structure.