

HUMAN
RIGHTS
WATCH



THE HUMAN RIGHT TO WATER

A Guide for First Nations
Communities and Advocates



The Human Right to Water

A Guide for First Nations Communities and Advocates

DRAFT FOR PILOTING AND COMMENT

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The Human Right to Water

A Guide for First Nations Communities and Advocates (draft)

Call for Feedback and Comments	1
What are Human Rights?	3
The Human Right to Water	6
Related Human Rights	9
Right to Sanitation	9
Right to Health	9
Right to Housing	10
Right to Non-discrimination	11
Obligations of the Crown	12
The Right to Information	12
The Right to Participation	13
How Communities Can Use Human Rights to Advance the Right to Water	16
Set the stage for meaningful participation:	16
Use rights-language to demand transparency and accountability:	16

Call for Feedback and Comments

Many First Nations persons are facing daily challenges just to access safe water for drinking and hygiene—a fundamental human right easily enjoyed by most Canadians. Human Rights Watch conducted research in First Nations communities in the province of Ontario in 2015/2016 to understand the human impacts of this crisis, and to understand why the problem persists. We found that the Canadian government has violated a range of international human rights obligations toward First Nations persons and communities by failing to remedy the severe water crisis.

Along with infrastructure investments, the federal government should remedy a range of problems that contribute to the water crisis. This guide seeks to set out how First Nations communities and advocates can use the human rights framework as an additional tool in advocating for safe drinking water. While First Nations persons and peoples have aboriginal and treaty rights from which they can build their advocacy, the drinking water crisis on reserve is a space where human rights are also highly relevant. This guide seeks to provide an overview of the legal framework behind the human right to water and recommendations on how to engage government actors on the topic.

This draft paper is open for comments and suggestions. When finalized, it is intended to be a tool that is accessible and useful for chief and counsel, communities and individual waterkeepers, and advocates. This is a call for general comments and feedback on:

1. Whether the paper explains the legal framework of human rights in a manner that makes sense and is useful. If not, what could be different?
2. Is the link between the human right to water and the rights to information and participation clear? If not, what could be made clearer?
3. Does this paper provide you with the tools you need or want to empower your advocacy? If not, what more would you like to see included related to human rights?

We are also accepting photos related to water to include in the brochure.

Please send your comments no later than September 6, 2019 to Amanda Klasina, senior researcher on women's rights at Human Rights Watch, klasina@hrw.org and to Kathleen Padulo, environment director at Chiefs of Ontario, Kathleen.Padulo@coo.org.

What are Human Rights?

To speak of “human rights,” or to use the language of human rights law, is to speak an international language, one that, for all its complex and sometimes controversial history, has served as a powerful tool for positive change. As one human rights historian notes, human rights “evoke hope and provoke action.”¹

But what are human rights, and how do they provoke change? According to the United Nations:

“Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.”²

People or organizations often invoke human rights as a rhetorical tool to bring weight and gravity to situations of injustice. But the power of human rights’ rhetoric comes from the

INTERNATIONAL HUMAN RIGHTS TREATIES

Most countries have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). These treaties are legally binding—meaning enforceable. The covenants, along with the Universal Declaration of Human Rights (UDHR), are what is known as the “International Bill of Human Rights.” The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD) are other important human rights treaties highly relevant for practitioners working on Menstrual Hygiene Management (MHM).

Each treaty has its own committee of experts, based at the UN in Geneva, which periodically reviews countries’ compliance with their obligations, and some allow individuals to file cases against state parties for violations. In addition, the UN Human Rights Council conducts general reviews of countries’ human rights records, called the Universal Periodic Review (UPR). Human rights can also be enforced domestically through national human rights mechanisms or through court systems, when these rights are incorporated into domestic law.

¹ Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2010), p. 1.

² “What are Human Rights?” Office of the United Nations High Commissioner for Human Rights (OHCHR), <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>.

fact that these terms are grounded in a framework that has the force of international law, under which governments have obligations.

International human rights define the relationship between a state (the government) as a “duty-bearer” of rights and people living in that state as “rights-holders.” This means that the primary responsibility for making sure that people can enjoy their human rights rests with the government. States have voluntarily decided to accept the obligations contained in international human rights treaties to which they have agreed to become a party.

A human rights-based approach is one that makes those directly affected by a human rights failure central to planning and operationalizing a response. This approach recognizes individuals and communities as rights-holders with legal entitlements and identifies governments and their partners as duty-bearers with obligations to meet those entitlements. Adhering to human rights principles requires particular attention to the needs of vulnerable and marginalized groups, access to information, and the establishment of procedures to ensure non-discrimination and equality, accountability and participation.

Human rights standards should guide all stages of programming and any direct or indirect discrimination on any grounds should be eliminated immediately.

Working on drinking water through a human rights lens will often require looking at systemic problems, as these most often constitute the barriers to the realization of human rights. In practice, regulations, local by-laws or even administrative procedures can act either as enablers or barriers to enjoying human rights. Understanding these barriers and identifying how and why they unjustifiably interfere with human rights can inform how to advocate more effectively for change or hold governments accountable.

UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP)

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is the most important instrument for defining indigenous rights. UNDRIP, as a declaration, does not have the same force of law as a convention like the ICCPR or ICESCR. Conventions, which are essentially treaties, take their force from States ratifying or agreeing to their provisions, accepting that they will be bound by the provisions contained therein.

Declarations do not have such binding power, but this does not diminish their significance. UNDRIP, as a declaration adopted by the General Assembly of the United Nations, can be said to reflect the collective views of the state members of the United Nations.

UNDRIP has unique significance as the first text drafted by states together with rights-holders, offering insight into the power of a human rights approach in the hands of indigenous advocates to shape the language of human rights and thereby shape the understanding of state obligations. UNDRIP was the product of years of advocacy and mobilizing by indigenous communities across the globe. As James (Sa'ke'j) Youngblood Henderson, director of the Native Law Centre of Canada observes:

“Indigenous peoples created the Declaration with their own style of diplomacy with the nations-states and the UN system. This diplomacy is as important as the principles in the Declaration. The tenacity of Indigenous diplomacy and the legal traditions that inform it are the deep structure of the Declaration.”¹

The Human Right to Water

Canada has ratified numerous human rights treaties that contain obligations related to water and sanitation, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), and the International Covenant on Civil and Political Rights (ICCPR).³ Canada has also endorsed the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).⁴ That Declaration recognizes indigenous peoples' right to determine and develop priorities for the development or use of their lands or territories and recognizes indigenous peoples' right to maintain and strengthen their spiritual relationship with traditionally owned or occupied lands, territories, waters, coastal seas, and other resources, and to uphold their responsibilities to future generations.⁵

A number of international human rights bodies and experts have raised concerns, specifically, that Canada has failed to fulfill First Nations peoples' rights to water and sanitation.⁶ For example, after its February 2016 review of Canada, the United Nations

³ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, ratified by Canada 1976; ; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force September 3, 1981, ratified by Canada 1981; Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, ratified by Canada 1991; International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 99 U.N.T.S., entered into force March 23, 1976; Convention on the Rights of Persons with Disabilities (CRPD), adopted December 13, 2006, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. (No. 49) at 65, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008.

⁴ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted September 13, 2007, G.A. Res. 61/295, U.N. Doc. A/61/L.67 and Add.1 (2007), para. 25, 32, www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed February 14, 2015). Canada issued a statement formally supporting the UNDRIP three years after voting against its passage in September 2007 at the UN General Assembly. See, Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, November 12, 2010, <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> (accessed May 25, 2016). On May 9, 2016, Minister of Indigenous and Northern Affairs Canada announced it officially removed its objector status to the declaration. Tim Fontaine, "Canada officially adopts UN declaration on rights of Indigenous Peoples," *CBC News*, May 10, 2016, <http://www.cbc.ca/news/aboriginal/canada-adopting-implementing-un-rights-declaration-1.3575272> (accessed May 12, 2016).

⁵ UNDRIP, art. 32 and 25.

⁶ See, for example, UN Committee on the Elimination of Discrimination against Women, "Concluding observation of the Committee on the Elimination of Discrimination against Women Canada," CEDAW/C/CAN/CO/7, November 7, 2008, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/CAN/CO/7&Lang=En (accessed May 25, 2016), paras. 43-44; UN Committee on Economic, Social, and Cultural Rights, "Consideration of Reports Submitted by States Parties under articles 16 and 17 of the Covenant Concluding Observations, Canada," E/C.12/CAN/CO/4,

Committee on Economic, Social and Cultural Rights (CESCR), which monitors governments' compliance with the ICESCR, noted its concern about "the restricted access to safe drinking water and to sanitation by the First Nations as well as the lack of water regulations for the First Nations people living on reserves." It urged Canada to "live up to its commitment to ensure access to safe drinking water and to sanitation for the First Nations while ensuring their active participation in water planning and management," and to "bear in mind not only indigenous peoples' economic right to water but also the cultural significance of water to indigenous peoples."⁷

The right to water entitles everyone, without discrimination, to have access to:

- sufficient,
- safe,
- acceptable,
- physically accessible, and,
- affordable water for personal and domestic use."⁸

Various resolutions from the United Nations General Assembly and Human Rights Council affirm that the right to safe drinking water is derived from the right to an adequate standard of living.⁹ The right to an adequate standard of living is enshrined in human rights instruments ratified by Canada, such as the ICESCR, CEDAW, CRPD, and the CRC.

The CESCR, in its General Comment 15 on the right to water, noted that an aspect of the core content of the right to water is that water required for personal or domestic use must be safe. This means it must be free from harmful microbes and parasites, chemical substances, and radiological hazards that constitute a threat to a person's health.¹⁰

E/C.12/CAN/CO/5, May 22, 2006, <http://www.refworld.org/publisher,CESCR,CONCOBSERVATIONS,CAN,45377fa30,o.html> (accessed May 25, 2016), para. 17

⁷ UN Committee on Economic, Social, and Cultural Rights, "Consideration of Reports Submitted by States Parties under articles 16 and 17 of the Covenant Concluding Observations, Canada," E/C.12/CAN/CO/6, March 4, 2016, paras. 43-44.

⁸ United Nations General Assembly, "The human rights to safe drinking water and sanitation," Resolution 70/169, U.N. Doc. A/RES/70/169/

⁹ Ibid. See also, UN Human Rights Council resolution 15/9 of September 2010, resolution 16/2 of March 2011, resolution 18/1 of September 2011 and resolution 21/2 of September 2012.

¹⁰ The Committee on Economic, Social and Cultural Rights is the UN body responsible for monitoring compliance with the ICESCR. UN Committee on Economic, Social and Cultural Rights, General Comment No. 15, The Right to Water, U.N. Doc. E/C.12/2002/11(2003), para. 12(b).

The committee also stated that a “violation of the obligation to fulfill” the right to water can occur when there is “insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups.”¹¹

The UN Special rapporteur on the rights to water and sanitation has also noted that in situations of emergency, states “have an obligation to provide culturally appropriate services directly.”¹² She also noted that violations of the right to water may result from a failure to act, to implement comprehensive plans and strategies that ensure the full realization of the rights in the long term, to regulate non-state actors, and as an unintended consequence of policies, programs, and other measures.¹³

¹¹ Ibid., para. 44(c).

¹² United Nations, report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, “Common violations of the human rights to water and sanitation,” June 30, 2014, UN Doc. A/HRC/27/55, para. 53.

¹³ UN Human Rights Council, Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, UN Doc. A/HRC/27/55, June 30, 2014, para. 85.

Related Human Rights

Right to Sanitation

The right to sanitation entitles everyone, without discrimination, to “have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, and socially and culturally acceptable, and that provides privacy and ensures dignity.”¹⁴ As with the right to water, the right to sanitation is derived from the right to an adequate standard of living.¹⁵

The UN special rapporteur on the rights to water and sanitation has stated that states should “ensure that the management of human excreta does not negatively impact on human rights.”¹⁶

Right to Health

The right to the highest attainable standard of health is found in article 25 of the Universal Declaration of Human Rights (UDHR) and in international treaties binding upon Canada, including the ICESCR and the CRC.¹⁷

The CESCR, in its General Comment 14 on the right to health, has interpreted the ICESCR to include:

[T]he requirement to ensure an adequate supply of safe and potable water and basic sanitation [and] the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals,

¹⁴ United Nations General Assembly, “The human rights to safe drinking water and sanitation,” Resolution 70/169, U.N. Doc. A/RES/70/169, December 17, 2015.

¹⁵ Ibid. See also, UN Human Rights Council resolution 15/9 of September 2010, resolution 16/2 of March 2011, resolution 18/1 of September 2011 and resolution 21/2 of September 2012.

¹⁶ United Nations General Assembly, Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, UN Doc. A/HRC/12/24, July 1, 2009, para. 64. ; see also UN Committee on Economic, Social and Cultural Rights, Statement on the Right to Sanitation, U.N. Doc. E/C.12/2010/1, November 19, 2010.

¹⁷ Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), art. 25; ICESCR, art. 12; Convention on the Rights of the Child, art. 24.

or other detrimental environmental conditions that directly or indirectly impact upon human health.¹⁸

The right to health encompasses the right to healthy natural environments.¹⁹ This right involves the obligation to “prevent threats to health from unsafe and toxic water conditions.”²⁰

The CESCR has stated that a “violation of the obligation to fulfill” the right to health can occur when there is “insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups.”²¹

Right to Housing

The poor water and sanitation situation in First Nation communities is related to challenges in realizing other human rights—with housing as a primary concern. Overcrowding is the norm on reserves, and many communities cannot address this issue through extending their housing stock without upgrades to their water and wastewater infrastructure. The right to housing is found in article 25 of the UDHR, as a part of the right to an adequate standard of living, and in international treaties binding upon Canada, including the ICESCR.²²

The CESCR, in its General Comment 4 on the right to adequate housing, has interpreted the right to include:

[C]ertain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for

¹⁸ UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, U.N. Doc. E/C.12/2000/4 (2000), para. 15.

¹⁹ ICESCR, art 12; CESCR General Comment No. 14, para. 15.

²⁰ CESCR General Comment No. 15, para. 8; see also CESCR General Comment No. 14, para. 15.

²¹ CESCR General Comment No. 14, para. 52.

²² UDHR, art. 25; ICESCR, art. 11(1).

cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.²³

The CESCR has stated parties to the treaty should “give due priority to those social groups living in unfavourable conditions by giving them particular consideration.”²⁴

Right to Non-discrimination

Core international human rights treaties expressly prohibit discrimination and require the parties to these conventions to take measures to eradicate all forms of discrimination against individuals.

The CESCR, in its General Comment No. 20 on non-discrimination in economic, social and cultural rights, recommended that states parties adopt “specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such laws should aim at eliminating formal and substantive discrimination, attribute obligations to public and private actors, and cover the prohibited grounds discussed above. Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.”²⁵

²³ UN Committee on Economic, Social and Cultural Rights, General Comment No. 4, The Right to Adequate Housing, U.N. Doc. E/1992/23 (1992), para. 8(b).

²⁴ Ibid., para. 11.

²⁵ CESCR General Comment No. 20, para. 37.

Obligations of the Crown

The Right to Information

The right to water also entails certain procedural obligations when it comes to the provision of information about water resources and the involvement of community members in decisions that impact water resources. Specifically, the right to water protects the right of individuals to have full access to information held by public authorities or third parties, such as corporations, concerning water services and the environment.²⁶ It is also protected under the right to participation²⁷ and as an independent right in and of itself.²⁸

This means that the Canadian government has a legal obligation to ensure that information relevant to water resource use and quality is made available, accessible, functional, and shared in a manner consistent with the principle of non-discrimination.

Available means that “current reliable information has been generated and collected in a manner adequate to assess the magnitude of potential adverse impacts on the rights of people.”²⁹

Accessible means that “everyone can seek, obtain, receive and hold available information,” that the information is provided “in a timely manner,” and that any costs resulting from accessing such information are “kept at a minimum.”³⁰

²⁶ CESCR General Comment No. 15, para.48. See also U.N. Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 5(1)(c), June 25, 1998 (requiring immediate dissemination to potentially affected communities of all information that could enable the public to take measures to prevent or mitigate harm arising from environmental threats). See General Comment No. 15,, *supra* note 3, para.12(c)(iv); OHCHR, “The Right to Water: Fact Sheet No. 35,” August 2010, <https://www.refworld.org/docid/4ca45fed2.html>, 16.; United Nations General Assembly, Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, U.N. Doc. A/69/213, July 31, 2014, para. 27 and 29. (listing access to information as a criterion for active, free and meaningful participation).

²⁷ Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, paras. 9 - 17 (describing the legal basis of the right to participation).

²⁸ See Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes, UN Human Rights Council, Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes, Baskut Tuncak, U.N. Doc. A/HRC/30/40, July 8, 2015, para. 22.(noting that the right is derived from the right freedom of expression and the right to take part in public affairs, and encompasses “the right of individuals to request and receive information of public interest and information concerning themselves that may affect their individual rights”).

²⁹ *Ibid.*, para. 33.

³⁰ *Ibid.*, para. 34.

Functional means that the information “works to prevent harm, to enable democratic decision-making, and to ensure accountability, access to justice, and an effective remedy.”³¹ Technical language must be “translated into a language that is functional, to enable individuals and groups of individuals to make informed choices,” and the “underlying data from which conclusions are drawn” must be accessible.³²

Consistent with the principle of non-discrimination means that information must be “disaggregated and specialized” to “understand and prevent disproportionate implications and impacts of hazardous substances and wastes on individuals and specific population groups, including different ages, incomes, ethnicities, genders as well as minorities and indigenous peoples.”³³

The UN Special Rapporteur on the on the human right to safe drinking water and sanitation, Catarina de Albuquerque (hereinafter “the special rapporteur”), has emphasized that in the context of water, the right to information means “Public bodies should proactively publish information rather than merely react to crises or complaints. Requests for information should be processed rapidly and fairly.”³⁴

The Right to Participation

Providing information in-line with the right to information is also essential to the fulfillment of the right to participate in decision-making processes that affect the exercise of the right to water,³⁵ and the case of indigenous communities, the right to free, prior, and informed consent with respect to projects implicating the utilization of water resources.³⁶

³¹ Ibid., para. 35.

³² Ibid., para. 36.

³³ Ibid., para. 37.

³⁴ Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, para 29.

³⁵ See General Comment No. 15, *supra* note 3, ¶ 48; UN Human Rights Council, Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Common Violations of the Human Rights to Water and Sanitation, Catarina de Albuquerque, U.N. Doc. A/HRC/27/55. June 30, 2014, para. 68 (stating that violations of the right to participate can occur through “failure to take reasonable steps to facilitate participation, including by ensuring the right to access to information” and noting that the procedural dimension of the right to water stems from the right to participate in public affairs as guaranteed by ICCPR, art. 25(a)).

³⁶ See G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/61/L.67 and Add.1, art. 32(2) (Sep. 13, 2007).

“Participation is not a single event, but a continuous process”,³⁷ and it must be “active, free, and meaningful.”³⁸

Active, free, and meaningful participation requires more than “token forms of participation,” such as “the mere sharing of information or superficial consultation.”³⁹ Rather, “[s]tates have an obligation to invite participation and to create opportunities from the beginning of deliberations on a particular measure and before any decisions, even de facto decisions, have been taken.”⁴⁰ Further, “[p]articipants must be involved in determining the terms of participation, the scope of issues and the questions to be addressed, their framing and sequencing, and rules of procedure.”⁴¹ In the context of the right to water, required participation includes the right to participate in decisions on financing and budgeting of water services;⁴² and the type, location, and improvement of water service provision, including whether to involve the private sector.⁴³

For meaningful participation to occur, it is important to ensure that people’s views are not only considered, but actually influence decision-making.⁴⁴ The special rapporteur observes that “[o]ften, consultations are oriented towards securing people’s consent rather than involving them in the design of measures. If people are allowed ‘voice without influence’, i.e., they are involved in processes that have no impact on policy-making, the potential for frustration is enormous.”⁴⁵

³⁷ Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, para. 2.

³⁸ Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, paras. 18–31. (defining “active, free and meaningful” as requiring the following steps: involving people in the terms of engagement; creating opportunities for participation from the beginning of deliberations; eliminating all barriers to accessing deliberative processes; free and safe participation without coercion, inducement, reprisals, or discrimination; access to information; ensuring people’s views are considered and are able to influence the decision; requiring more than simply obtaining consent). See also Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Common Violations of the Human Rights to Water and Sanitation, paras. 68-69. (supporting the concept of “meaningful engagement” established in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg*, [2008] ZACC 1, para. 18, 21 (S. Afr.)). See also Inga Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Portland: Hart Publishing, 2012), p. 220 (participation requires that “the specific decisions regarding water allocation within that framework are taken by including all relevant stakeholders”)

³⁹ Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, para. 18.

⁴⁰ Ibid., para. 21.

⁴¹ Ibid., para. 19.

⁴² Ibid., paras. 62-63 (citing the example of Kenyan residents in Kayole-Soweto who were successful in negotiating a policy of spreading payment for water connection over two years).

⁴³ Ibid., para. 67.

⁴⁴ Ibid., para. 30..

⁴⁵ Ibid. (footnotes omitted).

States must also actively work to eliminate barriers to participation.⁴⁶ Barriers can take the form of prohibitive costs for people participating, both in terms of lost time and opportunity costs.⁴⁷ “In order to justify the costs and avoid frustration,” the special rapporteur notes, “participation must be meaningful and actually influence decision-making.” Indeed, for government and service providers, “the cost of undoing or redoing a project because of people’s objections can be higher than the costs of participatory processes.”⁴⁸ The special rapporteur also notes:

“The most persistent barrier to participation may lie in surmounting a culture of low expectations and cynicism, beliefs harboured both by individuals and public officials. States should revise the incentive structures for public officials so that they are rewarded for facilitating genuine participation rather than regarding it merely as an item to be mechanically ticked off on a checklist. This may require training on facilitation and inter-personal skills.”⁴⁹

Active, free, and meaningful participation also requires that participation must be free from coercion or inducement, direct or indirect.⁵⁰ More specifically, the special rapporteur on the human right to safe drinking water and sanitation has asserted that, “There must be no conditions attached, such as tying access to water and sanitation to attendance of a public hearing. Participation must not be secured through bribery or the promise of a reward.”⁵¹

⁴⁶ Ibid., para. 22.

⁴⁷ Ibid., para. 37.

⁴⁸ Ibid., para. 38.

⁴⁹ Ibid., para. 23.

⁵⁰ Ibid., para. 25.

⁵¹ Ibid.

How Communities Can Use Human Rights to Advance the Right to Water

Set the stage for meaningful participation:

- Work with representative organizations to advocate for a First Nations water commission to monitor and evaluate government performance related to water and wastewater on First Nations, including specifically the outcomes related to government water and wastewater funding commitments. In its work, the commission should take into account indigenous customs, laws, and practices.
- Require government actors to recognize and engage the cultural aspects of water when calling on community input or participation so that communities and individuals can identify culturally acceptable sustainable water policy, and practical solutions on reserves.
- Provide government actors with a set of lessons learned from past community engagement and failed funding commitments for water and wastewater systems to prevent replication of past failures.
- Work closely with First Nations technical and community experts and ensure that new system designs allow for population growth, account for sustainable life-cycle costs, and are adaptable to decreased source water quality over time.
- Identify within the community individuals who are most marginalized and unable to participate in community decision-making and actively create channels for their participation throughout any process. Present government authorities with clearly identified channels and plan for broad spectrum participation.

Use rights-language to demand transparency and accountability:

- As a matter of human rights, seek to develop a plan with the federal government to address local water and sanitation crises with a concrete, collaborative plan. The plan should have:
 - Quantifiable targets;
 - Sufficient and consistent budget allocations;
 - A fixed timeframe for initial implementation;
 - Federal commitments for ongoing operation and maintenance support;
 - A time-bound commitment to end long-term drinking water advisories and reduce risk level of high-risk water and wastewater assets on reserves;

- Specific recommendations, funding, and measures related to private or household-level water and wastewater systems; and,
 - Clear expectations for reporting back to the community progress towards the plan.
- Develop a community-based assessment of water and wastewater assets annually to present to government actors and highlight where funding commitments are failing to keep pace with investment needs.
- Demand that the federal government develop a fair, transparent process for determining financial support for water and wastewater systems on reserves, including a formula for calculating capital, operation, and maintenance funding levels.

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Aerial photo of the vast freshwater resources in the
Hudson Bay Lowlands, Ontario, Canada. October 2018.

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