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The Right to Safe Water and Crown-Aboriginal Fiduciary Law: Litigating a Resolution to the Public Health Hazards of On-Reserve Water Problems

Constance MacIntosh*

A. Introduction

The focus of this chapter is on relations of injustice and finding a route for realizing a core social right that many Indigenous peoples live without: access to safe drinking water. This chapter is an exploration of whether fiduciary law could be the enabling instrument for Indigenous peoples residing on reserves to gain consistent access to safe drinking water. The context driving this work can be summarized with reference to three key facts.

First, there 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.”¹ When elements of this right are not realized, there is a high risk for outbreak and spread of communicable diseases, and basic hygiene practices essential to good health are undermined. Second, for decades we have known that Indigenous Canadians residing on reserves often live with risky water, and have been denied the fundamental human right to safe drinking water on an intergenerational level. This is obviously part of the matrix that has resulted in Indigenous peoples bearing a disproportionate burden of ill health compared to other Canadians.² Indigenous peoples being denied safe water has garnered considerable international criticism for several decades and has been identified as being inconsistent with Canada’s

* Director, Dalhousie Health Law Institute, Associate Professor, Schulich School of Law. The author thanks Martha Jackman and Bruce Porter for their encouragement to explore the issues raised in this chapter, as well as all the participants of the CURA workshop for their collegiality and scholarly generosity. The author also thanks Zeynep Hursevoglu for her meticulous research assistance.

¹ UN Committee on Economic, Social and Cultural Rights, *General Comment No 15: The Right to Water (Arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UNESCOR, 29th Sess, UN Doc E/C/C.12/2002/11, (2002) at 1 & 2.

² See Constance MacIntosh, “Indigenous Peoples and Health Laws and Policies: Responsibilities and Obligations” in Jocelyn Downie, Timothy Caulfield, & Colleen Flood, eds, *Canadian Health Law and Policy*, 4th ed (Markham: LexisNexis, 2011) at 581-84.

obligations under key international human rights instruments, which implicitly recognize a right to safe water.³ Finally, Canada has become a leader in resisting the international trend of explicitly recognizing water rights as human rights.⁴ This bodes poorly vis-à-vis Canada's political commitments to remedying its domestic situation.

Canada's resistance was exemplified in 2008 when the United Nations Human Rights Council put forward a resolution to recognize access to safe water in adequate quantities as a human right and, importantly, to create a body to monitor state compliance with this resolution. Canada front-lined the opposition, which ultimately led to the resolution being defeated.⁵ In a similar vein, Canada was one of forty-three states that abstained when a General Assembly resolution recognizing access to water as a human right was passed in 2010.⁶ The abstaining states objected on several bases, including arguments that the General Assembly was the wrong forum and that the meaning of the right was uncertain.⁷ Canada specifically criticized the resolution as premature because the vote arose "without allowing states the benefit of full deliberation based on the Independent Expert's findings, their own internal processes and the agreement of states."⁸ However, Canada has also had other motivations ascribed to its objections to the two resolutions, including its intention to avoid being found in violation of these resolutions vis-à-vis its Indigenous reserve-based population.⁹

³ See for example: Economic and Social Council, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, CESCR, 36th Sess, UN Doc E/C.12/CAN/CO/4, (2006) at paras 11(d) and 64.

⁴ David Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 McGill LJ 81 at 126 [Boyd].

⁵ See Lynda Collins, "Environmental Rights on the Wrong Side of History: Revisiting Canada's Position on the Human Right to Water" (2010) 19:3 RECIEL 351 at 351 (the author provides a fulsome discussion of international law in this area).

⁶ *The Human Right to Water and Sanitation*, GA Res A/RES/64/292, UNGAOR, 64th Sess, A/64/L.63/Rev.1, (2010); UN-Water Decade Programme on Advocacy and Communication and Water Supply and Sanitation Collaborative Council, Media Brief, "The Human Right to Water and Sanitation," online: UN www.un.org/waterforlifedecade/pdf/human_right_to_water_and_sanitation_media_brief.pdf (this document provides an overview of the resolution).

⁷ See Bruce Pardy, "The Dark Irony of International Water Rights" (2011) 28 Pace Envtl L Rev 907 (Pardy provides a discussion of the vote, as well as an argument as to potential risks arising from recognizing a right to water).

⁸ Government of Canada, "Explanation of Vote Before the Vote by His Excellency Henri-Paul Normandin, Ambassador and Chargé d'Affaires, AI of Canada to the United Nations, UNGA-64: Bolivian Resolution on The Human Right to Water and Sanitation" (28 July 2010), online: CanadaInternational.gc.ca www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/human_rights-droits_personne/07282010_Normandin.aspx.

⁹ See, for example, James Harnum, "Deriving the Right to Water from the Right to Life, Liberty and Security of the Person: Section 7 of the Canadian Charter of Rights and Freedoms and Aboriginal Communities in Canada" (2010) 19:3 RECIEL 306 at 306.

The facts outlined above risk creating the impression that Canada has utterly ignored the crisis of on-reserve water quality, or tried to pretend that the problem does not exist; however, this is not the case. For decades, Canada has been investing in policies, protocols, and spending practices directed to remedying the on-reserve water situation. Unfortunately, these political commitments have failed to afford satisfactory improvements in aligning on-reserve living standards with other Canadian rural communities. Rather, as of 2008, Indigenous communities continue to compose the majority of the one percent of Canada's rural population that lives with inadequate drinking water and sanitation.¹⁰ The persistence of this problem substantiates a practical need to identify the circumstances under which water rights may be justiciable, since relying merely on political will has proven inadequate to resolve the water rights deficit. In this chapter I propose that the social right of having access to safe drinking water in adequate quantities could found or form part of an action in Canadian courts. The chapter opens with a quick overview of the current water quality situation on First Nation reserves, before turning to legal argument.

B. Indigenous Peoples Live With Risky Water

Many Indigenous Canadians residing in reserve communities live with water that places their health and well-being at risk. An arm's-length and comprehensive engineering assessment of on-reserve water systems was released in April 2011, identifying seventy-three percent of the systems as being either medium or high risk¹¹ (thirty-four percent and thirty-nine percent, respectively). Medium risk means that the system has deficiencies such that there is a "medium probability that any problem could result in unsafe water."¹² High risk is defined as "major deficiencies in most of the components" such that there is a "high probability that any problem could result in unsafe water,"¹³ which "may lead to potential health and safety or environmental

¹⁰ Boyd, above note 4 at 83.

¹¹ Indian and Northern Affairs Canada, *National Assessment of First Nations Water and Wastewater Systems: National Roll-Up Report Final* (2011) at 16, online: AANDC www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/enr_wtr_nawws_rurnat_rurnat_1313761126676_eng.pdf [INAC, *2011 National Assessment*] (a total of 571 out of the 587 reserve-based First Nations participated in the study, so its figures can be considered representative, at i. It is important to note that these water systems serve different sized communities. Although thirty-nine percent of water systems are high risk, they serve twenty-five percent—not thirty-nine percent—of the reserve-based population in Canada, at 16).

¹² *Ibid* at Appendix A: Glossary.

¹³ *Ibid*.

concerns” and requires “immediate corrective action.”¹⁴ The risk levels associated with water systems are presently considerably worse than they were a decade ago, when “only” twenty-two percent of water systems garnered a “high risk” rating.¹⁵ At that time, such a level of risk was considered significant enough for the federal government to conclude that urgent action was required.¹⁶ The current figures clearly demonstrate the fact that existing protocols, policies, and practices need to be carefully assessed to determine why and how they fall short and to consider whether an entirely new approach is warranted. According to the report’s definitions, the thirty-nine percent of water systems that received the high risk rating are in need of “immediate corrective action.”¹⁷ Aboriginal Affairs and Northern Development Canada’s (AANDC)¹⁸ response to the 2011 National Assessment, however, downplays the significance of the data. One of its key comments on the figures, which it repeats twice in its official statement released with the report, is that “risk rating is a measure of overall system management risk, not necessarily of water safety or quality.”¹⁹

In fact, a high-risk rating can be triggered through the cumulative effect of factors other than immediate water safety risks, such as a lack of maintenance plans and source protection or for responding to emergencies, as well as not having a certified systems operator. However, the 2011 National Assessment makes it clear that water safety concerns did actually drive many of the high-risk designations. Of the 314 water systems that were rated as high risk, 192 (sixty-one percent) received that designation because they failed to meet a health-related parameter. For example, 150 of these systems were high-risk due to bacteriological risk levels. A further 120

¹⁴ *Ibid* at 15 & 16.

¹⁵ See Treasury Board of Canada Secretariat, *First Nations Water Management Strategy: Plans, Spending and Results for 2003/2004* (2004) [Treasury Board of Canada, *First Nations 2003/2004*] (this document reports the 2002 figure). See, for example, Indian and Northern Affairs Canada, *Plan of Action for Drinking Water in First Nations Communities: Progress Report - December 7, 2006* (Ottawa: INAC, 2006) at 1 [INAC, *Plan of Action*] (this government report describes twenty-nine percent of systems as having been at high risk in 2001 and 2002. Reported figures on risk levels are often slightly in variance due to overlapping (but slightly different) time-periods being scanned, and due to the fact that different reports/studies seem to use slightly different definitions of risk).

¹⁶ Indian and Northern Affairs Canada & Health Canada, *Summative Evaluation of the First Nations Water Management Strategy: Project 06/13* (2007) at 3, online : AANDC www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/efnw08_1100100012017_eng.pdf [INAC, *Summative Evaluation*].

¹⁷ INAC, *2011 National Assessment*, above note 11 at 15-16.

¹⁸ The Ministry of Indian and Northern Affairs Canada (INAC) was recently renamed. It is now called Aboriginal Affairs and Northern Development Canada (AANDC). This chapter will refer to AANDC, except in situations where INAC is used in a direct quote.

¹⁹ Aboriginal Affairs and Northern Development Canada, *Department’s Response to the National Assessment of First Nations Water and Wastewater Systems* (2011), online: AANDC www.aadnc-AANDC.gc.ca/eng/1314383237592/1314383364994.

systems also failed to meet health parameters, but because of the manner in which those parameters were weighed, they were not assessed as high-risk.²⁰ It is worth noting that the risk evaluation system that AANDC required the independent assessors to use did not meet the assessors' approval in a number of ways. One of their critiques was that the system failed to weigh 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."²¹ As a result, it is important to consider whether more systems would have received poorer ratings if contaminant health risks were weighed in accordance with the standards that the independent assessors felt were appropriate. Although the actual level of risk from unsafe water is therefore not entirely clear, the baseline figures support the conclusion that an unacceptable number of water systems place the health and well-being of reserve residents at risk.

AANDC's quieted description of the relevance of this data is striking given the fact that in 2003 AANDC had committed to addressing all high risk water systems by 2006 as a key plank of its First Nations Water Management Strategy ('FNWMS'). In fact, under the FNWMS the number of systems rated as high risk decreased rather incrementally, going from twenty-two percent in 2002 to twenty percent in 2004-2005.²² By 2006, the federal government had shifted its deadline to 2008, while remaining clear that "the main objective of the First Nations Water Management Strategy is to address all of the high risk systems by the end of March of 2008."²³ By January 2008, AANDC reported that the number of communities with high-risk systems had decreased to eighty-five.²⁴ It seems reasonable to assume that a contributing factor²⁵ to the failure in bringing all systems to low (or even medium) risk status is AANDC's policy to fund

²⁰ INAC, *2011 National Assessment*, above note 11 at 23.

²¹ *Ibid* at 42.

²² Treasury Board of Canada Secretariat, *First Nations Water Management Strategy: Plans, Spending and Results for 2004/2005* (2005); Treasury Board of Canada Secretariat, *First Nations 2003/2004*, above note 15 (this commitment was part of the 2003 to 2008 First Nations Water Management Strategy).

²³ INAC, *Plan of Action*, above note 15 at 2.

²⁴ Indian and Northern Affairs Canada, *First Nations Water and Wastewater Action Plan: Progress Report January 2008 – March 2009* (Ottawa: INAC, 2009) at 6 (it is unclear whether this figure refers to the number of high-risk systems (and some reserves have two or more systems on their land) or to the number of reserve communities, which are served by one or more high-risk systems. In the latter case, a figure of eighty-five would correlate with approximately fourteen percent of communities having high-risk systems).

²⁵ 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 80-4 [MacIntosh, "Testing the Waters"] (the author provides a more detailed discussion of the complexities involved in addressing on-reserve water, which include jurisdiction complications).

only eighty percent of estimated operations and maintenance costs for reserve-based capital infrastructure once administrative responsibility for that infrastructure is transferred to communities, regardless of the reserve community's actual costs and ability to find alternate funding.²⁶ 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.²⁷ This feeling was substantiated in part by assessment inspectors who found equipment in disrepair due to “a [reported] lack of funding.”²⁸ 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 twenty percent of the costs.²⁹

However, when mandated by law, safe water has been provided to reserve residents. The federal labour code requires federal employees to have access to safe drinking water.³⁰ As a result, many nursing stations on reserves (when staffed by federal employees) have had their own water filtration system installed when reserve water has been deemed to be potentially unsafe.³¹ There is a troubling irony in this situation: although the federal government will take the necessary steps to actually provide safe water in the face of clearly legislated liability, the reserve population served by these health care professionals must boil and disinfect or import their water, or else drink and use unsafe water. This speaks both to the questions of political will and to the force of the threat of liability.

²⁶ See Constance MacIntosh, “Envisioning the Future of Aboriginal Health Under the Health Transfer Process” (2008) *Health LJ (Special Edition)* 67 at 73-84 [MacIntosh, “Envisioning the Future”].

²⁷ INAC, *2011 National Assessment*, above note 11 at 37.

²⁸ *Ibid.*

²⁹ Office of the Auditor General of Canada, *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons* (2005) at 19 & 20, online : OAG www.oag-bvg.gc.ca/internet/docs/c20050905ce.pdf [OAG, *2005 Report*].

³⁰ *Canada Labour Code*, RSC 1985, c L-2, s 125(1)(j); *Occupational Safety and Health Regulations*, SOR/86-304, s 9.24.

³¹ OAG, *2005 Report*, above note 29 at 10.

C. Fiduciary Law as a Route to Realizing Water Rights

The question of whether the ongoing failure to provide safe water to on-reserve residents is justiciable in a Canadian courtroom has never been litigated,³² although it is beginning to attract some scholarly attention.³³ The remainder of this chapter explores the possibility that on-reserve Indigenous people may have an actionable right to safe water that arises under the operation of fiduciary law.

1) Fiduciary Law in the Aboriginal-Crown Context

Fiduciary law is developing in a unique fashion within the Crown-Aboriginal context.³⁴ In general, Canadian courts only impose fiduciary duties “with regard to obligations originating in a private law context.”³⁵ They seldom impose enforceable fiduciary obligations on the Crown when it is acting on its public responsibilities; rather, courts are typically limited to only scrutinizing Crown action for lawfulness.³⁶ This limitation is rationalized on the basis that the Crown is considered to be politically accountable when acting on its discretion. Furthermore, because the Crown must manage “the public’s property for the common good,” it normally ought not to have its discretion restrained by fiduciary obligations to singular groups or segments of the public.³⁷

Although “the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function[s],”³⁸ the Supreme Court of Canada has determined that, in specific circumstances, the Crown owes fiduciary obligations to Indigenous peoples that are “in

³² See MacIntosh, “Testing the Waters,” above note 25 at 85-7 (the author briefly considers the potential for fiduciary law in this previous article, but does not, in any way, properly canvass its potential).

³³ See, for example, Boyd, above note 4 (the author identifies how sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* support an argument that Indigenous peoples have an enforceable constitutional right to safe and adequate water).

³⁴ Lynda Collins & Meghan Murtha, “Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap” (2010) 47:4 *Alta L Rev* 959 at 965 (the authors describe the “free-standing fiduciary duty” as being “relatively undeveloped in the Aboriginal law jurisprudence” and, therefore, “fertile ground”).

³⁵ *Guerin v The Queen*, [1984] 2 SCR 335 at para 104 [*Guerin*].

³⁶ See, for example, *Reference Re ss 193 and 195.1(1)(c) of the Criminal Code (Manitoba)*, [1990] 1 SCR 1123, Dickson CJC [*Reference*] (“[t]he issue is not whether the legislative scheme is frustrating or unwise but whether the scheme offends the basic tenets of our legal system” at 1142).

³⁷ David Elliot, “Much Ado about Dittos: *Wewaykum* and the Fiduciary Obligation of the Crown” (2003) 29:1 *Queen’s LJ* 1 at 9 [Elliot].

³⁸ *Guerin*, above note 35 at para 104.

the nature of a private law duty.”³⁹ As a result, they are directly actionable.⁴⁰ If the required criteria are met, courts have the authority to scrutinize the quality or character of Crown laws, policies, decisions, and actions affecting Indigenous peoples against fiduciary standards,⁴¹ rather than merely their compliance with, for example, an underlying statutory process. Given the nature of fiduciary law, courts are also able to impose remedies that are informed by principles of equity, shaped towards restitution⁴² and reconciliation,⁴³ instead of simply awarding damages.

This variation from the general law has been determined to be a unique and necessary feature of Crown-Aboriginal law. 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 government misconduct or ineptitude.”⁴⁴ 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.”⁴⁵

Not every decision or action of the Crown that engages Indigenous peoples, however, is subject to being scrutinized for consistency with fiduciary standards.⁴⁶ As cautioned by the Supreme Court of Canada in *Weywaykum*, “the fiduciary duty imposed on the Crown does not

³⁹ *Ibid.*

⁴⁰ *Ibid.* See also Leonard Rotman, “*Wewaykum*: A New Spin on the Crown’s Fiduciary Obligations to Aboriginal Peoples?” (2004) 37:1 UBC L Rev 219 at 220-26 [Rotman] (overview of Supreme Court of Canada jurisprudence regarding the development of the Crown-Aboriginal fiduciary relationship); Elliot, above note 37 at 7-17. See generally James Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal People* (Saskatoon: Purich Publishing, 2005) [Reynolds].

⁴¹ See, for example, *Guerin*, above note 35; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 [*Blueberry River*]; *Wewaykum Indian Band v Canada*, 2002 SCC 79 [*Wewaykum*].

⁴² Rotman, above note 40 at 227, n 36.

⁴³ Constance MacIntosh, “The Reconciliation Doctrine in Chief Justice McLachlin’s Court: From a ‘Final Legal Remedy’ to a ‘Just and Lasting’ Process” in David Wright & Adam Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) 201.

⁴⁴ *Wewaykum*, above note 41 at para 80.

⁴⁵ *Ibid.* at para 79.

⁴⁶ *Lax Kw’alaams Indian Band v Canada (AG)*, 2011 SCC 56 at paras 69-72.

exist at large but in relation to specific Indian interests.”⁴⁷ For fiduciary obligations to arise, the Crown must undertake “discretionary control” over a “cognizable Indian interest.”⁴⁸ Although the test described in *Wewaykum* leaves issues to be determined and creates some new uncertainties,⁴⁹ it does offer key clarifications regarding the nature of the sort of “interest” that could be subject to the fiduciary duty. In particular, the court clarified that the “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, such as where transfers of land are involved.⁵⁰ The idea of a cognizable Indian interest is thus fairly broad.

2) Evidence that Fiduciary Duties Arise

In the case of on-reserve water, it is not a significant challenge to show that the Crown took discretionary control over a cognizable Indian interest; indeed, one can establish a *prima facie* case by considering what is available on the public record. The British Crown and then-Canada historically left Indigenous peoples with little choice but to reside on reserves.⁵¹ 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.”⁵² 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, capita infrastructure, and water systems.⁵³

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

⁴⁷ *Wewaykum*, above note 41 at para 81.

⁴⁸ *Ibid* at para 85.

⁴⁹ See, for example, Elliot, above note 37 at 35-7.

⁵⁰ *Wewaykum*, above note 41 (“[a]ll members of the Court accepted in *Ross River* that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (*Sparrow*) or existing reserves (*Guerin*),” at para 79).

⁵¹ See Constance MacIntosh, “From Judging Culture to Taxing ‘Indians’: Tracing the Legal Discourse of the ‘Indian Mode of Life’” (2009) 47:3 *Osgoode Hall LJ* 399 (indeed, both historically and recently, one’s status and statutory rights as an “Indian” turned on living an Indian “mode of life,” a conceptualization that centrally turned on residing on reserved land. Although the situation has, over time, become less rigid, in the recent taxation case of *Bastien Estate v Canada*, 2011 SCC 38, the Supreme Court of Canada affirmed that the tax exemption provisions of the *Indian Act* are tied to owning personal property that is situated on reserves).

⁵² *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, App II, No 5.

⁵³ See, for example, *Indian Act*, RSC 1985, c I-5, s 8.

protection regime.⁵⁴ 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.⁵⁵ Thus the Crown has unilaterally asserted or claimed discretionary authority through both constitutional and legislative instruments.

Alongside creating this legislative regime, under which reserve-based Indigenous communities are legally precluded from effectively self-regulating their water regimes, the Crown has acted upon its assumed powers through enacting various policies and practices; as a result, an argument can be made on the basis of conduct. For example, the Auditor General of Canada provided this overview of federal practices in 2005:

Federal programs and funding related to drinking water on reserves are based on government policy adopted in the 1960s and 1970s, and parliamentary appropriations. The objective of the government policy is to ensure that people living on reserves attain a comparable level of health and have access to water facilities comparable with other Canadians living in communities of a similar size and location.⁵⁶

Specific examples of policies and protocols that demonstrate Canada's assertion of discretionary control over this interest are readily available. In 1991, Indian and Northern Affairs Canada (INAC) affirmed its commitment to a policy dictating that reserve communities would live in conditions comparable to non-Aboriginal communities by 2001,⁵⁷ a commitment that obviously embraces water quality. Then, in 1995, INAC asserted it would remedy all deficient on-reserve water systems by 2004.⁵⁸ In 2003, Canada introduced the First Nations Water Management Strategy, which was to address all high-risk facilities, address infrastructure deficits

⁵⁴ See, for example, *Ibid* at ss 81(1)(f) and 81(1)(l). See also MacIntosh, "Testing the Waters," above note 25 at 69.

⁵⁵ See Office of the Auditor General of Canada, *Report of the Auditor General of Canada*, ch 23 (Ottawa: Public Works and Services Canada, 1995) at para 23.45 [OAG, 1995 Report] (the specific date when Canada assumed control over drinking water is not relevant for the purposes of this analysis. It is sufficient to note that throughout the 1970s, Indian and Northern Affairs Canada assigned project managers to oversee all on-reserve capital projects and infrastructure, including water and sewage treatment facilities. The Auditor General's assessment is that the Indigenous inhabitants of the reserves had essentially no role. As a result, their interests were in practice entirely at the mercy of the federal government).

⁵⁶ OAG, 2005 Report, above note 29 at 3. See also Nicolas Auclair & Tonina Simeone, "Bill S-11: The Safe Drinking Water for First Nations Act" (Ottawa: Library of Parliament, 2010) at 2 [Auclair & Simeone, "Bill S-11"].

⁵⁷ See OAG, 1995 Report, above note 55 at para 23.21.

⁵⁸ See *Report of the Royal Commission on Aboriginal Peoples: Gathering Support*, vol 3 (Ottawa: Supply and Services Canada, 1996) at 380-81 [RCAP, vol 3].

to bring them up to industry standards, design and implement multi-barrier quality standards, and ensure all water operators were certified by 2008.

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. It is not relevant whether this control was asserted unilaterally, or if it arose in a different fashion—the conduct alone is sufficient to found the fiduciary relationship.⁵⁹

3) Fiduciary Standards Have Not Been Met

The standards that are required of a fiduciary are high. In the pivotal case of *Wewaykum*, Binnie J confirmed that the nature and scope of the Crown’s fiduciary duties align with those that are usually imposed on persons who assume private law fiduciary relationships:

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.⁶⁰

“Good faith” efforts that are informed by “diligence” are adequately supported and funded, and are reasonably responsive to objective assessments of why existing efforts are failing. However, Crown efforts to date have failed: although all federal initiatives have resulted in some level of improvement, none have met their goals.⁶¹ In both designing and implementing plans, federal policies and practices have consistently been selectively responsive to concerns and observations regarding why they have (or are going to) fail. It is this selective responsiveness to

⁵⁹ See *M(K) v M(H)*, [1992] 3 SCR 6 [*M(K) v M(H)*] (“fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary” at 61).

⁶⁰ *Wewaykum*, above note 41 at para 94.

⁶¹ Office of the Auditor General of Canada, *Status Report of the Auditor General of Canada to the House of Commons*, ch 4 (Ottawa: Public Works and Government Services, 2011) [OAG, 2011 Report].

evidence and, in particular, a failure to modify approaches based on that evidence that largely grounds the breach.

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 ANNDCC constructed and has or had been operating. This is despite AANDCC'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. AANDCC has strong-armed this offloading onto its 'beneficiary' via various transfer and contribution agreements, a practice that, in this instance, has been criticized as being primarily "a deficit-fighting measure,"⁶² instead of a measure designed to address water quality or safety. A slight digression is in order, to explain how this policy has been operationalized. As noted above, the federal Crown has long assumed control over reserve-based communities. Given the federal-provincial division of powers, this means that it has claimed fields that are usually deemed to fall under provincial jurisdiction, such as education and social services programming.

Transfer or contribution agreements are the route by which AANDCC offers reserve-based Indigenous communities the opportunity to administer the programming which has been designed, administered, funded, and delivered by federal government offices,⁶³ purportedly as part of supporting Indigenous self-government. Programs offered include considerable aspects of public health and social services programming, and so are of great interest to many communities. However, any community that wishes to enter into an agreement where they have any level of discretionary control over public health, for example, must agree to deliver certain programs, including Environmental/Occupational Health and Safety.⁶⁴ The Environmental Health Program includes, in turn, drinking water monitoring and sewage infrastructure.⁶⁵ While responsibility is allegedly transferred, adequate funding to fulfill responsibilities is not. This is because it is AANDCC's policy that transfer agreements are to limit funding to eighty percent of the estimated

⁶² Assembly of First Nations, *Federal Government Funding to First Nations: The Facts, the Myths, and the Way Forward* (Ottawa: Assembly of First Nations, 2004) at 11.

⁶³ See MacIntosh, "Envisioning the Future," above note 25 (the author provides a detailed discussion of these agreements in the context of health transfers); Judith Rae, "Program Delivery Devolution: A Stepping Stone or Quagmire for First Nations?" (2009) 7:2 *Indigenous LJ* 1 at 14-7 (the author discusses how communities are typically deeply dissatisfied with these agreements in the context of education and child protection services, but enter into them nonetheless)

⁶⁴ Health Canada, *Transfer of Health Programs to First Nations and Inuit Communities: Handbook 2 - The Health Services Transfer* (Ottawa: Health Canada, 2004) at 9.

⁶⁵ *Ibid* at 10 & 11.

operations and maintenance costs of water infrastructure.⁶⁶ Given that systems have been identified as not operating safely when run by AANDC (and, therefore, with allegedly full funding), this practice has been identified by the Auditor General and by the Royal Commission on Aboriginal Peoples as likely setting communities up to fail.⁶⁷ Calls for reform to AANDC's policy, however, remain unanswered.

Coupled with this policy, starting around 2007, the standard transfer agreement to design and administer such programs as education and housing was modified to impose the following mandatory obligation:

[Band] Council shall:

- a. provide for the preservation of public health, safety and the environment (e.g. address drinking water advisories in a timely manner); and
- b. at a minimum, *adhere to all the applicable codes, protocols and guidelines standards for design, construction, operation, maintenance and monitoring of facilities*. This includes the Protocol for Safe Drinking Water in First Nations Communities.⁶⁸

The required commitment for Indigenous communities to shoulder these responsibilities is a draconian imposition that Indigenous communities are extremely unlikely to meet. The federal government itself has, in many instances, been unable to comply with these codes and protocols. For example, despite the promise of the federal government's 2003 First Nations Water Management Strategy that it would have all water treatment plants on reserves overseen by certified operators by 2008,⁶⁹ thus bringing practice in line with one of the elements of the Safe Drinking Water Protocol—by 2011 only fifty-four percent of operators were certified.⁷⁰ According to the Safe Drinking Water Foundation, reserve communities who tried to refuse to

⁶⁶ OAG, *2005 Report*, above note 29 at 4.

⁶⁷ See, for example, OAG, *1995 Report*, above note 55 at paras 23.45-46; OAG, *2005 Report*, above note 29; *RCAP*, vol 3, above note 58 at 379.

⁶⁸ Indian and Northern Affairs Canada, *Comprehensive Funding Arrangement National Model for Use with First Nations and Tribal Councils for 2010-2011* (2010) s 10.1.1, online: AANDC www.aandc-aandc.gc.ca/eng/1100100010071 [emphasis added].

⁶⁹ MacIntosh, "Envisioning the Future," above note 26 at 76 & 77; INAC, *Summative Evaluation*, above note 16.

⁷⁰ INAC, *2011 National Assessment*, above note 11 at 24.

commit to meeting these standards and resisted signing the contribution agreement “had funds withheld for housing, education, health services or for water projects.”⁷¹

This coercive, alleged offloading 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 that AANDC designed and constructed are already not compliant,⁷² 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.”⁷³

Assuming the legitimacy of the constitutional division of powers and the assignment of the head of power over “Indians and lands reserved to the Indians” to the federal government under section 91(24) of the *Constitution Act, 1867*, such a divesting of responsibility is also not possible in law as constitutional obligations cannot be contracted out-of.⁷⁴ In its assessment of the transfer agreements, the Auditor General has determined that regardless of the wording of such agreements, INAC “continues to be responsible and accountable” for on-reserve water systems,⁷⁵ a conclusion that was also reached by Health Canada’s Interdepartmental Working Group on Drinking Water in 2005.⁷⁶ This point is taken up again, below, where an argument is presented that the Crown, as a fiduciary, is responsible for remedying the situation that it has enabled.

Similarly, despite the fact that Canada invests money into reserve water systems and claims it is committed to providing ‘comparable’ living standards, the federally appointed Expert Panel on Safe Drinking Water for First Nations concluded in 2006 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.”⁷⁷

⁷¹ Safe Drinking Water Foundation, *A Review of the Engagement Sessions for the Federal Action Plan on Safe Drinking Water for First Nations: Position Statement* (Saskatoon: Safe Drinking Water Foundation, 2009) at 2.

⁷² Constance MacIntosh, “Public Health Protection and Drinking Water Quality on First Nation Reserves: Considering the New Federal Regulatory Proposal” (2009) 18:1 Health L Rev 5 at 6 [MacIntosh, “Public Health Protection”] (regarding how facilities have not been built to meet provincial or other building and design codes).

⁷³ *Wewaykum*, above note 41 at para 94.

⁷⁴ See, for example, *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at para 40.

⁷⁵ OAG, *1995 Report*, above note 55 at paras 23.45-46.

⁷⁶ Health Canada, *Guidance for Providing Safe Drinking Water in Areas of Federal Jurisdiction: Version 1* (Ottawa: Health Canada, 2005) at 25 (the Group concluded that INAC can contract out specific duties to First Nations, but remains responsible for actually meeting drinking water objectives).

⁷⁷ Harry Swain, Stan Louttit & Steve Hrudehy, *Report of the Expert Panel on Safe Drinking Water for First Nations*, vol 1 (Ottawa: Indian Affairs and Northern Development, 2006) at 22 [Swain, Louttit & Hrudehy, *Report of the Expert Panel 2006*, vol 1].

The federal government received a detailed engineering analysis in 2011 from an arm's-length source, complete with a cost figure for the investment that is actually required to realize the various commitments and standards that are allegedly supported by political will and recommended under protocols. The 2011 National Assessment reported that “[t]he total cost (both construction and non-construction) associated with upgrading water systems to comply with applicable guidelines, protocols and legislation is estimated to be \$846 million.”⁷⁸ As noted above, the federal government seeks to make the Indigenous beneficiary responsible, under transfer agreements, for addressing the compliance gap that Indigenous communities are allegedly inheriting. Consistent with holding its course, the federal government’s response to the 2011 National Assessment cost estimate was to assert that the figures were inflated and to state that any funds to improve water-quality infrastructure will come from the existing funding base.⁷⁹ This statement is quite troubling. In examining the federal government’s capital plan for 2002-2007, the Expert Panel reported that “the federal government’s initial estimates of the capital needed to invest in First Nations water and wastewater systems turned out to be one-third of what was actually needed.”⁸⁰ The Expert Panel found that the programs were underfunded, in part because the figures were not based on a detailed engineering analysis.⁸¹ To plan without data once is surprising enough, but to choose to not invest the funds that independent engineers have determined are necessary to bring facilities and practices up to standard seems counterintuitive and certainly inconsistent with acting reasonably and with due diligence.

The government’s stance also seems to suggest that a decision has already been made that the findings from the 2011 National Assessment do not signal a crisis situation. Once again, in the face of seventy-three percent of water systems operating at medium or high-risk levels, such action and inaction are hard to reconcile with the Crown “acting in what it reasonably and with diligence” could suggest is in “the best interest of the beneficiary.”⁸²

Just as the federal government has never provided the funding that its own panels, working groups, and other studies have concluded is necessary, there are examples of AANDC not fulfilling even some of its basic commitments. One such instance is AANDC’s lack of

⁷⁸ INAC, *2011 National Assessment*, above note 11 at 35.

⁷⁹ “First Nations’ drinking-water ‘high risk’: report” (19 July 2011), online : The Canadian Press www.thecanadianpress.com (in this article, these statements were attributed to Michelle Yao, spokesperson for Aboriginal Affairs Minister John Duncan).

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Wewaykum*, above note 41 at para 94.

compliance with its policy that on-reserve water systems undergo annual inspections. When the Auditor General's Office conducted a 'spot test' in regions where a drinking water advisory had been issued between January 2009 and March 2010, the Office found that from 2006 to 2010 "INAC had conducted only 25 of 80 required annual inspections and 47 of 80 risk evaluations."⁸³ Given these facts, it is hard to imagine how one could find that AANDC has acted with loyalty and in good faith.

Fiduciary standards have similarly not been met in the federal government's most recent initiative, which is to bring in a legislative framework to regulate on-reserve water quality. This initiative can be seen as a partial response to the consistent findings of arm's-length government-based or other assessors, since at least 2005, that a regulatory regime is necessary if reserve residents are to experience safe water. In particular, such assessors have identified a need for justiciable quality standards.⁸⁴ For example, the 2005 Auditor General report stated:

When it comes to the safety of drinking water, residents of First Nations communities do not benefit from a level of protection comparable to that of people who live off reserves. This is partly because there are no laws and regulations governing the provision of drinking water in First Nations communities, unlike other communities.

The federal government tabled a bill to regulate on-reserve water in May 2010. It was at second reading when the government fell. At press time, the bill had not yet been reintroduced.

Although legislation is clearly required, it is not at all certain that the bill, as drafted and tabled, would remedy the situation if it were ultimately passed. Indeed, there is reason to believe that it may actually enhance risk. This is because the bill selectively addresses the issues that were identified as pressing.⁸⁵ In particular, although the bill would grant the federal government considerable power to pass regulations to do things such as make provincial quality standards apply on reserves, it fails to create a structure under which such standards can, in fact, be achieved. This is because it does not contemplate mandating the necessary funding obligations.

⁸³ OAG, *2011 Report*, above note 60 at 17.

⁸⁴ OAG, *2005 Report*, above note 28; Swain, Louttit & Hrudehy, *Report of the Expert Panel 2006*, vol 1, above note 77.

⁸⁵ See MacIntosh, "Public Health Protection," above note 72 (the author provides a discussion of the legislation's general approach and an assessment of which factors may improve under the legislation, as well as where it may fail).

The Expert Panel on Safe Drinking Water for First Nations, whose primary role was to identify key features of an adequate legislative regime, concluded that “[g]iven the resource concerns of First Nations, it would be useful, almost necessary for INAC’s funding role to be mandated in legislation.”⁸⁶ This legislative element complemented the Expert Panel’s conclusion that “adequate resources—for plants and piping, training and monitoring, and operations and maintenance—are more critical to ensuring safe drinking water than is regulation alone.”⁸⁷

In its 2011 audit, the Office of the Auditor General commended the federal government for its commitment to developing a regulatory regime, while noting that “even after the bill is passed into law, however, it may still take years to develop and implement related regulations.”⁸⁸ Regardless of when or whether the bill and its yet-to-be drafted regulations come into force, the Auditor General was clear that more is required if safe water is to become a reality. The Auditor General wrote:

Broader concerns that we believe have inhibited progress include the lack of clarity about service levels on First Nation reserves, *lack of a legislative base to fund service delivery on reserves, a lack of an appropriate funding mechanism*, and a lack of organizations that could support local service delivery.⁸⁹

The Auditor General cautioned that unless these concerns are addressed, there is a “risk that living conditions on many First Nation reserves will remain significantly below national averages, with little prospect of a brighter future ...”⁹⁰

The Expert Panel on Safe Drinking Water for First Nations similarly highlighted the need for adequate funding, while cautioning that enacting a regulatory regime without the necessary investment could create heightened risk as resources go towards meeting regulatory requirements (such as filing reports so as to avoid being fined), instead of building and maintaining the actual infrastructure. They concluded:

⁸⁶ Harry Swain, Stan Louttit & Steve Hrudehy, *Report of the Expert Panel on Safe Drinking Water for First Nations: Legal Analysis*, vol 2 (Ottawa: Indian Affairs and Northern Development, 2006) at 30.

⁸⁷ Swain, Louttit & Hrudehy, *Report of the Expert Panel 2006*, vol 1, above note 77 at 22.

⁸⁸ OAG, *2011 Report*, above note 61 at 16.

⁸⁹ *Ibid* at 8 [emphasis added].

⁹⁰ *Ibid*.

It is no coincidence that the report of the Walkerton Inquiry ... put regulation at the end of the list of elements needed for a comprehensive framework. Regulation alone will not be effective in ensuring safe drinking water unless the other requirements—a multiple-barrier approach, cautious decision-making and effective management systems—are met.

These other requirements depend on adequate investment in both human resources and physical assets. *Regulation without the investment needed to build capacity may even put drinking water safety at risk* by diverting badly needed resources into regulatory frameworks and compliance costs.⁹¹

The federal government has this information but resists incorporating it into its plans, policies, and proposed legislation; this criticism was even pointed out in the Parliamentary Library's legislative summary of the bill:

Several First Nations participating in the engagement sessions on the government's proposed legislative approach have expressed concern that the introduction of water standards legislation, *without adequate investment* to build capacity, could place First Nations drinking water *at further risk* by increasing costs associated with monitoring, reporting and compliance, as well as potential financial penalties associated with enforcement.⁹²

The summary also notes the Assembly of First Nations' assessment that "regulations without the capacity and financial resources to support them will only set up First Nations to fail."⁹³

There is, therefore, a rich body of evidence to support a claim that Canada has assumed roles and responsibilities over an identified Indigenous interest, with resulting fiduciary obligations, and that Canada has not acted consistently with fiduciary standards on a number of levels. The mere fact that Canada is operating in a context where it can "invoke competing interests" does not permit it to "shirk its fiduciary duty."⁹⁴

⁹¹ Swain, Louttit & Hruday, *Report of the Expert Panel 2006*, vol 1, above note 77 at 18 [emphasis added].

⁹² Auclair & Simeone, "Bill S-11", above note 56 at 9 [emphasis added].

⁹³ *Ibid* at 10, citing Assembly of First Nations, "AFN National Chief Calls for Real Action on Safe Drinking Water for First Nations: Need Action to Address the 'Capacity Gap as well as the Regulatory Gap'" 27 May 2010.

⁹⁴ *Wewaykum*, above note 41 at para 104. See also *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at para 51.

D. International Law and Canadian Obligations

If a claim based on fiduciary law were brought forward, Indigenous litigants would, no doubt, frame their claimed right to safe water within the overarching context of international law, which clearly supports the realization of these rights. Central to such submissions may be the fact that Canada's recent positions at the United Nations, referred to above, do not undo Canada's existing commitments.

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."⁹⁵ The *ICESCR* specifically calls on states to address hygiene, as well as the prevention, treatment, and control of epidemic and endemic diseases.⁹⁶ 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."⁹⁷

In their *General Comment No 15*, the Committee considered the human right to safe drinking water.⁹⁸ The Comment explains that the right "entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses."⁹⁹ 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.¹⁰⁰ While the General Comments do not create independent rights,¹⁰¹ they are authoritative

⁹⁵ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, art 12, 6 ILM 368 [*ICESCR*] (Canada acceded to the *ICESCR* on May 19, 1976. These rights are not absolute, but are intended to be realized gradually in accordance with the resources of member states (art 2)).

⁹⁶ *Ibid*, art 12.

⁹⁷ Economic and Social Council, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights General Comment No 14. The right to the highest attainable standard of health*, UNESCOR, 22d Sess, UN Doc E/C/12/2000/4 (2000) at para 43[*General Comment No 14*].

⁹⁸ Economic and Social Council, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights General Comment No 15. The right to water*, UNESCOR, 29th Sess, UN Doc E/C 12/2002/11 (2002) [*General Comment No 15*].

⁹⁹ *Ibid*, principle 2.

¹⁰⁰ *Ibid*, principle 16.

¹⁰¹ See Rebecca Bates, "The Road to the Well: An Evaluation of the Customary Right to Water" 2010 19:3 *RECIEL* 282 at 287 [Bates].

interpretations of the existing obligations under the *ICESCR*¹⁰² and support the conclusion that the right to water is part of international customary law, to which Canada is already bound.¹⁰³

It is also clear that Canada knows it cannot meet its *ICESCR* obligations unless it addresses drinking water concerns. Canada has consistently included descriptions of the state of on-reserve water and of its efforts to improve drinking water quality on reserves in its reports to the Committee, which oversees the *ICESCR*.¹⁰⁴ In response, the Committee has repeatedly found that Canada has failed to address the lack of access to safe water for its Indigenous peoples.¹⁰⁵

The Committee has been particularly frustrated with Canada's failure to develop legislation that recognizes "the right to water as a legal entitlement."¹⁰⁶ In 2006, it urged Canada to act upon these and other outstanding obligations. In particular, the Committee requested that Canada take the required steps to make Covenant rights directly enforceable and to establish "effective" mechanisms to oversee the implementation of the *ICESCR*.¹⁰⁷ They were concerned by:

The State party's restrictive interpretation of its obligations under the Covenant, in particular its position that it may implement the legal obligations set forth in the Covenant by adopting specific measures and policies rather than by enacting legislation specifically recognizing economic, social and cultural rights, and the consequent lack of awareness, in the provinces and territories, of the State party's legal obligations under the Covenant;
[and] ... The lack of legal redress available to individuals when governments fail to implement the Covenant, resulting from the insufficient coverage in domestic legislation of economic, social and cultural rights, as spelled out in the Covenant; the lack of effective enforcement mechanisms for these rights; the practice of governments of urging upon their courts an interpretation of the Canadian Charter of Rights and Freedoms denying protection

¹⁰² Lynda Collins, "Environmental Rights on the Wrong Side of History: Revisiting Canada's Position on the Human Right to Water" 2010 19:3 RECIEL 351 at 354; Salman Salman & Siobhán McInerney-Lankford, *The Human Right to Water: Legal and Policy Dimensions* (Washington: The World Bank, 2004) at 5.

¹⁰³ Bates, above note 101 at 287.

¹⁰⁴ See, for example, *International Covenant on Economic, Social and Cultural rights: Fourth Report of Canada* (Ottawa: Public Works and Government Services Canada, 2004) at paras 383-85.

¹⁰⁵ See, for example, Committee on Economic, Social and Cultural rights, *Reports of States: Canada*, 36th Sess (Geneva, 1 to 19 May 2006) at 2, online: ISHR http://olddoc.ishr.ch/hrm/tmb/treaty/cescr/reports/cescr_36/Canada_CESCR_36.pdf.

¹⁰⁶ Economic and Social Council, *Concluding observations of the Committee on Economic, Social and Cultural rights*, UNESCOR, 36th Sess, UN Doc E/C.12/CAN/CO/4 (2006) at para 11(d).

¹⁰⁷ *Ibid* at para 35.

of Covenant rights, and the inadequate availability of civil legal aid, particularly for economic, social and cultural rights.¹⁰⁸

These comments are from the Committee's response to Canada in 2006. Canada was scheduled to deliver its next report on implementation in 2010, which presumably would have had to respond to these requests for action. However, at press time, this report appears to still be outstanding. Given the caliber of criticisms that the Canadian situation has engendered due to failings under the *ICESCR*, it is hardly surprising that Canada resists treaties that include overseeing bodies that would specifically monitor Canada's compliance with the right to water.

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"¹⁰⁹ and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, which requires state parties to ensure "women in rural areas ... enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply"¹¹⁰

Perhaps more pointedly, 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.¹¹¹ Both sanitation and health depend upon, among other factors, safe drinking water in sufficient quantities. Given that this term is framed as a positive obligation, it is explicit that signatory countries must take steps to enable the realization of *UNDRIP* rights instead of merely not interfering with matters that may affect rights.

¹⁰⁸ *Ibid* at para 11.

¹⁰⁹ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, art 24(2)(c); 28 ILM 1456.

¹¹⁰ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13, art 14(2)(h), 19 ILM 33 (Canada ratified this treaty on 10 December 1981).

¹¹¹ *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, UN Doc A/61/L.67, (2007) arts 1, 20, 23, and 29.

Additionally, Article 38 of *UNDRIP* explicitly requires states to take action to implement the Declaration, including enacting legislation.¹¹² Some domestic courts have found that even absent domestic implementation, the Declaration directly constrains domestic action. A case in point is the 2007 decision of the Supreme Court of Belize in *Aurelio Cal et al v Belize*. In this case, in “elaborating on his finding of a violation of customary international law, [the Chief Justice] stated his view that the 2007 Declaration ‘embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it.’”¹¹³

These international instruments result in more than the creation of an adjudicative space.¹¹⁴ They also crystalize the legitimacy of rights claims by giving the rights form and recognition, while creating public expectations that the terms of treaties will be honoured by governments. Canada’s ratification of the above instruments results in their having interpretive force as courts will assume that Canada intends not to act in violation of international legal instruments. For example, courts will strive to interpret legislation to be consistent with obligations shouldered under international law¹¹⁵ 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.”¹¹⁶ 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.

¹¹² See Siegfried Wiessner, “United Nations Declaration on the Rights of Indigenous Peoples: Introduction,” online: Audiovisual Library of International Law http://untreaty.un.org/cod/avl/ha/ga_61-295/ga_61-295.html (several states have complied with this requirement).

¹¹³ *Ibid.*

¹¹⁴ Bruce Porter, “Claiming Adjudicative Space: Social Rights, Equality and Citizenship” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 77 at 80.

¹¹⁵ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 67.

¹¹⁶ *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1056-7. See Martha Jackman & Bruce Porter, “Canada: Socio-Economic Rights under the Canadian Charter” in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209 at 214-15 (the authors provide a discussion of this presumption and the jurisprudence that supports it).

E. Finding a Remedy, Righting the Wrong

An action based on a breach of fiduciary duties may be successful, but what would the remedy actually be?¹¹⁷ In the cases where fiduciary breaches have been made out, the courts have been concerned with ensuring justice is achieved. For example, in the germinal decision of *R v Guerin*¹¹⁸ the Supreme Court found that the following principles ought to guide considerations of remedies where the Crown has breached its fiduciary obligations to Indigenous peoples:

[I]f a breach has been committed then the trustee is liable to place the trust estate in the same position as it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter.... The principles embodied in this approach do not appear to involve any inquiry as to whether the loss was caused by or flowed from the breach. Rather the inquiry in each instance would appear to be whether the loss would have happened if there had been no breach.¹¹⁹

Thus the remedy award in *Guerin* was crafted to reflect a lost best opportunity. Similarly, in *Blueberry River*¹²⁰ the damages award reflected the current value of an interest that the Crown had transferred in a manner inconsistent with its fiduciary obligations to the First Nation. In *Osoyoos Indian Band*, in the face of uncertainty over which interests in reserve land had been expropriated by the Crown several decades before, the Court read the expropriation action to be consistent with the fiduciary duty, thereby limiting the expropriation to the minimal interests

¹¹⁷ See *Wewaykum*, above note 41, at para 135 (limitation periods concerns may also arise. However, limitation periods are not likely to be a barrier as there are copious instances of new breaches. This contrasts with the situation of a singular historic breach with continuing consequences, which would indeed be statute barred. Pursuant to the *Federal Court Act*, RSC 1985, c.F-7, s 39(1) claims based on fiduciary law against the federal government are subject to provincial limitation period legislation). See also *Wewaykum*, above note 40 at 114; *Blueberry River*, above note 40 at 107 (there is also evidence of recent instances where the Crown knew of the negative consequences of older federal policies and practices and received that knowledge at a time when it held the ability to effectively act to remedy the situation. There is an analogy here to *Blueberry River* where acting on a specific breach was barred by limitation periods but the Crown was still liable because it had a continuing power to act that extended into a period, which was not statute-barred. The Supreme Court of Canada found that “[s]o long as the [federal department] has the power the [federal department] was under a fiduciary duty to exercise this power” at 365); *Reynolds*, above note 40 at 202 (thus an actionable breach based on fiduciary law was found in the Crown’s failure to remedy the situation once it became aware of it).

¹¹⁸ *Guerin*, above note 35.

¹¹⁹ *Ibid* at para 50, citing *Re Dawson; Union Fidelity Trustee Co v Perpetual Trustee Co* (1966), 84 WN (Pt 1) (NSW) 399 at 404-06.

¹²⁰ *Blueberry River*, above note 41.

necessary to fulfill the Crown's purposes. This, in turn, left sufficient interest in the land, such that it was available to be taxed by the First Nation in question.

In some respects water is an easy issue to address. The technology for making water safe is known and we already have a national and arm's-length engineering analysis in hand that provides much of the required baseline information. A short-term step is to make the financial commitments that are required to address pressing concerns about basic infrastructure and operations. The question of how to maintain that infrastructure and sustain water safety is more complex: it necessarily involves developing just approaches to governance relationships between the Crown and Indigenous peoples that recognize the impact of intergenerational poverty and social marginalization on capacity. Such approaches must therefore be informed by a decolonizing and empowering ethic, not just the imposition of, for example, a municipal model on a First Nation community.

Scholars assessing fiduciary claims in other contexts have proposed approaches that may be helpful here. For example, Kent McNeil has assessed how the fiduciary doctrine plays out in terms of the facts surrounding Canada's assertion of control over Indigenous governments. He concludes that given past and continuing interferences and the current state of Indigenous communities due to those interferences, there is a "positive fiduciary obligation to provide Aboriginal nations with assistance to rebuild their capacity to govern themselves autonomously."¹²¹ This approach is consistent both with the jurisprudence and the scholarship of others. Writing on the general topic of transferring control over areas from the Crown's hands to Indigenous communities, Leonard Rotman observes that given the principles of fiduciary law, "it is insufficient for the Crown to attempt to dispose of its obligations by dumping them unceremoniously on the Native people without providing for their harmonious transition"¹²² Such reasoning is clearly applicable to the case of water as well. Having asserted control over water and created a dysfunctional and risky status quo, fiduciary law dictates that Canada is required to provide the specific assistance that will remedy the situation. The sort of remedy required could not be dictated in any detail from the bench, especially since planning and implementation is most likely to succeed where it is aligned with remediating the underlying

¹²¹ Kent McNeil, *The Inherent Right of Self-Government: Emerging Directions for Legal Research* (Chilliwack, BC: First Nations Governance Centre, 2004) at 31.

¹²² Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 259-60.

conditions of political marginalization, alienation, and poverty that are experienced by many Indigenous individuals and communities.¹²³ Nevertheless, a judge could set some basic parameters as dictated by fiduciary law and remain seized of the matter while the parties negotiate an appropriate process or framework for realizing the Crown's obligations and the transition into a situation where on-reserve water is no longer inordinately risky.

F. Concluding Comments

It is depressing to consider that the water woes of on-reserve Indigenous peoples in Canada may only be effectively addressed as a result of litigation, instead of as a product of dedicated political will. This is especially the case given Canada's relative wealth and the growing international recognition that access to safe and sufficient water is a human right that plays a foundational role in enabling the realization of other rights.

There is ample evidence of the failure to realize this right and of the fact that this failure is not a new phenomenon, but rather a persistent one with a considerable pedigree. While fiduciary claims are seldom possible against the federal government, the unique facts of this situation, coupled with the distinct constitutional relationship between Indigenous peoples and the state, makes such claims legally possible. In particular, there seems to be a *prima facie* case, as all of the requirements identified under developing law for establishing Crown-Indigenous fiduciary obligations are present in this situation.

First, the Crown asserted discretionary control over on-reserve water systems. This control was asserted in a variety of forms, both pursuant to legislation and policy, as well as through practice, resulting in fiduciary obligations. Second, evidence from the public record illustrates, on a *prima facie* basis, that the Crown has not met the standards to which fiduciaries are held. To support this claim, I note the acknowledged underfunded approach Canada has taken to overseeing water, its neglect in following through explicitly assumed responsibilities, and its recent introduction of legislation has been flagged as potentially increasing the risk of unsafe water, largely due to its approach to the funding base. The case for a breach is further bolstered

¹²³ Janet Smylie & Paul Adomako, eds, *Indigenous Children's Health Report: Health Assessment in Action* (Toronto: Centre for Research on Inner City Health, 2010) at 4. See also, Gerald Taiaiake Alfred, "Colonialism and State Dependency" (2009) 5:2 *Journal of Aboriginal Health* 42 at 44 ("[i]t is evidence to anyone who has experience living or working within First Nation communities that conventional approaches to health promotion and community development are not showing strong signs of success").

by the understanding of water rights and the rights of Indigenous peoples, which have been recognized under international law. International law inflects the content of the fiduciary obligations that Canada has assumed, and, therefore, informs the standards that ought to be met. It also likely informs the nature of the remedy that is in order, requiring that it engage Indigenous capacity building and that it be sensitive to sustainability.

Given the public record and the jurisprudence, a claim based on fiduciary law is one route that may reasonably be pursued to enable on-reserve Indigenous peoples to realize the core social right of access to safe water in sufficient quantities.