"Providing Essential Services of Reasonable Quality to All Canadians": Understanding Section 36(1)(c) of the *Constitution Act, 1982*

*Karen Busby**

Section 36(1)(c) has attracted little judicial or academic attention. I examine the text, context, historic circumstances, judicial determinations, and assertions by Canada in international fora respecting this constitutional provision in order to shed light on whether it contains a substantive right or simply expresses an aspiration. I further discuss the concept of "constitutional privity" to clarify whether or not it precludes anyone other than the federal or provincial governments from asserting an alleged breach in litigation. I also address the question of sources for determining the acceptable standards for "essential public services." Underpinning this examination is the question of whether people living on a First Nation reserve that does not have access to safe drinking water and adequate sanitation could make a claim against the federal government for failing to uphold the 36(1)(c) commitment "to provid[e] essential public services of reasonable quality to all Canadians." I conclude that each of the issues I address supports a 36(1)(c) claim.

L'article 36(1)c) a attiré peu d'attention judiciaire ou universitaire. J'examine le texte, le contexte, les circonstances historiques, les décisions et les affirmations judiciaires du Canada dans les forums internationaux relativement à cette disposition constitutionnelle afin d'éclaircir la question à savoir si elle comprend un droit fondamental ou si elle exprime simplement une aspiration et si le concept du « lien constitutionnel » empêche quiconque, autre que les gouvernements fédéral ou provinciaux, de faire valoir une infraction présumée dans un litige. À la base de cet examen est la question à savoir si les gens qui habitent une réserve des Premières Nations dépourvue d'un accès à l'eau potable salubre et un système sanitaire adéquat pourraient présenter une demande contre le gouvernement fédéral pour avoir omis de faire respecter l'engagement de l'article 36(1)c) « à fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels ».

* Professor of Law & Director of the Centre for Human Rights Research at the University of Manitoba. Karen_Busby@umanitoba.ca. I would like to acknowledge the financial assistance of the Social Sciences Research Council of Canada, Natural Sciences and Engineering Research Council of Canada, University of Manitoba Legal Research Institute and University of Manitoba Undergraduate Research Award program and the support of the Centre for Human Rights Research. Invaluable research assistance was provided by Will Steinburg, Jared Wheeler, Faye Roberts, and Jenna Seavers. I am grateful for the advice and feedback provided by Aimée Craft, Helen Fallding, Umut Őzsu, Adriene Porcin, David Boyd, Michael Anderson, Kajia Eidse-Rempel and the anonymous reviewers.

I. Introduction

While most parts of the *Constitution Act, 1982* have generated a torrent of judicial decisions and academic commentary, the riverbed of Part III, which is wholly comprised of section 36, is still all but dry.[1] In this paper, I examine Part III with a focus on section 36(1)(c), and specifically the question of whether a First Nation reserve that does not have access to safe drinking water and adequate sanitation could be successful in making a claim against the federal government for failing to uphold the commitment "to provid[e] essential public services of reasonable quality to all Canadians." This work complements and adds to the recent work of others on constitutional rights-based responses to the deplorable state of water and sanitation on reserves.[2]

I start with a brief overview of the state of water and sanitation systems in some First Nations reserves. Next, I consider two questions: (1) is the section limited by a concept of "constitutional privity" which precludes service recipients from asserting a legal claim? (2) does the section delineate an enforceable substantive right, or is it merely a statement of aspiration by Canadian gov-

1 Three appellate court decisions touch on section 36: *Manitoba Keewatinowi Okimakanak Inc. v Manitoba Hydro Electric Board,* (1992) 91 DLR (4th) 554 (Man CA) [*MKO*]; *Canadian Bar Assn v British Columbia,* 2008 BCCA 92, 290 DLR)4th) 617, [*CBA*]; *Cape Breton v Nova Scotia,* 2009 NSCA 44, 277 NSR (2nd) 350, leave to appeal denied, Court File No. 33246 2009-12-17 [*Cape Breton*]. Only one academic article, written by a then-law student, is devoted to the meaning of section 36: Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment Under Section 36" (1996) 19 Dal LJ 306. Other academics deal with the section briefly, in passing, or by raising a question. For example, Peter Hogg's text *Constitutional Law of Canada,* Student ed (Toronto: Carswell, 2013) [Hogg] considers section 36 in about 200 words (see discussion at page 12) at 610-611 and Michel Robert, "'Challenges and Choices': Implications for Fiscal Federalism" in Thomas J. Courchene, David W. Conklin & Gail C.A. Cook, eds, *Ottawa and the Provinces: The Distribution of Money and Power* (Toronto: Canadian Cataloguing in Publication Data, 1985) at most devotes 250 words to section 36. Other short treatments include: David Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011-2012) 57:1 McGill LJ 81; Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law Inc., 2014) at 11; Martha Jackman & Bruce Porter, "Rights-Based Strategies to Address Homelessness and Poverty in Canada: The Constitutional Framework" (2013) Ottawa Faculty of Law Working Paper No 2013-10, online: <http://socialrightscura.ca/documents/publications/Constitutional Framework Canada.pdf > at 12-18; and Lorne M. Sossin, *Boundaries of Judicial Review The Law of Justiciability In Canada,* 2nd ed (Toronto: Carswell, 2012) at 183-85, 188-190 and Burton H. Kellock & Sylvie LeRoy, "Questioning the Legality of Equalization" in Jason Clemens & Niels Veldhuis, eds, *Beyond Equalization: Examining Fiscal Transfers in a Broader Context* (Vancouver: Fraser Institute, 2007) at 25-29, 33, 40.

2 See, e.g., Nathalie J. Chalifour, "Environmental Discrimination and the Charter's Equality Guarantee: The Case of Drinking Water for First Nations Living on Reserves" (2013) 43:1 RGD 121. David R. Boyd, *ibid*; and Constance MacIntosh, "The Right to Safe Water and Crown-Aboriginal Fiduciary Law: Litigating a Resolution to the Public Health Hazards of On-Reserve Water Problems" in Jackman & Porter, *ibid.*

ernments to provide essential public services? The first question arises out of the *Cape Breton* case which concluded that only provincial governments could assert a section 36 claim and the second question arises from Peter Hogg's assertion that section 36 is a "statement of economic and social goals that ought to guide governments but which are not enforceable by courts." [3] To answer these questions I examine the text, context and history of the enactment of section 36, as well as judicial determinations and assertions by the government of Canada in international fora since its passage. Finally, in answer to concerns that section 36 may be too vague and lacking in standards, I offer some thoughts on how international law has contributed to the development of the normative content or scope of "essential public services." For the last decade, Canada has been actively involved in international discussions on the scope of what could be described as the quintessential public service: provision of safe drinking water and sanitation.[4] While space constraints prevent me from considering here other issues which are germane to the success of a section 36(1)(c) claim, notably justiciability, standing, adjudication venues, and remedies, I conclude that neither the aspirational argument nor the privity argument justify dismissing claims to judicial enforcement of the constitutional rights of all Canadians to "essential services of reasonable quality" and that Canada has already expressed its agreement in international fora on the scope of "essential public services".

II. Water and Sanitation on First Nations Reserves

More than 10,000 people living on First Nations reserves in Canada live in homes that do not have running water or functional toilets. Over 100 First Nations communities were, at any given time over the last decade, under drinking water advisories.[5] A 2011 national report commissioned by the Department

3 *Cape Breton*, *supra* note 1; Hogg, *supra* note 1 at 610.

4 I describe these developments more fully in "From Resistance to Recognition: Recent Developments in Canada Touching on International Law and the Human Right to Water and Sanitation [forthcoming in Canadian Journal for Human Rights, 2016].

5 Canada, Department of Indian and Northern Affairs (INAC), *National Assessment of First Nations Water and Wastewater Systems,* 2011, at 4, online: <http://www.aadnc-aandc.gc.ca/eng/1313770257504/1313770328745>. This assessment reported 1,880 households with no water service X average household size 4.3 = about 8,000 people with no water service at all, not including homes where water is delivered to a barrel. When those barrel-delivery homes are included in the tally, 3,410 First Nation homes had no running water in 2010 X 4.3 = almost 15,000 people (see Helen Fallding, "First Nations an hour from Winnipeg face Third World conditions", *Winnipeg Free Press* (30 October 2010), online: <http://www.winnipegfreepress.com/no-running-water/without/high--dry-first-nations-an-hour-from-winnipeg--face-third-world-conditions-106365403.html>). That number is dropping, as some homes get retrofitted. See Health Canada, First Nations & Inuit Health, "Drinking Water Advisories in First Nations Communities", online: <http://www.

of Indian and Northern Affairs (INAC) of 807 water systems on First Nations reserves found that 314 (39%) were at high overall risk, 278 (34%) were at medium overall risk, and only 215 (27%) were at low overall risk. Of the 532 wastewater systems inspected, 72 (14%) were at high overall risk, 272 (51%) were at medium overall risk, and 188 (35%) were at low overall risk.[6] The report determined that, based on the 10 year projected populations and inflation, the combined water and wastewater servicing needs are estimated to be $4.7 billion plus a projected operating and maintenance budget of $419 million per year. However, recent federal budgets provide only $165 million annually or about one-third of the recommended amount. If the recommended annual expenditure level is not maintained — and it has not been in the years since the report was written — the forecast not only extends into the future, but may no longer be achievable at all due to the effects of the other key variables.[7]

In addition to poor water and sanitation infrastructure, other studies show that there are source water protection issues, serious water quality problems, accessibility issues, high rates of waterborne disease, and spiritual and cultural impacts related to lack of access to water and sanitation. The marked difference between access to safe water and sanitation on and off reserves in Canada has been noted by, among others, the United Nation's Committee on Economic, Social, and Cultural Rights (2006) and its Human Rights Council (2013), the Royal Commission on Aboriginal Peoples (1996), and the Auditor-General of Canada (2011).[8]

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hc-sc.gc.ca/fniah-spnia/promotion/public-publique/water-dwa-eau-aqep-eng.php> and First Nations Health Authority, "Environmental Health", online: <http://www.fnha.ca/what-we-do/environmental-health>.

6 Canada, Department of Indian and Northern Affairs (INAC), *National Assessment of First Nations Water and Wastewater Systems* (Ontario: Neegan Burnside Ltd., 2011), at i, ii, online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/enr_wtr_nawws_rurnat_rurnat_1313761126676_eng.pdf>.

7 Email correspondence with Michael Anderson, Director of the Manitoba Keewatinowi Okimakanak Natural Resources Secretariat (July 15, 2015).

8 CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, 36th session, (2006) at 4; <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.CAN.CO.4,%20E.C.12.CAN.CO.5.En?Opendocument> Aboriginal Affairs and Northern Development Canada, Royal Commission on Aboriginal Peoples, *Royal Commission Report on Aboriginal Peoples* (1996) at 2.1; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Canada (23 June 2013) A/HRC/24/11 at 5, 6, 22. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/152/42/PDF/G1315242.pdf?OpenElement>. An analysis of these studies is all better developed in Karen Busby, "Blue Lakes and Rocky Shores: Canada's Obligations to First Nations Reserves under International Human Rights Law on Water and Sanitation", [tentative title] [in progress].

All provinces and territories have passed laws and regulations establishing drinking water quality and sanitation standards, as well as requirements for monitoring, testing, operator training and certification, and public reporting. But, the current federal regime on water and sanitation on First Nations reserves has serious infrastructural, funding, and regulatory gaps. As the 2006 *Expert Panel on Safe Drinking Water for First Nations* report noted, "the arrangements are neither comprehensive nor easily deciphered; most critically, there is a lack of uniform standards, as well as enforcement and accountability mechanisms."[9]

Legislated water quality and sanitation standards for First Nations reserves do not yet exist although other specific federal water quality standards are in place.[10] For example, federally-regulated employees, such as nurses working on First Nations reserves, are entitled to have bottled water supplied to them by their employer under workplace health and safety legislation if local water does not meet certain standards.[11] Until 2013 First Nation reserves did not have statutory protections for drinking water and wastewater.[12] That year Parliament enacted the *Safe Drinking Water for First Nations Act* (*SDWFNA*)[13] which enables the federal government to create a regulatory structure governing drinking water and waste water. While it has been in force since November 1, 2013, no regulations had been passed as of mid-2015.

A 2010 report observed that "core issues relating to the provision of safe drinking water include the high costs of equipment for and construction and maintenance of facilities in remote locations; limited local capacity and ability to retain qualified operators; the absence of a regulatory framework; the lack of resources to properly fund system operation and maintenance; and the lack

9 Canada, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, *Report of the Expert Panel on Safe Drinking Water for First Nations*, vol 2 (Ottawa: November 2006), at 1, online: <http://publications.gc.ca/collections/Collection/R2-445-2006E1.pdf> [Report on Safe Drinking Water].

10 Canada, Auditor General of Canada, "2011 June Status Report of the Auditor General of Canada" (Ottawa: OAD, 3 May 2011), at 4.23, online: <http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html#hd5f>.

11 *Canada Labour Code,* RSC 1985, C L-2, s 125(f), online: <http://laws-lois.justice.gc.ca/eng/acts/L-2/page-55.html#h-51>; *Occupational Health and Safety Regulations,* SOR/86-303, s 9.24, online: <http://laws-lois.justice.gc.ca/eng/regulations/Sor-86-304/page-40.html#h-102>.

12 Aboriginal Affairs and Northern Development Canada, *Backgrounder: Safe Drinking Water for First Nations Act*, online: <https://www.aadnc-aandc.gc.ca/eng/1330529331921/1330529392602>.

13 *Safe Drinking Water for First Nations Act,* SC 2013, c 21, online: <http://laws-lois.justice.gc.ca/eng/acts/S-1.04/index.html> [SDWFNA].

of clarity regarding roles and responsibilities."[14] The *SDWFNA* is contentious and many claimed that it has serious deficiencies.[15] In sum, while this statute might address the regulatory gap, it does nothing to address gaps in infrastructure and funding. The 2006 expert panel observed that until drinking water infrastructure on reserves is brought to a level of quality comparable to other communities, any regulatory scheme would likely be inadequate to address the problems.[16] Funding is required to attain clean drinking water and adequate wastewater treatment on First Nations reserves, but funding is not included in the *SDWFNA*.[17] In fact, the statute places the financial and regulatory burden to provide safe drinking water and sanitation directly on Chiefs and Council, with the provision that they can be fined for breaches by a federal agency.[18]

14 Nicholas Auclair & Tonina Simeone, Legislative Summary of Bill S-11: The Safe Drinking Water for First Nations Act, Library of Parliament Research Publications, Publication Number 40-3-S11E (7 June 2010) <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/Bills_ls.asp?Language=E&ls=s11&source=library_prb&Parl=40&Ses=3>.

15 For critiques of the *Safe Drinking Water for First Nations Act* see Boyd, *supra* note 1. Robert J. Patrick, "Uneven Access to Safe Drinking Water for First Nations in Canada: Connecting Health and Place Through Source Water Protection" (2011) 17:1 Health & Place, at 386-389, online: <http://www.elsevier.com/locate/healthplace>; Laura Eggertson, "Legislation Introduced to Regulate Water Quality on Reserves" (2010) 182:10 *Can Med Assoc J*, online: <http://go.galegroup.com/ps/i.do?id=GALE%7CA231610062&v=2.1&u=univmanitoba&it=r&p=HRCA&sw=w&asid=dd37ae125c6e7d9b5ef12923e6c14c6d>; Peter Scott Vicaire, "Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context" (2013) 58:3 McGill LJ, online: <http://go.galegroup.com/ps/i.do?id=GALE%7CA343944988&v=2.1&u=umanitobalaw&it=r&p=LT&sw=w&asid=aff88b8f8ed52eec955702664317ea1e>; Constance McIntosh, "Public Health Protection and Drinking Water Quality on First Nation Reserves: Considering the New Federal Regulatory Proposal" (2009) 18:1 Health Law Review at 5-11; Pamela D Palmater, "Stretched Beyond Human Limits: Death By Poverty in First Nations" (2011) 65 Canadian Review of Social Policy, online: <http://pi.library.yorku.ca/ojs/index.php/crsp/article/viewFile/35220/32057>; Assembly of First Nations Submission to the Standing Senate Committee on Aboriginal Peoples: Bill S-8: Safe Drinking Water for First Nations Act (16 May 2012), online: <http://www.afn.ca/uploads/files/2012-05 16_afn_submission_to_the_senate_standing_committee_on_bill_s-8.pdf>; Ontario Native Women's Association, "Water Legislation Progresses Despite Failure to Address Needs and Concerns of Aboriginal Women" (16 July 2012), online: <http://www.onwa.ca/upload/documents/water-s-8-media-release-final.pdf>; Allison A. Thornton "Implications of Bill S-8 and Federal Regulation of Drinking water in First Nation Communities" (20-21 March 2012), online: <http://www.afn.ca/uploads/files/parliamentary/legalanaylsis.pdf>; Chiefs of Ontario, "Federal Bill S-8 Fails to Protect Drinking Water for First Nations", online: <http://www.chiefs-of-ontario.org/node/233>; Wawatay News Desk, "Water Quality Act Flawed says NAN", *Wawatay News* (2 March 2012), online: <http://www.wawataynews.ca/archive/all/2012/3/2/water-quality-act-flawed-says-nan_22496>.

16 Report on Safe Drinking Water, *supra* note 9 at 27.

17 *SDWFNA, supra* note 13.

18 *Ibid.* Section 5(1) provides that the regulations made under section 4 can "establish offences punishable on summary conviction for contraventions of the regulations and set fines or terms of imprisonment or both for such offences." See also Auclair & Simeone, *supra* note 14.

III. The Scope and Meaning of Section 36(1)(c)

Section 36 reads in its entirety:

36(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the Legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians;

(b) furthering economic development to reduce disparity in opportunities; and

(c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

36(1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent

(a) promouvoir l'égalité des chances de tous les Canadiens dans la echerché de leur bien-être

(b) favoriser le développement économique pour réduire l'inégalité des chances;

(c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels

(2) Le Parlement et le gouvernement du Canada prennent l'engagement de principe de faire des paiements de péréquation propres à donner aux gouvernements provinciaux des revenus suffisants pour les mettre en mesure d'assurer les services publics à un niveau de qualité et de fiscalité sensiblement comparables.

As a legal academic prior to entering politics, Pierre Trudeau was a proponent of constitutional recognition of economic rights.[19] Both the *International Covenant on Social, Economic and Cultural Rights (ICESCR)* and the *International Covenant on Civil and Political Rights* (*ICCPR*) were adopted and became available for signature in 1966 and by 1976 both documents had enough signatories, including Canada, to enter into force. It was against the backdrop of interest and enthusiasm generated by these important covenants that, as a first step in 1969 talks on constitutional reform, then-Prime Minister Trudeau presented four objectives for discussion among the federal and provincial governments:

19 Pierre Elliott Trudeau, "Economic Rights" (1961-62) 8:2 McGill LJ 121 at 122 online: <http://lawjournal.mcgill.ca/userfiles/other/6413541-trudeau.pdf>.

(1) To establish for Canada a federal system of government based on democratic principles,

(2) To protect basic human rights, which shall include linguistic rights,

(3) To promote national economic, social and cultural development, and the general welfare and equality of opportunity for all Canadians in whatever region they may live, including the opportunity for gainful work, for just conditions of employment, for an adequate standard of living, for security, for education, and for rest and leisure,

(4) To contribute to the achievement of world peace and security, social progress and better standards of life for all mankind.[20]

These objectives appear to be rooted in a desire to give domestic effect to the new covenants. Notably, the language used in the first two objectives echoes the *ICCPR*, whereas the language of the *ICESCR* appears in the third and fourth objectives. As will be discussed, the 1982 *Canadian Charter of Rights and Freedoms* could be said to be Canada's domestic response to its ratification of the *ICCPR* and section 36(1) was Canada's domestic response to the ratification of the *ICESCR*.[21] The first iteration of what became section 36(1) appeared as Articles 46 and 47 of the Victoria Charter,[22] a document which came out of the Federal-Provincial First Ministers Conference held in 1971. That text, broadly speaking, also reflects the objectives set out above.

Section 36(2) had its genesis in a very different set of concerns. Several provincial leaders came to the 1978 First Ministers Conference seeking to ensure the protection and entrenchment of long-standing tax revenue transfers from the federal government to the provincial governments, something which the federal government had already signalled its willingness to protect through a non-abrogation clause.[23] The provinces were further alarmed by the treatment

20 Pierre Elliot Trudeau, *The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government* (Ottawa: Queen's Printer, 1969) at 6-14.

21 See Constitutional Conference – Victoria (1971), *The Canadian Constitutional Charter, the Victoria Charter* (Victoria, 14-16 June 1971), online: <http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=hist&doc=victoria-eng.htm> arts 46-47 [Constitutional Conference – Victoria].

22 *Ibid.*

23 See Canada, Bill C-60, *The Constitutional Amendment Act,* 3rd Sess, 30th Parl, 1978. Introduced in 1978, Bill C-60 included a non-abrogation clause protecting transfer payments:

> Section 99. Where authority is conferred or provided by any Act of the Parliament of Canada for the payment, otherwise than pursuant to an agreement or other arrangement having the force of a binding contractual obligation, of any province or territory of Canada subject to such terms and condition, if any, as may be contained in or provided for by that Act, the authority for such

of this question in the 1978 federal *Constitutional Amendment Bill*.[24] The first draft of what became section 36(2) emerged from the 1979 Federal-Provincial First Ministers Conference as a separate and additional commitment to section 36(1). Thus, while sections 36(1) and 36(2) appear together under the heading "Part III Economic and Regional Disparities" of the *Constitution Act, 1982*, the two sections arose independently from each other and address different concerns.

Case law and academic commentary suggest that two principal issues need to be considered in order to assess the prospects for a claim under section 36(1)(c) by recipients of essential public services: (1) Is such a claim precluded by a concept of "constitutional privity" that would view the federal and provincial governments as the only "parties" to any commitment made in the section? (2) Is the commitment made in section 36(1)(c) merely aspirational, or does it contain a substantive promise?

A. Constitutional "Privity"

Section 36(1)(c) has only been judicially considered in three cases, all at the appellate level[25] and in each case, the court acknowledged that the section might contain a justiciable or enforceable commitment. In the 2009 *Cape Breton* case, an economically depressed regional municipality asserted that the Province of Nova Scotia breached section 36(1) by failing to fairly distribute federal funding it had received. The Nova Scotia Court of Appeal ordered that the claim be struck for failing to disclose a cause of action. It found that only the federal or provincial governments were "privy" to the commitments made in section 36(1)(c). Otherwise stated, the section did not create "a cause of action belonging to the [regional municipality] . . . ."[26] However, the court acknowledged that section 36(1)(c) "may indeed be justiciable in certain contexts"[27] and that such an interpretation was "worthy of consideration" in an appropriate case.[28]

payment, if expressly stated in that Act to create an obligation on Canada to which this section shall apply, shall, for the period of subsistence of the authority and subject to those terms and conditions, if any, constitute an obligation accordingly by which Canada shall be bound and to which Canada shall be committed pursuant to the Constitution of Canada, and it shall not be competent for the Parliament of Canada to terminate of alter any such obligation except as one by which Canada is so bound and to which it is so committed.

This bill died when the government changed. See also, Canada, *The Constitutional Amendment Bill: Text And Explanatory Notes (*June 1978) at 47 [Constitutional Amendment Bill].

24 Kellock & LeRoy, *supra* note 1 at 30; Nader, *supra* note 1 at 321.

25 *MKO, supra* note 1; *CBA, supra* note 1; *Cape Breton, supra* note 1.

26 *Ibid* at para 65.

27 *Ibid* at para 32.

28 *Ibid* at para 65.

Section 36(1)(c) was also pleaded to support claims in two earlier cases — *Manitoba Keewatiniwi Okimakanak* (*MKO*) and *Canadian Bar Association* (*CBA*). And, in both of these cases, appellate courts held, without stating much more, that "a reasonable argument might be advanced that [section 36] could possibly have been intended to create enforceable rights."[29] These decisions were silent on the issues of privity and scope. As the pleadings in both of these cases were deficient for other reasons, including a failure to plead material facts, neither claim was re-filed, and thus the substantive issues were never judicially determined.

The deciding factor in the *Cape Breton* decision was the conclusion that only the federal or provincial governments were "privy" to the commitments made in section 36 and therefore only they could assert a breach. The court's ruling that only governments can assert a constitutional breach is novel; it was never before seen in Canadian constitutional jurisprudence. "Privity," as that concept is used in *Cape Breton*, should not be confused with "standing." Current rules on standing are flexible and pragmatic. They permit a challenger to bring an action if: the case raises a serious justiciable issue; the party bringing the case has a real stake in the proceeding or is engaged with the issues that it raises; and, the proposed suit is a reasonable and effective means to bring the case to court. In contrast, the *Cape Breton* court, apparently drawing on the contractual concept of privity, held that anyone who was not "privy" to the creation of the constitutional commitments — that is, anyone other than the federal and the provincial governments — was precluded from commencing an action.

The court's conclusion flowed from four related observations. First, section 36 was separated from the express rights-creating parts of the *Constitution Act, 1982* (the Charter (Part I) and Aboriginal Rights (Part II)) and the absence of the word "right" attached to a specific beneficiary of that right lead to the conclusion that the part is not enforceable. Second, the court noted that section 36 does not disclose any intent that its principles be actionable by individuals or municipalities. Third, the court described the three commitments contained in section 36(1) as "vague standards [that] are inconsistent with the notion that an individual, or a municipal unit representing individuals, is accorded an enforceable cause of action. Rather, the wording supports the interpretation that section 36 represents the terms of an agreement among federal and provincial

29 *Ibid*; see also *MKO, supra* note 1 at para 9 and *CBA supra* note 1 at para 53. In *MKO* the plaintiffs claimed that to achieve the objectives of section 36, the Public Utilities Board ought to approve differential electricity rates for First Nations communities. In the *CBA* case the plaintiffs asserted that legal aid funding violated, amongst other things, section 36.

governments."[30] Finally, the Court concluded that section 36 represents a legislative compromise with commitments by and for only the negotiating parties. In other words, section 36 codifies a constitutional agreement that rests with only the federal and provincial governments and not with individuals or other political entities such as municipalities and, as such, the claim failed to disclose a reasonable cause of action. These observations are not well supported and do not sustain the court's decision.

Sections 91 and 92 of the *Constitution Act, 1867* suffered the same deficiencies identified by the *Cape Breton* court respecting section 36. These sections are not explicitly rights-creating and no rights are attached to a specific beneficiary. Nowhere does the *Constitution Act, 1867* expressly state that any breaches are actionable by aggrieved parties. The language is vague (for example, "peace, order, good government"; "trade and commerce"), and the wording could support the conclusion that the commitments were by and for only the negotiating parties. Yet, no one would seriously contend that only the federal government could complain of provincial encroachment on its powers or *vice versa*. Nor would anyone seriously contend that the judiciary has no role to play when it comes to determining the parameters of federal and provincial jurisdiction.

The *Cape Breton* court's reasoning on privity is flawed in other ways. For example, section 36 (1)(c) does name a beneficiary: "all Canadians." It might be thought that had the section been intended to operate on the basis of governmental privity, this would have been expressly stated. As will be discussed in the context of relevant international treaty provisions, the meaning of "essential public services of reasonable quality" is not a "vague standard." Finally, while privity between the federal and provincial governments might be argued to attach to the agreement concerning equalization payments embodied in section 36(2), there is no apparent reason to extend the concept to the different and more general commitment in section 36(1)(c).

Given the serious flaws in the *Cape Breton* court's novel concept of constitutional privity, I would assert that this decision should not be followed in the future.

B. Mere Aspiration or Substantive Commitment?

In this section, I will take a closer look at the framers' intent and the historic context of the passage of section 36, especially in relation to similar commitments made in other national constitutions — both before and after 1982 —

30 *Cape Breton*, *supra* note 1 at para 56.

along with the precise text and its antecedents. As the constitutional text is silent on this issue, we can take guidance from the Supreme Court of Canada decision in Amaratunga[31]:

> . . . it is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation.

Lastly, I present Canada's assertions respecting section 36 in international fora with a view to examining whether these analyses provides any support for the conclusion that section 36(1)(c) is merely an unenforceable, vague expression of an aspiration by governments or an enforceable commitment. As we shall see, this examination points to the latter conclusion.

(1) Purpose and Historical Context of Section 36(1)(c)

In a discussion focused on section 36(2) and the meaning of "equalization payments," Peter Hogg asserts that

> The constitutional obligation to make adequate equalization payments . . . is probably too vague, and too political to be justiciable. It is like the "directive principles of state policy" in the Constitution of India, which are statements of economic and social goals that ought to guide governments but which are not enforceable in courts.

The Court of Appeal in *Cape Breton* read Hogg's assertions as applying to both section 36(1) and 36(2). While his comments clearly relate to equalization payments — the exclusive focus of section 36(2) — the court gave his assertion a broader reading and applied it to both section 36(1) and 36(2).

More fundamentally, there is nothing anywhere in the historical record touching on the evolution of section 36 to suggest that the well known concept of "directive principles" referred to by Hogg was in any way animating discussions in Canada on either section 36(1) or (2). If the Indian approach was influencing the Canadian approach, "directive principles" language could have been used in section 36; instead, the original non-compellability clause was removed. Moreover, readings by courts of constitutional provisions that may look like "directive principles" do not inevitably lead to the conclusion that Hogg suggests: namely, that such provisions are mere guides to government and are not enforceable by courts. In 1980, prior to the finalization of the text of section 36, the Supreme Court of India read the Constitution of India

31 Amaratunga v Northwest Atlantic Fisheries Organization, 2013 SCC 66 at para 36, 3 SCR 866.

as imposing the obligation on Indian governments to provide clean water and sanitation under the "right to life" or "right to health" provisions, reasoning that such an interpretation was grounded in the directive principles. Thus, if Indian jurisprudence was animating discussions in Canada, that jurisprudence would have supported judicial enforceability.

Constitutionally-protected and judicially-enforceable rights to water, and sometimes sanitation, have been expressly adopted in at least 15 countries. For example, the 2013 Constitution of the Republic of Fiji has provisions on water and sanitation that reflect the core principles of international human rights law. Such obligations have also emerged from judicial rulings in some countries where, as in section 36(1), the language of constitutional obligation or commitment, rather than the language of rights, is used. For example, Article 365 of the Constitution of Colombia, under the heading "Concerning the Social Purpose of the State and of the Public Services" provides that:

> The general welfare and improvement of the population quality of life are social purposes of the state. A basic objective of the state's activity will be to address unsatisfied public health, educational, environmental, and potable water needs.

Colombian courts have found that, pursuant to this article, "public authorities and public water companies have the obligation to, in settlements that have already been legalised, provide water and sanitation services efficiently and in a timely manner."

In summary, a close look at the historic context of the Canadian commitment especially in relation to similar commitments made in other national constitutions, both before and after 1982, does not provide support for the conclusion that section 36(1)(c) is merely an unenforceable vague expression of an aspiration by governments.

Ordinary and Grammatical Meaning

The *Cape Breton* Court itself noted that "(i)t is presumed that the legislature avoids superfluous or meaningless words . . . Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose."[32] Further, the English and the French texts of the Constitution are equally authoritative. While constitutional interpretation in Canada is, in any case, not limited to text or original intention but rather is a process of pro-

32 *Cape Breton, supra* note 1 at para 64.

gressive evolution of meaning, I focus here on the more conservative approach of text and intention.[33]

What do the words "are committed to" as used in English text of section 36(1)(c) mean in their grammatical and ordinary sense? The *Oxford Dictionary* definition of "commit" indicates that this is a strong verb: "pledge or bind . . . to a certain course or policy."[34] The French text uses the verb "s'engager" which, according to *Dictionnaires de francais Larousse* means "se lier moralement par une promesse."[35] Thus, Canadian governments are morally pledged and bound to the promise to take a course of action; that is, to provide essential public services of reasonable quality to all Canadians. The *Cape Breton* court recognized that the verb "commit/s'engager" supported the regional municipality's interpretation that the section is more than aspirational.[36] All three courts of appeal in the section 36 cases agree that "by its plain meaning, "commit/s'engager" could, in appropriate circumstances, connote a justiciable obligation."[37]

It is also useful to contrast the verbs which open the three sub clauses in section 31(1) — promote/promouvir, further/favoriser and provide/fournir — remembering the maxim "same words, same meaning" and its inversion, "different words, different meanings." The *Oxford Dictionary* defines "promote" as "support or actively encourage." "Further" is defined as "help the progress or development of (something)" and "provide" is defined as "make available for use; supply." Thus, the verbs "promote" and "further" are less active, less immediate, and less concrete than the direct, immediate, and definitive verb "provide" used in section 36(1)(c). Similarly, according to *Dictionnaires de francais Larousse*, "promouvoir" means "d'en favoriser le développement"; "favoriser" means "faciliter, encourager"; and "fournir" means "procurer quelque chose à quelqu'un." Thus, like its English counterpart "provide," "fournir" denotes a strong undertaking than either "promouvoir" or "favoriser." Both the English and the French texts reserve the stronger verb — provide/fournir — to open the subclause in section 36(1)(c) and use weaker combinations — promote/promouvir and further/favoriser — for subclauses (a) and (b).

Inferences can be drawn from omissions as between related texts. The commitments made in section 36(1) are unqualified — "governments are com-

33 I would like to thank one of the reviewers of this paper for making this observation.

34 All English definitions in this part are from *The Oxford English Dictionary*, online: <http://www.oxforddictionaries.com>.

35 All French definitions in this part are from *Editions Larousse Dictionnaire*, online: <http://www.larousse.fr/dictionnaires/francais>.

36 *Cape Breton, supra* note 1 at para 54.

37 *Ibid* at para 50.

mitted" — whereas section 36(2) provides that governments "are committed to the principle [de principe] of making equalization payments." The qualification in section 36(2) may suggest that the commitment to making equalization payments is only an objective or goal that Parliament and the provincial legislatures have adopted. The absence of qualifying language such as "to the principle /de principe" from section 36(1) suggests that this section embodies more than an objective or goal.

The assertion that section 36(1) contains a substantive commitment and not just an aspirational promise is also supported by comparing it to the earlier iteration of section 36 as it appeared in the Victoria Charter.[38] This document, which came out of the 1971 Federal-Provincial First Minister conference, provided that:

Art. 46 Parliament and the government of Canada and the Legislatures and governments of the Provinces are committed to

(1) The promotion of equality of opportunity and well-being for all individuals in Canada

(2) The assurance, as nearly as possible, that essential public services of reasonable quality are available to all individuals in Canada; and

(3) The promotion of economic development to reduce disparities in the social and economic opportunities for all individuals in Canada wherever they may live.

Art. 47 The provisions of this part shall not have the effect of altering the distribution of powers and shall not compel the Parliament of Canada or the Legislatures of the Provinces to exercise their legislative powers.

Art 46 Il incombe au Parlement et au Gouvernement du Canada ainsi qu'aux Législatures et aux Gouvernements des Provinces.

(1) de promouvoir l'égalité des chances pour toutes les personnes qui vivent au Canada et d'assurer leur bien-être;

(2) de procurer à toute la population, dans la mesure du possible et suivant des normes raisonnables de qualité, les services publics essentiels; et

(3) de promouvoir le progrès économique afin de réduire les inégalités sociales et matérielles entre les personnes, où qu'elles habitent au Canada.

Art 47 Les dispositions de ce titre n'ont pas pour effet de modifier la répartition des pouvoirs, non plus qu'elles n'obligent le Parlement du Canada ou les Législatures des Provinces à exercer leurs pouvoirs législatifs.

38 See Constitutional Conference – Victoria, *supra* note 21; see also Constitutional Amendment Bill, *supra* note 23.

A comparison of these articles with section 36(1) supports the argument that the final version embodies a more substantial and enforceable promise than the original version. The 1971 iteration qualified the clause on "essential public services of reasonable quality" in two ways. First, the 1971 draft contained an unambiguous non-compulsion clause — "the provision . . . shall not compel the Parliament of Canada or the legislatures to exercise their legislative powers" — this clause was dropped in 1972. Second, in the 1971 draft, the commitment to "essential services" was qualified as an "assurance, as nearly as possible." This became "an assurance as nearly as practicable" in the text emanating from the First Minister's conferences in 1972, 1976, and 1977 and in the 1978 federal *Constitutional Amendment Bill*.[39] Thereafter, the direct, unqualified language of "provided" was introduced in place of "assurance as nearly as possible." That these two limiting clauses were initially considered and then subsequently abandoned strengthens the argument that section 36(1) was intended to make a substantive commitment.

To sum up, the grammatical and ordinary sense of the words used in both English and French texts supports the conclusion that section 36(1)(c) is not merely aspirational but rather embodies a substantial obligation. Most notably, during the drafting process, limiting words and a non-compulsion clause were eliminated suggesting that the federal and provincial governments intended to make a constitutional commitment to provide (and not just promote or further) essential public services.

(3) Context Provided by the *International Covenant on Social, Economic and Cultural Rights* (*ICSECR*)

The language used in early iterations and the timing of section 36(1) are consistent with the ICSECR, which came into force and was ratified by Canada in 1966. As earlier noted, Pierre Trudeau, when a legal scholar, was a proponent for recognition of economic rights.[40] He belonged to what Martha Jackman has described as the Canadian movement engaged with international human rights in the decade leading up to the passage of the *Constitution Act, 1982*.[41] In 1969, Trudeau stated that one objective of constitutional reform was "[t]o promote national economic, social and cultural development, and the general welfare and equality of opportunity for gainful work, for just conditions of

39 Constitutional Amendment Bill, *supra* note 23 at 47.

40 Trudeau, "Economic Rights", *supra* note 19 at 122.

41 Martha Jackman & Bruce Porter, "Introduction: Advancing Social Rights in Canada" in Martha Jackman & Bruce Ported, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) at 11.

employment, for an adequate standard of living, for security, for education and for rest and leisure."[42]

Section 36 can be viewed as Canada's domestic response to the ratification of the *ICESCR*. Some witnesses appearing before the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada called for the *ICESCR* to be explicitly referred to in section 36, and Committee members debated the issue when Member of Parliament Svend Robinson proposed an amendment to add a fourth sub-clause to section 36(1) to reference the *ICESCR*. The amendment was rejected for unclear reasons unrelated to the substance of the motion, but with the general tenor is that the amendment was unnecessary or redundant.[43] For example, then-Justice Minister Jean Chrétien stated that

> Canada has already committed itself internationally to give domestic effect to the rights set for Indians in the National Covenant and it is hardly needed to reaffirm this commitment in the Constitution. The Covenant merely obliges parties to take steps to progressively achieve the full realization of the Covenant rights by appropriate means, including legislative measures. I think that, and I can tell you, Mr. McGrath, it is what we call high sounding rhetoric. I am waiting soon for an amendment to inscribe in the Constitution the apple pie and the recipe of ma tante Berthe, and I do think that we cannot put everything there. It is the Constitution, so I reject this amendment.[44]

Since 1982, the federal government has reported to UN bodies during their periodic treaty reviews that section 36 is a part of Canada's effort to realize its commitments under international law. In its first periodic review under the ICESCR in late 1982 — on articles 10 (protection of family), 11 (adequate standard of living), and 12 (right to health) — the Canadian government, with Chrétien still as Minister of Justice, reported:

> On April 17, 1982 . . . The Canada Act, 1982, includes the Constitution Act, 1982, which contains the Canadian Charter of Rights and Freedoms, recognition of the Rights of the Aboriginal Peoples of Canada, and the following commitments of the Parliament and the legislatures, together with the Government of Canada and the provincial governments:

42 P.E. Trudeau, "Government of Canada Working Paper on the Constitution" in *The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People and the Institution of Government* (Ottawa: Queen's Printer, 1969).

43 Canada, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, Minutes of Proceedings and Evidence, 32nd Parl, 1st Sess, No 49 (January 30, 1981) at 65-71.

44 *Ibid* at 70.

> (a) promoting equal opportunities for the well-being of Canadians;
>
> (b) furthering economic development to reduce disparities in opportunities; and
>
> (c) providing essential public services of reasonable quality to all Canadians.

A year later, during its second periodic review under the *ICCPR*, Canada reported under a section discussing Canada's efforts to realize the equality provisions of the covenant that

> Section 36(1) of the Constitution Act, 1982 commits federal and provincial governments to promote equal opportunities for the well-being of Canadians and to provide essential public services of reasonable quality to all Canadians. Section 36(2) sets forth a commitment to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide comparable levels of public services at comparable levels of taxation.

Most recently, in 2013, Canada stated in its submission respecting its sixth periodic review under *ICESCR*, under the heading "Measures adopted to reduce economic, social and geographical disparities" that

> Part III of the Constitution Act, 1982, entitled Equalization and Regional Disparities, commits federal and provincial governments to promoting equal opportunities for the well-being of Canadians, furthering economic development to reduce disparity in opportunities and providing essential public services of reasonable quality to all Canadians. Furthermore, it commits the Government of Canada to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation. These provisions are particularly relevant in regard to Canada's international obligations for the protection of economic, social and cultural rights.

Thus by its own assertions, including those made in its first and in its most recent periodic review reports, Canada has acknowledged that section 36 is "particularly relevant in regard to Canada's international obligations for the protection of economic, social and cultural rights." Canada has thus recognized not only that international law and section 36 inform each other, but also that section 36 is an important domestic manifestation of Canada's international obligations.[45]

45 In its concluding observations on the sixth periodic report of Canada in March 2016 (E/c.12/CAN/CO/6), the [United Nations] Committee on Economic, Social and Cultural Rights "recommends that [Canada] implement its commitment to review its litigation strategies in order to foster the justice ability of the economic, social and cultural rights." It goes on to specifically refer to section 36 of the *Constitution Act, 1982*. More specifically, the Committee urges the State party to intensify its efforts to address indigenous peoples' housing crisis, in consultations with indigenous governments

Canada's international recognition of the meaning of 36(1)(c) together with the observations I have already made about the text and its antecedents as well as the historic context of the Canadian commitment especially in relation to similar commitments made in other national constitutions, both before and after 1982, does not provide support for the conclusion that section 36(1)(c) is merely an unenforceable vague expression of an aspiration by governments. In fact, all elements of this examination point to the opposite conclusion.

IV. The Scope of "Essential Public Services" and Implications for First Nations

In *Cape Breton*, the Nova Scotia Court of Appeal concluded that the language of section 36(1)(c) was too vague and lacking in standards to permit a claim for judicial enforcement. However, guidance as to what "essential public services" represent and include can be drawn from international law. International law plays an important role in the development and interpretation of domestic Canadian law, including both legislation and constitutional instruments. The presumption of conformity requires decision-makers to interpret domestic laws in a manner that respects Canada's international legal obligations.[46] The Supreme Court of Canada recently stated that

> [I]n interpreting the *Charter*, the Court "has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other": para. 55 and this Court reaffirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at para. 23, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".[47]

Canada initially resisted recognition of the human right to water and sanitation in international law. However, this changed in 2013 when Canada joined the consensus on a 2013 UN General Assembly resolution ("2013 GA resolution") reaffirming the human right to safe drinking water and sanitation. This resolution enjoyed extraordinary support: it was co-sponsored by 90

and organizations. The Committee also "urge[d] [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."

46 See Gilbert Van Ert, *Using International Law in Canadian Courts*, 2nd ed (Toronto: Irwin Law, 2008) and Armand de Mestral & Evan Fox-Decent, "Implementation and Reception: The Congeniality of Canada's Legal Order to International Law" in Oonagh Fitzgerald, ed, *The Globalized Rule of Law: Relationships between International and Domestic* Law (Toronto: Irwin Law, 2006) at 31.

47 *Saskatchewan Federation of Labour* v *Saskatchewan*, 2015 SCC 4 at para 86, 1 SCR 245.

countries and was passed by all without abstentions. The resolution states that the right to safe water and sanitation is derived from the right to an adequate standard of living and is inextricably linked to "the right to the highest attainable standard of physical and mental health, as well as to the right to life and human dignity."[48] Thus, while the human right to water and sanitation is drawn normatively from human rights to life (protected by the *ICCPR*) and to an adequate standard of living and health (protected by the *ICESCR)*, it is now seen as an independent human right. As such, the issue shifts from a focus on political aspirations to legal accountabilities. The 2013 GA resolution was complemented by an even more detailed resolution of the UN Human Rights Council in 2014.[49] Both resolutions delineate the scope of the right, with the HRC stating that everyone is entitled "without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use and to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity."[50] Catarina de Albuquerque, the UN Special Rapporteur on the human right to safe drinking water and sanitation, has asserted that "toilets must be hygienic to use and to maintain, and waste matter must be safely contained, transported, treated and disposed of or recycled."[51]

Many First Nations communities in Canada contend with poor source water protection, poor water and sanitation infrastructure, serious water quality problems, weak water quality testing, various accessibility issues, high rates of waterborne disease, and interference with their spiritual and cultural connections to water.[52] It would not be difficult to establish that the water and san-

48 UN GA Resolution Adopted by the General Assembly on 18 December 2013 "The Human Right to Safe Drinking Water and Sanitation" 68/157 <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/157>.

49 General Assembly, *The human right to safe drinking water and sanitation,* UNGAOR, 68th Sess, A/RES/68/157 (2013), online: <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/157> and Human Rights Council, *The human right to safe drinking water and sanitation,* UNHRCOR, 27th Sess, UN Doc A/HRC/27/L.11/Rev.1, (2014) online: <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/27/L.11/Rev.1> [Human Rights Council resolution]. I described the law and other developments reviewed in this paragraph in much more detail in a separate article, *supra* note 4.

50 Human Rights Council resolution, *ibid.*

51 Catarina de Albuquerque, UN Special Rapporteur on the human right to safe drinking water and sanitation, *Realising the human rights to water and sanitation: A Handbook* (2014) in Chapter 4 "Planning processes, service providers, service levels and settlements" at 19, online: <http://www.righttowater.info/handbook/> [Realising the human rights].

52 See a fuller analysis in Busby, *supra* note 4.

itation services on many reserves fail to meet the criteria established by these resolutions.

When international law recognizes an interest as a "human right," states immediately have the well-established substantive obligations to respect, protect and fulfil the right in a manner that respects core principles of participation, accountability and transparency, non-discrimination, progressive realization, and effective remedies. In other words, international human rights law is both detailed and action-oriented. International law authorities have already fleshed out these obligations and principles both generally and specifically on the issue of water and sanitation.[53] There is no merit to an argument that "essential public services" is too vague a concept for enforcement.

As I have more fully examined elsewhere,[54] Canada has failed to meet the substantive obligations to respect, protect, and fulfil emanating from international law when it comes to water and sanitation on reserves. The same or a similar claim can be made pursuant to section 36(1)(c) of the *Constitution Act, 1982*. The text, context, historic circumstances, and assertions by Canada before UN treaty bodies support the proposition that section 36(1)(c) is not merely aspirational but rather contains a substantive right to "essential services of reasonable quality for all Canadians." Nothing in Canadian constitutional jurisprudence or the text of the *Constitution Act 1982* supports limiting claims for enforcement of section 36(1)(c) to governments themselves. By any measure, access to safe drinking water and sanitation is an "essential public service." People living on First Nations reserves with inadequate water and sanitation cannot be said to have been provided with "services of reasonable quality." International human rights law recognizes that water and sanitation are essential public services. Canada has been an active participant for the last decade on discussions on the scope and normative content of the right to water and sanitation. And now that Canada has joined the consensus recognizing international law norms on the issue, Canadian courts faced with a claim under section 36(1)(c) should have readily available standards by which to judge the adequacy of the Canadian response.

First Nations organizations have had little success in getting the federal government to move on improving the state of water and sanitation systems in the communities they represent. Given the recent change in government,

53 See e.g. UN Committee on Social, Economic and Cultural Rights, *General Comment No. 15: The Right to Water* (Arts 11, 12 of the Covenant) 20 January 2003, E/C.12/2002/11, online: <http://www.refworld.org/docid/4538838d11.html> and Realising the human rights, *supra* note 50.

54 See Busby, *supra* notes 4 and 8.

these organizations may now have more success.[55] One strategy they may want to pursue, however, is litigation asserting the constitutional right to "essential services of reasonable quality". As I demonstrate in this paper, the sum of obstacles to such an action-- the purported aspirational nature of the section, the novel privity argument made by one court and the assertion that standards are too vague-- can be overcome. More research is necessary on issues related to justiciability, standing, adjudication venues, and remedies before a conclusion can be reached on the likelihood of success of such an action.

55 During the 2015 federal election campaign, now-Prime Minister Justin Trudeau, promised to eliminate all boil-water advisories within five years; and to conduct a full review of legislation relating to Aboriginal Peoples. See The Canadian Press, "Justin Trudeau vows to end First Nations reserve boil-water advisories within 5 years", CBC News (5 October 2015) online: <http://www.cbc.ca/news/politics/canada-election-2015-justin-trudeau-first-nations-boil-water-advisories-1.3258058> and Justin Trudeau, Remarks delivered at the AGM of the Assembly of First Nations, 7 July 2015. Online: <https://www.liberal.ca/realchange/justin-trudeau-at-the-assembly-of-first-nations-36th-annual-general-assembly/>.