

The Senate



Le Sénat

SAFE DRINKING WATER FOR FIRST NATIONS

Final report of
The Standing Senate Committee on Aboriginal Peoples

Chair
The Honourable Gerry St. Germain, P.C.

Deputy Chair
The Honourable Nick Sibbeston

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MEMBERSHIP

THE STANDING SENATE COMMITTEE ON ABORIGINAL PEOPLES 1st Session, 39th Parliament

The Honourable Gerry St. Germain, P.C., *Chair*
The Honourable Nick Sibbeston, *Deputy Chair*

The Honourable Senators:

Larry W. Campbell
Lillian Eva Dyck
Aurélien Gill
Leonard J. Gustafson
Elizabeth Hubley
Sandra M. Lovelace Nicholas
Robert W. Peterson
Hugh Segal
Charlie Watt

Ex officio members of the Committee:

The Honourable Senators : Marjory LeBreton, P.C. (or Gerald J. Comeau), Céline Hervieux-Payette, P.C. (or Claudette Tardif)

Other Senator who has participated from time to time to this study:

The Honourable Senator Lorna Milne.

Committee Clerk:

Josée Thérien

Analyst from the Parliamentary Information and Research Service of the Library of Parliament:

Tonina Simeone

ORDER OF REFERENCE

Extract from the *Journals of the Senate* of Thursday, March 29, 2007:

The Honourable Senator Comeau moved, seconded by the Honourable Senator Di Nino:

That the Standing Senate Committee on Aboriginal Peoples, in accordance with rule 86(1)(q), be authorized to examine and report on recent work completed in relation to drinking water in First Nations' communities, notably: the November 2006 *Report of the Expert Panel on Safe Drinking Water for First Nations*; the 2005 Report of the Commissioner of the Environment and Sustainable Development on *Drinking Water in First Nations Communities*; and the Department of Indian Affairs and Northern Development's Plan of Action to address drinking water concerns in First Nations' communities.

That the Committee submit its report on this matter to the Senate no later than June 15, 2007.

The question being put on the motion, it was adopted.

Paul C. Bélisle

Clerk of the Senate

SAFE DRINKING WATER FOR FIRST NATIONS

INTRODUCTION

On 25 October 2005, the Minister of Aboriginal Affairs for the province of Ontario ordered the evacuation of almost 1,000 residents of the Kashechewan reserve after their drinking water had tested positive for elevated levels of *Escherichia coli* (*E. coli*). Residents of this small northern Ontario First Nations community, located on a flood plain on the shores of James Bay, had been under a boil water advisory for over two years. The community's water treatment plant was located a short distance downstream from its sewage lagoon.

Issues surrounding the quality and delivery of safe drinking water on-reserve are not unique to the community of Kashechewan. In 1995, an assessment carried out by the Department of Indian Affairs and Northern Development (DIAND) and Health Canada found that about 25% of water systems on-reserve posed potential health and safety risks to First Nations people in the affected communities. In 2001, a follow-up assessment revealed that almost three quarters of drinking water systems on-reserve posed significant risk. Most recently, in March 2007, the Department of Indian Affairs and Northern Development released a progress report on First Nations drinking water indicating that the water systems of 97 First Nations communities are classified as high risk. In addition, DIAND's 2006 *Protocol for Safe Drinking Water for First Nations Communities* requires that every First Nations community have a certified water systems operator. Currently, only 37% of operators are certified.

Ironically, a number of the issues surrounding drinking water quality on-reserve have been the result of economic development and other activities that have polluted the source water surrounding First Nations communities. Many northern communities, for example, experience high levels of diesel contamination; buried military equipment has resulted in elevated levels of PCBs in nearby water systems.

The seriousness and urgency of this issue demands that our government's response to it be right. The Committee examined a number of reports related to the delivery of safe drinking water on-reserve. This report is based on our review of these sources and witness testimony.

A. ADDRESSING THE RESOURCE GAP AS A PRECONDITION TO A REGULATORY REGIME

My personal conclusion is that if we want to see the completion of what has been a fairly considerable national effort to get good water on Indian reserves, then we should worry about the basic resources and then about a regulatory regime.

Dr. Harry Swain
Chair of the Expert Panel on Safe Drinking Water for First Nations

Witnesses testifying before the Committee, including the Assembly of First Nations (AFN), all agree, in principle, on the need to establish a regulatory framework to govern the provision of drinking water in First Nations communities. That water standards legislation should be developed is not at issue. The question of when any such legislation should be introduced, however, is a matter of some debate.

The view of the Expert Panel on Safe Drinking Water for First Nations⁽¹⁾ (Expert Panel) is that regulation alone will not be effective in ensuring safe drinking water unless other requirements are met, including investment in both human resources and physical assets. According to the Expert Panel, it would not be “credible to go forward with any regulatory regime without adequate capacity to satisfy the regulatory requirements.”⁽²⁾ Not only would a regulatory regime take time to create and enforce, they conclude, but the attention and money invested might be better directed to systems, operators, management and governance. Panel members also expressed concern that if additional funding were provided to cover only the costs of a regulatory regime, the resource gap would continue.

Similarly, the AFN takes the position that the Government of Canada must address the gap in resources required to bring First Nations facilities to a level that is on a par with those in the rest of Canada. Richard Jock, the AFN’s Chief Executive Officer, told the Committee that: “You can have the highest standards, but if there is no systematic way to get to them then it will be meaningless.”⁽³⁾ The need to address capacity issues in First Nations communities was also underscored by officials from the Commissioner of the Environment and Sustainable Development. They told us that: “The thing that most assures safe drinking water...is the commitment and capacity of the people who are running the systems.” In their view, any “regulatory regime that will work for the future has to be something that, from the beginning, fosters the creation and maintenance of that capacity.”⁽⁴⁾

In written submissions to the Expert Panel, several First Nations communities echoed the view that water systems must be brought up to clear standards before a legislated regulatory regime is put in place. The Atlantic Policy Congress of First Nation Chiefs, for instance, told Panel members: “Do not put the cart before the horse in implementing a regulatory regime [since] that would leave First Nation communities in a bad or worse position.”⁽⁵⁾ This view is supported by the Expert Panel’s conclusion that: “Regulation without the investment needed to build capacity may even put drinking water at risk by diverting badly needed resources into regulatory frameworks and

(1) The Expert Panel on Safe Drinking Water was established in June 2006 by the Minister of Indian Affairs and Northern Development with the support of the Assembly of First Nations. The Panel’s report, released in November 2006, examined options for a regulatory framework on reserve.

(2) Canada, *Report of the Expert Panel on Safe Drinking Water on Reserve*, Volume 1, November 2006, p. 49. The Report can be consulted on-line at: http://www.eps-sdw.gc.ca/index_e.asp.

(3) Standing Senate Committee on Aboriginal Peoples, *Proceedings*, 16 May 2007, Richard Jock, Chief Executive Officer, Assembly of First Nations [Hereafter referred to as *Proceedings*].

(4) *Proceedings*, 2 May 2007, Jerome Berthelette, Principal, Office of the Auditor General.

(5) Atlantic Policy Congress of First Nation Chiefs, *Response to the Panel of Experts on Water*, Simon Osmond, Policy Analyst. This document can be consulted on-line at: http://www.eps-sdw.gc.ca/inlv/at_sbm_2/index_e.asp.

compliance costs.”⁽⁶⁾ Similarly, the AFN expressed concern with the risk to individual communities that are unable to comply with legislated standards as a result of deficiencies in their existing water systems and/or the lack of trained operators to manage those systems.

The Department of Indian Affairs and Northern Development takes a different view. Departmental officials told us that, based on their deliberations, it would be best to develop a regulatory regime first and “then phase in the implementation of it to permit the systems to be brought up to the level of the regime.”⁽⁷⁾ Considering the sources we consulted and subsequent witness testimony, the Committee is deeply concerned by the Department’s position in this regard, which seems to run counter to that of its own Expert Panel. The Committee agrees with witnesses that the first priority ought to be filling the resource gap, not regulation. Regulatory standards, in the absence of the physical and human capacity to meet them, are unlikely to improve the quality and delivery of drinking water on-reserve, and may in fact worsen the situation.

On this point, the Committee is alarmed at how little progress has been made in training and certifying First Nations water systems operators. Even the best facilities cannot ensure safe water unless properly managed and operated. Although DIAND is working to strengthen and expand its Circuit Rider Training program – a program designed to enhance First Nations capacity to operate and maintain water system and wastewater systems – these efforts are clearly insufficient. The 2005 Report of the Commissioner of the Environment and Sustainable Development found that, in many instances, much of the trainer’s time was spent troubleshooting rather than providing training. The Committee feels strongly that a comprehensive, long-term training program must be in place immediately. To this end, the Department may consider establishing regional training centers or partnering with local community colleges to deliver adequate training.

Over the past decade, significant investments have been made to address these capacity needs and on-reserve water and wastewater systems. The 2005 *Report of the Commissioner of the Environment and Sustainable Development on Drinking Water in First Nations Communities* estimates that, between 1995 and 2003, the federal government spent roughly \$1.9 billion on the provision of safe drinking water on-reserve. DIAND officials told the Committee that since 2003 an additional \$1 billion has been invested in the capital construction, operation and maintenance of water and waste water treatment plants on-reserve. DIAND acknowledges that despite ongoing efforts and federal support, some First Nations communities continue to face significant challenges in establishing safe and efficient water regimes. Core issues cited by officials include: high costs of equipment, construction and maintenance of facilities in remote locations; limited local capacity and ability to retain qualified operators; and lack of resources to properly fund system operation and maintenance.⁽⁸⁾ The Committee also notes that DIAND’s 2003 First Nations Water Management Strategy, which allocated \$600 million in new funding over five years to improve the quality of water and wastewater treatment in First Nations communities, will expire in March 2008.

According to the Expert Panel, these investments have resulted in significant improvements, but “the time has come for one last big push.” Dr. Harry Swain, Chair of the Expert Panel, told us that:

⁽⁶⁾ Report of the Expert Panel, Volume 1, p. 18.

⁽⁷⁾ *Proceedings*, 2 May 2007, Christine Cram, Associate Assistant Deputy Minister, Socio-economic Policy and Regional Operations Sector, Department of Indian Affairs and Northern Development.

⁽⁸⁾ *Ibid.*

[I]f the federal government continued its present level of effort for another five years, we should be operating at a level where the number of boil water advisories is very small and there is nothing serious to worry about. This is not, in other words, one of those problems in Aboriginal Canada that will persist for ever and ever and ever. This is one that can be solved and it can be solved with the application of a good chunk of money for a limited period of time.⁽⁹⁾

The level of investment required to ensure that First Nations community water systems, including their operation, are brought up to an acceptable, sustainable level, is uncertain. The AFN indicated to us that a rough estimate would be between \$15 billion to \$25 billion. According to Dr. Swain: “We are now at a stage where the intent of the 1977 policy – standards similar to non-native communities of comparable size and remoteness – seems to be in sight, *although good measurement is lacking.*”⁽¹⁰⁾ [Emphasis Added]

The Committee is keenly aware that there are a number of significant concerns with the Department’s measurement and risk assessment tools. Commenting on the findings of the Commissioner of the Environment’s 2005 audit of safe drinking water on reserve, Jerome Berthelette of the Office of the Auditor General indicated to the Committee that the “department did not have sufficient proof that the water treatment plants were either built to the standard they wanted it to be built or expected it to be built to, and that there were no deficiencies with respect to the water treatment plant.”⁽¹¹⁾ In other words, the Department had not adequately identified existing deficiencies with respect to both the ability of the plant to produce the quantity and quality of water required, as well as the construction of the plant itself. As a result, the Committee is deeply concerned that Parliament is not receiving full and accurate information about the quality and safety of drinking water in First Nations communities.

In a similar vein, the Expert Panel told the Committee that they had identified communities that were clearly at higher risk, but that *these communities failed to appear as high risk on the Department’s risk assessment because they did not have any water systems at all.* According to the AFN, the Department’s assessments are, at best, questionable: “This is not a professional engineer’s assessment; this is someone from the Department who maybe telephones the community...we are asking that every one of the systems should be assessed by a professional engineer.”⁽¹²⁾ Given the fundamental importance of safe drinking water for the health of First Nations people and communities, the Committee feels strongly that the lack of comprehensive information gathering and reporting in this area by the Department is a matter of urgent concern.

Based on the evidence before this Committee with respect to the resource needs of First Nations communities in relation to safe drinking water, the Committee recommends:

⁽⁹⁾ *Proceedings*, 15 May 2007, Dr. Harry Swain, Chair, Expert Panel on Safe Drinking Water for First Nations.

⁽¹⁰⁾ *Ibid.*

⁽¹¹⁾ *Proceedings*, 2 May 2007, Jerome Berthelette, Principal, Office of the Auditor General.

⁽¹²⁾ *Proceedings*, 16 May 2007, Earl Commanda, Director of Housing, Assembly of First Nations.

RECOMMENDATION 1:

That the Department of Indian Affairs and Northern Development provide for a professional audit of water system facilities, as well as an independent needs assessment, with First Nations representation, of both the physical assets and human resource needs of individual First Nations communities in relation to the delivery of safe drinking water prior to the March 2008 expiration of the First Nations Water Management Strategy;

That, upon completion of the independent needs assessment, the Department dedicate the necessary funds to provide for all identified resource needs of First Nations communities in relation to the delivery of safe drinking water;

That a comprehensive plan for the allocation of monies from said funds be completed by June 2008; and

That, upon completion of the comprehensive plan, the Department provide a copy to this Committee and appear before it to report on its contents.

B. CONSULTATIONS ON THE LEGISLATIVE OPTIONS

The Expert Panel on Safe Drinking Water for First Nations established by the Minister of Indian Affairs and Northern Development in 2006 explored five legislative options as possible routes to regulating drinking water on reserve. It considered three options – creating a new federal act, incorporating provincial water laws in new federal legislation and applying asserted First Nations jurisdiction and customary laws – the most workable, and conducted a comparative analysis of their merits.

In testimony to the Committee, DIAND officials indicated their intention to proceed with legislation to regulate safe drinking water on-reserve by incorporating provincial water laws in new federal legislation. In its review of legislative options, however, the Expert Panel concluded that enacting federal legislation that would reference existing provincial regimes “appears to be the weaker option owing to gaps and variations in those regimes, the complexity of involving another level of government, and the lower acceptability to many First Nations.”⁽¹³⁾

Concerns with this option were also expressed by the AFN. Following the release of the Expert Panel’s report, the AFN retained the services of the Centre for Indigenous Environmental Resources (CIER) to carry out a legal analysis of the Panel’s proposed legislative options, as well as to consider alternate approaches. The CIER found that “it is likely that the provincial regime option has the potential to impact First Nation rights most extensively.”⁽¹⁴⁾ In testimony to the Committee,

⁽¹³⁾ Report of the Expert Panel, Volume 1, p. 59. For a more detailed examination of this legislative option, readers should also consult Volume II, pp. 32-35.

⁽¹⁴⁾ Assembly of First Nations, *Expert Panel Report on Safe Drinking Water for First Nations*, Position Paper. This document can be consulted on-line at: <http://www.afn.ca/cmslib/general/water-panel-report.pdf>.

AFN officials emphasized their unease around the issue of enforcement. “Where First Nations really object,” we were told, “is having someone from the province coming onto a First Nation jurisdiction and saying that they will now be enforcing a provincial law. This is a bone of contention that our leadership would have a hard time accepting given this approach.”⁽¹⁵⁾ Consequently, the AFN is proposing an alternate option for consideration along with those outlined by the Expert Panel. It advocates the application of a federal regime as an interim measure for the application of national standards for safe drinking water on-reserve, until such time as First Nations community governments are ready to exercise their own jurisdiction over water management.

The Department itself, it would seem, also recognizes some of the complexities of proceeding with the “provincial” option, including the likelihood of having to persuade provincial governments to expand their existing regimes beyond drinking water quality to include, for example, source water protection, an issue of significant concern to First Nations. Officials told us that:

Much of the provincial legislation currently in place does not necessarily cover some of the issues that we run into in First Nations communities, such as cisterns or water that is trucked in by vehicles and many of the smaller systems.⁽¹⁶⁾

And again:

Because our legislative approach ... is one of adopting provincial regulatory regimes, then they will be potentially different province by province. You would need to work with the systems in each province to bring them up to an appropriate level.⁽¹⁷⁾

The Committee is left to wonder at the Department’s intention to proceed with a legislative scheme that is not only incomplete, but that may also find little support among those who must apply, and comply with, the legislation. Based on the evidence – including the Expert Panel’s assessment of this legislative approach as the “weaker option” – we are, quite frankly, mystified by the Department’s chosen approach. Nor do we feel assured that First Nations communities will be (or have been) properly consulted on the matter.⁽¹⁸⁾ The Committee would have hoped that the Department had learned by now that imposing legislation on First Nations without their meaningful input – particularly when the option contemplated appears to be problematic from the start – will meet with resistance.

The Committee feels strongly that whatever regulatory regime is eventually adopted must be developed in close collaboration with First Nations communities and organizations. We agree wholeheartedly with the view of the Expert Panel that apart from the legal duty to consult First Nations communities affected by the proposed legislation, “meaningful discussion between the

⁽¹⁵⁾ *Proceedings*, 16 May 2007, Earl Commanda, Director of Housing, Assembly of First Nations.

⁽¹⁶⁾ *Proceedings*, 2 May 2007, Mark Brooks, Director General, Community Development Branch, Department of Indian Affairs and Northern Development.

⁽¹⁷⁾ *Proceedings*, 2 May 2007, Christine Cram, Associate Assistant Deputy Minister, Socio-economic Policy and Regional Operations sector, Department of Indian Affairs and Northern Development.

⁽¹⁸⁾ The Report of the Expert Panel explicitly states that its public hearings were not broad consultation. Similarly, the AFN has stated that it will insist on consultations with respect to the Expert Panel’s suggested options.

federal government and First Nations is necessary if any action to improve the safety of water on reserves is to be effective and responsive.”⁽¹⁹⁾ Having considered the evidence before the Committee, we urge the Department of Indian Affairs and Northern Development to give full and careful consideration to the observations made in the report of the Expert Panel in respect of regulatory options and the conditions that must be in place for any regulatory regime to succeed, as well as the legislative process set forth by the Assembly of First Nations. Accordingly, the Committee recommends:

RECOMMENDATION 2:

That the Department of Indian Affairs and Northern Development undertake a comprehensive consultation process with First Nations communities and organizations regarding legislative options, including those set out in reports of the Expert Panel on Safe Drinking Water and the Assembly of First Nations, with a view to collaboratively developing such legislation.

⁽¹⁹⁾ Report of the Expert Panel, Volume 1, p. 51.

CONCLUSION

First Nations people in this country have a right to expect, as do all Canadians, that their drinking water is safe. Through sustained investment and dedicated efforts, there has been notable improvement in the quality of water delivered in First Nations communities. However, the events at Kasheshewan serve to remind us that much more needs to be done. In 2005, the Commissioner of the Environment and Sustainable Development concluded that “[d]espite the hundreds of millions in federal funds invested, a significant proportion of drinking water systems in First Nations communities continue to deliver drinking water whose quality or safety is at risk.”⁽²⁰⁾ This is a situation that no Canadian should tolerate.

Legislation to regulate water standards on reserve is required. No one, including this Committee, argues differently. Regulations are, however, only part of the answer. Sustained investment in the capacity of First Nations community water systems and of those running the systems is absolutely essential to ensure First Nations people on-reserve enjoy safe drinking water. Without this investment, we risk introducing a regulatory regime that burdens communities and does little to help them meet legislated standards. Given the gravity of this health and safety issue, we count on the government to ensure this does not occur, and strongly urge the Department to take immediate action on our recommendations.

⁽²⁰⁾ Commissioner for the Environment and Sustainable Development, *Report of the Commissioner for the Environment and Sustainable Development*, “Chapter 5 – Indian and Northern Affairs Canada – Drinking Water in First Nations Communities,” 2005. This report can be consulted on-line at: <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/c20050905ce.html>.

**APPENDIX:
LIST OF WITNESSES**

Agency and Spokesperson	Date
<p>Assembly of First Nations:</p> <ul style="list-style-type: none"> • Richard Jock, Chief Executive Officer • Earl Commanda, Director of Housing • Candice Metallic, Legal Counsel 	16.05.2007
<p>Expert Panel on Safe Drinking Water for First Nations:</p> <ul style="list-style-type: none"> • Harry Swain, Chair • Steve Hrudehy, Member • Juli Abouchar, Legal Advisor 	15.05.2007
<p>Indian and Northern Affairs Canada:</p> <ul style="list-style-type: none"> • Christine Cram, Associate Assistant Deputy Minister, Socio-economic Policy and Regional Operations sector • Marc Brooks, Director General, Community Development Branch 	02.05.2007
<p>Office of the Auditor General of Canada:</p> <ul style="list-style-type: none"> • Ron C. Thompson, Interim Commissioner of the Environment and Sustainable Development • Ronald Campbell, Assistant Auditor General • Jerome Berthelette, Principal • André Côté, Director 	02.05.2007