Environmental Law Centre Clinic
Murray and Anne Fraser Building
University of Victoria
P.O. Box 1700 STN CSC
Victoria, BC, Canada V8W 2Y2
www.elc.uvic.ca

A Draft Submission: Canada's Legal Obligation and Duty to Ensure On-Reserve Access to Clean Drinking Water

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Researcher: Craig Crooks

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Environmental Law Clinic
UNIVERSITY OF VICTORIA

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By Craig Crooks, law student

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Introduction

Recently, Craig Crooks, an Environmental Law Clinic student, worked with Calvin Sandborn and a First Nation government on a draft submission to the Federal Government of Canada, requesting Ottawa fulfill its obligation and duty to ensure on-reserve drinking water systems provide First Nations communities with safe drinking water.

While the Government of Canada may be "committed to helping ensure First Nations have access to safe, clean, and reliable drinking water"[1] significant change is required before this goal is actually achieved. In the Nation we worked with people on reserve experience chronic health problems, likely as a result of poor drinking water quality. Water has been contaminated as a result of failing septic fields, dirty water pipes that could not be cleaned because of their poor design, and deteriorating infrastructure. The vast majority of the Nation's water systems were ranked as high risk by the *National Assessment of First Nations Water and Wastewater Systems*, and were on boil water advisory when these submissions were drafted. The water systems in the territory also lacked adequate operation and maintenance funding from Ottawa, resulting in understaffing. Insufficient funding has also resulted in continued degradation of the systems, and a subsequent increase in the risks posed to communities relying on these systems as their main source of drinking water. Water systems also lacked appropriate emergency response systems, adequate data acquisition and control systems.

The low quality water provided to the communities we worked with has been attributed to deteriorating, and inadequate water systems. Significant financial support is needed to ensure the communities we worked with have access to safe, clean and reliable drinking water, now and for years to come. Below we advocate that Canada has a legal obligation to provide this funding.

As concerns around drinking water quality apply to many aboriginal communities, we have chosen to make Craig Crooks' draft submission publicly available with the hopes that it can be a resource to other First Nations who choose to advocate for improved drinking water quality within the Canadian legal framework. Although work needs to be done on this submission and it requires final legal review, we feel that it contains information that may be useful to lawyers making submissions to Ottawa on behalf of First Nations.

Note that the name of the Nation Craig Crooks worked with, and details about that Nation, have been removed from these submissions. We have indicated in brackets (i.e. […]) the type of information removed from the original submission.

We are deeply indebted to Professors Constance MacIntosh and David Boyd, whose seminal works are quoted extensively here.

Finally, we must again note that this document is not intended to be legal advice and the arguments outlined below should not be relied upon without further advice from a lawyer.

[1] Aboriginal Affairs and Northern Development Canada, "Water", online: Canada < http://www.aadnc-aandc.gc.ca/eng/1100100034879/1100100034883>.

Draft Submission

I. BACKGROUND

[Provide background on the First Nation making the submission and who is bringing the submission forward on behalf of the Nation].

II. THE FACTS

[Provide facts on the drinking water situation on the reserves in question. Much information may be available in the *National Assessment of First Nations Water and Wastewater Systems*, and in First Nations health records.]

The Recognized Need for Clean Drinking Water

Ottawa has recognized that "[t]he provision of safe drinking water and the effective treatment of wastewater are critical in ensuring the health and safety of First Nation people."[2] It is well recognized that one of the primary drivers of public health is clean water and sanitation.[3] When there is insufficient access to safe, reliable, and physically accessible water for personal and domestic uses, the risk of outbreak and spread of communicable dieses increases dramatically.[4]

It is also generally recognized that the lack of access to safe drinking water can have adverse physical and psychological effects. Ottawa has admitted that "[t]he incidence of waterborne diseases is several times higher in First Nations communities, than in the general population, in part because of the inadequate or non- existent water treatment systems."[5]

Access to adequate safe water is a fundamental human right. As Professor Constance MacIntosh has stated:

> [T]here is growing international consensus that access to safe water in adequate quantities is a human right simply because it is foundational for human well being and, thus, a precondition for enjoying many other recognized rights. Fundamentally, this right is defined as entitling everyone *to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.*[6]

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[2] Government of Canada, Drinking Water and Wastewater in First Nation Communities: Discussion Paper: Engagement Sessions on the Development of a Proposed Legislative Framework for Drinking Water and Wastewater in First Nation Communities (Ottawa: Indian and Northern Affairs Canada, 2009) at 3.

[3] Constance MacIntosh, "Public Health Protection and Drinking Water Quality on First Nation Reserves: Considering the New Federal Regulatory Proposal" (2009) 18:1 Health Law Review 5 at 5 [*Regulatory Proposal*].

[4] Constance MacIntosh "The Right to Safe Water and Crown-Aboriginal Fiduciary Law: Litigating a Resolution to the Public Health Deficit Caused by On-Reserve Water Problems" in Martha Jackman and Bruce Porter (eds) Reconceiving Human Rights Practice for the New Social Rights Paradigm (Irwin Law, 2012) (forthcoming)

at 1 [*Fiduciary Law*].

[5] Government of Canada. 2004. *Implementation of the International Covenant on Economic, Social, and Cultural Rights: 4th Periodic report to the UN under articles 16 and 17 of the Covenant*, E/C.12/4/Add.15, p. 84; David Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 81 at Boyd 84 [*Boyd*].

[6] *Fiduciary Law, supra* at 1.

However, the Federal Government is lagging behind the provinces and territories in their recognition of drinking water as a basic human right:

- Quebec has led Canada by being the first province to formally recognize drinking water as a human right, legislating that: "Under the conditions and within the limits defined by the law, it is the right of every natural person to have access to water that is safe for drinking, cooking and personal hygiene."[7]

- The Northwest Territories have recognized "all peoples have a fundamental human right to water that must be recognized nationally and internationally, including the development of appropriate institutional mechanisms to ensure that these rights are implemented"[8] through the adoption of a resolution in 2007.

- Atlantic Canada has recognized First Nations' right to water through the Land Claims Agreement of the Labrador Inuit.[9]

"[A]ll populations under federal jurisdiction have their drinking water protected by law, except for on-reserve First Nations people."[10] "This is part of a larger pattern of 'regulatory abandonment' of reserve lands and waters that also includes an absence of regulation for wastewater treatment, garbage disposal, hazardous waste, air pollution, and other environmental concerns."[11]

Legal experts have noted a number of reasons why Canada is obligated under international agreements to recognize the right to safe drinking water. These include that:

- "Canada has freely chosen to accede to a number of international instruments that either explicitly or implicitly recognize a right to safe water. For example, Canada ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1976, which requires that parties *recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*. The ICESCR specifically calls on states to address hygiene, as well as the prevention, treatment, and control of epidemic and endemic diseases. The Committee that oversees the ICESCR confirmed in General Comment No. 14 that these health rights require states to *ensure access to basic shelter, housing and sanitation and an adequate supply of safe and potable water*." [12]

[7] *An Act to affirm the collective nature of water resources and provide for increased water resource protection*, S.Q. 2009, c. 21, s. 2.
[8] Northwest Territories Legislative Assembly. 2007. "Right to Water Motion 20-15(5)," NWT *Hansard*, March 5, 2007, pp. 1168-69.
[9] *Boyd, supra,* at 86.
[10] C. MacIntosh. 2007-08. "Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves," 39 *Ottawa Law Review* 63 at 68.
[11] *Boyd, supra* at 99.
[12] *Fiduciary Law, supra* at 19-20.

- "In their General Comment 15, the Committee considered the human right to safe drinking water. The Comment explains that the right *entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses*. The Comment also indicates that states are required to *give special attention* to those who have faced difficulty *in exercising this right,* and identifies Indigenous peoples as one such group. While the General Comments do not create independent rights, they are authoritative interpretations of the existing obligations under the ICESCR and support the conclusion that the right to water is part of international customary law, to which Canada is already bound."[13]

- "Canada has also ratified or acceded to several international instruments that directly recognize a general right to water. These include the Convention on the Rights of the Child, which requires state parties to *take appropriate measures* to *combat disease … through … the provision of … clean drinking water* and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, which requires state parties to ensure *woman in rural areas … enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply …*" [14]

- "Canada has also ratified the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This instrument both recognizes a right of Indigenous people to the improvement of their *social conditions*, including sanitation and health, as well as a positive obligation on states *to ensure continuing improvement* of these conditions. Both sanitation and health depend upon, among other factors, safe drinking water in sufficient quantities."[15]

<u>*Ottawa's Failure to Provide Adequate Clean Drinking Water Infrastructure to Reserves*</u>

In spite of its obligations, Canada has failed to provide adequate clean drinking water infrastructure to reserves. "[I]n 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."[16] The constructed facilities were not built to a recognized enforceable building standard or operational standard. As a result, even though Ottawa was responsible for building the systems, many facilities fail to meet the federal government's drinking water guidelines and fail to meet provincial or federal design standards that are considered essential to provide safe drinking water.[17]

As Professor Constance MacIntosh has stated: this "[l]ack of regulation has in practice left water quality standards to exist as essentially discretionary, a situation which contrasts boldly with the lawful rights of federal employees who are assigned on-reserve worksites because the same federal guidelines are referentially incorporated into the Canada Labour Code. This creates

[13] *Fiduciary Law, supra* at 20.
[14] *Fiduciary Law, supra* at 22.
[15] *Fiduciary Law, supra* at 22.
[16] Constance MacIntosh "Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves" (2007) 39:1 Ottawa L Rev 63 at 69 [*Testing the Waters*].

[17] *Regulatory Proposal, supra* at 6.

a lawful right for federal employees to potable water and hygienic facilities. As a result, when on-reserve water quality falls below standards, Health Canada must install water treatment units to serve these employees."[18]

This lack of standards was first recognized by Ottawa in 1977, when a federal policy proposed that the infrastructure program being provided to reserves should have a goal to provide "[i]ndian homes and communities with the physical infrastructure that meets commonly accepted health and safety standards, [and] is similar to that available in neighboring, non-Indian communities or comparable locations."[19]

Ottawa has continually failed to meet commitments to rectify infrastructure, operation, and maintenance issues that originated with the construction of the original drinking water facilities. The Department of Indian Affairs and Northern Development (DIAND) committed in 1991 to achieve equality with respect to water by 2001.[20] When it became clear that Ottawa would fail to meet this target, INAC committed to remedy all deficient drinking water systems by 2004, while recognizing one in four First Nation Reserves reported serious problems with their drinking water.[21] With neither of these goals being met, Ottawa initiated the First Nations Water Management Strategy (FNWMS). The key objectives of FNWMS was 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."[22] Part of FNWMS was to correct one third of "high risk" systems each year to rectify all systems by 2006. Recognizing this was not going to be met, Ottawa pushed their commitment to rectify all "high risk" water systems to 2008.[23] In 2008, the Government of Canada announced the *First Nations Water and Wastewater Action Plan* (FNWWAP). This plan appears to move away from commitments to rectify all "high risk" systems and just commits to funding over two year increments "for treatment facility construction and renovation, operation and maintenance of facilities, training of operators and related public health activities on reserve."[24]

In 2005 the Commissioner of the Environment and Sustainable Development concluded "[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." [25]

In 2011 a comprehensive engineering assessment of reserve water systems was conducted finding thirty-nine percent of all reserve water drinking water systems to be "high risk" with another thirty-four percent being medium risk.[26] (This assessment focused mainly on the system design. While exceeding bacteriological maximum allowable concentration may lead to a

[18] *Regulatory Proposal, supra* at 7.
[19] *Boyd, supra* at 88.
[20] *Testing the Waters, supra* at 67.
[21] *Testing the Waters, supra* at 67.
[22] *Testing the Waters, supra* at 67.
[23] *Testing the Waters, supra* at 67.
[24] Canada, Aboriginal Affairs and Northern Development Canada, *First Nations Water and Wastewater Action Plan, online:* <http://www.aadnc-aandc.gc.ca/eng/1313426171775>.
[25] *Testing the Waters, supra* at 68.
[26] *Fiduciary Law, supra* at 3.

"high risk" ranking it is unclear at what point this occurs.)[27] In addition, the assessment did not analyze "the risk from contaminants, including lead, arsenic, antimony, and uranium on par with bacteriological contaminants, despite the fact that these contaminants *may be just as harmful with prolonged exposure*."[28]

Ottawa's Failure to Provide Adequate Resources for Maintenance and Operation of Drinking Water Infrastructure

Ottawa was originally responsible for all maintenance and operation of reserve water systems. Then starting in the 1980's Ottawa started making agreements with First Nations that would make Nations responsible for the maintenance and operation of certain facilities, including drinking water infrastructure. With the delegation of responsibility came soft standards with no lawful accountability if systems were not meeting appropriate specifications or showed signs of failure.[29]

In 1995 the Auditor General's report reprimanded Ottawa for failing to analyze whether the First Nation communities had the human capital or resources to maintain and operate these facilities, and for providing inadequate technical support.[30] This disapproval was repeated in 1996 by the Royal Commission, which stated that the "government withdrew without ensuring that communities had the awareness, resources or skills to take over." [31]

The Auditor General's report also recognized that although AANDC was trying to distance itself from the responsibilities and accountability of water infrastructure and maintenance projects, that "notwithstanding the approach to devolution, it continues to be responsible and accountable for the activity. Thus, we would expect the Department to target and control risks in ensuring that the projects are properly planned, managed and implemented."[32]

Even with the devolution of responsibility and accountability, Ottawa continued to make commitments with regards to the operations of water systems on reserves indicating their continued oversight. Recognizing that properly trained operators are essential to the safe operation of water systems, Ottawa committed, in 2003 as part of FNWMS, to have certified operators overseeing all water treatment plants on reserves by 2008. Yet, in 2011, only fifty-four percent of all operators on reserves were certified.[33]

AANDC reported that in 2008 eighty-five reserve water systems were considered "high risk" and that by March 2009 the number of "high risk" systems had been reduced to fifty-eight.[34]

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[27] Indian and Northern Affairs Canada, National Assessment of First Nations Water and Wastewater Systems: National Roll-Up Report Final (2011) at 41 [*National Roll-Up*].
[28] *Fiduciary Law, supra* at 5.
[29] *Testing the Waters, supra,* at 70-71.
[30] *Fiduciary Law, supra,* at 5.
[31] *Testing the Waters, supra,* at 70-71.
[32] Office of the Auditor General of Canada, 1995 Report of the Auditor General of Canada (Ottawa: Minster of Public Works and Services Canada, 1995) at para. 23.46 [Auditor General 1995].

[33] *Fiduciary Law, supra* at 12.
[34] Indian and Northern Affairs Canada, First Nations Water and Wastewater Action Plan: Progress Report January 2008 March 2009 (Ottawa: INAC, 2009) at 6 online: <http://www.aadnc-aandc.gc.ca/eng/1100100034945>.

However, after an arms-length engineering assessment it was found that three hundred and fourteen reserve water systems were categorized as high risk.[35]

Although it is possible that the engineering assessment was more thorough, a greater contributor to the decline in water safety is likely due to AANDC's policy to fund only eighty percent of maintenance and operations costs regardless of a reserves ability to generate the rest of the funding.[36] As Professor MacIntosh points out "The 2011 National Assessment reported *a general feeling* within communities that the transferred operations and maintenance budgets were too low to retain certified facility operators, to replace components as needed, and to engage in the required level of monitoring. This feeling was substantiated, in part, by assessment inspectors who found equipment in disrepair due to *a [reported] lack of funding*. It was also identified as a fact in the scathing 2005 Auditor General report, which found that *INAC ignores whether First Nations have other resources to meet this requirement* of covering the outstanding 20 percent of the costs."[37]

The Expert Panel on Safe Drinking Water for First Nations recognized that "the federal government has never provided enough funding to First Nations to ensure that the quantity and quality of their water systems was comparable to that of off-reserve communities."[38] This is despite the fact that 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*, [AANDC]'s practices fall short of this rather obvious federal policy recommendation."[39]

Although Ottawa was not able to maintain First Nation drinking water infrastructure on reserves at one hundred percent funding, it is somehow expected that the First Nation communities with less human capital, technical support, and resources are to achieve better results with less funding.

III. Ottawa's Legal Obligations

Ottawa's Fiduciary Duty to Rectify Water Quality Issues

The [First Nation's name here] submit that the Federal Government has a fiduciary duty to provide an adequate supply of safe drinking water to the Nation's reserves and has failed to do so.

"The justiciable character of Crown decisions, practices, and policies has emerged as a practical restraint on how the Crown has and continues to assume or assert the right to control aspects of Indigenous people's lives and communities. In his decision for the Supreme Court of Canada in Wewaykum Indian Band v Canada Binnie J explained that *the degree of economic, social and proprietary control and discretion* that the Crown has asserted or assumed over Indigenous peoples' land, lives and interests may leave *aboriginal populations vulnerable to the risks of*

[35] *National Roll-Up, supra*.
[36] *Fiduciary Law, supra* at 5-6.
[37] *Fiduciary Law, supra* at 6.
[38] Expert Panel on Safe Drinking Water for First Nations. 2006. *Report of the Expert Panel on Safe Drinking Water for First Nations*, vol. 1. Ottawa: Minister of Public Works and Government Services Canada, pp. 22, 49-50.
[39] *Testing the Waters, supra* at 72.

government misconduct or ineptitude. Given this vulnerability, these assumed powers must be constrained and their exercise subjected to external and independent scrutiny: [*t]he fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples."* [40]

A fiduciary obligation arises where the Crown assumes discretionary control over a First Nations "cognizable Indian interest."[41] "[T]he *interest* in question need not be one that attracts constitutional protection as an Aboriginal or Treaty right, nor does it need to be one where the fiduciary obligation has also been codified through legislation … The idea of a *cognizable Indian interest* is thus fairly broad"[42]

The fiduciary obligations to provide an adequate supply of safe drinking water to First Nation's formed when the Crown unilaterally asserted and assumed control of reserve drinking water services. "The Crown asserted authority over those lands and communities through no less than the constitutional division of powers under which the federal government claimed jurisdiction over *Indians, and Lands Reserved for the Indians*. Acting under this assumed power and among other measures, Canada enacted legislation under various incarnations of the *Indian Act* that purported to dictate the nature of band governments and to define and thus restrain the scope of authority of these governments over matters including reserve land, capital infrastructure, and water systems. … Under the current *Indian Act*, as under previous versions, the federal government delegated insignificant powers to statutorily created band councils to actually create a water protection regime. Having failed to delegate such powers, the federal government presumed to preserve for itself the authority to control matters such as reserve capital infrastructure and the design and delivery of core services, like water. Thus the Crown has unilaterally asserted or claimed discretionary authority through both constitutional and legislative instruments."[43]

Whether the Crown unilaterally asserted control over First Nations water supplies or the Crown's control arose in a different manner, the historical conduct of the Crown is enough to found the fiduciary duty owed. "It is evident that, long ago, Canada assumed discretionary control over supervising the on-reserve water regime and, given the terms of the Constitution and the Indian Act, decided that First Nations had no independent authority to do so themselves. Having assumed discretionary control over this cognizable *Indian interest* of on-reserve water quality and quantity, the test for the Crown having fiduciary duties with regard to this interest is met."[44]

The Supreme Court of Canada has recognized "the imposition of a fiduciary duty attaches to the Crown's intervention the additional obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary."[45]

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[40] *Fiduciary Law, supra* at 8.
[41] Rotman pg 580, Roberts V R, or *Wewakum Indian Band v Canada* 220 DLR (4th) 1 (SCC) [*Wewaykum*] at para 83 and Constance at pg 9.
[42] *Fiduciary Law, supra* at 9.
[43] *Fiduciary Law, supra* at 9-10.
[44] *Fiduciary Law, supra* at 11.
[45] *Wewaykum*, at para 94.

Although "good faith" may have been present, the consistent failure to meet governmental objectives and goals demonstrates a lack of "diligence" and "reasonableness." While designing and implementing federal policies and objectives, Ottawa has been selective in how it has responded to the many concerns brought to their attention. As stated by Professor MacIntosh "[i]t is this selective responsiveness to evidence and, in particular, a failure to modify approaches based on that evidence that largely grounds the breach."[46] "For example, federal policy has aimed to attempt to require reserve-based Indigenous communities to take responsibility for operating and maintaining existing water treatment facilities that ANNDC constructed and has or had been operating. This is despite AANDC's knowledge, gained from multiple reports, that many of the facilities are already not producing safe water and are not capable of meeting health and safety guidelines or protocols."[47]

The fiduciary duty was also breached when AANDC transferred the maintenance and operation of the drinking water systems to the [Nation's] communities while only providing eighty percent of the supposedly required funding. This practice was "identified by the Auditor General and by the Royal Commission on Aboriginal Peoples as likely setting communities up to fail,"[48] especially since the systems were not operated and maintained at an adequate level when the systems were run by AANDC at supposedly full funding.[49]

Even where new capital systems are being funded by AANDC, the continued inadequate funding for maintenance and operation requirements breaches the Crown's fiduciary duty. There is no signal to the [_____ First Nation] that they will have adequate funding or even eighty percent of the actually required funding for these new systems. AANDC will likely continue their current practice of underfunding the water systems maintenance and operation, knowing that the only way the [_____ First Nation] will be able to make up funding shortfalls will be to transfer funding from social welfare or health related programs. This surely cannot be found to be a policy made in "good faith."

The breach of the duty of "good faith" dealings was also seen in how Ottawa ensured transfer agreement implementation. "According to the Safe Drinking Water Foundation, reserve communities who tried to refuse to commit to meet these standards and resisted signing the contribution agreement, *had funds withheld for housing, education, health services or for water projects*."[50] "This coercive, alleged downloading of responsibility to meet standards which AANDC has failed to meet, and which AANDC knows in many instances the First Nation will not be able to meet because the facilities which AANDC designed and constructed are already not compliant, is clearly inconsistent with the responsibilities of acting as a fiduciary. Such policies do not align with what one can *reasonably and with diligence regard as the best interest of the beneficiary*."[51]

Although Ottawa has made many commitments to the [_____ First Nation] and other First Nations, it has never fulfilled its fiduciary duty to provide an adequate supply of safe drinking

[46] *Fiduciary Law, supra* at 11-12
[47] *Fiduciary Law, supra* at 12.
[48] *Fiduciary Law, supra* at 13.
[49] *Fiduciary Law, supra* at 13.
[50] *Fiduciary Law, supra* at 14.
[51] *Fiduciary Law, supra* at 14.

water. The federally appointed Expert on Safe Drinking Water for the First Nations concluded that "the federal government has never provided enough funding to First Nations to ensure that the quantity and quality of their water systems was comparable to that of off-reserve communities."[52]

Yet there is considerable evidence, as outlined in this submission, that support our claim that Canada has assumed roles and responsibilities with regards to the [_____ First Nation] reserve water systems, an identified Indigenous interest, resulting in fiduciary obligations that Ottawa has failed to meet.

The fiduciary duties owed by Ottawa to the [_____ First Nation] must be interpreted in a manner consistent with Ottawa's international obligations. While Ottawa has not chosen to acknowledge clean drinking water as a basic human right for all, they have acceded to a number of international instruments that explicitly or implicitly recognize the [_____ First Nation's] right to safe water.

Ottawa has consistently demonstrated that it is bound to meet its international and fiduciary obligations by reporting its efforts to rectify reserve water issues to the Committee that oversees the ICESCR. The ICESCR Committee in reply to the reports has consistently found that Ottawa has failed in addressing the lack of safe water for First Nations.[53] In addition, UNDRIP is framed as a positive obligation which makes it explicit that Ottawa must act to rectify the risks which Ottawa has created for the [_____ First Nation] through their drinking water systems "instead of merely not interfering with matters that may affect rights."[54]

It must be assumed that Ottawa does not intend to act in a manner that violates the international instruments that it has ratified. As such the instruments must be given force when interpreting the fiduciary duty owed to the [_____ First Nation]. It is recognized that "courts will strive to interpret legislation to be consistent with obligations shouldered under international law, and will interpret the Charter *to provide protection at least as great as that afforded by similar provisions in international human rights documents that Canada has ratified*. It is consistent with these understandings to posit that courts will similarly expect Canada to respect its freely assumed international obligations, especially those articulated in UNDRIP, as informing the meaning of fulfilling its fiduciary obligations to Indigenous peoples."[55]

The [_____ First Nation] submit that by Ottawa assuming discretionary control over reserve water regimes they have a fiduciary obligation to ensure an adequate supply of safe drinking water to reserve inhabitants. The fiduciary duty has not been acted out with the complete "good faith," "diligence" or "reasonableness" that is required. This obligation will not be met until systems are installed that respect First Nation communities cultural, community and health requirements, while also providing adequate funding for operations and maintenance, as well as future community growth needs.

Ottawa's Requirement to Act to Fulfill S.15 of the Canadian Charter of Rights and Freedoms

[52] *Fiduciary Law, supra* at 14.
[53] *Fiduciary Law, supra* at 20.
[54] *Fiduciary Law, supra* at 22.
[55] *Fiduciary Law,* at 23.

The [_____ First Nation] submit that in order for Ottawa to meet the obligations under S.15 of the *Canadian Charter of Rights and Freedoms* Ottawa must rectify the water inequalities found on the [_____ First Nation] reserves that have lead to the discrimination the [_____ First Nation] on reserve land.

Section 15(1) of the *Canadian Charter of Rights and Freedoms* states:

> Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.[56]

Discrimination has been defined by the Supreme Court of Canada as:

> as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[57]

"It is a general principle of *Charter* interpretation that s. 15(1) *is to be generously and purposively interpreted*.[58] Courts have been clear in explaining that s.15 applies to more than just statutes. As the Supreme Court ruled in *Lovelace*, government programs and activities undertaken pursuant to statutory authority are also subject to *Charter* scrutiny." [59]

The Supreme Court of Canada recognizes a two-part test for the determination of a s. 15 violation. The two questions are "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"[60]

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[56] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[57] *Withler v. Canada (Attorney General)* [2011] 1 SCR 396 at para 20 [*Withler*] citing *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, at p 174 – 175.

[58] *Hunter v. Southam Inc.*, [1984] 2 SCR 145, at p. 156. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at pp. 336 and 344. *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at p. 509. *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, at p. 175.

[59] *Boyd, supra* at *110.*

[60] *Withler*, *supra* note 63 at para 30 affirming *R v Kapp* [2008] 2 SCR 483 at Para 17.

It is clear that those people residing on [_____ First Nation's] reserve land are an enumerated group under s. 15 of the Charter. The Supreme Court has consistently determined that "[ra]ce and ethnicity are enumerated grounds under s. 15, and many cases have confirmed that Aboriginal people are a disadvantaged group ... It is the combination of Aboriginality with on-reserve residence that is the basis of the distinction, or Aboriginality-residence to use the terminology of the Supreme Court of Canada. In the case of *Corbière*, it was Aboriginal people living off-reserve whose s. 15 equality rights were violated by *Indian Act* provisions requiring residence on reserve in order to vote in ban council elections. Residence on an Indian reserve is an exception to the courts' position that place of residence is not an analogous ground. The Supreme Court unanimously held in *Corbière* that *Aboriginality-residence* is an analogous ground because the decision to live on or off-reserve is a *personal characteristic essential to a band member's personal identity* which can be changed *only at great cost, if at all*." [61]

The differential treatment of the [_____ First Nation] occurs due to the fact there are no federal or provincial laws that regulate drinking water on First Nation reserves. "Every province and territory in Canada has legislation intended to ensure the provision of safe drinking water. However, because Canada's *Constitution* assigns jurisdiction over Indians and Indian lands to the federal government, these laws do not apply on First Nations reserves. The practical consequence is that the roughly half a million Canadians who live on reserves are without the legal guarantees of water quality enjoyed by the other 34 million Canadians."[62] This legal framework has created a glaring gap that puts the [_____ First Nation] and other First Nations on reserves at considerable risk due to under inclusive legislation. While drinking water laws do not specifically exclude First Nations on reserves, it is the ultimate effect of the otherwise comprehensive federal and provincial legislation.[63]

It lies with Ottawa to rectify the unsafe conditions created for the [_____ First Nation] by the under inclusivity of safe drinking water legislation. Ottawa must take action as the constitutional jurisdiction over reserves is within the federal government's power. Although Ottawa has provided the [_____ First Nation] with the power to create bylaws with respect to water systems (which allow fines to be imposed up to one hundred dollars or imprisonment up to 30 days), these powers are quite limited and do not provide a regulatory framework to ensure safe drinking water like the federal and provincial legislation that exists for others. The Supreme Court of Canada has recognized that the under inclusiveness of a law can lead to a violation of s. 15. "In *Vriend*, Alberta human rights legislation was held to be under-inclusive because it did not include discrimination based on sexual orientation. In *Dunmore*, a case dealing with the Ontario legislation excluding agricultural workers from the statutory labour relations regime, the Supreme Court held that *legislation that is under-inclusive may, in unique contexts, substantially impact the exercise of a constitutional freedom* (emphasis in original)." [64]

Historically the first part of a s. 15 analysis "requires a comparison between the legal position of the claimant and that of other people to whom the claimant may legitimately invite

[61] *Boyd, supra* at *112*.
[62] *Boyd, supra* at *113-114.*
[63] *Boyd, supra* at 114.
[64] *Boyd, supra* at 114.

comparison."[65] However, recently the Supreme Court of Canada has determined that a comparator group is not necessarily required to find a violation of s. 15. In *Withler* the Supreme Court of Canada determined that "[w]hat is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact … is to perpetuate disadvantage or negative stereotypes about that group."[66] It was recognized in *Withler* that a comparison group may not always be available. Citing Professor Margot Young, the Supreme Court of Canada cautioned that "[i]f there is no counterpart to the experience or profile of those closer to the centre, the marginalization and dispossession of our most unequal will be missed. These cases will seem simple individual instances of personal failure, oddity or happenstance."[67]

We submit that there may be no appropriate comparator group for the under inclusiveness of safe drinking water legislation when it comes to First Nations on reserves, as was the case in *Withler*. As the Federal Court has recently recognized "as a result of their unique position in the Canadian constitutional order, Canada's First Nations people receive services from the federal government that are not provided to other Canadians at the federal level. These include child welfare services, education services and health care, amongst others."[68] These services also include drinking water to First Nations on reserves. The Federal Court also recognizes that "[a]boriginal people occupy a unique position within Canada's constitutional and legal structure. They are, moreover, the only class of people identified by the Government of Canada for legal purposes on the basis of race,"[69] which "creates many unusual or singular situations."[70]

In the alternative, we submit that the closest comparator may be federal government employees who are assigned to work on reserves and fall under the Canada Labour Code, which guarantees them the right to safe water. They may be the closest comparator as the other significant group of people that fall under federal jurisdiction, under the constitution, on reserve land. And they are treated differently, with a guarantee of safe water. Inherent in the word "distinction" in section 15 is the idea that the claimant is treated differently than others. This is consistent with Supreme Court of Canada decision in *Withler* where it was found that "[c]omparison is … engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1)."[71]

In the further alternative we submit that the appropriate comparator group would be other small communities in British Columbia. The British Columbia *Drinking Water Protection Act* and other legislation provides some level of protection to all domestic water systems that supply water to more than one residence. We submit that because the government as a policy

[65] *Boyd, supra* at 113.
[66] *Withler*, *supra* at para 40.
[67] *Withler*, *supra* at para. 59 citing "Blissed Out: Section 15 at Twenty", in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: Butterworths, 2006) 45 at 63.
[68] *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)* [2012] FCJ No 425.
[69] *Ibid* at para 332.
[70] *Ibid* at para 333.
[71] *Withler, supra* at para 62.

committed to achieving equality with respect to drinking water on and off reserves, Ottawa itself determined that small communities in British Columbia are appropriate comparators. The Federal Court has determined where Ottawa aims to achieve the same standards for those on reserves as off, an appropriate comparator group could be those people under provincial legislation.[72]

The second part of the s. 15 test is: "Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?" In applying this part of the test the Supreme Court of Canada has identified a non-exhaustive list of guiding principles. Three of the guiding principles identified by the Supreme Court of Canada "as being relevant to the analysis under this last branch of the s.15 test"[73] have been met. They are: pre-existing disadvantage, correspondence between the ground of distinction and the actual needs and circumstances of the affected group, and the nature of the interests affected.[74]

"One of the elements at the heart of s. 15(1) is the concept of human dignity. As the Supreme Court observed in [*Law v. Canada (Minister of Employment and Immigration)] [h]uman dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society*.[75] The Court elaborated:

> [P]robably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group … These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. <u>It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable</u>.[76]

"Whereas *Law* focused on the *impairment of human dignity*, *Kapp* emphasizes discrimination, which it defines as the perpetuation of disadvantage or stereotyping. Under both of these related approaches, it is clear that First Nations persons living on reserves with inferior drinking water protection meet the test. In *Corbière*, *Lovelace*, and *Kapp*, the Supreme Court of Canada confirmed that First Nations people suffer historical and ongoing disadvantages vis-à-vis the general Canadian population."[77]

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[72] *Withler, supra* at para 62.
[73] *Boyd, supra* at 115.
[74] *Boyd, supra* at 115.
[75] *Boyd, supra* at 115-116 quoting: *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, para 51.
[76] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, para. 63.
[77] *Boyd, supra* at 115.

The [_____ First Nation] have experienced adverse cultural, economic, and health effects due to the lack of safe drinking water on their reserves. The Supreme Court of Canada has recognized that "the essence of differential treatment cannot be fully appreciated without evaluating the economic, constitutional and societal significance of the interest adversely affected by the program in question."[78]

"In human rights jurisprudence, it is a widely accepted principle that failing to take positive actions to provide basic public services to disadvantaged groups can constitute discrimination. The Supreme Court has consistently held that *once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner*.[79] In *Eldridge* v. *British Columbia (Attorney General)*, the Supreme Court ruled that section 15 may require governments to take special measures to ensure that disadvantaged groups are able to benefit equally from government services, for example by extending the scope of a benefit to a previously excluded group. *Eldridge* was a case of discrimination in which the adverse effects suffered by deaf persons were caused by the failure to ensure that deaf persons benefited equally from an essential service offered to everyone. By analogy, it is incumbent upon the government to ensure that in the context of access to safe drinking water, First Nations persons living on reserve (members of a disadvantaged group) are provided with the same essential services as the rest of the population. Although the various federal government programs, initiatives, and investments described earlier may represent useful steps in the right direction, they are flawed in that they do not direct adequate resources to communities with the most urgent needs."[80] It has been recognized that Ottawa's failure to legislate or take positive action may lead to a charter violation under s. 15.[81]

The [_____ First Nation] submits the test for discrimination under s. 15 of the *Charter* has been met and that Ottawa must take action to rectify the inequalities and discrimination that has been created by Ottawa's less than adequate action taken through policy rather than legislation.

In addition, the [_____ First Nation] submits that Ottawa has discriminatorily applied safe drinking water regulations as they apply to all people under Ottawa's Constitutional jurisdiction except First Nations on reserves.

The [_____ First Nation] submits that as a first step towards removing this inequality and fulfilling Canada's s. 15 obligations, and in order to meet its previously-discussed fiduciary duty:

[78] *Boyd, supra* at 115.
[79] *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, pp. 1041-42; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, at p. 655; and *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, para. 73.
[80] *Boyd, supra* at 117.
[81] *Vriend v Alberta*, [1998] 1 SCR. 493, at para 64.

- Drinking water systems must be installed that respect [_____ First Nation's] communities cultural, community and health requirements;

- The people of the [_____ First Nation] must be fully involved from the outset in all decision-making and implementation of the new and improved water systems; and

- Adequate funding must be provided to [_____ First Nation] communities for operations and maintenance, as well as future community growth needs.

The [_____ First Nation] respectfully recognizes that Ottawa has attempted to take some steps to remove the inequality and discrimination that exist with regard to the [_____ First Nation]; however, as the Supreme Court has stated "groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time."[82]

XII. REQUEST FOR RELIEF

[Request resources needed to ensure each community in question has access to clean drinking water].

[82] *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

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