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SAFE WATER FOR FIRST NATION COMMUNITIES: LEARNING THE LESSONS FROM WALKERTON

A Paper Presented By

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INTRODUCTION

"The water provided on many First Nation reserves is some of the poorest quality water in the province"[1].

This was the principal finding relating to First Nation communities of the Walkerton Inquiry, following an exhaustive study of the provision of potable water in Ontario. To anyone familiar with reserve communities, whether in Ontario or the rest of Canada, such a conclusion comes as no surprise. Indeed, water is symptomatic of a much wider problem facing First Nation communities. Almost all of their systems for delivering services to their residents are under developed. For example, reserve communities have schools but nothing equivalent to a school board or a provincial department of education. In other areas - such as natural resource management, environmental protection, fire protection and the provision of water - regulatory voids abound.

Potable water is particularly worrisome, given the implications for health and safety. The Walkerton Inquiry summarized the situation facing the provision of safe water in First Nation communities as follows:

- Infrastructure is either obsolete, entirely absent, inappropriate, or of low quality;
- Not enough operators are adequately trained or certified;
- Testing and inspections are inadequate;
- Microbial contamination is frequent; and
- Distribution systems, especially on reserve, are sized to deliver about half the water per capita available to other Ontarians.[2]

In an earlier policy brief on potable water[3], the Institute On Governance pointed to several additional problems relating to the lack of a proper regulatory system for reserves. Consider the following:

- <u>There is no effective legislative base for regulating potable water on reserves</u>. The operative federal standards, set out in the "Guidelines for Canadian Drinking Water Quality", are just that - guidelines, with no legislative teeth[4]. Moreover, they are vague in places and fast becoming obsolete in the face of provincial initiatives to introduce more demanding norms.[5] On the other hand, relevant provincial law may not apply to Indian lands for constitutional reasons. Even if some provincial laws do apply, provincial governments have shown reluctance in the past to enforce such laws. Finally, by-law making powers for First Nations under the *Indian Act* are inadequate to deal with regulating potable water.

- <u>Among the principal players involved in assuring water quality, there is a lack of clarity about roles</u>. There is no public document laying out the agreed upon responsibilities of the key federal departments (Indian and Northern Affairs, Health and Public Works & Government Services) and those of Chief and Council, water plant operators or tribal

councils. In short, it is unclear who has the ultimate responsibility to shut down a plant in a Walkerton-like situation.

- Informing First Nation citizens of the results of water testing is not a federal requirement under its funding arrangements with First Nations.

- Finally, and this is by no means a comprehensive list, the nature and frequency of water testing in First Nation communities does not always comply with federal guidelines.

Does any of this really matter? Plentiful examples suggest that it does. One of the most telling was a tragedy in some respects far worse than that of Walkerton, a tragedy that occurred in the Cree communities of Waskaganish and Nemaska in the early 1980s. An estimated eight children died from gastro-enteritis in one season, likely caused from contaminated water from a central well tap[6].

The obvious question is "what's to be done?" The purpose of this paper is twofold. First, it charts a reform package for those First Nations falling under or who may fall under self-government agreements. In establishing modern, First Nation governments these agreements have the potential for addressing the regulatory and other problems noted above. Second, it will suggest a series of policy changes for those First Nations who remain under the *Indian Act*.

PART ONE: PROBLEMS WITH SELF-GOVERNMENT

Self-Government Agreements

Signed in 1975, the James Bay and Northern Quebec Agreement and the North Eastern Quebec Agreement were the first modern lands claim treaty and self-government agreements. Others soon followed, including self-government agreements with the Sechelt Indian Band, with seven First Nations in the Yukon, 14 First Nations involved in the Framework Agreement on First Nation Land Management, and with the Nisga'a. Several other negotiations, involving close to 30 First Nation and Inuit communities, are in the advanced stages.

All of these agreements are the result of intensive negotiations between First Nations representatives and their federal counterparts. Some, including the Nisga'a agreement and the those in the Yukon, also involve provincial or territorial governments. The aim of these agreements is to establish modern, First Nation governments with powers and capacities found in both provincial and municipal governments. Some – for example, the Framework Agreement on First Nation Land Management – focus on a single sector. Others are more comprehensive in nature. All involve legislative change that, among other things, removes the First Nations in whole or in part from the *Indian Act,* a piece of legislation that still reflects its Victorian-era roots and that was never intended to empower First Nation governments.

Do these modern, self-government agreements address the regulatory and other problem areas noted in the introductory section? The answer is that, with few exceptions, they do not. Indeed an argument can be made that many of the agreements actually worsen the situation. The Institute has conducted a review of these agreements and reached three conclusions relating to potable water.

First, self-government agreements with First Nations provide them with the jurisdiction to deal with potable water and in some cases, but not all, dictate that standards must be equal to or exceed existing federal or provincial ones. But most do not ensure that First Nations or the Provinces will fill the existing regulatory void. Thus, it is possible for communities under some self-government agreement to have no regulatory system of potable water whatsoever. Such appears to be the case for some long-standing agreements such as the Cree of Northern Quebec and the more recent agreements affecting First Nations in the Yukon. Lamentably, there is a similar potential in even more recent agreements - for example, with the Meadowlake First Nations and with the Sioux Valley First Nation.

Second, many of the agreements make no provision for the necessary tools to build a proper regulatory system. Thus, there is little consistency among the agreements relating to such matters as inspection and enforcement powers, penalties, the use of user fees, the transfer of assets, and the harmonization of laws with the province. The Nisga'a agreement, the latest to be signed and formalized in law, deals with the public works function in three short sentences and does not even refer to potable water.

Finally, the large majority of the agreements do not provide an appropriate governmental structure for an effective regulatory system for potable water and other matters requiring regulation. In particular, most of the agreements create a single tier model of government, assigning both the regulatory and operating responsibilities to the same government without any special provisions for how a government can effectively regulate itself.

On this last point, Brian Crowley, president of the Atlantic Institute for Market Studies, a Halifax-based think tank, states the problem succinctly as follows:

> "When the government is a supplier of a service, such as water, it tends to be a poor regulator of quality. Regulator and supplier often work in the same department, may belong to the same union, and are both responsible to the same elected officials – who want to avoid unpleasantness and conflict. Problems are hushed up or ignored with a wink and a nod. Governments can be far more rigorous regulators when they are at arm's length from the supplier."[7]

Several agreements, notably with the Nisga'a, do create a two tier system of government but are not structured to permit the assignment of operating responsibilities to one tier and regulatory responsibilities to the other. Other agreements - for example, involving the Meadowlake First Nations and the Sioux Valley First Nation - allow for responsibilities to be delegated to a larger aggregation such as a tribal council. Whether such delegation will be used with potable water, whether it would be sustainable, given that delegated responsibilities can be withdrawn, whether a tribal council is of sufficient size and independence to exercise regulatory responsibilities - these are all unanswered questions.

In summary, most self-government agreements may actually worsen the potential for problems noted above for First Nation communities under the *Indian Act*[8]. The contrast with the United States is stark. There, only one tribe, the Navajo with a population of 140,000 occupying a land mass the size of the West Virginia, has jurisdiction for regulating potable water (in Canada, the

average on reserve population is approximately 600) - and it took the Navajo some eight years of preparation before taking on the responsibility. That said, the need for effective separation of the regulatory function from operations in the Navajo Nation remains a concern for US officials.

Policy Implications

Of the policy implications flowing from this analysis, five stand out. The first is painful: the signatories of existing self-government regimes need to review their potable water situation and move to fix any existing problems as best they can. This might mean modifying the agreements themselves. A corollary is that existing agreements - such as the Framework Agreement on First Nation Land Management - should not be extended to other First Nations until it is clear that potable water and other matters requiring a regulatory regime can be handled adequately[9].

Second, for new agreements, self-government negotiators on all sides have to take the regulatory function far more seriously. The box below summarizes characteristics of effective regulation, recognized by the federal government[10].

Characteristics of Sound Regulatory Systems

- Clear, concise, consistent and measurable regulatory objectives
- A legislative base
- Clear roles and responsibilities among the key players, including what to do in an emergency
- An appropriate balance of promotion, monitoring and enforcement activities
- A regulator that is set up and organized in a way that limits the ability of other stakeholders from unduly influencing monitoring and enforcement
- An understanding of the regulated group, including who they are and how they behave. This knowledge will assist in developing effective promotion, monitoring and compliance
- Regular evaluation for effectiveness, and adjustment due to intervening factors

For each governmental jurisdiction in which regulation plays a role (and there are many of these including potable water, sewage treatment, housing construction, environmental protection, resource management, policing and a series of social services), negotiators need to ask themselves how the agreement should be structured to ensure that these characteristics can be realized. Sadly, negotiators of past self-government agreements appear to have overlooked regulation as a matter worthy of any serious attention. Their focus has been primarily on jurisdictions and not on the tools or instruments of governance. That sound governance is as much about means as ends is a principle that should inform all future negotiations.

The third implication is even farther reaching. If negotiators accept the premise that governments like other organizations have difficulty regulating themselves, they appear to have two options:

- apply provincial regulatory systems to the First Nation government (this is already happening in certain jurisdictions such as oil and gas production on Indian reserves and in the regulation of child and family service agencies) or
- develop a two-tier First Nation government with regulatory and operating roles clearly defined and separated.

Up to now neither of these options has been popular with First Nation negotiators. Being subjected to a significant amount of provincial law and regulatory enforcement will not go down well in many communities. Nor will the notion of being subject to a 'higher' order of Aboriginal government mesh with the assumption that the inherent right to self government rests at the community level, an assumption held by many First Nations across Canada. That said, self-government regimes that retain both operating and regulatory responsibilities in a single tier government should be regarded with much scepticism.

Likely the most practical way of proceeding is as follows. Self-government agreements should establish a two tier system of First Nation government with the first or 'senior' tier encompassing a large region or even a province. The second tier would consist of individual communities. The first tier would then proceed to adopt a law that would incorporate by reference provincial laws with regards to potable water. This would be accompanied by an agreement with the province such that provincial inspectors and enforcement personnel would act as agents of the First Nation government. Further, this agreement would include a strategy for developing capacity for the First Nation government to eventually exercise some, or perhaps all, of these regulatory responsibilities.

This proposed solution leads to a fourth implication, namely that self-government negotiations involving potable water and other functions requiring regulation for health and safety reasons should not proceed without provincial involvement. Even if negotiators choose a two tier system of government, it is hard to imagine these regulatory systems working without some provincial participation. Developing science-based organizations for testing and certification purposes does not appear feasible in the short run and will only benefit from provincial involvement in the longer term.

Finally, the federal government, First Nation communities under the *Indian Act* and the provinces need to get serious about tackling the myriad of regulatory problems relating to reserve lands. Dealing with potable water would be a good starting point but efforts should encompass many other areas as well. Protecting the health and safety of citizens, achieving sound environmental management, practising sustainable forestry management - these are some of the objectives that should drive such efforts. Furthermore, from a self-government perspective, the numerous regulatory gaps now facing First Nation communities make the building of effective self-government regimes a monumental task in that there is so much to 'fix'.

Conclusions

The Walkerton tragedy has highlighted the complexities of governments' providing safe drinking water to their citizens, a service that many of us previously took for granted. Unfortunately, most self-government agreements prior to Walkerton have not been fashioned to meet these complexities and, as a result, are seriously flawed. These flaws extend to other services provided by government where some regulation is required.

The policy implications are numerous: past agreements need to be reviewed, possibly modified and certainly not extended to other First Nations in their current form. Future agreements should be developed with much greater attention being given to the regulatory function. Assumptions about the feasibility of single tier governments at the level of individual First Nations need to be revisited. Provincial participation in most, if not all, self-government negotiations appears to be a necessity. Finally, all governments - federal, provincial and Aboriginal - need to move smartly to deal with a long list of regulatory problems that now exist in First Nation communities.

PART TWO: CHARTING A COURSE FOR REFORM FOR FIRST NATIONS UNDER THE INDIAN ACT

Self-government agreements affect only a small number of the over 600 First Nations in Canada. This will remain the case for the next several decades if not beyond. What then should be done with those First Nations under the *Indian Act*?[11] Fixing the regulatory gap that now exists for potable water on First Nation reserves is the focus of this section of this paper. A reform package would include among other things a new piece of federal legislation based on a clear goal statement and a set of principles that fall out of the Walkerton Inquiry.

The Elements of a Reform Package

The Overall Goal

For many First Nations, water is a sacred element in their existence and forms an important part of their understanding of who they are as a people. At a minimum, First Nations' drinking water should be comparable in quality to that of neighbouring communities. The O'Connor Commission stated this goal as follows:

> "Aboriginal Ontarians, including First Nations people living on "lands reserved for Indians," are residents of the province and should be entitled to safe drinking water on the same terms as those prevailing in other similarly placed communities."[12]

Principles

The principles enunciated by the Walkerton Inquiry to ensure safe water for Ontario are well entrenched within the potable water industry and should apply equally to First Nation communities. These are summarized in the box below:

General Principles
Walkerton Inquiry

- **Apply a multiple barrier approach** by putting in place a series of independent measures to prevent water borne contaminants from reaching consumers
- **Adopt a cautious approach to making decisions about water**, decisions which vary from the content of water quality standards to whether to shut down a water plant in the face of a potential risk
- **Ensure that water providers apply sound management and operating systems -** this means, among other things, certifying water operators and water systems, adopting viable financial plans and having the necessary resources to execute them, ensuring transparency with consumers and putting in place sound accountability procedures
- **Provide for effective government regulation and oversight –** the characteristics of effective regulatory systems were outlined in Part One. Adequate resources are critical in ensuring these characteristics can be realized in practice.

In addition to these principles, I would cite one more - that any reform package should provide a bridge to self-government. As I argued in the first part of this paper, self-government regimes take so long to negotiate in part because would-be self-governing First Nations have so many new public service systems to build - the regulation of potable water is just one among many.

Safe Water Act for First Nation Communities

At the heart of any reform package to effect the goal and principles enunciated above should be a federal *Safe Water Act*, legislation that should apply to First Nation reserves and perhaps to other federal lands such as military bases and national parks[13]. That no such Act now exists is nothing short of scandalous. Indeed, those living in First Nation communities in Canada must be one of the few groups of citizens in any developed country not protected by safe water legislation[14].

The reasons for a approach centred on legislation are compelling. First, a well-designed regulatory regime, as opposed to the contractual approach now being utilized by the federal government with First Nations, would have a much wider variety of responses to water problems, responses varying from traditional enforcement techniques to negotiation, education and other voluntary approaches. Second, regulatory systems are by their nature politically charged. No one likes to be the subject of enforcement activities and appeals to politicians are not infrequent. Regulators need the certainty and force of legislation to do their jobs properly. Finally, legislation will force needed clarity and transparency into the murkiness of unclear roles and accountabilities that now characterize the current situation.

Developing such an Act would require the close collaboration of First Nation peoples and, given its importance and complexity, especially in regards to the provinces, would demand strong political leadership form both First Nations and the federal government.

What should such an Act contain? A fundamental issue is whether the Act should be based on federal or provincial standards and conditions. With few exceptions, the Act should incorporate by reference provincial regulations to apply to First Nation reserves. (This parallels a similar proposal we made in Part One of this paper in regard to self-governing First Nations.) Such an approach will ensure that First Nation communities are not isolated 'islands' dotted across the province, that First Nation communities have access to the variety of training and certification organizations available to their neighbours, that such communities will be able to contract easily with provincial organizations or neighbouring municipalities to provide water for them and that becoming part of watershed protection organizations - as called for by the Walkerton Inquiry - would be practical.

There may be exceptions to this general rule of incorporating by reference provincial regulations to First Nation reserves. First Nation communities located in provinces that are reluctant to adopt a regulatory regime based on the Walkerton Inquiry goal and principles for the provision of safe water should not be subject to the same unacceptable risks of their neighbouring municipalities. In these cases a federal regulation regime will need to be developed and applied.

Incorporating by reference provincial regulations is one thing. But who should administer them - the provincial regulatory authorities or a federal agency? The preferred option is the provincial regulatory authority. Indeed, there are already several precedents for this arrangement. Of these, the most relevant is the current system for regulating many aspects of oil and gas exploration and development on First Nation reserves. In this case the *Indian Oil and Gas Act*, a federal statute, through its regulations[15], ensures that provincial regulations apply to Indian reserves as a condition of each oil and gas lease and these regulations are in turn administered by provincial authorities.

An improvement on the Indian Oil and Gas approach would be a negotiated arrangement with each province to establish a special inspection and enforcement unit to be staffed primarily by personnel recruited from First Nations. Not only would such a unit be more acceptable on First Nation communities in administering what is essentially a provincial regime. It would also provide an eventual bridge for self-government. That is, at some point in the future, the First Nation unit could become part of some First Nation government and would bring with it the experience, skills and contacts that would otherwise take years to build.

There is some evidence to suggest that such arrangements might be acceptable to First Nations if they were part of the negotiations. The Walkerton Inquiry quoted a brief submitted by the Chiefs of Ontario, which noted that nothing prevents

> "…the establishment of an effective tripartite relationship between[the Department of Indian Affairs and Northern Development], First Nations and provinces such as Ontario which may be better equipped than the federal government to provide some of the mechanisms to build First Nation capacity to operate and maintain effective water treatment systems. However as a further incident of the fiduciary relationship between Canada and First Nations, capacity-building solutions must not be unilaterally imposed

on First Nations, particularly by a federal-provincial agreement to which First Nations are not a party."[16]

Other Elements of a Reform Package

A federal *Safe Water Act* should not be the sole element of an effective reform package. For example, as alluded to earlier in this brief, the Walkerton Inquiry made a sensible recommendation[17] that First Nations should be invited by the province to join any regionally-based watershed planning processes. Such processes would encompass a wide variety of non-Aboriginal stakeholders including municipal governments and conservation groups and would aim at adopting measures for source water protection, a crucial element in any multiple barrier approach. This recommendation should be vigourously pursued by both First Nations and the federal government, not only in Ontario but elsewhere in Canada.

Another element of any reform package is building the necessary capacity for First Nations to develop sound management systems for providing safe water to their communities. This may require some hard thinking on everyone's part. According to one expert, Harry Swain, who chaired the Research Advisory Panel of the Walkerton Inquiry, a minimum of about 10,000 households is required to sustain a high quality provider of drinking water[18]. No reserve in Canada meets this standard. Consequently, contracting out to existing organizations like neighbouring municipalities or the Ontario Clean Water Agency (OCWA), a Crown Corporation which contracts with municipalities to operate their water systems, or conversely, developing regionally-based, First Nation-run organizations may be the only viable options.

Having in place adequate training and certification programs for operators, ensuring that First Nation leaders have orientation programs to review their responsibilities, developing effective relationships with provincial water and wastewater associations, putting in place a certification regime based on a quality management standard for water – these are some of the other elements required to build First Nation capacity to ensure high quality water on reserves.

Finally, there is no point in adopting a federal *Safe Water Act* if a significant portion of existing water plants on reserve can not meet current standards. Furthermore, there is a real question as to whether operating funds are sufficient to maintain and operate the water plants and systems that now exist. Consequently, a part of any successful reform package will be a funding strategy, to which the federal government (and perhaps others such as First Nation consumers through user fees[19]) will need to contribute new funds.

CONCLUSIONS

We are under no illusions that the package of reforms being proposed in this paper will be easy to effect. Quite the contrary, the sorry mess that now characterizes the provision of potable water on reserve is a governance problem of major complexity, one that will need the collaboration of First Nations, the federal government and the provinces. Simply to throw money at this problem is not enough. Indeed, the problem is not primarily a funding problem. Would that it were.

To deal with such a complex set of issues will require the leadership skills and clout that only Ministers and First Nation leaders can bring to a thorny public policy issue. Currently, an ad hoc group of federal Ministers is charged with an in-depth review of federal Aboriginal policies. Surely, fixing the potable water problem on reserves – whether in the context of self-government or for those First Nations remaining under the *Indian Act* - should be at the top of their list. Or is another Walkerton-like tragedy, this time in a First Nation community, necessary before the federal government chooses to act?

To the Walkerton Inquiry go the final words:

> "Since Dr. John Snow's 1854 discovery in London, England, that drinking water could kill people by transmitting disease, the developed world has come a long way toward eliminating the transmission of water-borne disease. The Walkerton experience warns us that we may have become victims of our own success, taking for granted our drinking water's safety. The keynote for the future should be vigilance. We should never be complacent about drinking water safety."[20]

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[1] "Part Two Report of the Walkerton Inquiry", (www.walkertoninquiry.ca), P. 17
[2] Ibid, P.486
[3] Institute On Governance, "Policy Brief No. 12: Rethinking Self-Government Agreements", (www.iog.ca), November 2001
[4] The Guidelines establish maximum acceptable concentration limits for certain microbes, chemicals and physical properties. These have been incorporated in Part IV of the *Canada Labour Code* and apply to First Nation facilities employing staff. But as the O'Connor Commission notes, "This does not, however, require the sampling, testing or reporting of the results nor does it allow for prosecution of water suppliers who do not meet the quality standards." Ibid, P. 155-156
[5] Quebec appears to be the latest province to introduce tougher new standards. See its recent communique on potable water at http://communiques.gouv.qc.ca
[6] Mathew Coon Come, "Address to National Health Conference First Nations Health: Our Voice, Our Decisions, Our Responsibility", February 25, 2001, www.afn.ca. For a more vivid description of the tragedy, see Roy MacGregor, "Chief: The Fearless Vision of Billy Diamond", P. 163-165
[7] "Tap Dancing: Canadians avoid the real problem with water", *The Ottawa Citizen*, May 14, 2001. The problem of having a public body with conflicting functions or mandates is sometimes referred to in law as "institutional bias" - that is, the performance of one function biases the proper performance of the other.
[8] One exception is the Dogrib Agreement, which retains regulation of water of the affected communities by a federal water board.
[9] The Framework Agreement has at least three flaws from a potable water perspective: the small size of the First Nations (one has less than a 100 members on reserve), the single tier government structure and the lack of jurisdiction over public health.
[10] See, for example, "A Strategic Approach to Developing Compliance Policies, Parts I and II", Treasury Board of Canada, 1992.
[11] Current bills now being considered by Parliament such as the *First Nations Governance Act* will amend and supplement the *Indian Act* but nothing proposed to date deals in any substantive way with the regulatory gaps now facing First Nation communities, most notably with regard to water.

[12] op. cit. P. 486. The Commission's overall goal for Ontario is "…to ensure that Ontario's drinking water systems deliver water with a level of risk so negligible that a reasonable and informed person would feel safe drinking the water." op. cit. P.5.
[13] Note that this call for an a federal act to apply to federal lands is not the same as the proposal, proffered by Senator Grafstein, for a federal act to apply to all of Canada including provincial lands. Leaving aside fiscal and perhaps constitutional considerations, it would be presumptuous of the federal government to undertake such a course of action without first getting its own house in order.
[14] In contrast to Canada, American tribes fall under the federal *Safe Water Drinking Act* and the United States *Clean Water Act*, both administered by the Environmental Protection Agency.
[15] The key Section in the *Indian Oil and Gas Regulations* is the following: "4. It is a term and condition of every lease, permit licence or other disposition issued or made under these Regulations…that the operator will comply with ….d) unless otherwise directed by the Minister in writing, the applicable laws of the province in which a contract area is situated and with any orders or regulations made from time to time thereunder relating to the environment and the exploration for, development, treatment, conservation and equitable production of oil and gas." Shin Imai and Donna Hawley, "The 1995 Annotated Indian Act", (Carswell; Toronto: 1994)
[16] op. cit. P. 493
[17] See Recommendation 88, op. cit. P. 494.
[18] Mr. Swain made this assertion at a Safe Water seminar organized by the Institute in June 2002 in Ottawa.
[19] Very few First Nations charge fees for consumption of water in their communities. Two prominent reasons are first, an aversion to paying taxes of any kind and second, the difficulty of enforcing penalties for non-payment in small, closely knit communities.
[20] op. cit. P. 8