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Policy Brief

Safe Water for First Nations: Charting a Course for Reform

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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.

The obvious question is "what's to be done?" The purpose of this policy brief is to propose the principal elements of a reform package for dealing with the situation facing First Nation communities, a package that borrows heavily from the Walkerton Inquiry but builds on other relevant experience as well. Further it pertains to all of Canada, not just Ontario, and proposes important considerations not dealt with by Justice O'Connor, who headed the Walkerton Inquiry - for example, that any reform package should provide a bridge to self-government.

The Nature of the Problem

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:

- There is no effective legislative base for regulating potable water on reserves. 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.
- Among the principal players involved in assuring water quality, there is a lack of clarity about roles. There is no public document laying out the 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

[1] Part Two Report of the Walkerton Inquiry, (www.walkertoninquiry.ca), P. 17
[2] Ibid, P.486
[3] Policy Brief No. 12: Rethinking Self-Government Agreements, (www.iog.ca), November 2001

[4] The Guidelines' maximum acceptable concentration limits for certain microbes, chemicals and physical properties have been incorporated in Part IV of the *Canada Labour Code*. 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

tragedy far worse in respect to size of population 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 gastroenteritis in one season, likely caused from contaminated water from a central well tap[6].

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"[7]

Principles

The widely accepted principles enunciated by the Walkerton Inquiry to ensure safe water for Ontario 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, ensuring transparency with consumers and putting in place sound accountability procedures
- **Provide for effective government regulation and oversight**

In addition to these principles, we would cite one more - that any reform package should provide a bridge to self-government. As we argued in an earlier Policy Brief[8], 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 Federal Lands

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[9]. That no such Act now exists for Indian reserves is

[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] 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." P. 5.

[8] Policy Brief #12, op. cit.

[9] Note that this call for 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.

nothing short of scandalous. Indeed, those living on reserves in Canada must be one of the few groups of citizens in any developed country not protected by safe water legislation[10].

The current approach of the federal government is to compel First Nations to meet the standards set out in the Guidelines for Canadian Drinking Water Quality through conditions set out in funding arrangements. The reasons for a legislated approach are compelling. First, a well-designed regulatory regime, as opposed to the contractual approach now being utilized, 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 will ensure that First Nation communities are not isolated 'islands' doted across the province, that First Nation communities have available to them 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 federal regulations 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[11], 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

[10] 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.

[11] 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 explorartion for, development, treatment, conservation and equitable production of oil and gas."

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."[12]

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[13] 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[14]. 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.

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) will need to contribute new funds

Conclusions

We are under no illusions that the package of reforms being proposed in this brief 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 reserve should be at the top of their list. Or is another Walkerton-

[12] Op. Cit. P. 493
[13] See Recommendation 88, op. cit. P. 494.
[14] Mr. Swain made this assertion at a Safe Water seminar organized by the Institute in June 2002 in Ottawa.

like tragedy, this time on a First Nation community, necessary before the federal government and First Nation leaders choose 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."[15]

[15] Op. cit. P. 8