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# Sections 7 and 15 of the Canadian Charter of Rights and Freedoms in the Context of the Clean Water Crisis on Reserves: Opportunities and Challenges for First Nations Women

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## **Abstract**

This paper analyzes the water crisis on reserves through the lens of the *Canadian Charter of Rights and Freedoms* (“the *Charter*”). Specifically, this paper discusses various issues, stemming from the water crisis, that some First Nations women experience, through the lens of the *Charter’s* section 15 right to equality, and section 7 right to life, liberty, and security of the person. In doing so, this paper aims to draw attention to the different ways that the water crisis uniquely impacts First Nations women due to their intersectional experiences under the protected grounds of sex, ethnic origin, race, and residency on reserve land. The intent of this paper is to determine the viability of sections 15 and 7 as legal tools to address the water crisis for First Nations women, in hopes of advancing greater environmental justice.

**Keywords:** *Canadian Charter of Rights and Freedoms*, Section 7, Section 15, Equality, Life Liberty and Security of the Person, Water Crisis, Women, Indigenous, First Nations

## A. Introduction

There is great disparity in the water quality available to the First Nations peoples of Canada who live on reserves and to those who do not. Namely, the water sourced to First Nations communities is tarnished due to defective water treatment infrastructure, or inaccessible by some other means.<sup>1</sup> This is ironic, because Canada is among the world's most affluent and water-rich nations, having access to 18 percent of the world's fresh water resources.<sup>2</sup> Thus, one might reasonably conclude that clean and affordable drinking water is accessible to every individual in Canada. Unfortunately, this is not the reality.

This paper builds upon the work of renowned environmental scholars, including Nathalie Chalifour, Lynda Collins, and David Boyd, who have compellingly advocated that environmental rights should be incorporated into the *Canadian Charter of Rights and Freedoms* (“*Charter*”). Particularly, this paper will determine whether sections 7 and 15 of the *Charter* can be used as legal tools to address and remedy the water crisis inflicting First Nation communities across Canada, specifically when the claimant is a First Nations woman.

The water crisis is a product of environmental inequality, and must be solved with better environmental justice. A well-cited definition for environmental justice derives from the United States Environmental Protection Agency:

Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies...It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.<sup>3</sup>

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<sup>1</sup> Amanda M Klasing, *Make it Safe: Canada's Obligation to End the First Nations Water Crisis* (Human Rights Watch, 2016) at 3 [Klasing].

<sup>2</sup> *Ibid.*

<sup>3</sup> United States Environmental Protection Agency, *Environmental Justice*, online: <<http://www.epa.gov/environmentaljustice/>>.

Nathalie Chalifour, a social justice and environmental law scholar, argues that environmental justice will be achieved when “...all people, regardless of age, income, gender, race or ability, have access to clean air and water, safe food and other environmental amenities.”<sup>4</sup> It is also worth noting that community-driven activist works, among legal strategies, are also used to contest environmental injustices.<sup>5</sup> The law is but one avenue.

The *Constitution Act*, 1982, which embeds the *Charter*, is certainly a vehicle that can be used to advance environmental justice, especially for the most vulnerable people of Canadian society. Section 35 of the *Constitution Act*, which guards fundamental Aboriginal rights in the country, is a potential route.<sup>6</sup> Another is section 36, which obligates the federal and provincial governments to provide “essential public services of reasonable quality to all Canadians.”<sup>7</sup> This paper looks exclusively at the *Charter*, and more particularly, sections 7 and 15 as a means to achieve environmental justice for First Nations women suffering from lack of potable and accessible clean water in their homes. Environmental Justice is largely about environmental equality<sup>8</sup> and section 15 guarantees that “Every Individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”<sup>9</sup> This paper examines the potential for the *Charter*’s

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<sup>4</sup> Nathalie J Chalifour, “Environmental Justice and the Charter: Do Environmental Injustices Infringe Sections 7 and 15 of the Charter?” (2015) Ottawa Faculty of Law Working Paper No 2017-12 [Chalifour, “Environmental Justice”].

<sup>5</sup> *Ibid.*

<sup>6</sup> *Constitution Act*, 1982, s 35, being Schedule B to the *Canada Act* (UK), 1982, c 11 [*Constitution*].

<sup>7</sup> *Ibid* at s 36.

<sup>8</sup> Chalifour, “Environmental Justice”, *supra* note 4.

<sup>9</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 at s 15(1) [*Charter*].

section 15 equality right to protect women victims of environmental discrimination in the context of the water crisis.

Section 7 of the *Charter* explicitly states that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>10</sup> The focus of this paper will be the security of the person protection. David Boyd, a leading environmental lawyer and associate law professor at the University of British Columbia, has written extensively about the *Charter*’s potential to implicitly include environmental rights, consequently imbedding them into our Constitution. Boyd alleges that litigation by way of section 7 is the most practical means to achieve this goal, due to the provision’s broad phrasing.<sup>11</sup> In doing so, section 7 certainly has potential to protect environmental rights for certain groups which are at the heart of environmental justice.

This paper intends to draw on the various distinct experiences of First Nations women throughout Canada to determine whether, and to what extent, sections 7 and 15 are applicable to the environmental injustices they face, as examined through the water crisis. First Nations women are protected under the grounds of sex, race, and creed. In my view, this intersectionality renders the experiences of First Nations women unique, and for that reason, worthy of greater discussion. In providing my analyses in this paper, I do not intend to generalize the experiences of *all* First Nations women. I recognize that experiences are individual, and can vary among different people, the several reserves across Canada, as well as between individual women.

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<sup>10</sup> *Charter*, *supra* note 9 at s 7.

<sup>11</sup> David R Boyd, *The Right to a Healthy Environment Revitalizing Canada’s Constitution* (Vancouver: UBC Press, 2012) at 177 [Boyd, “The Right to a Healthy Environment”].

Rather, I explain the situations of certain First Nations communities that are inflicted with the water crisis, and infer how the experiences of women living in those communities may fit within the ambits of sections 15 and 7 of the *Charter*. I draw from findings outlined by Human Rights Watch (HRW)—an organization that undertakes research and advocacy efforts to promote various human rights goals, to make my inferences. In its 2016 edition, HRW conducted a study concerning the water crisis on reserves, and interviewed several different people, including many women, who are impacted. Through this paper, I hope to provide a comprehensive discussion on, as well as bring attention to, the several water-related issues that First Nations women specifically face within the sections 7 and 15 frameworks.

Section 1 of the *Charter* dictates that the violation of any given provision must not be “a reasonable limit prescribed by law as can be demonstrably justifiable in a free and democratic society.”<sup>12</sup> Therefore, to succeed with any *Charter* claim, and benefit from a *Charter* remedy in a formal analysis, a prospective litigant must first establish that a government action breached his or her protected right and that the breach is not saved by section 1. In this paper, I will solely examine the issues stemming from the water crisis through the lenses of section 7 and 15, as they relate to First Nations Women. Therefore, I will not delve into a section 1 analysis, and leave this consideration for future scholarly work.

This paper is organized in four parts. First, I will discuss contemporary water governance in Canada and how this has contributed to the water crisis on various reserves throughout the country. Next, I will discuss how the *Charter* might apply to the water

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<sup>12</sup> *Charter*, *supra* note 9 at s 1.

crisis on reserves. Third, I will examine certain experiences of some First Nations women, living on a reserve impacted by the water crisis, through the lens of section 15. Finally, I will examine these experiences through the lens of section 7.

### **B. Decentralized Water Governance in Canada and its Effect on First Nation Communities**

Scholars suggest that the inequality of water accessibility on reserves stems from the fact that Canada lacks a unified national and enforceable water law and drinking water regulatory framework.<sup>13</sup> Canada is home to one of the world's most decentralized water governance schemes.<sup>14</sup> The Federal Government has established national and unenforceable guidelines, which the various provinces have adopted into their own water regulations.<sup>15</sup> Due to the current constitutional division of powers, provincial drinking water laws apply to everyone under the provincial jurisdiction, and the Federal Government is responsible for providing safe drinking water to those under federal jurisdiction. Thus, our country depends on inconsistent laws and policies for drinking water regulation.<sup>16</sup> Military bases, reformatory prisons, and large conveyance vessels are but few entities that fall within the ambit of the federal power,<sup>17</sup> and individuals within these categories are protected with safe drinking water provisions under various, federal statutes.<sup>18</sup> The division of powers doctrine also renders "Indians, and lands reserves for

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<sup>13</sup> Maura Hanrahan, "Water (in)security in Canada: national identity and the exclusion of Indigenous peoples", online: (2017) 30:1 *British J Can Studies* at 75 <<https://doi.org/10.3828/bjcs.2017.4>> [Hanrahan].

<sup>14</sup> *Ibid.*

<sup>15</sup> David R Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 *McGill LJ* 81 at 96 [Boyd, "No Taps, No Toilets"].

<sup>16</sup> Hanrahan, *supra* note 13 at 75.

<sup>17</sup> *Constitution, supra* note 6 at s 91.

<sup>18</sup> Nathalie J Chalifour, "Environmental Discrimination and the *Charter's* Equality Guarantee: The Case of Drinking Water for First Nations Living on Reserves" (2013) 43 *Revue générale de droit* 183 at 197 [Chalifour, "Environmental Discrimination"].

Indians”<sup>19</sup> a federal responsibility, however no existing, enforceable water law guarantees safe and clean drinking water to First Nations peoples living on reserves.

The country’s “legal patchwork” has left several First Nations communities without legal protection and sufficient funding to access crucial water treatment infrastructure and potable water.<sup>20</sup> One statistic indicates that First Nations’ homes are 90 times more likely to be without running water, when compared to non-First Nations homes.<sup>21</sup> Contrastingly these other homes are located in communities that enjoy elaborate water treatment infrastructure, and by extension, clean and quality water resources. Canada also lacks a national strategy to develop a uniform water law, which some argue would lead to equal water resource protection and clean water accessibility for all.<sup>22</sup> Thus, First Nations communities are much more likely to experience and suffer from water-borne illnesses than other Canadians.<sup>23</sup>

The myriad of enforceable and unenforceable water regulation in our country include unequal source water protection strategies and insufficient funding mechanisms for water treatment infrastructure. The quality of source water is directly related to the quality of drinking water. Water treatment infrastructure cleans source water, making it safe to drink. Thus, it is far more difficult and costly to treat source water that is highly

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<sup>19</sup> *Constitution*, *supra* note 6 at s 91(24).

<sup>20</sup> Kaitlyn Mitchell “Why it’s time for Canada to recognize our right to water” (21 April 2015), *Ecojustice* (blog), online: <<http://www.ecojustice.ca/why-its-time-for-canada-to-recognize-our-right-to-water/>>.

<sup>21</sup> UN Permanent Forum on Indigenous Issues (UNPFII), *State of the World’s Indigenous Peoples* (New York: United Nations, 2009) at 25.

<sup>22</sup> Hanrahan, *supra* note 13 at 75.

<sup>23</sup> *Implementation of the International Covenant on Economic, Social and Cultural Rights: Addendum to the Fourth Periodic Reports Submitted by State Parties, Canada*, UNESCOR, 19th Sess, UN Doc E/C.12/4/Add.15 (2004) at 84.



contaminated.<sup>24</sup> First Nations peoples, along with water resource experts throughout Ontario, repeatedly expressed the following worries:

that their lakes, rivers, and streams are severely degraded...due to agricultural runoff, industrial activities, and dangerous waste disposal from private vacation homes...mainly from off reserve.<sup>25</sup>

Canadian jurisdictions have developed robust source water protection strategies and regulations to foster quality drinking water supplies, however positive impacts of these strategies are not experienced on reserves.<sup>26</sup> For example, a current strategy is the multi-barrier approach to source water protection. This approach contemplates all possible risks and threats to source water, and assures that there are barriers in place to reduce their effects.<sup>27</sup> Cumulatively, the multiple barriers “...provide greater assurance that the water will be safe to drink over the long term.”<sup>28</sup> Multi-barrier protection is far more robust for communities off-reserve. The 2016 HRW study found that in 2011, only 11 percent of First Nations in Ontario reported to have a source water protection plan, even though the *Protocol for Safe Drinking Water in First Nations Communities* obliges that such a plan be in place.<sup>29</sup> This low percentage stems from insufficient funding available to First Nations communities for water protection efforts.

In Ontario, municipalities are responsible for ensuring that they fall within the squares of the province’s strict drinking water regulations. Because compliance is

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<sup>24</sup> Klasing, *supra* note 1 at 77.

<sup>25</sup> *Ibid.*

<sup>26</sup> Dan Walters et al, “Multi-Barrier Protection of Drinking Water Systems in Ontario: A Comparison of First Nation and Non-First Nation Communities”, online: (2012) 3:3 Intl Indigenous Policy J 8 at 1 <<https://ir.lib.uwo.ca/iipj/vol3/iss3/8>> [Walters].

<sup>27</sup> “The Multi-Barrier Approach to Safe Drinking Water” (31 Oct 2013), *The Government of Canada*, online: <<https://www.canada.ca/en/health-canada/services/environmental-workplace-health/water-quality/drinking-water/multi-barrier-approach-safe-drinking-water-environmental-workplace-health-health-canada.html>>.

<sup>28</sup> *Ibid.*

<sup>29</sup> Klasing, *supra* note 1 at 77-78.

expensive, Ontario provides financial support to municipalities, so that they have the necessary funding and other resources to implement water management strategies, reduce water-borne threats, and ensure the satisfactory operation of water treatment infrastructure.<sup>30</sup> The *Sustainable Water and Sewage Systems Act* provides that municipalities are wholly compensated for the costs of services associated with safe drinking water and wastewater management. The province provides financial support directly to municipalities that are limited in financial, technological, and administrative resources required for the multi-barrier approach to source water protection.<sup>31</sup>

First Nations communities are not included in these arrangements, and instead share funding responsibilities with the Federal Government.<sup>32</sup> There is no similar, robust federal legal framework for water resource and drinking water financial support available to reserves. Instead, First Nations communities in Canada consult mere “guidance materials” to create source water protection plans and ensure their drinking water is of good quality.<sup>33</sup> The absence of robust legal mechanisms, as well as the severe fragmentation of the Federal Government’s responsibility, has led to the lack of adequate multi-barrier protection on reserves.<sup>34</sup>

According to Boyd, the Federal Government has long recognized its obligation to remedy the drinking water crisis on reserves. In 1991, Indian and Northern Affairs Canada (INAC)—as it then was—pledged to fix deficient water treatment systems, provide funding to improve water and wastewater infrastructure, and create action plans

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<sup>30</sup> *Walters, supra* note 26 at 2.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid* at 2-3.

<sup>33</sup> *Ibid* at 2.

<sup>34</sup> *Ibid* at 3.

to ensure First Nation communities had access to safe drinking water.<sup>35</sup> The Federal Government promised to address all the high risk systems by 2008, budgeting and investing time and money to reach its objective.<sup>36</sup>

Although these investments resulted in some tangible improvements for potable water access in First Nation communities, certain problems persist. Boyd identifies three outstanding issues: 1) the Federal Government fails to provide enough funding to First Nations to ensure that the quality and quantity of their drinking water is akin to communities off-reserve; 2) the lack of a unified regulatory framework prevents First Nation communities from benefitting from government protection of their water resources, comparable to off-reserve communities; and 3) several high-risk communities were excluded from Federal scrutiny due to not having a water system or that existing water treatment infrastructure produced potable water, despite not being connected to the majority of homes located on reserve.<sup>37</sup> Additionally, INAC's approach does not include crucial elements that are found in most provincial drinking water regulatory schemes, such as "approval and licensing of water treatment plants, ongoing monitoring, public reporting requirements, and compliance and enforcement mechanisms."<sup>38</sup>

According to a report by the Council of Canadians, since January 2015, 169 drinking water advisories (DWA) existed in 126 Indigenous communities across Canada.<sup>39</sup> Ontario has the highest number of DWAs, and is followed by BC,

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<sup>35</sup> Boyd, "No Taps, No Toilets", *supra* note 15 at 88.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid* at 90.

<sup>38</sup> House of Commons, Office of the Auditor General of Canada, "Chapter 5: Drinking Water in First Nations Communities" in *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons* (29 September 2005) at 10-11.

<sup>39</sup> Megan Rowney & Hannah James, "Many First Nations communities without access to clean drinking water", *Global News* (5 November 2015), online: <<https://globalnews.ca/news/2320937/many-first-nations-communities-without-access-to-clean-drinking-water/>> [Rowney & James].

Saskatchewan, Alberta, the Atlantic, and Manitoba.<sup>40</sup> The Assembly of First Nations (AFN) measured that “75% of the 740 water treatment systems and 70% of the 462 wastewater treatment systems on reserves posed a medium-to-high risk to drinking water and wastewater quality.”<sup>41</sup> The following are a series of cases, which illustrate the contemporary water crises on reserves throughout Canada, and provide some context to the sections 15 and 7 analyses explored later in this paper.

**a. Shoal Lake 40 First Nation**

Shoal Lake 40 First Nation community stands on the Manitoba-Ontario boarder. The community is isolated due to the construction of an aqueduct, which has supplied clean water to Winnipeg for generations, while separating the reserve onto a manmade island.<sup>42</sup> The HRW study included findings based on interviews with members of the Shoal Lake 40 First Nation Community. The report indicated that the community was provided with running water in 1995 after the construction of federally endorsed “small pump houses.”<sup>43</sup> Shortly after, in 1997, a drinking water advisory ensued, due to the poor quality of the water treatment infrastructure.<sup>44</sup> According to International Joint Commission, which is responsible for transboundary water resource management between Canada and the United States, Shoal Lake 40 First Nation Community has been

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<sup>40</sup> *Ibid.*

<sup>41</sup> Hanrahan, *supra* note 13 at 74.

<sup>42</sup> “Shoal Lake 40 and Winnipeg’s drinking water: What’s at stake?”, *CBC News* (10 August 2015), online: <<http://www.cbc.ca/news/canada/manitoba/shoal-lake-40-and-winnipeg-s-drinking-water-what-s-at-stake-1.3185733>> [Shoal Lake 40]; Klasing, *supra* note 1 at 26.

<sup>43</sup> *Ibid.*

<sup>44</sup> Cori Marshall “Issues in Shoal Lake 40 First Nation Extend Far Beyond Water” (17 October 2017), *WATERTODAY*, online: <<https://www.watertoday.ca/ts-fn-shoal-lake-issues-extend-beyond-water.asp>> [Marshall]; Klasing, *supra* note 1 at 26.

under a boil water advisory for twenty years.<sup>45</sup> As a result, the community has had to rely on costly bottled water to drink.<sup>46</sup>

### **b. Grassy Narrows First Nation**

The Grassy Narrows First Nation community is located along Wabigoon-English River in Western Ontario, and residents of the Grassy Narrows First Nation were also interviewed for the HRW study.<sup>47</sup> For decades, the community has suffered from mercury poisoning dating “...back to the 1960s, when a pulp and paper mill in Dryden, Ontario...dumped 9,000 kg of mercury into the Wabigoon and English River systems.”<sup>48</sup> Mercury contamination shut down the community’s once thriving commercial fishery, consequently devastating the community’s economy.<sup>49</sup> Due to the lack of local economic opportunities and little wealth, residents have continued to consume fish from the community’s nearby contaminated water resources for several years.<sup>50</sup>

Instead of remedying the mercury contamination in the water, the Federal Government and private owner of the pulp and paper mill, paid a settlement to the community.<sup>51</sup> Contemporarily, the Grassy Narrows First Nation community obtains its drinking water from either the communal water treatment system or from the two community wells. However, due to ineffective water treatment techniques and the high

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<sup>45</sup> Shoal Lake 40, *supra* note 42.

<sup>46</sup> *Ibid.*

<sup>47</sup> Klasing, *supra* note 1 at 3, 26.

<sup>48</sup> Luke Harris, “Mercury poisoning in Grassy Narrows: Clean water for First Nations communities!” (27 September 2016), *Fightback THE MARXIST VOICE OF LABOUR AND YOUTH*, online: <<https://www.marxist.ca/analysis/first-nations/1134-mercury-poisoning-in-grassy-narrows-clean-water-for-first-nations-communities.html>> [Harris].

<sup>49</sup> Matt Prokopchuk, “Grassy Narrows mercury victims up to 6 times more likely to have debilitating health problems, report says”, *CBC News* (24 May 2018), online: <<https://www.cbc.ca/news/canada/thunder-bay/grassy-narrows-health-report-release-1.4675091>> [Prokopchuk].

<sup>50</sup> *Ibid.*

<sup>51</sup> Harris, *supra* note 48.

concentration of uranium as well as cancer-causing toxins in the community's water resource, the water treatment system and wells are under "do not consume" orders.<sup>52</sup> The community water treatment system is over decade old and is defective; due to insufficient funding from the Federal Government, the community is unable to repair the system.<sup>53</sup>

### **c. Pikangikum First Nation**

Pikangikum First Nation is a remote-access community situated in the northwestern region of Ontario, with a population of approximately 2,300.<sup>54</sup> As of 2006, 95% of the homes on reserve did not have running water or indoor plumbing. Approximately 20 of the 387 homes were connected to the community's water treatment system, requiring most of the residents to travel to the adjoining lake to collect drinking water in buckets.<sup>55</sup> A sewage lagoon which serves the community's RCMP station, school, and local store contributes to the water contamination on the reserve. Media sources have stated, that between 1995 and 2000, the community likely had the highest suicide rate in the world.<sup>56</sup>

The community prompted the Ontario government's health department to assess its drinking water and sewage systems and evaluate the presence of water-borne illnesses in Pikangikum. Experts found that there was likely a connection between the community's lack of basic and fundamental water treatment infrastructure, and the consequent suffering from skin diseases, head lice, and gastrointestinal infections.<sup>57</sup> They also commented on the blatant neglect of Pikangikum, describing the living conditions to

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<sup>52</sup> Klasing, *supra* note 1 at 26.

<sup>53</sup> Harris, *supra* note 48.

<sup>54</sup> Boyd, "No Taps, No Toilets", *supra* note 15 at 90.

<sup>55</sup> *Ibid.*

<sup>56</sup> Martin Patriquin, "Canada: Home to Pikangikum, suicide capital of the world" (30 March 2012), online: < <https://www.macleans.ca/news/canada/canada-home-to-the-suicide-capital-of-the-world/> > [Patriquin].

<sup>57</sup> Boyd, "No Taps, No Toilets", *supra* note 15 at 91.

be shocking and atrocious, which ultimately subjected residents to the harmful illnesses stated above.<sup>58</sup> One expert found that sewage from the community's exhausted septic systems flowed directly into the lake, and a sample of lake water was infested with *E.coli*. Nearly the whole community depended on poorly maintained outhouses for waste and sewage collection.<sup>59</sup>

To this day, the issues at Pikangikum persist due to insufficient government action and unfulfilled promises. The Federal Government offered to provide Pikangikum with 200 new outhouses, but this offer was accordingly rejected by the community leaders as unsatisfactory.<sup>60</sup> In 2007, the Federal Government pledged to allocate \$9.7 million for new water treatment systems in the community that would provide potable water directly to homes, however the promised funding was not received. In 2011, the community's water system malfunctioned, which put the community under a state of emergency.<sup>61</sup> In the same year, then Chief of the community, Gordon Peters, wrote a letter to Ban Ki-moon, the United Nations Secretary-General, describing the appalling conditions of Pikangikum as "fourth world."<sup>62</sup> In 2012, community members wrote to the Prime Minister, shaming the government for not fulfilling their promise to provide the necessary funding to improve the water treatment infrastructure.<sup>63</sup>

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<sup>58</sup> *Ibid.*

<sup>59</sup> Boyd, "No Taps, No Toilets", *supra* note 15 at 91 citing Indian and Northern Affairs Canada, *Report of the Expert Panel on Safe Drinking Water for First Nations*, vol 1 (Ottawa: Minister of Public Works and Government Services Canada, 2006) at 52 [*Report of the Expert Panel*, vol 1].

<sup>60</sup> Boyd, "No Taps, No Toilets", *supra* note 15 at 92.

<sup>61</sup> Allan Woods, "A decade of despair in the Pikangikum First Nation", *The Toronto Star* (April 25, 2016), online: < <https://www.thestar.com/news/canada/2016/04/25/a-decade-of-despair-in-the-pikangikum-first-nation.html>>.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

#### d. Little Buffalo

Little Buffalo, Alberta is a Lubicon Cree First Nation community of approximately 225 people. Unlike the other communities referenced, this one is not in or near Ontario, however it is important because it is largely effected by Alberta's oil and gas industry, and consequently suffers from a water crisis.<sup>64</sup> Little Buffalo lacks running water, its local water resources are highly polluted and unsafe to drink, and most homes do not have indoor plumbing. Consequently, community members are required to drive great distances to Peace River so they can purchase bottled water.<sup>65</sup> Up until 2014, every person in the community relied on outhouses and stored their drinking water in barrels, when 50 homes were provided with independent cisterns and septic tanks. However, this effort is not enough, as more than half of the community still lives without potable water in their homes.

The Lubicon have been repeatedly excluded from important environmental and land development decision-making processes. The community has not signed a treaty with the Canadian government, and therefore is not legally recognized as a reserve subject to the *Indian Act*.<sup>66</sup> The government has used this lack of legal recognition for their own benefit. Per Amnesty International, in the last thirty years, Alberta has approved licenses for over 2600 oil and gas wells on traditional Lubicon land, which the community has long used for hunting, fishing, and trapping.<sup>67</sup> In 2011, a pipeline spilled approximately 4.5 million litres of crude oil near the community, amounting to one of the

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<sup>64</sup> Boyd, "No Taps, No Toilets", *supra* note 15 at 93.

<sup>65</sup> *Ibid.*

<sup>66</sup> "The Lubicon Cree: Ongoing human rights violations", *Amnesty International* (2011), online: <https://www.amnesty.ca/our-work/issues/indigenous-peoples/the-lubicon-cree-ongoing-human-rights-violations> [Amnesty International].

<sup>67</sup> *Ibid.*



largest oil spills to have ever occurred in the province.<sup>68</sup> The United Nations has repeatedly criticized the Canadian government for denying the Lubicon Cree people their basic human rights, and profiting from large-scale oil and gas developments on their land and at their expense.<sup>69</sup>

### **C. How the Canadian *Charter* might apply to the Water Crisis on First Nation Reserves**

This part of the paper discusses how issues stemming from the water crisis might fall within the ambit of the *Charter*. The *Charter* is part of the Canadian Constitution, and thus provides supreme human rights protection to every person in Canada. The renowned constitutional legal scholar, Peter H. Hogg, stated that the *Charter* provides customary “uniform national standards for the protection of [a set of] civil liberties [which are] regarded as so important that they should receive immunity, or at least special protection, from state action.”<sup>70</sup> Accordingly, section 32 of the *Charter* mandates that a claimant may only challenge a *state* action when seeking a *Charter* remedy.<sup>71</sup> However, this does not mean that private entities are automatically precluded from the *Charter*’s reach, and private conduct may be caught under the umbrella of government action.

Lynda Collins, an expert on both environmental and constitutional law, identifies three different ways that private action can be considered as government action in the

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<sup>68</sup> “2nd largest pipeline spill in Alberta history leads to charges”, *CBC Radio-Canada* (27 April 2013) online: < <https://www.cbc.ca/news/canada/edmonton/2nd-largest-pipeline-spill-in-alberta-history-leads-to-charges-1.1311723>>.

<sup>69</sup> Amnesty International, *supra* note 67.

<sup>70</sup> Peter H Hogg *Constitutional Law of Canada*, 5<sup>th</sup> ed Vol 2 (Scarborough, Ontario: Thomson Carswell Limited, 2007).

<sup>71</sup> *Charter*, *supra* note 9 at s 32.

environmental context.<sup>72</sup> First, the impugned government action can indirectly come from a government-controlled, private industrial service.<sup>73</sup> Second, a government body can allow a private entity (through a license or permit) to engage in activities that cause environmental harm, and that private action will fall within the ambit of section 32.<sup>74</sup> Finally, a government can set too low statutory standards for the emission of harmful contaminants into the environment.<sup>75</sup> Outdated and unsatisfactory government-regulated standards, which allow for excessive pollution, effectively capture private facilities which conform to them, and therefore the private facilities are directly subject to the *Charter*.

Chalifour typifies several possible environmental justice claims, which might be subject to *Charter* scrutiny. These categories are based on the nature of the evidence available to prove the *Charter* breach and include the following: geospatial cases; body burden or chronic pollution cases; procedural justice cases; and cases involving inequitable access to environmental protection (in the form of benefits, and services).<sup>76</sup>

Geospatial cases involve an aggregation of environmental harms confined to one geographical area.<sup>77</sup> The early environmental justice movement comprised several geospatial cases in which "...the location of toxic waste sites, landfills and other environmental harmful activities near poor, racialized communities..." were contested.<sup>78</sup> This category can also include cases where marginalized or vulnerable community members challenge government decisions that ultimately allowed emissions of harmful

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<sup>72</sup> Lynda Margaret Collins "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms" (2009) 26 Windsor Rev Leg & Social Issues 7 at 17 [Collins, "Ecologically Literate Reading"].

<sup>73</sup> *Ibid* at 17.

<sup>74</sup> *Ibid*.

<sup>75</sup> *Ibid* at 18.

<sup>76</sup> Chalifour, "Environmental Justice", *supra* note 4.

<sup>77</sup> *Ibid*.

<sup>78</sup> *Ibid*.

substances into the environment in proximity to their community. This geospatial category speaks to the situations in Grassy Narrows First Nation and Little Buffalo, where the government permitted activities that emitted pollutants into the environment, which ultimately contaminated the water in the communities.

The next category, cases involving body burdens or exposure to chronic pollution, involves “...evidence of a disproportionately large body burden created by environmental factors...”<sup>79</sup> Chalifour explains that even though some of the cases in this category may also fit within the geospatial category, environmental harms resulting in bodily burdens are not necessarily geographically focused. Rather, this category includes cases where a particular group bears general body burdens from exposure to chronic, low-dose pollution.<sup>80</sup> A First Nations woman from any of the above communities could, it seems, fit her claim within this category if she, for example, demonstrates that chronic consumption of contaminated or low-quality water contributed to her reproductive health issues.

Another type of environmental injustice claim “...is procedural, where individuals or communities are unable to participate meaningfully in environmental decision-making or otherwise access justice for their claims.”<sup>81</sup> Chalifour claims that this category also encompasses cases where environmental management procedures fail to capture the voices of certain groups.<sup>82</sup> First Nations women on reserves are some of the most oppressed individuals in our country. As will be explored later in the section 15 analysis of this paper, women have been historically excluded from voting, band politics, and

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<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

environmental-decision making processes. Their poor procedural participation can subject them to this category of environmental justice claims.

The final type of environmental justice claim involves “...evidence of inequitable access to environmental protection and/ or services, including enforcement, or where the costs of policies are unfairly distributed.”<sup>83</sup> These cases can include allegations by a group of people that they are being denied fair and equal access to government-sponsored environmental benefits. For example, low-income groups can argue that a carbon tax is unjust without a complementary policy to alleviate some of the expense burdens for people belonging to such groups. Similarly, First Nations women (and even men) living in communities where potable and clean water is inaccessible can argue that the absence of a uniform Canadian water law, and the consequent “patchwork” of water regulation, contributes to their disadvantage.<sup>84</sup> First Nations communities across Canada that do not have access to clean water compared with the rest of the country, can argue that they are being denied “fair and equal access to environmental services or benefits”<sup>85</sup> by the government. This category is arguably the most applicable to the current unequal drinking water access on First Nations territory, because potable and clean water can be considered as an environmental benefit that other Canadians enjoy.

#### **D. Section 15: Equality and the Water Crises**

Given the landscape of water regulation in Canada and the forms of *Charter* claims for environmental harms, we can now turn to one of the specific questions of this paper: how the experiences of certain First Nations women, living on reserves inflicted

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

with the water crises, may be analyzed through the lens of section 15. I argue that the *Charter*'s equality provision holds much potential to legally redress environmental injustices, such as the clean water crisis, experienced by First Nations women. In my view, a First Nations woman who lives in any of the reserve communities highlighted above, could meet the evidentiary burden to allege that the water crisis is discriminatory for the purposes of section 15.

The purpose of section 15 is to uphold *substantive* rather than *formal* equality, and this has long been the judicial interpretation.<sup>86</sup> *Andrews v Law Society of British Columbia* was the very first case in which the Supreme Court of Canada (“the Court”) scrutinized section 15, and stated that substantive equality “entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”<sup>87</sup> Thus, section 15(1) aims to correct and inhibit discrimination against certain groups “suffering social, political and legal disadvantage in our society.”<sup>88</sup>

The prime consideration for substantive equality involves analyzing the impact of the impugned law on the distressed group.<sup>89</sup> Substantive equality aims to confront the causes of inequality, rather than treat every person equally. It recognizes that treating everyone the same way can sometimes perpetuate discrimination, and therefore should not be the purpose of the equality provision.<sup>90</sup>

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<sup>86</sup> *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 56 DLR (4th) 1, [*Andrews*].

<sup>87</sup> *Ibid* at para 171.

<sup>88</sup> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 54, 151 DLR (4th) 577, [*Eldridge*] citing *R v Turpin*, [1989] 1 SCR 1296, 1989 CanLII 98, [*Turpin*].

<sup>89</sup> *Andrews*, *supra* note 87 at para 171.

<sup>90</sup> *Chalifour*, “Environmental Discrimination”, *supra* note 18 at 191.

The current section 15 test derives from *Quebec (Attorney General) v A*, in which the Court confirmed that the provision protects substantive equality.<sup>91</sup> To make a *prima facie* discrimination claim under section 15(1), a claimant must provide evidence to show there was a distinction, which was based on an enumerated or analogous ground, and that distinction's impact on the claimant individual (or group) perpetuates arbitrary disadvantage.<sup>92</sup> The water crises certainly does perpetuate arbitrary disadvantages upon some First Nations women who live in the various communities outlined above. The following subparts examine each portion of the section 15 framework, determining whether they can be satisfied by a claimant who is a First Nations Woman, lives in a community without access to clean and potable water, and consequently suffers from the effects of the water crisis.

**a. The claimant can draw a distinction based on an enumerated or analogous ground**

*i. First Nations Women are Captured by Multiple Grounds Protected by Section 15*

To be in the purview of section 15, a claimant must belong to either a protected group enumerated in the provision or one that is analogous. The enumerated grounds include the following: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>93</sup> First Nations women living on reserves fall within the enumerated grounds of ethnic origin, sex, and race, however these grounds alone do not serve as a sufficient basis for an equality challenge. This is because First Nations women who live off-reserve enjoy the same federal, provincial, and territorial drinking water

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<sup>91</sup> *Quebec (Attorney General) v A*, 2013 SCC 5 at para 325, 354 DLR (4th) 191 [*Quebec v A*].

<sup>92</sup> *Ibid*; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 16, [2015] 2 SCR 548 [*Taypotat*].

<sup>93</sup> *Charter*, *supra* note 9 at s 15(1).

legal protections as all other Canadians.<sup>94</sup> Instead, for our hypothetical case, the valid ground for discrimination is intersectional experience of sex, ethnic origin, race, and residency on reserve land.

The Court in *Corbière v Canada* held that the *Charter's* equality right is triggered when the claimant is denied an equal benefit of the law on grounds that are immutable, meaning they are “...based on characteristics that [an individual] cannot change or that the government has no legitimate interest in expecting [an individual] to change to receive equal treatment under the law.”<sup>95</sup> The Court has recognized several grounds to be immutable for the purposes of section 15, including citizenship, marital status, and sexual orientation.<sup>96</sup> The Court does not generally consider a place of residence to fall within its definition of “immutable” because a person can choose where they wish to live. However, in *Corbière*, the Court distinguished “Aboriginality-residence” and deemed it to be an analogous ground. It found that choosing to live on a reserve is very much connected to First Nation cultural identity, and cannot be changed without great costs to band members.<sup>97</sup> Accordingly, for our case, this portion of the section 15 framework would not be very onerous to meet.

*ii. Comparator Groups are No Longer Necessary to Draw a Distinction*

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<sup>94</sup> Boyd, “No Taps, No Toilets”, *supra* note 15 at 112.

<sup>95</sup> *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1 [*Corbière*].

<sup>96</sup> Rosalind Dixon, “The Supreme Court of Canada and Constitutional (Equality) Baselines” (2013) 50:3 Osgoode Hall LJ 637 at 639.

<sup>97</sup> *Corbière*, *supra* note 96 at para 14.

Prior to the court's decision in *Withler v Canada*, identifying a “comparator group” was necessary to proceed by way of section 15.<sup>98</sup> When alleging his or her equality rights, a claimant first needed to identify a relevant comparator to sufficiently highlight the differential treatment he or she experienced. *Withler* eliminated the need for comparator groups, because this practice did not align with provision's mandate to promote substantive equality.<sup>99</sup> Although comparators are no longer required, they certainly help to emphasize differential treatment. For the purposes of our analysis, a relevant comparator group could be another remote, non-reserve community, which is proximate to any of the communities outlined above.

For example, the community of Red Lake, Ontario may serve as appropriate comparator to Pikangikum, as the two have a comparable population and are located relatively close to one another.<sup>100</sup> In contrast to Pikangikum, residents (including the women) of Red Lake enjoy safe and provincially-regulated drinking water, and are benefited by certified water systems and sewage treatment plants that must adhere to the strict conditions of Ontario's *Safe Drinking Water Act*.<sup>101</sup> The same legislation does not apply to Pikangikum, which has led to conditions that its residents (including the women) to rely on outhouses and live without running water in their homes.<sup>102</sup>

A woman in Pikangikum can argue that she is being treated differently from women living in Red Lake, regarding her access to safe drinking water. She can argue that the inaccessibility of potable water on her reserve causes her to suffer from many

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<sup>98</sup> *Lovelace v Ontario*, 2000 SCC 37 at para 62, 48 OR (3d) 735 [*Lovelace*]; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 24, 170 DLR (4th) 1 [*Law v Canada*].

<sup>99</sup> *Withler v Canada (Attorney General)*, 2011 SCC 12 para 60, [2011] 1 SCR 396 [*Withler*].

<sup>100</sup> Boyd, “No Taps, No Toilets”, *supra* note 15 at 113.

<sup>101</sup> *Safe Drinking Water Act*, RS O 2002, c 32.

<sup>102</sup> Boyd, “No Taps, No Toilets”, *supra* note 15 at 113.



physical, psychological, financial, and even cultural burdens that a woman in the comparator community does not face.<sup>103</sup> A claimant can also simply argue that she is being denied a benefit that others enjoy.<sup>104</sup> For the purpose of our hypothetical analysis, a potential claimant would be able to demonstrate differential treatment fairly easily, because the need for comparator groups is no longer necessary to make a section 15 claim.

The most challenging step in the section 15 framework is drawing a distinction created by *law* that denies women in various First Nation communities equal access to clean water. This is largely because there is no specific law or legal framework that has caused the alleged differential treatment (central to section 15).<sup>105</sup> Rather, there is an intricate web of laws which collectively denies clean, accessible, and potable water to First Nations people on reserve land, while supplying these same benefits to everyone else. The overall effect of the existing decentralized water governance in Canada amounts to the omission of First Nations women from statutory drinking water protections, which are available to others in our country.<sup>106</sup> First Nations people living on reserves is virtually the sole group which is denied this legal safeguard.<sup>107</sup>

The Court has routinely supported a purposive interpretation of the *Charter* and its rights,<sup>108</sup> and has construed “law” broadly to align with the section 15 goal to promote substantive equality. In my view, Chalifour convincingly argues that the *Charter*’s equality guarantee would likely “...extend to the full range of government action (and

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<sup>103</sup> *Chalifour*, “Environmental Discrimination”, *supra* note 18 at 195.

<sup>104</sup> *Withler*, *supra* note 100 at para 29 citing *Andrews*, *supra* note 87 at paras 174-75.

<sup>105</sup> *Chalifour*, “Environmental Discrimination”, *supra* note 18 at 188.

<sup>106</sup> *Chalifour*, *supra* note 4.

<sup>107</sup> *Chalifour*, “Environmental Discrimination”, *supra* note 18 at 197.

<sup>108</sup> *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 1985 CanLII 69 [*R v Big M*.]; *Hunter et al v Southam Inc*, [1984] 2 SCR 145, 1984 CanLII 33 [*Hunter v Southam*].

inaction) regardless whether the action stems from one law, regulation or policy, or a set of laws that, acting together, creates discrimination.”<sup>109</sup> Limiting the equality provision only to one single law would be incongruent with the Court’s purposive reading of the *Charter* and its consistent support for substantive equality. It would be implausible for the Court to find that the *Charter*’s equality provision does not apply to a First Nations woman, who is protected based on multiple grounds, only because she is omitted from an overall patchwork of law, which provides a benefit to everyone but her. Thus, the entire drinking water regulatory scheme would need to be examined as the impugned “law” for the purposes of our section 15 analysis.<sup>110</sup> There are numerous ways that the Court can interpret this legal framework.

*iii. Drawing a Distinction Created by Law: The Federal Legal Regime*

The Court can exclusively focus on the overall network of federal drinking water laws. The Canadian Federal Government has created several provisions under several different statutes to ensure safe drinking water access for people captured by federal jurisdiction. Legislation such as the *Canada Labour Code*<sup>111</sup> and the *Potable Water on Board Trains, Vessels, Aircraft and Buses Regulations*<sup>112</sup> under the *Department of Health Act*<sup>113</sup> guarantee that individuals have access to high-quality, clean and potable water.<sup>114</sup> This federal regulatory regime provides clean drinking water to city residents, prison inmates, cruise ship (and other common carrier) passengers, and employees who work on

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<sup>109</sup> *Chalifour*, “Environmental Discrimination”, *supra* note 18 at 188.

<sup>110</sup> *Ibid* at 201.

<sup>111</sup> *Canada Labour Code*, RS C 1985, c L-2.

<sup>112</sup> *Potable Water on Board Trains, Vessels, Aircraft and Buses Regulations*, SOR/2016-43, s 4 [*Aircraft and Buses Regulations*].

<sup>113</sup> *Department of Health Act*, S C 1996 c 8.

<sup>114</sup> *Aircraft and Buses Regulations*, *supra* note 113 at s 4.

federally-regulated land, with the exclusion of First Nation communities.<sup>115</sup> The exclusion is especially stark, considering that institutions such as Health Canada provide federal employees, working on reserves with unsafe drinking water, with small water treatment systems.<sup>116</sup> Ironically, First Nations people who reside on those very same reserves do not benefit from equivalent technologies.<sup>117</sup>

Chalifour suggests that the Court could also focus on a single federal policy as the impugned law. The Interdepartmental Working Group on Drinking Water formulated the *Guidance for Providing Safe Drinking Water in Areas of Federal Jurisdiction – Version 2*, which guides every Federal Government department (including facilities that operate under federal jurisdiction) in providing safe and reliable drinking water to consumers.<sup>118</sup> Under the policy, consumers include employees, inmates and visitors of correctional facilities, visitors to federal lands, and residents of First Nations communities.<sup>119</sup> According to the policy, each government department and facility bears the onus of ensuring that drinking water supplies are safe for consumers.<sup>120</sup>

Although this document is a policy and not an enforceable regulation, a purposive interpretation of section 15 would allow the Court to deduce it as a “law.” The purpose of this document is to “give clear, consistent guidance” on how it should be implemented.<sup>121</sup> This policy also encourages federal departments “to strive to meet the guidance set out in [the] document in order to protect the health of the people who

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<sup>115</sup> Chalifour, “Environmental Discrimination”, *supra* note 18 at 188, 203.

<sup>116</sup> *Ibid* at 203.

<sup>117</sup> *Ibid*.

<sup>118</sup> Health Canada, “Guidance For Providing Safe Drinking Water in a Federal Jurisdiction – Version 2”, May 2013 (Ottawa: Catalogue No H128-1/05-440-1E-PDF).

<sup>119</sup> *Ibid* at 6.

<sup>120</sup> *Ibid*.

<sup>121</sup> *Ibid*.

consume the water provided.”<sup>122</sup> The practical effect of these guidelines is the fulfilment of its goals for consumers on federal land, with the exception of First Nations people who live on reserves.<sup>123</sup> In its decision for *RWDSU v Dolphin Delivery Ltd*, McIntyre J stated that the *Charter* applies to “any exercise of or reliance upon government action...”<sup>124</sup> Thus, by finding this federal policy not to be law for the purposes of our analysis, the Court would not be reading section 15 purposively, and would be disregarding the effect of the law in creating discrimination.<sup>125</sup>

*iv. Drawing a Distinction Created by Law: Omissions from the Law and Failure to Act*

In *Vriend v Alberta*, the Court found that the *Alberta Individual’s Rights Protection Act* was underinclusive for omitting sexual orientation as a ground for discrimination.<sup>126</sup> Corey, J stated that “the underinclusiveness of [an] Act...does not alter the fact that it is the legislative act which is the subject of *Charter* scrutiny...”<sup>127</sup> Similarly, in *Dunmore v Ontario (AG)*, the Ontario *Labour Relations Act* excluded agricultural workers, thus preventing them from partaking in lawful trade union activities. The Court found that “legislation that is *underinclusive* may, in unique contexts, substantially impact the exercise of a constitutional freedom.”<sup>128</sup> Accordingly, when the government omits a certain group from a government-sponsored program or legal protection, that group may utilize the *Charter* to obtain a remedy. Although in *Vriend* and *Dunmore*, the Court was asked to determine whether an omission from *one* law or

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<sup>122</sup> *Ibid.*

<sup>123</sup> *Chalifour*, “Environmental Discrimination”, *supra* note 18 at 204.

<sup>124</sup> *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at para 41, 33 DLR (4th) 174 [*Dolphin Delivery*].

<sup>125</sup> *Chalifour*, “Environmental Discrimination”, *supra* note 18 at 204.

<sup>126</sup> *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend*].

<sup>127</sup> *Ibid* at para 55.

<sup>128</sup> *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016 at para 22, 207 DLR (4th) 193 [*Dunmore*].

program constituted as discriminatory, a purposive interpretation of the equality provision would allow the Court to find that the national patchwork of water laws is underinclusive of the First Nations peoples of Canada,<sup>129</sup> and by extension, First Nations woman.

In the same vein, the Court has also left the door open for a litigant to challenge the government's failure to act.<sup>130</sup> In *Haig v Canada*, L'Heureux-Dubé J stated, "a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of s 15."<sup>131</sup> This suggests that the Court could find the government's failure to create enforceable national drinking water laws, and failure to develop a national strategy to create such laws, as a section 15 violation. A claimant could also challenge a government institution (such as Health Canada) for failing to provide drinking water treatment systems to First Nations residing on reserve land, while providing the same technology to Federal employees. She could also allege that the government's blatant neglect of a community, and repeated failure to provide basic and fundamental water treatment systems (such as the case of Pikangikum) amounts to a section 15 breach.

*v. Drawing a Distinction Created by Law: The Overall National Drinking Water Legal Regime*

The national drinking water legal regime consists of federal laws and policies, as well as the comprehensive provincial and territorial drinking water legal frameworks (such as Ontario's source water protection plan, which was discussed earlier in this

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<sup>129</sup> Chalifour, "Environmental Justice", *supra* note 4.

<sup>130</sup> *Vriend*, *supra* note 127 at para 63.

<sup>131</sup> *Haig v Canada*, *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, 105 DLR (4th) 577 [*Haig*].

paper). A First Nations woman could argue that her omission from the country's overall drinking water legal system is enough to trigger her section 15 equality rights. In *Eldridge v British Columbia (Attorney General)*, La Forest J confirmed that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner."<sup>132</sup> The benefit of potable water has been legally enshrined in various pieces of legislation and policies, which collectively ensure the benefit to all Canadians except First Nations people living on reserves. Since the state provides this benefit, it carries the burden of providing it in a manner that is not discriminatory.

**b. The distinction's impact on the individual or group perpetuates disadvantage**

The final part of the section 15 framework aims to discern whether a differential treatment, created by law, perpetuates disadvantage upon the claimant. This portion of the test has undergone considerable evolution since its first consideration by the Court in *Andrews*. In *Law v Canada (Minister of Employment and Immigration)*, the Court recognized that the core purpose of the equality guarantee was to protect the claimant's human dignity.<sup>133</sup> The Court further stated that human dignity was "concerned with physical and psychological integrity and empowerment...and harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits."<sup>134</sup> *Law* also identified four contextual factors to consider, in determining whether a claimant's human dignity was degraded: 1) pre-existing disadvantage, stereotype, or prejudice experienced by the claimant group; 2) the congruity between the differential treatment and the claimant group's actual lived reality;

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<sup>132</sup> *Eldridge*, *supra* note 89 at para 73.

<sup>133</sup> *Law v Canada*, *supra* note 99 at para 48.

<sup>134</sup> *Ibid* at para 53.

3) whether the impugned law serves an ameliorative purpose; and 4) the nature of affected right.<sup>135</sup>

In *R v Kapp*, the Court withdrew from its application of the four contextual factors, and revisited its analysis in *Andrews*. It concluded that the central focus of a discrimination analysis ought to be whether an impugned law perpetuates prejudice or whether it stereotypes the claimant group, which leads to its disadvantage.<sup>136</sup> In its most recent iteration of the section 15(1) test, the Court emphasized the importance of using “a flexible and contextual inquiry [in determining] whether a distinction has the effect of perpetuating arbitrary disadvantage.”<sup>137</sup> Thus, while the concepts of stereotype and prejudice, along with the four contextual factors derived from *Law*, are no longer strict legal tests conducive to a successful section 15(1) claim, they may still be considered by the Court to determine whether a claimant’s differential treatment is discriminatory.<sup>138</sup>

*i. Applying the Contextual Factors to our Hypothetical Case: Historical disadvantage*

The two contextual factors most pertinent to our hypothetical case are the first (pre-existing disadvantage) and last (the nature of the affected right). It is undisputed that the First Nations people of Canada have been historically disadvantaged, stereotyped, and prejudiced. They were once denied the right to vote,<sup>139</sup> and were victims of cultural genocide and abuse through the “aggressive assimilation” policy and implementation of residential schools.<sup>140</sup> The recently published *Report on Equality Rights of Aboriginal*

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<sup>135</sup> *Ibid* at para 9.

<sup>136</sup> *R v Kapp*, 2008 SCC 41 at para 18, 294 DLR (4th) 1 [*Kapp*].

<sup>137</sup> *Quebec v A*, *supra* note 92 at para 331.

<sup>138</sup> *Ibid* at para 180; *Withler*, *supra* note 100 at para 64.

<sup>139</sup> Boyd, “No Taps, No Toilets”, *supra* note 15 at 116.

<sup>140</sup> “A history of residential schools in Canada”, *CBC News* (16 May 2008), online: <<https://www.cbc.ca/news/canada/a-history-of-residential-schools-in-canada-1.702280>> [A history of residential schools in Canada].

*People* shows that First Nations people in Canada, in comparison to other Canadians, are disadvantaged in several ways. According to the Report, First Nations people are more likely to: be unemployed and collect unemployment insurance and social assistance; be victims of physical, emotional, and sexual abuse as well as violent crimes; live in subpar housing that require major repairs; earn a much lower income; and be imprisoned with less chances of parole.<sup>141</sup>

First Nations Women experience additional pre-existing disadvantages, which are unique to their gender. These disadvantages stem from European colonization, and subsequent enactment of the *Indian Act*, which subjected First Nations women in Canada and their children to hardship for generations. Before it was repealed, section 12(1)(b) of the Act divested women of their “Indian” status if they married a non-Indian man.<sup>142</sup> These sex-based discriminatory provisions sparked a series of court challenges, and in 1981 Canada was eventually found to be in contravention of the International Covenant on Political and Civil Rights.<sup>143</sup> As a result, Bill C-31—or a Bill to Amend the Indian Act—was passed in 1985, to bring the Act in line with the *Charter’s* equality provision.<sup>144</sup> Regardless of these efforts, the very act of colonization imposed the European patriarchal system upon the First Nations peoples, which subordinated and oppressed First Nations women and prevented them from partaking in many political activities.<sup>145</sup>

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<sup>141</sup> Canadian Human Rights Commission, “Report on Equality Rights of Aboriginal People”, (Ottawa-Ontario: Canadian Human Rights Commission 2013) at 3 [Report on Equality Rights of Aboriginal People].

<sup>142</sup> Bonita Lawrence, “Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview” (2003) 18:2 *Hypatia* A J Feminist Philosophy 3 at 13.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> Michael James Burton, *Legislated Oppression: Racism, Patriarchy and Colonialism in the Status Provisions of the Indian Act* (MA Thesis, University of Regina, 2012) [unpublished].



Women were traditionally excluded from their band governments, or even from voting in their band elections.<sup>146</sup> The effects of this oppression are still present today, as First Nations women are seldom invited to participate in environmental decision-making processes regarding water. Furthermore, “indigenous women do not participate actively in Canadian climate change and environmental policy processes, which threatens their responsibility to protect water”.<sup>147</sup> In many First Nations traditions, women held important caretaking roles towards the environment and connected water resources.<sup>148</sup> Only recently has there been some emphasis on the importance of including women, and by extension their traditional ecological knowledge (TEK) regarding water, into environmental decision-making processes.<sup>149</sup> Provinces have created various declarations to foster this inclusion, such as the “Water Declaration of the Anshinabek, Mushkegowuk and Onkwehonwe.”<sup>150</sup> This Declaration, though an important step forward, merely “emphasizes the importance of exercising the caretaking role of Indigenous peoples with regard to water and the environment”<sup>151</sup> and “recognizes the special role of women and traditional knowledge in decision-making regarding water.”<sup>152</sup> It does not legally bind the participation of First Nations women in environmental-decision making.

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<sup>146</sup> “Marginalization of Aboriginal women A Brief History of the Marginalization of Aboriginal Women in Canada”, *First Nations & Indigenous Studies The University of British Columbia*, online: <[https://indigenousfoundations.arts.ubc.ca/marginalization\\_of\\_aboriginal\\_women/](https://indigenousfoundations.arts.ubc.ca/marginalization_of_aboriginal_women/)>.

<sup>147</sup> Kyle Powys Whyte, “Indigenous Women, Climate Change Impacts, and Collective Action” (2014) 29:3 *Hypatia* A J of Feminist Philosophy 599 at 606.

<sup>148</sup> Deborah McGregor, “Traditional Knowledge: Considerations for Protecting Water in Ontario” Online: (2012) 3:3 *Intl Indigenous Policy J* 11 at 9 [McGregor].

<sup>149</sup> Judith F Sayers & Kelly A MacDonald “A Strong and Meaningful Role for First Nations Women in Governance” in ed, *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports* (Ottawa: 2001) 5 at 32.

<sup>150</sup> McGregor, *supra* note 149 at 9.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

According to a statistical study from 2006, First Nations women earn much less money compared to their male counterparts and other women in Canada.<sup>153</sup> They are generally also less likely to be employed in comparison to these groups.<sup>154</sup> The percentage of First Nations women living in poverty exceeds by more than double in comparison to other Canadian women.<sup>155</sup> In 2006, a large percentage of First Nations women resided with their immediate or extended families. Registered First Nations women were much more likely to head single-parent households on reserves compared with non-First Nations women, and were much more likely to have three or more children.<sup>156</sup> The fertility rate amongst women on reserves, twenty years or younger, was estimated to be seven times greater than non-First Nations women, and high teen pregnancy rates have persisted since the 1980s. This has contributed to the increased socio-economic vulnerabilities that First Nations women face.<sup>157</sup>

First Nations peoples in Canada suffer from greater health concerns compared with the rest of the Canadian population, due to several factors: the unavailability of certain treatments on reserves, health limiting conditions, and the prevalence of mental health challenges in their communities.<sup>158</sup> Within the First Nations population, women specifically suffer from even greater health risks than men, which stems from inequalities of social determinants of health in Canada.<sup>159</sup> As a result, First Nations women are at

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<sup>153</sup> Indigenous and Northern Affairs Canada, “Aboriginal Women in Canada: A Statistical Profile from the 2006 Census”, 2012 (Ottawa: Catalogue No 978-1-100-20165-6).

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> Report on Equality Rights of Aboriginal People, *supra* note 142 at 46, 47, 51.

<sup>159</sup> *Social Determinants of Health and Canada’s Aboriginal Women* (Native Women’s Association of Canada, 2007) at 5, <online: <https://www.nwac.ca/wp-content/uploads/2015/05/2007-Social-Determinants-of-Health-and-Canada%E2%80%99s-Aboriginal-Women-NWAC-Submission-to-WHO-Commission.pdf>>.

greater risk of substance abuse, mental health illnesses, diabetes, suicide, and other poor health indicators.<sup>160</sup>

In my view, the clean water crisis compounds the several pre-existing disadvantages that the First Nations women face. The HRW study identifies different ways the water crisis contributes to social and human impacts on reserves: 1) harmful effects on human health and hygiene; 2) auxiliary stress on caretakers and at-risk individuals; 3) additional cost burdens on financially disadvantaged homes; 4) contribution to housing shortages; 5) and harmful impacts on First Nations culture.<sup>161</sup>

#### Harmful Effect on Human Health and Hygiene

According to the HRW study, drinking water sources on reserves across Canada are littered with several disease-causing pathogens, such as E. coli and cancer-causing bacteria.<sup>162</sup> Contact with these particles can lead to serious health complications. This is especially problematic because some individuals in the study were so frustrated with living under drinking water advisories for so long, that they drank untreated contaminated water.<sup>163</sup>

When a community is living under a drinking water advisory, the Federal Government, along with First Nations leaders, provides limited alternatives to drinking water, such as minimal bottled water supplies or “community treated water collection points.”<sup>164</sup> While these efforts assist community members secure nominal amounts of drinking water under times of distress, the same response is not provided for securing

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<sup>160</sup> *Ibid* at 6.

<sup>161</sup> Klasing, *supra* note 1 at 9.

<sup>162</sup> *Ibid*.

<sup>163</sup> *Ibid*.

<sup>164</sup> *Ibid* at 40-41.

water for hygienic purposes. As a result, many interviewees for the HRW study “...reported problems related to skin infections, eczema, psoriasis, or other skin problems that they thought were related to or exacerbated by the water conditions in their home.”<sup>165</sup>

Households also resorted to chlorine to treat community water, which many believed to be the cause of skin inflammation, discomfort, and dermatitis.<sup>166</sup> Several households had to lessen the time and frequency of their showers, which also had a direct and negative impact on their health.<sup>167</sup> First Nations women are disproportionately impacted by health concerns as it is. Thus, a woman who lives in Grassy Narrows First Nation, Shoal Lake 40, or another community inflicted with the water crises, may be able to generate enough evidence to argue that the lack of clean drinking water (or lack of clean water for hygienic purposes) available to her community arbitrarily perpetuates her health disadvantages.

#### Auxiliary Stress on Caretakers and At-Risk Individuals

According to HRW, the “at-risk population” comprises of “...people with disabilities, recovering from surgeries or health conditions, the elderly, children, and pregnant women.”<sup>168</sup> The water crisis burdens at-risk individuals in many ways. One challenge is that certain people have trouble physically accessing alternative water resources when advisories are underway.<sup>169</sup> Sometimes people are required to travel to

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<sup>165</sup> *Ibid* at 40.

<sup>166</sup> *Ibid* at 43.

<sup>167</sup> *Ibid* at 41.

<sup>168</sup> *Ibid* at 45.

<sup>169</sup> *Ibid*.

community treated water points and carry large quantities of safe drinking water back to their homes. Other times, the government provides bottled water, which people need to pick up themselves.<sup>170</sup> Such a task can be very inconvenient to disabled persons, the elderly, and pregnant women due to the weight of the bottles. It can also be difficult without access to a vehicle, which might not be possible for low-income individuals. Additionally, in Canada, harsh winter weather conditions can exacerbate these challenges, often making it impossible for at-risk populations to collect water.<sup>171</sup> A First Nations woman who is pregnant and resides in Pikangikum or Little Buffalo could argue that having to travel far distances to collect safe drinking water compounds upon her mobility disadvantages.

The HRW study also found that caregivers on reserves were predominately women, and the water crises made their everyday tasks more time consuming and stressful. Several mothers were interviewed for the HRW study, and many expressed concerns of their young children accidentally drinking contaminated tap water while bathing, and so would use bottled water to bathe them.<sup>172</sup> They described numerous ways they were disadvantaged by the water crisis: 1) they spent hours of their time washing dirty water bottles, walking to community water collection points, and boiling untreated water for hygienic purposes; 2) they suffered from additional stress due to monitoring their children to make sure they did not drink contaminated water while bathing or brushing their teeth; 3) they experienced financial stress derived from constantly having to fix faulty water infrastructure and buying potable water.<sup>173</sup> A woman who is also a

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<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid* at 46.

<sup>172</sup> *Ibid* at 47.

<sup>173</sup> *Ibid* at 47-48.

caregiver living on a reserve subjected to a boil water advisory can certainly argue that the water crisis perpetuates her existing disadvantages.

#### Cost Burdens on Financially Disadvantaged Households

It is not inconceivable that financially strapped households on reserves immensely suffer from coping with the monetary demands of the water crisis. The costs associated with operating and maintaining private wells and wastewater systems, as well as capital costs required to restore defective systems, can be very high and thus burdensome on lower-income households.<sup>174</sup> Consequently, many homes on reserves do not have adequate water treatment or sanitation systems because they do not have enough money to install them.<sup>175</sup> Some households resort to borrowing large sums of money from the bank (and some go into debt) so they have the funds to repair their faulty systems and private wells. Still, other households find it difficult to afford the monthly costs of water, “where many households purchase trucked water for wells or cisterns and bottled water for drinking.”<sup>176</sup> Additionally, one single mother who was interviewed for the HRW study expressed that she spent about \$120 a month to fill her cistern for domestic purposes and an extra \$10-15 a week for drinking water.<sup>177</sup> A First Nations woman suffering from poverty may be able to meet the evidentiary burden necessary to argue that her financial hardships, stemming from the water crisis, perpetuates her existing socio-economic vulnerabilities.

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<sup>174</sup> *Ibid* at 49.

<sup>175</sup> *Ibid*.

<sup>176</sup> *Ibid*.

<sup>177</sup> *Ibid*.

### Contribution to Severe Housing Shortages on Reserves

The water crisis also has a negative impact on the prevailing housing crisis on reserves. Many reserve communities are overcrowded with long waitlists for housing, and an estimated 35,000 to 85,000 new homes are needed to accommodate residents.<sup>178</sup> Many communities do not have the appropriate housing to extend their existing systems to service lots, which essentially entails linking new homes to water treatment and sewage systems. Servicing lots is an expensive endeavour, largely due to investment in water treatment and sewage systems, which federal housing programs have not accounted for in their funding initiatives. Other communities that do have existing systems cannot sufficiently operate them, as they are generally defective, to safely provide water to new homes.<sup>179</sup> Additionally, boiling water to make it safe for drinking or cleaning can contribute to hazardous conditions in the home, such as mould growth. The HRW study indicated that this was the case for one of its interviewees.<sup>180</sup>

Subpar housing conditions is a pre-existing disadvantage that many First Nations peoples, living on reserves, face. A First Nations woman can argue that the limited funds available to her community to upgrade water treatment systems perpetuates the inadequate housing conditions on her reserve. Lack of appropriate water treatment infrastructure prevents communities from servicing lots and upgrading their homes or building new homes in response to housing shortages. The act of boiling water also perpetuates the subpar housing conditions as it contributes to mold growth.

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<sup>178</sup> *Ibid* at 52.

<sup>179</sup> *Ibid*.

<sup>180</sup> *Ibid* at 54.

### Negative Impact on Indigenous Culture

Several First Nations communities believe in the sanctity of water, and thus feel the need and responsibility to care for water resources. They partake in "...ceremonies, knowledge, customary laws, and ways of teaching children about their special relationship with water."<sup>181</sup> Contaminated water can disrupt the root meanings of certain ceremonies that require individuals to directly consume source water. Not being able to drink the water for cultural purposes can be distressing to some people.<sup>182</sup>

In several First Nations communities, women are "the keepers and spiritual protectors of water."<sup>183</sup> Supplementary to a literature review on "Aboriginal women and water" alongside a data review for a boil water advisory mapping project, the Atlantic Centre of Excellence for Women's Health and Prairie Women's Health Centre of Excellence conducted a series of interviews with "Aboriginal Grandmothers" across BC, Alberta, Saskatchewan, Ontario, and Nunavut.<sup>184</sup> The interviews yielded considerable insight about the significance of water, the special role that women play regarding water, and the challenges women experience relating to water quality.<sup>185</sup>

Through the interviews, researchers found that water is critical and directly linked to maintaining health and well-being of all forms of life.<sup>186</sup> Water is considered to have medicinal properties, and thus is fundamental to cleanliness and for the prevention of illnesses. Many Grandmothers considered water to have a spiritual quality, and alluded to

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<sup>181</sup> *Ibid* at 50.

<sup>182</sup> *Ibid*.

<sup>183</sup> *Ibid*.

<sup>184</sup> Kim Anderson, *Aboriginal Women, Water and Health: Reflections from Eleven First Nations, Inuit and Métis Grandmothers* (Atlantic Centre of Excellence for Women's Health Prairie Women's Health Centre of Excellence, October 2010) at 1.

<sup>185</sup> *Ibid* at 4-5.

<sup>186</sup> *Ibid* at 7.



the value of that spirit in “creating and sustaining life.”<sup>187</sup> The spiritual energy of water was at the core of what many interviewees spoke about. Researchers learned that the unique relationship between women and water stems from the fact that women have the physical capacity “to host and sustain the life force that water represents.”<sup>188</sup> Women’s bodies hold water during pregnancy and giving birth requires releasing that water. For this reason, women are called “carriers of water” and are responsible for taking care of the water inside them, as well as in the physical world.<sup>189</sup>

First Nations people, including many First Nations women, across Canada were forced to attend residential schools as part of the government’s agenda to assimilate them into Canadian culture. Students were dejected from speaking their native languages or practicing their native traditions, and if they were caught, they were severely disciplined.<sup>190</sup> Students were subjected to unacceptable living conditions as well as physical, emotional, and sometimes sexual abuse. Students were disassociated from their cultures and families, and felt that they did not belong when they returned to their reserve.<sup>191</sup> The impact of residential schools cumulated to cultural disadvantage that many First Nations women experienced by being stripped away from their homes. For the purpose of our section 15 analysis, one can argue that the water crisis perpetuates the cultural disadvantage that First Nations women already experience because water continues to play a fundamental role in First Nations traditions across Canada.

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<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid* at 9.

<sup>189</sup> *Ibid.*

<sup>190</sup> A history of residential schools in Canada, *supra* note 141.

<sup>191</sup> *Ibid.*

ii. *Applying the Contextual Factors to our Hypothetical Case: The Nature of the Affected Right*

According to Chalifour, the Court is more likely to find discrimination exists where a person's fundamental interests are impacted.<sup>192</sup> It is difficult to imagine a more fundamental human right than clean water for drinking and sanitation. The United Nations General Assembly explicitly recognized "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights."<sup>193</sup> Denial of access to safe drinking water has a ripple effect of deteriorating a person's health, decreasing their productivity,<sup>194</sup> inflicting psychological stress upon them, interfering with their ability to care for their family, and increasing their living costs.<sup>195</sup> These disadvantages bar individuals from being on equal footing with other Canadians in many capacities, such as in the labour market or accessing educational and other opportunities.

The right to water includes the right to water that is suitable for cultural practices, and international documents have recognized this.<sup>196</sup> Article 25 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) states the following:

"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"<sup>197</sup>

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<sup>192</sup> Chalifour, "Environmental Discrimination", *supra* note 18 at 211 citing Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedom*, 4th ed (Toronto: Irwin Law, 2009) at 332.

<sup>193</sup> United Nations General Assembly 64/292 the human right to water and sanitation Adopted on 28 July 2010

<sup>194</sup> <http://www.who.int/news-room/fact-sheets/detail/drinking-water>

<sup>195</sup> Chalifour, "Environmental Discrimination", *supra* note 18 at 211.

<sup>196</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295 at articles 25 and 32 [UNDRIP].

<sup>197</sup> *Ibid* at article 25.

The water crisis on reserves prevents women from engaging fully with their traditional relationship to water and from passing on their cultural knowledge to their kin.<sup>198</sup> It is likely that the Court will consider these international instruments to determine the full nature and scope of the right affected.

Everything considered, it can be argued that the disadvantages experienced by certain First Nations women living on reserves inflicted with the water crisis fit within the section 15 framework. Given the historical experiences of First Nations women, a claimant from one of the reserve communities identified above may be able to demonstrate that the water crisis perpetuates her historical disadvantage. Water is a basic need fundamental to human survival, and the lack of access to clean water on reserves subjects this historically disadvantaged group to an additional burden that consumes their time, exposes them to stress and illness, and makes it difficult for them to enjoy similar opportunities that other Canadians enjoy. In true spirit of the equality guarantee, “If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.”<sup>199</sup>

#### **E. Section 7: Life, Liberty, and Security of the Person and the Water Crises**

Turning now to the other question, this paper will now consider the issues stemming from the water crisis, as they relate to First Nations women, through the lens of section 7. Unlike section 15, section 7 does not explicitly protect specific groups that are unfairly disadvantaged from environmental harms, and so some scholars suggest it is not the most appropriate provision to address environmental inequalities.<sup>200</sup> Section 7

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<sup>198</sup> Klasing, *supra* note 1 at 51.

<sup>199</sup> *Quebec v A*, *supra* note 92 at para 332.

<sup>200</sup> Chalifour, “Environmental Justice”, *supra* note 4.

safeguards *every person* from government-induced harms, and from our analysis of the equality provision, we gather that the water crisis disproportionately burdens First Nations women. Accordingly, it can be argued that the section 15 equality right is better suited to remedy environmental injustices inflicting protected groups. Nevertheless, in *Andrews*, the Court stated that the *Charter's* equality right is the broadest, and is applicable to every other *Charter* right.<sup>201</sup> Specifically, in *New Brunswick (Minister of Health & Community Services) v G (J)*, the Court stated, “the principles of equality...are a significant influence on interpreting the scope of protection offered by s. 7”.<sup>202</sup> Thus, although the section 7 right extends to everyone in Canada, one might reference *Andrews* and *G(J)* to argue that the right has some potential to redress environmental inequalities for particular vulnerable groups, who are at the heart of the *Charter's* equality guarantee.

#### **a. The Scope of the Section 7 Framework**

The section 7 right protects an individual’s right to life, liberty, and security of their person.<sup>203</sup> To make a successful section 7 claim in the environmental context, a prospective litigant must provide enough evidence to establish that a government action limited her right to life, liberty, or security of the person, and the limit was not in accordance with the principles of fundamental justice. The Court has interpreted section 7 expansively to protect both procedural and substantive rights, meaning with the appropriate evidence, any person may be able to use the provision to defend them from government action, which increases their risk of harm.<sup>204</sup>

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<sup>201</sup> *Andrews*, *supra* note 87 at para 185.

<sup>202</sup> *New Brunswick (Minister of Health and Community Services) v G (J)* [1999] 3 SCR 46 at para 112, 177 DLR (4th) 124 [*G(J)*].

<sup>203</sup> *Charter*, *supra* note 9 at s 7.

<sup>204</sup> Chalifour, “Environmental Justice”, *supra* note 4.

The harms can derive from varied sources such as abuse of police power or even from air pollution. The current judicial interpretation of the section 7 interest optimistically suggests there is opportunity for the right to nullify laws, policies, and government action that ultimately permit excessive discharge of contaminants into the environment, which consequently have a negative impact on human health or well-being.<sup>205</sup> With the appropriate evidence, a First Nations woman in Little Buffalo or Grassy Narrows can perhaps demonstrate that excessive, government-sponsored oil and gas exploration or mercury pollution causes contamination to her community's water resources, and the consumption of contaminated water causes harm to her health.

A prevalent dichotomy in constitutional and human rights discourse is whether the section 7 interest only protects a person's negative rights, or whether it should also be a source of positive state obligation.<sup>206</sup> Negative rights are the right not to be subjected to certain conditions and are generally "those perceived to require only forbearance by the state."<sup>207</sup> On the other hand, positive rights are generally tantamount to cultural, economic and social rights.<sup>208</sup> They can include the right to an adequate standard of living or "a healthy environment"<sup>209</sup> and could also include the right to accessible and clean drinking water.

Contemporarily, no claimant has successfully applied the section 7 framework to extend to positive rights, however the Court has left the door open for a future case (with an appropriate set of facts) to make such a finding. The Court's decision in *Gosselin v*

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<sup>205</sup> *Ibid.*

<sup>206</sup> Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Hart Publishing, 2018) at 218 [Stacey].

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> Boyd, "The Right to a Healthy Environment", *supra* note 11 at 178.

*Quebec*, expresses this possibility: “One day s. 7 may be interpreted to include positive obligations...It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases.”<sup>210</sup>

Cumulative assurances from the Court provide some opportunity to utilize section 7 to argue for positive rights in the context of the water crisis. The Court has consistently emphasized the importance of, and legislative intent, to foster environmental protection.<sup>211</sup> Simultaneously, over the last couple of decades, section 7 jurisprudence has held the value of human life to the highest standard, and has substantially evolved to include several, diverse state-sponsored harms.<sup>212</sup> In arguing for her positive rights, a woman residing in Pikangikum could challenge the government’s repeated failure to provide homes with running water or adequate plumbing. A woman on any reserve inflicted with the water crisis can challenge the government’s insufficient funding efforts, inadequate source water protection plans, and overall lack of enforceable water regulations.

#### **b. The Significance of the “Sufficient Causal Connection” Threshold**

In an environmental context, the “sufficient causal connection” threshold is imperative to the section 7 framework, and must be understood prior to beginning the analysis. This threshold has been classified by the Court as a reasonable and feasible “port of entry for s. 7 claims”<sup>213</sup> A potential litigant must provide sufficient evidence to directly and causally link an impugned government action to the subsequent risk she

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<sup>210</sup> *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 82, [2002] 221 DLR (4th) 257 [*Gosselin*].

<sup>211</sup> *Castonguay Blasting Ltd v Ontario (Environment)* 2013 SCC 52 at para 9, (CanLII); *Imperial Oil Ltd v Québec (Minister of the Environment)* 2003 SCC 58 at para 21.

<sup>212</sup> Chalifour, “Environmental Justice”, *supra* note 4.

<sup>213</sup> Lynda Collins, “Security of the Person, Peace of Mind: A Precautionary Approach to Environmental Uncertainty” (2013) 4:1 J of HR and the Env’t 79 [Collins, “Security of the Person”].

faces, otherwise her claim could be rejected for being too “uncertain, speculative and hypothetical to sustain a cause of action.”<sup>214</sup> In its recent consideration of section 7, in *Carter v Canada (Attorney General)*, the Court found the impugned law prohibiting physical-assisted dying caused “enduring and intolerable suffering”.<sup>215</sup> This evidentiary burden can be a problematic obstacle for section 7 litigants alleging environmental harm. This is because environmental harms, at their root, typically have a disassociated (spatial or temporal) cause and effect.<sup>216</sup>

Additionally, the relationship between the environment and human health is very complex, and there can be several different causes of environmental harms, which may have a ripple effect of other harms.<sup>217</sup> For example, a government can grant licenses to an oil and gas company for a drilling project, or approve the construction of a pulp and paper mill (which is what happened in Little Buffalo and Grassy Narrows respectively). The potential consequences of these government actions are not only the release of contaminants into community water resources but also myriad other effects: heightened stress levels and mental health issues from lack of access to clean drinking water or adequate plumbing, greater time spent on transporting clean water to and from the home, and declined productivity.

The claimant also bears the burden of evidencing that a government action caused the harm she suffers, which is difficult when her resources are limited compared to her alleged offender.<sup>218</sup> When proving environmental harms, claimants rely on costly

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<sup>214</sup> *Operation Dismantle v the Queen* [1985] 1 SCR 441 at para 3, 18 DLR (4th) 481, Dickson J [*Operation Dismantle*].

<sup>215</sup> *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 68, [2015] 1 SCR 331 [*Carter*].

<sup>216</sup> David W-L Wu, “Embedding Environmental Rights in Section 7 of the Canadian *Charter*: Resolving the Tension Between the Need for Precaution and the Need for Harm” (2014) 33:2 NJCL 191 at 195 [Wu].

<sup>217</sup> *Ibid.*

<sup>218</sup> *Ibid.*

epidemiological and expert reports. These types of evidence are often sufficient for demonstrating that pollution *correlates* to the alleged harm, however may fall short of meeting the sufficient causal connection threshold crucial to the section 7 framework.<sup>219</sup> For this reason, nearly every environmental harm case, attempting to utilize section 7 to seek a *Charter* remedy, has failed to meet the “sufficient causal connection” test.<sup>220</sup>

In the case of *Operation Dismantle v the Queen*, the Court did not find a sufficient causal connection between the government action of cruise missile testing and a *possibility* that foreign states will retaliate, causing future harm.<sup>221</sup> Similarly, in *Energy Probe v Canada (Attorney General)*, the court did not find that increased reliance on nuclear energy to produce electricity caused a greater risk of harm to the public than reliance on an alternative energy source.<sup>222</sup> Thus, current jurisprudence suggests that courts are still very concerned with claimants meeting the sufficient causal connection threshold, regardless of being more open to hearing section 7 cases alleging environmental harm and guaranteeing environmental protection.<sup>223</sup>

For our hypothetical case, a First Nations woman living on a reserve without access to clean drinking water would need to provide enough evidence for a court to conclude that a government action *caused* the water crisis she suffers from, which in turn violates her section 7 right. A First Nations woman living in Grassy Narrows could argue that the pulp and paper mill was the product of a government action, either through the approval of a permit or regulatory standards that allowed for the excessive release of

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<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*

<sup>221</sup> *Operation Dismantle*, *supra* note 215 at paras 18, 31.

<sup>222</sup> *Energy Probe v Canada (Attorney General)* [1994] OJ No 553 at para 69, OR (3d) 717 [*Energy Probe*].

<sup>223</sup> Wu, *supra* note 217 at 197.



mercury. Conversely, a First Nations woman living in Little Buffalo could argue that the government action to approve excessive oil and gas exploration *caused* the pollution of her community's natural water resources, which made clean drinking water inaccessible. She could also argue that the government, in failing to provide her community with sufficient water treatment systems, caused her lack of access to clean drinking water, albeit she would have to first make the argument that section 7 captures positive rights.

It is promising to note that there is agreement among scholars that the sufficient causal connection threshold will likely be met in cases where a government action results in the discharge of scientifically proven noxious substances, that are widely known to cause harm to human health.<sup>224</sup> For example, a substantial amount of mercury was discharged into the adjacent river from the pulp and paper mill in Grassy Narrows. According to the World Health Organization, the harmful health effects of mercury exposure are widely known, and it is regarded as “one of the top ten chemicals or groups of chemicals of major public health concern.”<sup>225</sup> Exposure to mercury can result in development threats to a child in utero; toxic poisoning to the digestive, immune, and nervous systems (among other body parts); and even mortality.<sup>226</sup> This renders Grassy Narrows an appropriate context for a section 7 violation claim.

### **c. Applying the Security of the Person Interest to the Water Crisis on Reserves**

In my opinion, the security of the person interest is the most comprehensive of the section 7 protections, and effectively the best suited to address and remedy environmental

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<sup>224</sup> Chalifour, “Environmental Justice”, *supra* note 4.

<sup>225</sup> World Health Organization, “Mercury and health” (31 March 2017), *World Health Organization* (website), online: < <http://www.who.int/en/news-room/fact-sheets/detail/mercury-and-health>>.

<sup>226</sup> *Ibid.*

harms. In *R v Morgentaler*, the Court determined that the security of the person interest recognizes the sanctity of the human body and a person's right to make significant decisions about their body.<sup>227</sup> In *Carter*, the Court found that the security of the person interest was most appropriate for analyzing state-induced conduct that negatively impacts a person's quality of life.<sup>228</sup> Both *Morgentaler* and *Carter* exemplify the broad scope of the security of the person protection, and it is because of this broad scope that this right is the most viable route for environmental harm cases. Therefore, for our case, I will exclusively conduct an analysis of the security of the person interest.

In *Rodriguez v British Columbia (Attorney General)*, the Court qualified the security of the person interest as “a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress.”<sup>229</sup> Accordingly, this right protects a person's physical as well as psychological well-being. In *Canada (Attorney General) v Bedford*, the Court confirmed that the state will infringe a person's security of the person right when it exposes them to harmful circumstances and prevents them from accessing the appropriate means to protect themselves in such circumstances.<sup>230</sup>

The Court's ruling in *Chaoulli v Quebec (Attorney General)* proposes that the physical component of the security of the person right is triggered when a state-induced activity results in a person's impaired health, but also when it increases a person's *risk* to impaired health.<sup>231</sup> Collins analyzes this ruling, and proposes that when state-sponsored

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<sup>227</sup> *R v Morgentaler*, [1988] 1 SCR 30, 63 OR (2d) 281 [*Morgentaler*].

<sup>228</sup> *Carter*, *supra* note 216 at para 57.

<sup>229</sup> *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519 at para 21, 107 DLR (4th) 342 [*Rodriguez*].

<sup>230</sup> *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 60, 366 DLR (4th) 237 [*Bedford*].

<sup>231</sup> Collins, “Ecologically Literate Reading”, *supra* note 73 at 24.

harm is environmental in nature, and that harm subjects an individual to increased health risks (or mortality), it will likely infringe their right to security of the person.<sup>232</sup> Thus, in the environmental context, to meet the physical component of the security of the person right, a claimant must evidence that state-sponsored action resulted in the discharge of a substance, known to be harmful to human health, and exposure to the substance increased the claimant's health risk.

A state-sponsored harm will trigger the psychological component of the security of the person right if it causes serious psychological stress to the claimant.<sup>233</sup> In *G(J)*, the Court found that the psychological stress “need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.”<sup>234</sup> Collins explains that we have enough empirical evidence to adduce that when individuals are subjected to environmental harms that are known to be perilous, they suffer from psychological stress and severe anxiety, which can sometimes develop into phobia.<sup>235</sup> Therefore, the psychological component of the security of the person right provides abundant opportunity for a prospective litigant who wishes to seek a remedy for an environmental harm, such as the clean water crisis.

A First Nations woman living on a reserve where government-sponsored industrial activity, the consequence of which was the excessive discharge of widely-known toxic and dangerous substances (such as mercury) into the community water resource, would be an appropriate litigant for security of the person allegation. A

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<sup>232</sup> *Ibid.*

<sup>233</sup> *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 57, [2000] 2 SCR 307 [*Blencoe*].

<sup>234</sup> *G(J)*, *supra* note 203 at para 60.

<sup>235</sup> Collins, “Ecologically Literate Reading”, *supra* note 73 at 25.

community that is regularly under drinking water advisory as a result of the toxic discharge may be deprived of their optimal mental health, which can trigger psychological distress. The UN Human Rights Council made the following remark in 2010: “the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and is inextricably related to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.”<sup>236</sup>

A prospective litigant from Grassy Narrows or Pikangikum could potentially meet the sufficient causal connection threshold for this right. The negative health effects of mercury are widely known, and enough evidence can be gathered to find that an individual from a community proximate to large amounts of mercury likely faces both physical and psychological harm. Grassy Narrows is under a drinking water advisory, yet community members still consume fish from mercury-contaminated water sources. According to a study conducted by Donna Mergler, an environmental health expert and member of a research group associated with the World Health Organization, “people in Grassy Narrows generally suffer from worse health, more severe food insecurity, and more suicidal tendencies than other First Nations, and far more than non-Native people in Canada.”<sup>237</sup> Residents that were diagnosed with mercury poisoning were five times more likely to suffer from intestinal issues, hearing impairment, blindness, and neuropsychological disorder among other ailments.<sup>238</sup> Similarly, residents in Pikangikum suffered from the highest suicide rate in the world. The studies undertaken in these

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<sup>236</sup> UN Human Rights Council, *The human right to safe drinking water and sanitation*, 8 April 2011, 16th sess, A/HRC/RES16/2 at 2.

<sup>237</sup> Amnesty International, *supra* note 67.

<sup>238</sup> *Ibid.*

reserves demonstrate the very real physical and psychological harms residents suffer from, which stem from the water crisis.

#### **d. The Principles of Fundamental Justice**

The final requirement of the section 7 framework requires a claimant to demonstrate that the impugned government action does not accord with the principles of fundamental justice. To qualify as a principle of fundamental justice, a decree must be a legal principle that society accepts as essential and fundamental to a fair legal system.<sup>239</sup> It must also be defined expressly so that it carries “a manageable standard against which to measure deprivations of life, liberty, or security of the person.”<sup>240</sup>

The most common principles of fundamental justice include prohibiting section 7 breaches that are arbitrary, grossly disproportionate to a state’s legitimate interest, and overbroad.<sup>241</sup> This paper will analyze these three principles, in the context of environmental rights and the clean water crisis. An impugned law, rule, or government action is arbitrary when it does not appropriately link with its objective. This principle of fundamental justice does not provide much utility for our case because “the role of the state is not to safeguard the environment absolutely, but to strike a balance between environmental safeguards and development.”<sup>242</sup> For this reason, the impugned action usually does bear *some* link to its stated objective, which makes it difficult for litigants to prove the two were absolutely disengaged.

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<sup>239</sup> Boyd, “The Right to a Healthy Environment”, *supra* note 11 at 180.

<sup>240</sup> *Ibid.*

<sup>241</sup> Collins, “Ecologically Literate Reading”, *supra* note 73 at 26-31.

<sup>242</sup> *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791 at para 131, 254 DLR (4<sup>th</sup>) 577; Wu, *supra* note 217 at 205.

According to Collins, one way that a claimant can demonstrate that government action is arbitrary is if they challenge a government's decision to issue a controversial permit that is "...contrary to the purpose of the enabling legislation under which it was issued."<sup>243</sup> For example, one of the main purposes of the Ontario *Environmental Protection Act* is to inhibit people from discharging toxic substances, that may have adverse health consequences, into the environment.<sup>244</sup> Despite this stated purpose, some regulators still issue licenses to businesses, allowing them to discharge known noxious substances into the environment.<sup>245</sup> Overbreadth is not very relevant to environmental harms cases because claimants are usually contending that a state's action is too narrow, and that instead the state should be *broader* with its environmental protections.<sup>246</sup>

The most relevant of the three principles of fundamental justice to our environmental harm case is gross disproportionality. Essentially, the gross proportionality analysis requires weighing whether the deleterious effects of a state action outweigh any salutary benefits gained.<sup>247</sup> A state action will be grossly disproportionate if it fails to promote a legitimate state interest<sup>248</sup> and "where the seriousness of the deprivation is completely out of sync with the object of the law."<sup>249</sup> This suggests that perhaps only the most egregious circumstances will meet the gross disproportionality test.

In our case, the deleterious impacts of the drinking water crisis are extreme for First Nations women living on reserves: subliminal physical and psychological stresses

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<sup>243</sup> Collins, "Ecologically Literate Reading", *supra* note 73 at 29.

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

<sup>246</sup> Wu, *supra* note 217 at 15.

<sup>247</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 78, [2009] 2 SCR 567 [*Hutterian Brethren*].

<sup>248</sup> Collins, "Ecologically Literate Reading", *supra* note 73 at 120.

<sup>249</sup> *Bedford*, *supra* note 231 at para 120.

given their role as caretakers and their likeliness to live below the poverty line, their economic deprivation, the denial of their unique cultural practices rooted in the special relationship they share with water, and the deprivation of one of the most basic and fundamental human rights to survival. The salutary benefits are merely economic gains, which in my opinion do not outweigh the many deleterious effects from the impugned government action.

In my opinion, a claim brought by a First Nations woman, suffering from conditions that stem from the clean water crisis, can better fit into the section 15 framework. This is due to section 7's onerous "sufficient causal connection" threshold and overall evidentiary burden put on the claimant. Furthermore, section 7 does not explicitly reference certain protected groups, and drawing attention to the harms, which are uniquely experienced by certain protected groups, can better advance environmental justice. Still, section 7 does provide some opportunity for claimants to advance environmental claims, and in effect, read environmental rights (which are also positive rights) into the *Charter*.

## **F. Conclusion**

The Constitution is Canada's supreme law. The fact that the *Charter* is part of the Canadian Constitution also renders it the most important law in Canada, and entails that the laws which limit or breach a person's *Charter* rights may be null and void.<sup>250</sup> First Nations women suffer from the water crisis in several unique ways by virtue of their sex,

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<sup>250</sup> Government of Canada, "Your Guide to the Canadian Charter of Rights and Freedoms", online: <<https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html#a2>>.

ethnic origin, race, and residency on reserve land. Certainly then, the *Charter* provides one avenue for a First Nations woman to seek a remedy.

The overall purpose of the section 15 equality guarantee is to remedy and prevent discrimination against individuals who experience political, legal, and social disadvantages in our country.<sup>251</sup> Accordingly, in deciding whether a law is discriminatory, a court must “look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger, social, political, and legal context.”<sup>252</sup> Unfortunately, in the case of the water crisis, there is no one law which the Court can invalidate for contravening section 15. However, after a purposive reading of the provision and consideration of the wider context of First Nations women in Canadian society, it would be just for the Court to find that the effect of the broad network of water laws is discriminatory against First Nations women. The *Charter*'s equality provision seeks to narrow the gap between protected groups and the rest of Canadians, yet the water crisis tremendously widens this gap.

The section 7 interests “require that laws that interfere with life, liberty and security of the person conform to the principles of fundamental justice – the basic principles that underlie our notions of justice and fair process.”<sup>253</sup> Even though litigants have not yet been able to utilize section 7 to advocate for environmental rights, the unique experiences of First Nations women regarding the water crisis, may lend an appropriate context. A person's security of the person interest protects them from “any

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<sup>251</sup> *Andrews, supra* note 87 at 167.

<sup>252</sup> *Turpin, supra* note 89.

<sup>253</sup> *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 19, [2007] 1 SCR 350 [Charkaoui].



state action that causes physical or serious psychological suffering.”<sup>254</sup> In my view, there is ample evidence to prove that First Nations women suffer both physically and psychologically as a result of the water crisis. Studies show they experience detrimental health issues through exposure to chronic water pollution and their suicide rates are greater when compared to the men. These deleterious effects significantly outweigh any economic benefits that stem from environmental exploitation, which consequently pollute a community’s water resource.

The Canadian *Charter* seeks to protect every person in Canada from government-sponsored activity that breaches their fundamental rights and freedoms. First Nations women living on reserves are no exception to the universal protections of the *Charter*. The fact that they live without access to one of the most basic human necessities for survival is not conducive to preserving a free and democratic society.

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<sup>254</sup> *Carter, supra* note 216 at para 64.

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