



**ONTARIO FIRST NATIONS
TECHNICAL SERVICES
CORPORATION**

**DECOLONIZING WATER GOVERNANCE: ADDRESSING THE
WATER CRISIS IN ONTARIO THROUGH RECOGNITION OF
FIRST NATIONS JURISDICTION**

**Ontario First Nations Technical Services Corporation
JULY 2022**

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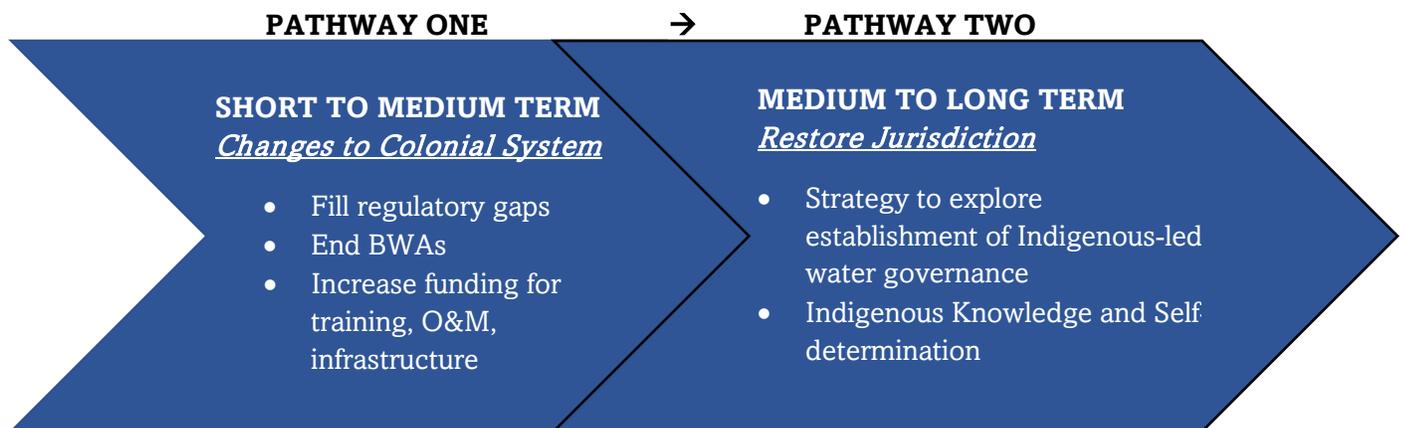
Executive Summary

Decolonizing the water governance apparatus that continues to fail Ontario First Nations is long overdue. Indeed, with significant advancements in the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in Canada, a clear window of opportunity exists that must be actioned upon. No longer can First Nations tolerate the status quo that, under Canada's watch, perpetuates oppression and denies fundamental Indigenous and human rights.

The following position paper details the approach the Ontario First Nations Technical Services Corporation (OFNTSC) recommends to usher in meaningful reforms in water governance and to address the ongoing water crisis on reserve in Ontario. Indigenous people must determine their own governance structures without outside interference, but with the support of colonial governments per their obligations under UNDRIP. Reforming the current approach to water management and water governance must register as a key priority for First Nations given the compounding challenges currently faced, and the threat posed by climate change.

This paper proposes an approach to decolonizing water governance in Ontario along two pathways:

- **Pathway One** (short to medium term) concern reforms that must be taken to address the water crisis from within the colonial system; and,
- **Pathway Two** (medium to long term) concerns the process and formalization of restored jurisdiction to First Nations regarding water governance that aligns with Indigenous knowledge, customs, and traditions and self-determination.



It is important to acknowledge that the OFNTSC is not a rights-holder and has no mandate to speak on behalf of Ontario First Nations. Rather, the intention of this paper is to inform and present options to rights-holding First Nations to consider regarding the restoration of their rightful jurisdiction in water governance. OFNTSC was founded upon the devolution of colonial responsibilities and is funded by and answers to Indigenous Services Canada; however, to provide the best level of quality technical services to Ontario First Nations, the OFNTSC is compelled to advocate for a new model and a new way forward based on self-determination. This position paper articulates this aspiration and is intended as a catalyst to advance these important discussions.

Introduction

As stated by Chief Del Riley, “Indigenous people are at a crossroads... there is a resurgence of Indigenous sovereignty on unceded lands... operating on the basis of inherent Indigenous rights.”¹ The key to decolonization, he continues, is full, sovereign control of the “lands reserved for Indians” inclusive of unceded traditional territories by the Indigenous population themselves.² It is within this understanding that the OFNTSC is strongly advocating for a move away from colonial structures which includes the abandonment of the offloading or devolution of colonial responsibilities to First Nations and the First Nations organizations designed to serve them.

The focus of this position paper is water governance and the long overdue need to apply novel solutions to the Ontario First Nations water crisis which are founded upon self-determination and the laws and traditions of First Nations that have existed since time immemorial. What the return of jurisdiction looks like remains to be seen. It could take the form of a First Nations-led water authority, or perhaps several First Nations-led regional water authorities, or it could take a completely different form. This paper is not designed to be prescriptive, but rather, to catalyze discussions on the importance of water sovereignty, and the need to decolonize existing water management structures and restore First Nations jurisdiction over our water. We explain the current colonial on-reserve water management system, explore how it has failed and continues to fail First Nations, and we propose a 2-path framework for advancing First Nations self-determination in water governance.

The water crisis Ontario First Nations continue to experience goes far beyond boil water advisories. If anything, the failure to provide safe water and sanitation is indicative of a systemic problem. The root causes of the crisis are found in the colonial project, its legacy, and in many cases, the forced relocation of many communities to areas where scarcity and resource extraction puts stress on drinking water sources. Contrary to what federal policy would suggest, the water crisis is not a project management issue: it is an Indigenous rights, human rights, and a sustainability issue. For decades, the government has invested money to address this issue, yet the crisis persists. It is clear that the status quo must be abandoned.

Too often, the water supplied to First Nations on-reserve is contaminated, inaccessible, or at risk due to faulty treatment systems. How can this be true when Canada is one of the most water-rich nations on earth? Ontario itself borders four out of five Great Lakes which together hold 18 percent of the world’s fresh surface water. Where access to sufficient safe drinking water and sanitation is a near guaranteed to non-Indigenous Canadians, the same cannot be said for many First Nations. Simply put, Canada has failed First Nations in their obligation to ensure adequate safe drinking water and sanitation on reserves.

On June 21, 2021, the federal government passed into law the *United Nations Declaration on the Rights of Indigenous Peoples Act*. Signaling a new era in rights recognition. The UNDRIP Act marks a historic milestone in Canada’s implementation of the UNDRIP. By 2023, Canada is expected to have an UNDRIP Action Plan in place. Ontario First Nations must ensure water and water governance is included in this action plan, in addition to a clear commitment and pathway to realize self-determination and decolonization in water governance.

¹ Riley, Del and Keefer, Tom (2022). “A Sovereign Path Forward: Band Councils, Lands reserved for Indians, and the need to move beyond the Indian Act.” A position paper from Wahta Mohawk Territory. *Real People’s Media*. Pg. 29.

² Ibid, pg. 30.

OFNTSC's Approach to Water Operators



OUR MISSION

is to accept the transfer of certain technical services from federal agencies such as the Department of Indian Affairs and the Department of Public Works (or their successors) on behalf of First Nations in Ontario. We provide core technical services to Tribal Councils and First Nations in Ontario, and assist existing technical services units at the First Nation and Tribal Council level. OFNTSC is mandated to accept the transfer of programs related to technical service areas from the governments of Ontario and Canada.



OUR VISION

is a future where Ontario First Nations are self-sufficient and sustainable, with the capacity to deliver self-reliant technical services for future generations.

OFNTSC is committed to ensuring that all Ontario First Nations communities have access to safe, clean and potable drinking water. To that end, OFNTSC's engineering service was established in 1996 and provides technical advice related to water and wastewater for Ontario First Nations. Specific services include project planning, project management, capital planning, and oversight throughout a project life cycle.

OFNTSC works with communities to identify and communicate issues with their water and wastewater systems, develop action plans, assist with securing funding, and work as part of a project team to implement solutions. A key part of our mandate is to transfer technical knowledge and skills to First Nations members to build capacity in First Nations communities across the province.

OFNTSC's engineers also provide guidance and oversight to First Nations when making funding applications, which collectively increases the number of First Nations who are receiving money through funding sources like the federal Clean Water and Wastewater Fund and Investing in Canada Infrastructure Program.

OFNTSC also administers the Circuit Rider Training Program (CRTP), which trains First Nations water and wastewater operators on the safe delivery of drinking water on-reserve. OFNTSC trainers provide Continuing-Education-Unit (CEU) and On-the-Job-Training (OJT) hours directly in First Nations communities to help water and wastewater system operators maintain their provincial licenses. By providing onsite training on the community water and wastewater systems, the CRTP provides knowledge needed so that operators can confidently and effectively operate treatment systems.

OFNTSC is proud of the services it continues to provide to Ontario First Nations, however, it must be noted that the operations structure is one where these responsibilities are colonial in nature and devolved from ISC to OFNTSC. Committing to transformative change and a decolonized approach to water governance will require this model to be upended in favour of one that upholds and implements Indigenous rights and in particular, the right to self-determination. This is especially true if OFNTSC is to realize our vision where Ontario First Nations are self-sufficient and sustainable with the capacity to deliver self-reliant technical services to future generations.

Guiding Frameworks for Rights-Based Water Governance

OFNTSC holds the position that water should not solely be treated as a resource or a commodity. Further, OFNTSC strongly holds that a new approach to water governance designed and led by First Nations is direly needed in Ontario.

Currently, the OFNTSC provides technical services within the scope of colonial legislation and policy. We have had considerable success, to be sure; however, it cannot be argued that OFNTSC—in its current service provision structure—is meaningfully supporting First Nations right to be self-determining. It is therefore important to highlight the guiding frameworks that support the OFNTSC’s position that change is overdue and that it must be based on self-determination and the laws of our peoples.

In this section, in addition to citing the relevant articles of UNDRIP and their significance to this discussion, we explore Indigenous Nibi Knowledge as an example of a framework to guide this important transformative change. While Indigenous Nibi Knowledge is only one piece of the distinct patchwork of Indigenous traditions in the lands that make up what is now called Ontario, for the purpose of this paper, it is highlighted to illustrate the reality that Ontario First Nations have long since held important traditions with respect to water governance that have been suppressed by colonial government.

United Nations Declaration on the Rights of Indigenous Peoples

The new legal and policy environment that is required by the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* (the “Act”) suggests that the basic human rights of Indigenous peoples in UNDRIP must be fully upheld and implemented. Section 5 of the UNDRIP Act requires Canada to take “all measures necessary” to ensure that Canada’s federal laws are consistent with the Declaration, and to do so in consultation and cooperation with Indigenous peoples. To achieve this purpose, section 6 requires the Minister designated by the federal Cabinet to prepare and implement an action plan to achieve the objectives of UNDRIP in consultation and cooperation with Indigenous peoples and other federal ministers. The action plan is expected to be complete by 2023.

UNDRIP states the “minimum” human rights standards for the “survival, dignity, and well-being” of Indigenous peoples (article 43). In passing the Act in 2021, Canada agreed that the standards of UNDRIP applies to the laws of Canada. This means that UNDRIP must be used by government to interpret all federal enactments. Further, Canada has an obligation in the Act to take all measures necessary to achieve consistency between UNDRIP and the laws of Canada. This legal obligation to take all measures necessary to achieve consistency applies to proposed new laws, and to existing laws. The minimum standards within UNDRIP that are relevant to this discussion include those of Indigenous self-determination and the inherent right of self-government:

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Further, and of critical importance is Article 19 of UNDRIP which states the standard that must be met when legislative or administrative measures are being contemplated that may affect Indigenous peoples:

Article 19

States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

It is not apparent how the standard of Article 19 is being met through the Act, especially with respect to the management and governance of water resources. It remains true that there is no apparent mechanism in place for how free, prior, and informed, consent will be obtained by First Nations. There is also no clarity of what measures are being taken to ensure that the minimum human rights standards of Indigenous peoples are upheld. Article 25 further supports assertions of Indigenous understandings of relationships and obligations to land and water:

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

In addition to self-determination and self-government, UNDRIP affirms and upholds many rights and standards that are to be met, even as the work of Nations asserting their jurisdiction is on-going. These include, for example, rights of Indigenous individuals, including rights to life, physical and mental integrity, and liberty and security of person (Article 7) and the right to be free from forced assimilation and destruction of culture (Article 8). They also include collective rights regarding promoting and developing systems of water governance:

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist,

juridical systems or customs, in accordance with international human rights standards.

The current colonial water governance structure is nowhere near meeting these basic human rights standards in UNDRIP and affirmed by the Act.

Indigenous Nibi Knowledge

Our First Nations teachings are clear: water or ‘nibi’ is life. As such, nibi hold a sacred place in our worldviews and is essential to the sustainability of our present and future generations. Nibi is a general word referring to all waters, including lakes, rivers, streams, rain, etc., but each individual body of water including rain has another word in Anishinabemowin (Anishinabek language). Nibi is, therefore, considered to encompass all waters and many now use the term “waters” to stress the importance of the different types of water.³

The Nibi Declaration of Treaty #3 explains nibi as follows:

Nibi (water) is alive and has a spirit. Indigenous people have been responsible for the care of the land and nibi since time immemorial. Nibi is our lifeblood and connects everything – it both gives and sustains life, and it can take life as well. All beings are born of nibi.

Nibi takes many forms (snow, ice, spring and salt water, rainwater, freshwater, aquifers, and birthwater). Each type of water has a role to play in our wellness and our healing as individuals, communities and nations. Even though it has suffered, nibi continues to bring forward life and we must work to heal the water and ourselves.

Nibi cannot be owned or controlled, it is shared across lands and territories, nations, and all other life forms. Indigenous, and indeed, all people, require nibi to live; it nourishes us emotionally, spiritually, physically, and mentally providing cleansing for our bodies and minds, and our individual and collective healing.⁴

Scholar Susan Chiblow states that knowledge production from the west (otherwise known as western science and technology) constitutes a form of imperialism that disregards and erases other types of knowledge.⁵ The implications of these imperial attempts to erase the knowledge of other peoples has deep implications of not knowing the best sustainable practices for nibi. This is true for colonial law in Canada as it relates to water governance, that the best practices learned from generations of stewardship of nibi are not considered or implemented by colonial policy and legislation.

Despite this, many different examples of water declarations have been created by First Nations, Indigenous political advocacy organizations and grassroots initiatives to formally recognize relationships with nibi. The following examples of water declarations demonstrate that while colonial policy and law have suppressed Indigenous legal principles and understandings of responsibilities and obligations to nibi, they remain strong as the guiding frameworks for First Nations in relation to water governance.

³ Chiblow, Susan (Ogamauh annag qwe) (2019). “Anishinabek Women’s Nibi Giikendaaswin (Water Knowledge).” Water, 11 (209).

⁴ <https://watergovernance.sites.olt.ubc.ca/files/2020/04/Nibi-Declaration-Toolkit.pdf>

⁵ Chiblow, Susan (Ogamauh annag qwe) (2019). “Anishinabek Women’s Nibi Giikendaaswin (Water Knowledge).” Water, 11 (209).

Nibi Declaration of Treaty 3: The Nibi Declaration of the Grand Council of Treaty #3 is a reflection of the sacred teachings of water held by Treaty #3 knowledge keepers/Gitiizii m'inaanik to be shared with communities and those outside of the Treaty #3 Nation. It speaks to the sacred relationship and responsibilities that the Anishinaabe have with water, water beings and the lakes and rivers around them. The Nibi Declaration has been developed and formally recognized through assembly and ceremony by Treaty #3. Communities can use the Declaration to ensure that any future policy decision, or any potential development project that impacts water, will respect the collective understanding of Treaty #3 Anishinaabe nibi inakonigewin.⁶

Kitchenuhmaykoosip Innuiwug Water Declaration: (Big Trout Lake First Nation) is a Treaty #9 community which created a water declaration that aims to protect the watershed within the community's territory from industrial development. It was formally accepted by membership in 2011.

Assembly of First Nations Water Declaration: The Assembly of First Nations (AFN) has a water portfolio that deals with many water issues such as First Nations right to water, watershed management and protection and overall water management. The First Nations National Water Declaration was brought to a Special Chiefs Assembly in 2013 where it was endorsed.

Chiefs of Ontario Water Declaration: The Chiefs of Ontario also identified the need for a water declaration after hosting a water policy forum. The Chiefs of Ontario's water declaration was brought forward and accepted in 2008 at the Chiefs assembly meeting.

Great Lakes Commons Charter Declaration: Great Lakes Commons is a grassroots organization that looks to restore the relationship, responsibilities and stewardship to the Great Lakes of Ontario.

Garma Declaration: The Garma Declaration recognizes that Indigenous peoples internationally share cultural and customary responsibilities to fresh water. The Declaration reflects Indigenous peoples' connections to water and expresses the significance of Indigenous knowledge and water interests to the security of freshwater when water laws and systems treat water as a commodity. The Declaration was endorsed in August 2008 by a group of Indigenous peoples from around the world.

Women's Water Commission: The Anishnabek Women's Water Commission is a group of women from the Union of Ontario Indians member communities formed in 2003. The Commission has taken a leadership role in raising the awareness of the quality and need for protection of the Great Lakes and beyond. Together, the Commission organizes a number of Water Walkers Journeys which help raise awareness of the critical nature of water for our people and the need to take serious and meaningful steps to protect it.

The Anishinaabe Water Law: A gathering of Anishinaabe elders from Manitoba and Northern Ontario in 2013 offered some traditional insight into Anishinaabe Water Law, "Anishinaabe nibi inakonigewin:" water is living and water is life, in a spiritual and physical way." Because this fundamental component is not only part of Anishinaabe teachings but with Haudenosaunee and most other Ontario First Nations, it is imperative that future water governance being about an understanding of traditional roles and responsibilities towards water, and not just Western conceptions of science and technology.

⁶ <https://watergovernance.sites.olt.ubc.ca/files/2020/04/Nibi-Declaration-Toolkit.pdf>

The Status Quo: Colonial Water Governance

With respect to water, the policies of the federal government suggest the primary problem to be addressed are boil water advisories (BWAs). Largely absent from federal and (to a degree) provincial policy discussions is the topic of Indigenous jurisdiction over water and how it is governed. It must be understood, while indeed important, long-term BWA statistics are measures linked to federal policy and not a true reflection of First Nations water security and well-being.

Beyond the unacceptable reality too many Ontario First Nations experience long-term BWAs, the problem is in fact far more pervasive. As stated earlier, the forced relocation of many communities to areas where resource extraction puts stress on drinking water sources, in addition to challenges with human resources (water operation staff retention), chronic underfunding for infrastructure and operations and maintenance (O&M), difficulties associated with remoteness, and the threat of climate change, all contribute to the reality First Nations face. Understanding the colonial approach to water governance is important to understand OFNTSC's position that the status quo is untenable and must change.

The Right to Water and Sanitation was adopted by the UN General Assembly on July 28, 2010, and in Canada the federal government has stated that “access to safe drinking water, the effective treatment of wastewater and the protection of sources of drinking water on First Nation lands are priorities for the Government of Canada.”⁷ Unfortunately, it remains true that First Nations have some of the poorest water quality in Ontario, and across the country. Long-term boil water advisories continue—in some communities, an entire generation has been unable to drink tap water—and communities have declared states of emergency as recently as July 2019.

The purpose of the section is not intended to provide an exhaustive review of the decades of colonial policies imposed on First Nations but rather to provide a high-level summary which helps contextualize the current challenges with water management on reserve and the dire need for the repatriation of Indigenous jurisdiction over water resources.

The *Constitution Act*, 1867, grants the federal government jurisdiction over “Indians and lands reserved for the Indians”—in effect governing most aspects of life on reserve, including how water is managed. Under this provision, the *Indian Act* was formalized in 1876, which has been amended many times since but remains in force today. While the federal government has devolved many social services to First Nations to administer on reserve, and similarly, technical services to organizations like the OFNTSC, First Nations Chiefs and Councils are accountable to members on reserve for providing services, including owning and operating water and wastewater systems on reserve. The power to govern these systems, however, is significantly limited by the far-reaching role of the federal government instituted by the *Indian Act*.

Except in rare cases, all capital costs and a portion of operation and maintenance costs for systems come from the federal government. Indigenous Services Canada (ISC)—the federal department with jurisdiction over services provided to reserves—has considerable authority over water and wastewater on reserve. In spite of ISC's role, 36 percent of the drinking water advisories in place in 2015 on water systems in Ontario First Nations had been in place for over 10 years.⁸ Part of this can be attributed to unpredictable and often insufficient funding from the federal government to build,

⁷ CITE

⁸ Human Rights Watch

operate, maintain, and monitor water and wastewater systems. The federal government funds a portion of operations and maintenance costs for First Nations' public water and wastewater systems on reserves, leaving a standard 20 percent deficit for the First Nations to cover. The federal government does not evaluate the ability of First Nations to make up the difference, despite limited community resources.

ISC has also failed to spend substantial funds over five recent fiscal years, and sent more than \$1 billion in funds back to the Treasury Board as "surplus."⁹ ISC has consistently struggled to spend budgeted funds, meaning tens of millions of promised dollars for First Nations have gone unspent. According to Human Rights Watch, these significant funding issues have not been publicly explained."¹⁰

Since 1977, the federal government has investigated, made recommendations, and committed funds to remediate the water and wastewater situation on the reserves. Yet the problem remains severe. The government's own audits show a pattern of overpromising and underperforming, without sufficient monitoring of whether money that is invested results in positive outcomes. In short, investments of billions of dollars over decades have not translated into safe drinking water for thousands of First Nations persons living on reserves."¹¹

The bulk of federal acts and regulations relating to water deal with inter-jurisdictional issues and national concern for the protection of water. The majority of the power to regulate water is placed within the provincial governments. Should issues be of national concern, the *Canada Water Act* allows the Minister of the Environment to upload the responsibility for only that issue or watershed to the federal government.

In 2003, the federal government's National Assessment on Water and Wastewater Systems in First Nations Communities highlighted the state of water for First Nations people.¹² At the time, the government report estimated that 13.5 per cent of First Nations had trucked-in water, 13 per cent had individual wells and 1.5 per cent had no water service at all. Attempts to obtain recent statistics on these figures turned out fruitless.

In 2015, Prime Minister Justin Trudeau committed to ending all long-term drinking water advisories by March 2021. When that deadline passed, the government recommitted to ending long-term advisories without a target date. This announcement comes as no surprise to many First Nations outraged by the lack of progress on ending drinking water advisories in their communities, and the growing divide and gap that exists between Indigenous and non-Indigenous communities.¹³

Since the 2015 announcement, attention has been placed on federally funded drinking water systems, which are larger community systems. The investments presented in Chapter 8 of Budget 2021 show investments in excess of \$18 billion over five years to "improve the quality of life and create new opportunities for people living in Indigenous communities."¹⁴ From budget 2021, \$4.3 billion supports an Indigenous Community Infrastructure Fund for all Indigenous people. A further \$1.7 billion covers operation and maintenance costs for First Nations living on-reserve. Other notable investments include a continued focus on water and wastewater, including \$125.2 million over four years

⁹ Human Rights Watch.

¹⁰ Human Rights Watch.

¹¹ Human Rights Watch

¹² Indigenous Services Canada (2003). "National Assessment of Water and Wastewater Systems In First Nations Communities - Summary Report." <https://www.sac-isc.gc.ca/eng/1100100034982/1584021932182>

¹³ <https://ucalgary.ca/news/tip-iceberg-true-state-drinking-water-advisories-first-nations>

¹⁴ Budget 2021.

beginning in 2022-23. These investments build on the recent announcement committing \$1.5 billion for drinking water in Indigenous communities. Despite these investments, Indigenous Services Canada has announced it will not end long-term advisories until 2023 at the earliest.

Water treatment regulation is a federal authority governed under the *Safe Drinking Water for First Nations Act* (SDWFNA), which requires that the Government of Canada create regulations for drinking water, the effective treatment of wastewater, and to protect drinking water sources on First Nations' reserve lands. Under the Act, Chief and Council are responsible for drinking water quality including sampling and testing, issuing drinking water advisories, and facilities planning, development, operations and maintenance. The SDWFNA was created in 2013 and has been criticized for ignoring the recommendations of First Nations, creating a regulatory framework without appropriate investments in resources, and passing the liability of failing infrastructure onto First Nations communities.

The Assembly of First Nations (AFN), in particular, has been critical of the Act and in 2015 passed Resolution 76/2015 "Safe Drinking Water for First Nations" to repeal it, stating – among other things – that it was "developed without meaningful consultation with First Nations, is contrary to inherent authority of First Nation governments and does not reflect the principles of Customary Laws regarding water."¹⁵ Following that resolution, the AFN passed Resolution 01/2018 "First Nations Led Process to Develop New Federal Safe Drinking Water Legislation," which mandated work with the federal government to create a co-developed process. Indigenous Services Canada (ISC) has agreed to work with the AFN on this process, and the two are working together to create safe-drinking water legislation and a long-term water and wastewater strategy.

Water and wastewater system operation and maintenance are supported by federal funding via the Capital Facilities and Maintenance Program (CFMP) and the First Nations Infrastructure Investment Fund (FNIF). This funding mix, however, leads to its own set of challenges that OFNTSC has identified in the past: funding has not increased to meet increasing rising costs, the funding formula is based on dated information, federal contributions are based on project costs rather than life-cycle costs and First Nations are obligated to meet a net funding requirement. If communities are unable to meet this last requirement, operations and maintenance needs are unmet. Taken all together, these issues lead to higher costs and prevents First Nations infrastructure and community assets from achieving their full life cycles.

Provincially, a number of statutes govern how water is managed in Ontario: the *Ontario Water Resources Act* manages water quality and quantity in Ontario. The *Environmental Protection Act* focuses on pollution control. Environmental planning is primarily managed under the *Environmental Assessment Act*. The purpose of the *Clean Water Act* is to protect existing and future drinking water sources. The *Water Opportunities and Water Conservation Act* balance new business opportunities in the water technology sector with water sustainability planning.

In 1991, the federal government committed to achieving equality for all in accessing safe water by 2001.¹⁶ Thirty plus years later, Canada has clearly failed to achieve this. As this section demonstrates, decades of policy and legislative efforts, coupled with poor budget management practices has only promulgated the problem and not led to the critical changes that are long overdue.

¹⁵ AFN Resolution page

¹⁶ Woods, John (2021). "Tip of the iceberg: The true state of drinking water advisories in First Nations ". <https://ucalgary.ca/news/tip-iceberg-true-state-drinking-water-advisories-first-nations>

Challenges and Opportunities

The challenges First Nations have faced and continue to face regarding water and wastewater are well known, steeped in colonial policy and legislation, and have been studied and reported on for decades. Among the biggest challenge is the fact that colonial policy and legislation to date prohibits First Nations from exercising their rightful jurisdiction over water. As stated in the Garma International Water Declaration:

Nation-States have grossly mismanaged the lands and waters of Indigenous Peoples, causing ecosystem collapse, human induced climate change, severe water quality degradation, extreme stress upon ecologies and species extinction at a scale and rate which is unprecedented; and Gross mismanagement of the lands and waters and denial of access of Indigenous Peoples to their lands and waters has caused severe, widespread and on-going detrimental impacts to all aspects of the lives and livelihoods of Indigenous Peoples.

This includes significant disadvantages to the health, economy and social well-being of many Indigenous Peoples. Cultural and linguistic diversity has also been compromised, leading to loss of culture and life-ways of Indigenous Peoples. A contributing factor is the concomitant degradation and expropriation by Nation-States of significant landscapes and sites of spiritual and cultural importance to Indigenous Peoples.¹⁷

As the above quote reveals, approaches to water have implications on a range of related policy areas, from housing to health and beyond. First Nations have been saying this for decades. Apart from the clear impediment of colonial policy and law, and the obvious threat of climate change, the following section provides a high-level summary of the challenges First Nations continue to face. The section ends with opportunities First Nations may consider to address the many challenges which go beyond what is cited in this section.

Challenge – growing infrastructure gap: The Ontario First Nations Technical Services Corporation (OFNTSC) puts the Ontario infrastructure gap on First Nations reserves at \$8.8 billion, a figure calculated over a 20-year period and putting the annual gap at almost \$500 million. In 2011, the annual infrastructure budget for First Nations in Ontario was around \$260 million.

The OFNTSC reported in 2011 that, on average, an on-reserve housing unit cost \$250,000 and that \$2.2 billion was required to remedy Ontario’s First Nations housing deficit, defined as the amount needed to build new units to meet demand and renovate houses in need of major repair. OFNTSC’s own estimates put the First Nations housing deficit at 8,800 units in Ontario alone.¹⁸ Other reports suggest closing the infrastructure gap will require upwards of \$30 billion to address new and existing deficits because of historic underfunding of both capital and operations costs:¹⁹ “In Ontario alone the infrastructure gap was estimated to be approximately \$2.2 billion for housing, \$2.5 billion for

¹⁷ Pg 2 Garma International Indigenous Water Declaration

¹⁸ Pg 4. Infrastructure – P3 report

¹⁹ https://www.pppcouncil.ca/web/pdf/first_nations_p3_report.pdf

institutional service buildings⁵, \$2 billion for water and wastewater treatment plants, and \$1.9 billion for linear structures and roads.”²⁰

Challenge – jurisdictional ambiguity and lack of regulations: Small water systems are not under federal jurisdiction: While the federal government is responsible for funding and overseeing water management in First Nations, this does not typically include small systems and individual wells and cisterns. And provincial governments and municipalities have no jurisdiction over water management on reserve. Provincial and territorial regulations governing safe drinking water and sanitation, which operate to protect the health of most Canadian residents, do not extend to First Nations reserves.

For decades, the federal government did not take appropriate action to ensure residents on First Nations reserves benefited from equal protection before the law—to this day there are no drinking water regulations on reserve. It is unsurprising, then, that this disparate system of regulations has led to disparate outcomes in access to safe drinking water and sanitation. Systems have been designed, constructed, and operated on reserves without the kind of legal standards and protections that the government has adopted for all other Canadians. Since 2006, the federal government has used contract law to govern safe drinking water on reserve. But even with contractual clauses in funding agreements between the federal government and First Nations, members of First Nations communities live without comparable protections and access to safe drinking water and sanitation as Canadians living off reserves.

The impact of this can be observed in the duration of water advisories on reserves, even for relatively new water systems. Of the dozens of drinking water advisories in effect on systems in Ontario First Nations, at least 57 of them are for systems less than 25 years old and 12 are for systems less than 15 years old. In at least two cases, the advisory was put in place within a few years of construction. At least one government contractor raised concerns in the mid-1990s that the government was funding systems on First Nations reserves in Ontario that would not be acceptable off reserve. Yet the practice continued, and to date, many reserve systems fall below provincial standards.”²¹

In addition to regulatory and funding problems, lack of source water protections and government support for private water and wastewater systems contributes to the crisis on reserves.

The quality of source water has a direct impact on drinking water. While water treatment is designed to make source water safe to drink, heavily contaminated source water can make water treatment more difficult and expensive. Ontario has more First Nations water systems that rely on surface water and “groundwater under the direct influence of surface water” than any other province—meaning water quality is directly related to watershed and source water conditions.

For the most part, source water protection falls under provincial law in Canada, because the watershed extends outside the reserve. This makes it legally and logistically difficult for First Nations to engage on the issue. In practice, First Nations cannot effectively carry out their culturally-understood obligation to protect water—either on or off reserve. First Nations leaders raised consistent concerns with Human Rights Watch about the lack of consultation regarding commercial activities that impact their traditional territories and the waters within it. In many cases, the lakes,

²⁰ Pg. 3. https://www.pppcouncil.ca/web/pdf/first_nations_p3_report.pdf

²¹ Human Rights Watch.

rivers, and streams that contribute to the source water for these communities have deteriorated because of pollutants from industries, and growing municipalities.

Challenge – inefficient capital funding structure: Failing or absent water and wastewater systems also contribute to overall systemic challenges on reserve. For example, funding provided for programming will at times need to be diverted to water and wastewater systems, and in some cases much-needed additional housing units cannot be added due to limitations on water and wastewater infrastructure. Regarding O&M, currently, infrastructure on reserve tends to deteriorate more quickly than its expected life cycle because O&M is not fully funded; sometimes the community lacks adequate training or is unable to retain the right employees to operate the facility. The current model, in which ISC only approves infrastructure projects once it has the cash on hand, essentially means that no leveraging of dollars or spreading a project's costs over many years can occur. This is a barrier to better outcomes for all infrastructure on reserve.

Challenge – O&M funding shortfalls and human resources issues: OFNTSC has also argued that federal funding for operations and maintenance must be amended to “provide greater resources for the costs associated with primary and secondary operator training and succession planning...and address the wage disparity between on-reserve and off-reserve O&M personnel salaries and benefits.” Compared to operator salaries in Ontario municipalities and the Ontario Clean Water Agency (OCWA), First Nation operators earn 22- 38% (municipalities) and 13-36% less (OCWA) than their counterparts. The consequences of this salary discrepancy cannot be understated: low salaries have the potential to increase turnover, which in turn could put safe drinking water and communities at risk.

Without support for training, succession planning and competitive salaries, First Nations will continue to face challenges maintaining their water and wastewater facilities and providing those essential services to communities. Federal funding is provided to run the Circuit Rider Training Program, which First Nations communities are automatically enrolled in if they operate a public drinking water or wastewater system. OFNTSC administers this program, which provides training to on-reserve operators on how to provide ongoing maintenance to water and wastewater systems. As First Nations reservations are federal lands, there is no provincial regulatory regime governing water or wastewater in First Nations communities.

Challenge – resource development on Indigenous territories and poor water quality: The historical relationship Indigenous peoples have had with water has been and continues to be upset by resource development, and other non-Indigenous societal and political constructs. These forces continue to alienate First Nations from true control and assertion of jurisdiction over water resources. In many First Nations, water has elevated levels of heavy metals, including iron and manganese, and contaminants like E. coli. Residents don't trust the drinking water and there is a preference to rely on bottled water as a reliable drinking water source.²²

The number of water-borne diseases in First Nations communities is 26 times higher than the national average, and people living on reserve are 90 times more likely to have no access to running water compared to non-Indigenous people in Canada.²³

Challenge – prohibitive costs: Lower-income or financially struggling families on First Nations reserves feel the water crisis intensely, and struggle with the cost of coping. This is particularly true

²² Wood.

²³ <https://ucalgary.ca/news/tip-iceberg-true-state-drinking-water-advisories-first-nations>

for households not serviced by community systems. One in five First Nations household in Ontario relies on a private well for drinking water, and 57 percent of households rely on a household septic system. The cost to monitor quality and maintain the safety of these systems can be difficult to afford—and, the capital costs needed to rehabilitate failed systems are often prohibitively high.²⁴

Challenge – connection to housing crisis: The poor water and sanitation situation in First Nations contributes to the severe housing shortage on reserves. There are long waiting lists for housing, and overcrowding is common. Yet communities cannot increase their housing without upgrades to water and wastewater infrastructure.

Challenge – impact on culture and cultural rights: The water crisis impacts the cultural rights of First Nations persons. According to custom and tradition among many communities, women are the keepers and protectors of waters. Many First Nations persons see water as living, and as a form of medicine. Not being able to drink the water from their own community is distressing to some. Ceremonies, customary fishing and hunting practices, and ways of teaching children and sharing traditional knowledge are impacted when water is contaminated.²⁵

Opportunity – court challenges: In 2019, Neskantaga First Nation, Curve Lake First Nation and Tataskweyak Cree Nation with the help of law firms Olthuis Kleeer Townshend LLP (OKT) and McCarthy Tétrault LLP (McCarthy Tétrault) started national class action lawsuits to address drinking water advisories in their communities and other First Nations across Canada. The lawsuits addressed Canada’s failure to take all reasonable steps to ensure that First Nations communities have adequate access to safe drinking water. On December 22, 2021, the Courts approved a Settlement between Canada and certain First Nations and their members who were subject to a drinking water advisory that lasted at least one year between November 20, 1995, and June 20, 2021. The Settlement also includes commitments to fund the construction, operation, and maintenance of infrastructure to provide First Nations and Individual Class Members with regular access to safe drinking water in their homes. While the court approach may not be the most desirable, it is an option available to First Nations given the precedent set in this example.

Opportunity – a First Nations-led Commission or Authority: Within our communities, discussions regarding the establishing of a First Nations Water and Wastewater Commission have continued since before the turn of this century.²⁶ Most recently, in 2013 the Chiefs of Ontario (COO) Chiefs in Assembly passed Resolution 13/2019 which mandates OFNTSC to explore the creation of a First Nations-led Water and Wastewater Commission. Despite this mandate, the creation of a Commission or Authority have been elusive. One contributing factor is the diversity of Ontario First Nations, and another is the ever-present lack of funding and federal policies that enable it. The extent to which we as First Nations require federal policies to enable this important work is questionable given the movements towards recognition of our rights and jurisdiction per UNDRIP. Nonetheless, the creation of a Water and Wastewater Commission or Authority controlled and governed by First Nations appears to be one of the strongest opportunities to achieve self-determination of water governance. A water commission can revisit a shared resource approach that puts Indigenous values, laws and worldviews at the forefront to restore our inherent relationship with water that has been suppressed by colonialism. First Nations organizations like the Atlantic First Nations Water Authority are moving towards autonomy and control over their water, and this case could provide lessons for

²⁴ CITE

²⁵ <https://www.hrw.org/report/2016/06/07/make-it-safe/canadas-obligation-end-first-nations-water-crisis>

²⁶ Ontario First Nations Technical Services Corporation (2019). “Ontario First Nations Water and Wastewater Commission: Final Report.” Pg. 1.

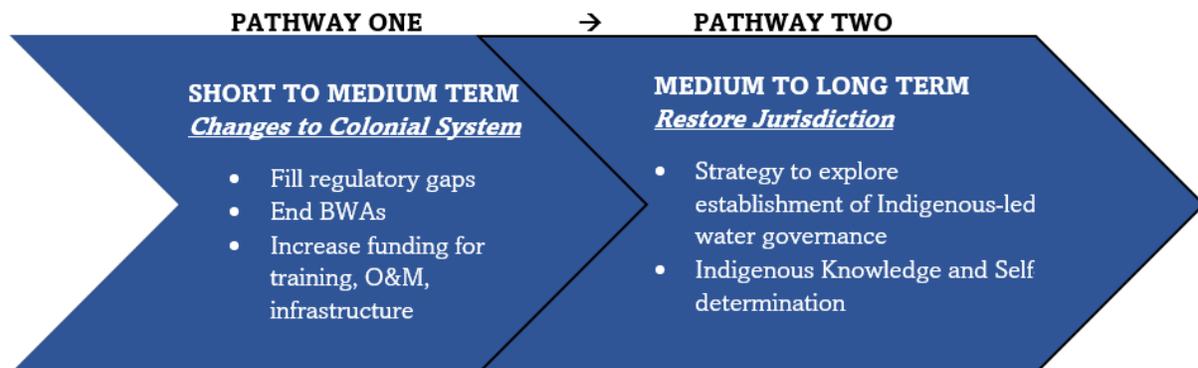
Ontario First Nations.²⁷ Indeed, OFNTSC has explored and detailed what this could look like in the 2019 Water and Wastewater Commission Final Report (available at www.ofntsc.org).

²⁷ <https://www.watercanada.net/atlantic-first-nations-water-authority-and-isc-sign-framework-agreement/>

The Future of Water Governance: A two-track approach to addressing the on-reserve water crisis and restoring First Nations Jurisdiction

OFNTSC cannot foresee the water crisis being addressed holistically through the existing colonial system. Rather, in alignment with the *United Nations Declaration on the Rights of Indigenous Peoples* a new approach to water governance is needed that is based on the recognition and implementation of First Nations rights. OFNTSC recognizes that a pan-Ontario approach is not ideal and that Ontario First Nations will determine for themselves how they choose to govern their water systems. That said, this position paper proposes a two path approach to addressing the on-reserve water crisis towards full Indigenous jurisdiction.

Indigenous people must determine their own governance structures without outside interference, but with the support of colonial governments per their obligations under UNDRIP. Reforming the current approach to water management and water governance must register as a key priority for First Nations given the compounding challenges currently faced, and the threat posed by climate change. The graphic below provides a visual representation of the two path approach OFNTSC is proposing.



Pathway One (short to medium term) concern reforms that must be taken to address the water crisis from within the colonial system. These include closing the infrastructure gap, filling regulatory gaps, ending BWAs, and properly funding water and wastewater systems. New investments in water and wastewater infrastructure on First Nations reserves should be accompanied by enforceable regulations, sufficient funds for capital, operation, and maintenance costs for community and household systems, and mechanisms to track progress. This pathway is necessary to make the current colonial approach to water less harmful to Indigenous peoples. While this important work is underway, First Nations will need to determine what decolonized water governance looks like and set a strategic path to restoring their rightful jurisdiction.

Pathway Two (medium to long term) concerns the process and formalization of restored jurisdiction to First Nations regarding water governance that aligns with Indigenous knowledge, customs, and traditions and self-determination. This may take the form of a water authority, a number or regional water authorities, or something else; however, the crucial piece is that it is led by First Nations. An independent First Nations water commission would be empowered to monitor and evaluate water policy and outcomes that affect First Nations.

Conclusion and Recommendations

If we really want to close the gap between Indigenous and non-Indigenous communities on safe drinking water, we need to look across the entire spectrum — from First Nations that rely on bottled water to those with individual wells and communities with reliable tap water. To address the real magnitude of this crisis, it is imperative that we decolonize water governance through recognition of First Nations jurisdiction in alignment with the *United Nations Declaration of the Rights of Indigenous Peoples* (UNDRIP). Section 6 of the federal UNDRIP Act requires Canada to prepare and implement an action plan to achieve the objectives of UNDRIP in consultation and cooperation with Indigenous peoples and other federal ministers. The action plan is expected to be complete by 2023.

Financial commitment alone will not solve the water and wastewater crisis on First Nations reserves. Along with infrastructure investments, the government should remedy a range of problems that contribute to the water crisis. These include: the lack of binding regulations on water quality on First Nations reserves; persistent under-funding and arbitrary budgeting for water system costs, including capital, operation, and maintenance costs; lack of support for household water and wastewater systems; worsening conditions of source water; and lack of capacity and support for water operators. At the core of these remedies is the need to meaningfully frame the water crisis and the lack of jurisdiction within the context and current political reality of UNDRIP which Canada has enshrined in law. Decolonizing the water governance system at present will not happen overnight, which is why this paper suggests a pragmatic two-path approach to realizing this goal.

Recommendations:

The following recommendations supplement to the two path approach outlined in this position paper:

1. Build a strategy for restoring First Nations jurisdiction in water governance along the two paths suggested in this paper and include them as key measurable targets in the OFNTSC 10-year Strategic Plan.
2. Work with PTOs to ensure an approach to Indigenous-led water governance that is consistent with UNDRIP is included in the UNDRIP Act action plan.
3. Work with PTOs to design an engagement framework for the development of a strategy that seeks to decolonize water governance through restoring First Nations jurisdiction. Seek funding from the federal and provincial government to develop the new water governance strategy that aligns with two pathways of work outlined in this paper.
4. Consider formalizing a tripartite partnership with federal and provincial governments through Memorandums of Understanding. These formal protocols could include multiple colonial ministries (i.e. Health Canada, ISC, Public Safety etc.) and work to implement the federal UNDRIP Act.
5. Continue to advocate for the implementation of the recommendations of the Walkerton Report, namely those that haven't been actioned upon.

6. Update capital needs estimates for water and wastewater needs to ensure the figures are up to date and reflective of the current needs of Ontario First Nations. While the 2018 figures cited in this paper are relevant, it is important to keep these estimates up to date to determine if the need is growing. Updated estimates should venture to include O&M and training capital needs which are not reflected in the 2018 estimates.

Indigenous peoples are at a crossroads, as Chief Del Riley has stated and as is cited earlier in this paper. It is incumbent upon us to lead this work and realize a sustainable future for our people in accordance with our knowledge, customs, and traditions. OFNTSC is here to support First Nations in this important, transformative work.

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