

Water and human rights¹

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It's an honour but not much of a pleasure to be addressing such an august and well-informed group today, mainly because I think we have the wrong topic. From where I sit, the big global question with respect to water is not human rights but climate change. You all know what last month's IPCC report² concluded: that we are headed into a hotter world, that the dry horse latitudes are going to get substantially drier, that higher temperatures mean that evaporation will be more rapid so that soil moisture will be less than what even the already bleak precipitation figures indicate, and that in the fertile belts to poleward, the story includes greater seasonality. Thus the great food-exporting regions of the world may experience both more heat and less water in their growing seasons. Moreover, consequences are now inevitable: if we stopped emitting greenhouse gasses tomorrow, the momentum of what we have done so far guarantees that the climate will keep on adjusting for many decades. What the IPCC Report did not discuss, because the science is too recent, is that even the oceans are threatened. Acidification may put an end to the corals by mid-century and calcite-based animals not long afterward. And of course you have all heard that the uncertainties about icecap melting and sea levels rising are all on, as they say, the upside. Learning to cope with a seriously altered world is the great challenge before us. In this light our subject today is but a quaint echo of the concerns of the twentieth century.

Declaring water to be a human right will not manufacture a single new molecule of it. Concentrating on a human right to water puts us in the same diversionary camp as the "business-as-usual" carbon cowboys. If we are concerned about the availability of water for the world's poor, our first task is to persuade governments that truly serious actions need to be taken with respect to energy policy all over the globe, as fast as we can. And by the way this is not unrelated to the goal of safe water, since about a third of the operating cost of water systems is power – more for deep boreholes in poor countries.

I

That's a gloomy preface, and it's not what the organizers wanted me to speak about, namely the Canadian system for assuring a plentiful supply of potable water for everyone. It's not a difficult story, although it does have its ups and downs. But in order to understand how it works here, you must know that there were two great battles for states' rights in North America in the 1860s. In the Great Republic, the federal government won, after a tragic civil war. In Canada, the provinces won, following innumerable rounds of federal-provincial meetings. Under the *British North America Act* of 1867, our founding document, the provinces have sovereign jurisdiction over natural resources, including, with minor exceptions, water. The exceptions relate to interprovincial trade – not relevant – to navigable

¹ Footnotes added to a keynote address to a conference arranged by the Department of Foreign Affairs and International Trade on Canada's possible recognition of water as a human right, Ottawa, March 29 2007

² Intergovernmental Panel on Climate Change, "Climate change 2007: the physical science basis. Summary for policymakers," IPCC Secretariat, WMO/UNEP, Geneva, February 2007

and fish-inhabited waters, and to the water resources of the First Nations, whose affairs are constitutionally federal. I'll come back to them.

In addition to provincial responsibility, we have a longstanding tradition of public ownership of both water and the means for its purification and delivery. Even in those few recent situations where the operation of facilities is contracted out, underlying ownership rests with the Crown. In this we are like most other countries, with the notable exception of the United Kingdom, whose utilities were consolidated in 1974 and sold off by the Blessed Margaret in 1989.

It's worth noting that water is dirt cheap in most parts of Canada. Urban dwellers typically pay \$1.50-\$2.00 per cubic meter for water of impeccable quality, and that price includes delivery to the home and the removal and treatment of contaminated water. These prices do not always cover the full costs, especially in smaller places, but are often subsidized out of general revenues. Recent developments in small-system technology, moreover, are lowering the cost dramatically for small communities and isolated homes. Only households with extensive lawns or swimming pools need pay more than the normal cost of telephone, internet, or cable TV service for all the water they want. It is far and away the cheapest liquid they buy. All the improvements and upgrades suggested for Ontario would cost the average household less than a bottle of scotch a month.³ In fact, its cheapness is part of the problem – because everybody over-consumes it, and because nobody thinks about it, and thus the sector does not always get the financial discipline or managerial excellence it requires.

This underscores a fault line in the discourse between poor well-off countries. The Committee's General Comment 15,⁴ thinking of the poor, urges "free or low-cost water," whereas in wealthy countries, the core of expert advice is getting water prices to internalize the full costs of provision, including environmental and regulatory costs, in part to moderate demand.

Drinking water quality standards are set by the provinces, but with strong reliance on that quintessentially Canadian invention, the federal-provincial committee of officials. This has two consequences. One, most standards for chemical and physical contaminants are what you might call theological. They are matters of faith, incapable of measurement by human hand or eye. The essential idea is that if you drink two liters a day of water with the reference dose in it for 70 years, you would have one extra chance in 10,000 of developing a neoplasm. In point of fact, it's worse than that, since even officials aren't willing to wait around for 70 years to observe the unobservable and hence rely on animal models. Whole extra orders of magnitude of safety are arbitrarily thrown into the calculations on grounds of possible interspecies differences in susceptibility, or animal size, or the possibility that some humans might be weak or ill, or just because it seems like a good idea. Risk aversion is the name of the game. The reason they can get away with this is that treating water to such standards turns out to be ridiculously cheap.

³ Harry Swain, Fred Lazar and Jim Pine, *Watertight: the case for change in Ontario's water and wastewater sector*, report of the water strategy expert panel, Queen's Printer, Toronto, July 2005

⁴ United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, "Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights. General Comment No. 15, The right to water," Geneva, November 2002

This is not the whole story about standards, though, because it masks the fact that most chemical contaminants, unless present in overwhelming quantity, won't even make you very sick. On the other hand, microbes can kill, and quickly. There are three types. Two of them, bacteria and viruses, are easily defeated with a tiny shot of chlorine, so we all do that. But protozoa, notably *Giardia lamblia* and *Cryptosporidia*, are not so easily killed, since in natural waters they exist as wee leathery cysts, dormant waiting to be swallowed into a mammalian gut, where they go on a reproductive spree. Filtration or, more recently, irradiation with ultraviolet light, are the preferred methods of dealing with these fellows. And filtration is expensive. So those officials who got sent to the fed-prov committee traditionally had a flea put in their collective ear by their Finance ministries – don't agree to anything expensive! And for many decades, filtration, the only practical way to avoid acute disease, was not part of the Canadian standard. All thinking jurisdictions required it, though. Unfortunately, until Walkerton, these did not include our bookend provinces, B.C. and Newfoundland. Evidently, bears do not poop in the woods in British Columbia

So “Super, Natural British Columbia” just had a two-week boil-water advisory in its biggest city because it does not yet have filtration.

Despite this embarrassment – and there was no serious health risk, just an abundance of caution based on a modest rise in turbidity – big city water in Canada is really, really safe. So safe that a reasonable person doesn't have to give it a thought. In smaller places the story is more ambiguous. Ontario has ten times as many water suppliers as it should, B.C. a hundred. North Battleford got what it deserved, having put its intake downstream from its sewage treatment plant. Walkerton was an example of ignorance and stupidity at several levels.

II

For our international guests I should perhaps explain something about Walkerton, the incident that woke all Canadians to the need for due care and attention in the water supply business. In May 2000, in a small town of 4,900 in a rural part of Ontario, a heavy thunderstorm caused manure contaminated with *E. coli* 0157:H7 to be washed into one of the community's wells, overwhelming the chlorine residual. The local public utilities commission was so cheap that it had not installed a \$13,000 automatic valve to shut down the well when chlorine fell below normal, even though it had more than \$500,000 in cash in its water account at the bank at the time. The system operators were unqualified, and the manager thought that because the water came from underground it was pure. In consequence he falsified his records, in a way so dumb that only a truly block-headed provincial inspector could fail to notice. She did, though. When people began to become sick, the manager denied to the public health authorities that the cause could be the water. In the end, almost half the people of Walkerton became ill, and seven died. Many have continuing liver or kidney problems, and some will require transplants or have their lives shortened. For a country that takes abundant, clean water for granted, this was a shocker, and led to a commission of inquiry under a very capable and senior judge, the Hon. Dennis O'Connor.

The outcome was a report in two volumes.⁵ The first was a detailed examination of just what happened at Walkerton – retrospective, lawyerly, specific, and sobering. The second was general and forward looking: what do we need to do to ensure safe water supplies to the general public? On this broader question of public policy, Justice O'Connor made some 83 recommendations, all closely related to public health. The embarrassment of the provincial government was so intense that it adopted all 83, and to this day the provincial Ministry of the Environment maintains a checklist of where they are in implementing these recommendations. They fell, generally, in four groups.

First, explicitly maintain a multiple-barrier approach between natural water and the tap: source protection, purification, distribution, and waste treatment, all with equipment capable of meeting high water quality standards and operated by people who have demonstrated, through training, experience and examination, that they know what they are doing.

Second, make sure there are quality management and oversight systems in place that keep everyone focused on the job to be done.

Third, put these responsibilities into law so that everyone knows their role and is held to a high standard of care.

Fourth, take the hitherto unenforceable water quality guidelines (“objectives”) and give them the force of law by putting them into regulations.

These were the recommendations that Ontario accepted, and which were noted by all the other provinces. Nationwide improvements in water management followed.

A point which I particularly wish you to note is that none of these recommendations depend on a legally defined human right to water.

Walkerton did something else for us as well. It highlighted that public health, as well as cost, varies with the size of system. The financial economies of scale are well known. What's less clear is that smaller systems, because they can't afford the quality of technical help required to meet modern standards, often run risks that are higher than comfortable. In consequence, there has been quite an emphasis in recent years on training water system operators. Since Walkerton, in 2000, training to match the technical complexity of the treatment process has become mandatory in most provinces, and on Indian reserves. The classic multiple barriers all depend on well-trained, dedicated people, and it is good to see that this fundamental resource is getting the investment required.

The bottom line is that, in Canada, the only places where there are reasons to worry about water quality are some of the smaller ones. And the answers to that include consolidation of systems, or at least centralized management of physically separated systems, in order to get better scale wherever possible. Better training always helps. As well, some of the more recent advances in treatment technology don't require a million customers to be efficient. Relatively inexpensive systems that work at the small community or even

⁵ Dennis R. O'Connor, *Report of the Walkerton Inquiry*, 2 vols., Queen's Printer for Ontario, 2002

household level have recently become available, but they meet regulatory resistance in some quarters. This is, after all, a mature industry, out of the public eye for the most part, and not subject to the spur of competition, so attitudes tend to get ingrained.

III

So much for the provinces and the municipal systems they supervise. I turn now to the special responsibilities of the federal government. The feds are constitutionally responsible for the provision of water and sanitation on Indian reserves, in national parks, on military bases, and in certain places of employment. This has, historically, been an insufficiently visible obligation to call forth the effort required. But things have changed. Public health warnings in the mid 1990s, plus the explosion of concern following Walkerton, have led to a federal investment of more than \$2 billion on reserves over the last decade, both in capital and in training. In addition to 100 percent of the capital cost, the federal government pays 80 percent of the operating costs of on-reserve water systems. There are still some communities in need of upgrading, but not many now, and they will be taken care of in the next few years. We are at the point where some provinces have quietly complained that the water quality on reserves is better than in those of surrounding communities, and is causing resentment among people who have to pay their own water bills. In at least two provinces the proportion of Indian communities with properly-certified operators is higher than the general provincial average. This is a good thing and comes rather late, but it has come. In hearings across the country last summer my colleagues and I met scores of competent, dedicated, and proud First Nations water operators.⁶

There are still complaints about “third-world conditions” on reserves, and it is true that on too many of them employment opportunities are lacking, social conditions are poor, and people labour under an *Indian Act* which imposes the last version of rural communism since East Germany went belly up. But they are not “third-world” in terms of water supply, a credulous media notwithstanding. The sum total of person-days affected by boil-water advisories is orders of magnitude less than the 20+ million experienced in Vancouver this year, and for the most part, about as dangerous – which is to say, not very. There are still some communities that need upgraded facilities, but not apparently more than those of non-native communities in similar circumstances. Those who would claim otherwise, I suggest, are obliged to demonstrate the case through public health statistics. This would be very difficult.

One gap, however, has been in respect of the legal framework surrounding water on reserves. In the wake of Walkerton, most provinces rapidly put their water quality “guidelines” into legislation. They are now enforceable. But for complicated legal reasons, these regulations do not apply on reserve. There is a suspicion that the feds may have not wanted to legislate in this area as that would imply a need to regulate, and spend, over the rest of the federal water responsibilities as well – an area where unlike the provinces they have little field experience. In any event, having worked on the problem of regulating water on reserve for a good part of last year, I was pleased to see the Government promise, last

⁶ Harry Swain, Stan Louttit and Steve E. Hrudey, *Report of the expert panel on safe drinking water for First Nations*, Canada, Indian Affairs and Northern Development, Ottawa, November 2006

week, to fill this legal gap, and I look forward to see how they propose to deal with some of the interesting questions practical implementation will raise.⁷

IV

Now, what is the gap that would be filled by declaring water to be a human right? In Canada, none. No international or treaty commitments are operative in Canada without the passage of domestic implementing legislation. I'm told that it is very rare for our courts even to take account of the language of covenants and treaties – that, in fact, when Supreme Court Justice Mme L'Heureux-Dubé did so in a dissenting judgment some years ago, it was a precedent, and moreover one that some scholars tut-tutted about. What matters in Canada are government programs to regulate and spend.

The question of rights arose in the course of the Walkerton Inquiry. Should any of the new laws and regulations contemplated there be justiciable – should they confer private rights to force government action or compliance? The learned judge decided that this was both unwise and unnecessary. Ordinary citizens could hardly hope to bear the costs of such actions, so that such a legislated remedy would be unavailing. It would be a Marie Antoinette law – “Let them eat cake.” To the degree that negligence or malfeasance caused harm, the ordinary and quite general process of seeking compensation for harm already existed.

With respect to the content of a human right to water, I confess I am confused about what is meant. The Committee on Economic, Social and Cultural Rights say it stems from Articles 11 and 12 of the International Covenant. This document is written in such aspirational (and widely ignored) language that almost anything could be read into it, but I note that although it does not mention water, it does mention food and agriculture. It would be easy to conclude that a human right to water would include enough potable water for drinking purposes, and maybe personal hygiene. But what about irrigation water? Can a distinction be drawn between the modest and reasonable needs of an African subsistence farmer who needs water for his millet and the insatiable demands of subsidized agriculture in, say, Arizona or Australia? Does the right to make a living imply a right to water for industrial uses? Would states be under some pressure to export water, as General Comment 15 suggests,⁸ or perhaps the means to purify local supplies? The latter is only a problem of money, but an obligation to export, or to make Canadian water available for purchase, runs against strongly held views in this country.

Does the right include water that meets not just health but also esthetic standards?⁹ What does “affordable” mean? Must a state like Canada change its constitution to allow a legally binding “national water strategy and plan of action addressing the whole population,”¹⁰ or would the UN admit the legitimacy of provinces sovereign in certain areas of public policy? Together with rights, is there any responsibility on individuals, as opposed

⁷ A one-line reference in *Budget 2007* promised legislative action.

⁸ Paragraph 34. I note that most sensible commentators regard this as but one of a range of possibilities, and that the obligation of states to serve their own populations does not extend to an obligation to export. But here as elsewhere the diplomatically agreed language tends to confuse lay readers not steeped in the disciplines of international law.

⁹ General Comment 15, paragraph 12 (b)

¹⁰ General Comment 15, paragraph 37 (d) and elsewhere; a “core obligation.”

to states, to use water carefully, to pay for its management, or even to move from a location where water is unavailable to one where it is abundant? Would states have an obligation to facilitate such movement?

I have already demonstrated, I hope, that all Canadians have access to high quality water in large quantities at very reasonable prices. Domestic legislation to create a human right to water is not necessary. The argument that Canada should sign up must therefore rest on advantages that would accrue to people in other countries. Those seem to be of two sorts: first, actionable rights that would inhere in citizens or groups to make somebody, perhaps a government, provide potable water, or at least to refrain from inhibiting access. Short of actionable rights, which would require domestic implementing legislation, international recognition of the right would increase the moral or rhetorical pressure on benighted governments. Such legislation, on the Canadian example, is neither necessary nor sufficient, but it is urged by the Committee.¹¹ At the least it implies a court system cheaper than ours.

Maybe, in the end, we are being urged to follow the international herd on the grounds that not doing so would leave Canada isolated and embarrassed. But since when has embarrassment been a cause for federal action? I need only refer to last week's Budget.

V

I think one might conclude several things from all this:

First, what really counts are the programs and expenditures that create safe water. This means proper capital asset management for invisible community resources and the financial discipline to do this year in and year out; it means a cadre of dedicated water professionals to operate these systems. As we said in our report on legislating water standards on Indian reserves last year, don't fool around with legislation until you've got the means in place to live up to the standards. Fortunately, we are almost there, all across the country.

Second, human rights law, to get even further from the tap, is not relevant to the provision of potable water in Canada. As one engineer friend of mine said, "Water may be a God-given right, but She didn't provide the pipes." Engineers are like that.

Third, it's not clear that any advantage beyond a moral or rhetorical one would accrue to anyone else from Canada's signature. One disadvantage is that Canada would presumably be exposed to yet another UN Committee that writes reports as silly, inflammatory and ignorant as this Committee's "Concluding Remarks" about Canada last May.¹² These are the sorts of antics that bring the whole UN apparatus into disrepute. Being hectored to pass unnecessary laws or to negotiate with the Lubicons are matters for which life is too short.

¹¹ General Comment 15, para. 45 and elsewhere.

¹² United Nations, Committee on Economic, Social and Cultural Rights, "Consideration of reports submitted by states parties under Articles 16 and 17 of the Covenant. Concluding observations on...Canada," Geneva, May 2006

Fourth, a principal reason for Ottawa being chary about signing up is because they think they should not promise things they cannot deliver. (One wishes they had thought of that before Kyoto.) A national strategy would require all ten provinces and three territories to sign on. This is an enormous hill to climb. To all my former colleagues in government, however, I would simply say that it's all pensionable time. Further, if this really is the principal reason for Canadian reluctance, it's hardly a matter of human rights, just a consequence of our fusty and unchangeable constitution.

Fifth, there is a danger of debasing the currency. The core elements of human rights – the dignity and importance of every individual human being, and a person's right to be free of the crimes committed by states – are too important to be extended too far. Maybe there's a human right to safe water, but must it be esthetically pleasing as well, as a basic human right?

Sixth, defining what's really at issue would help Canadians decide whether they ought to sign up. Someone has to say unambiguously just what a human right to water means, and what obligations it places on state parties. If at its core it is non-discriminatory, reasonably priced access to a small amount of potable water for personal uses, as Lynda Collins suggests,¹³ or if, as Susanne Schmidt says,¹⁴ all this is about improving the moral claims of poor people in other countries, no problem. If it's everything that the Committee says in General Comment 15, it's clear that we should have strong reservations.

Bottom line: if, after some further work, an unambiguous statement of what obligations would accrue to Canada on joining this declaration could be made; and if, as discussion at the conference would lead a lay observer to believe, such a statement would simply improve the moral claims of poor people in desperate circumstances, Canada should have no difficulty in signing. But it is incumbent on the proponents to tell the rest of us what they mean.

¹³ Lynda M. Collins, "Implementing the human right to water: a discussion paper," United Nations Association of Canada, March 2007

¹⁴ Conference remarks under the topic, "Practical aspects of the implementation of the human right to water"