

**Canadian Institute of Resources Law
Institut canadien du droit des ressources**

**Defining Aboriginal Rights to Water
in Alberta: Do They Still “Exist”?
How Extensive are They?**

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Executive Summary

This report explores some fundamental questions in relation to the water rights of Aboriginal peoples in Alberta. Aboriginal peoples have long asserted that water is essential to life. They view water as the lifeblood of the earth. The perceived threat to the health and integrity of river systems is a threat to their own integrity and survival. They share growing concerns over the future of water supplies in Alberta with non-Aboriginal peoples. They affirm that they have fundamental rights with respect to water, along with responsibilities to ensure that the integrity of waters is protected, responsibilities which they want to share with government and all water users.

There is uncertainty concerning the nature and extent of Aboriginal rights to water, both on reserve and off-reserve. The report addresses only some of the questions that arise in connection with this subject, namely the origin, nature and scope of the rights. The main question that we seek to answer is whether Aboriginal peoples in Alberta can claim rights to water, and if so, what is the status of these rights by comparison with other provincially recognized water rights.

To begin with, we trace the origin of the Aboriginal rights to water. Do Aboriginal title and Aboriginal rights, which are typically described in relation to “land”, include rights to water? If so, what is the nature and scope of these rights?

We then examine the impact of the 19th century Alberta treaties on these rights. Have Aboriginal rights to water been ceded or surrendered by treaty? Have they been reserved? Have they been modified? What is the nature and what is the scope of these rights? We suggest that the treaties did not extinguish Aboriginal rights to water, which were essential to the common intention of the parties to maintain the way of life and livelihood of the First Nations.

Next, we discuss the impact of federal water legislation, namely *The North-west Irrigation Act (NWIA)* of 1894, on Aboriginal and treaty water rights. Were existing Aboriginal or treaty water rights extinguished by federal legislation? We suggest that the Act shows no clear and plain intention to abrogate or derogate from these rights, and that the *NWIA* in fact offers protection to existing water rights such as those of the treaty signatories.

Finally, we address the implications of the 1930 *Natural Resources Transfer Agreement (NRTA)* on the water rights of Aboriginal peoples. We argue that the transfer of control and ownership of water resources confirmed by the 1938 amendment to the *NRTA* did not abrogate existing Aboriginal or treaty rights to water. The intention of the federal government was to preserve and protect the existing rights and interests of First Nations, consistent with Crown obligations under the treaties.

We conclude that the constitutional protection of Aboriginal and treaty rights in 1982 signals that these rights are paramount. It would be prudent for the provincial government to review its water legislation scheme in light of the water rights asserted by First Nations.

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This report explores some fundamental questions in relation to the rights of Aboriginal peoples in Alberta with respect to water. As noted in a recent paper, “although Aboriginal law in Canada has seen a rapid period of development, very little consideration, academic or judicial, has been given to the unique issues of Aboriginal water rights”.¹ While there is widespread recognition that Aboriginal peoples in Alberta do hold certain water-based rights, the extent of their water rights remains uncertain.² Provincial water legislation does not make any mention of the rights of Aboriginal peoples with respect to water. And most legal analyses of water rights do not even refer to them.³ A curious disconnect exists between the assertion of Aboriginal and Treaty rights in Canadian jurisprudence, and the extent to which they are ignored in provincial debates about the future of water resources and their allocation.⁴ At a time when the

¹ Christina Smith, *Aboriginal Water Rights: Paramountcy, Priority & Prior Informed Consent* (December 2007) [unpublished, archived at University of Calgary Faculty of Law]. The most comprehensive analysis of Aboriginal water rights dates back to 1988: Richard Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary: Canadian Institute of Resources Law, 1988); see also Nigel Bankes, “Water Law Reform in Alberta: Paying Obeisance to the ‘Lords of Yesterday’, or Creating a Water Charter for the Future?” (Winter 1995) 49 *Resources* 1-8; Vivienne Beisel, “*Do Not Take Them From Myself and My Children Forever*”: *Aboriginal Water Rights in Treaty 7 Territories and the Duty to Consult* (Masters of Laws Thesis, University of Saskatchewan, 2008); Kate Kempton, *Bridge over Troubled Waters: Canadian Law on Aboriginal and Treaty “Water” Rights, and the Great Lakes Annex* (Toronto: Olthuis Kleeer Townshend, April 2005), online: <http://www.thewaterhole.ca/sites/thewaterhole.ca/files/pdf/aboriginal_water_rights_and_annex_paper_final.pdf>; Kenichi Matsui, *Native Peoples and Water Rights: Irrigation, Dams, and the Law in Western Canada* (Montreal: McGill-Queen’s University Press, 2009) 243 p.; Merrell-Ann S. Phare, *Denying the Source — The Crisis of First Nations Water Rights* (Surrey: Rocky Mountain Books, 2009); Kristy Pozniak, “Indian Reserved Water Rights: Should Canadian Courts ‘Nod Approval’ to the *Winters* Doctrine and What are the Implications for Saskatchewan if they Do?” (2006) 69 *Sask. L. Rev.* 251; Graham Statt, “Tapping into Water Rights: An Exploration of Native Entitlement in the Treaty 8 Area of Northern Alberta” (2003) *C.J.L.S.* 103; Ardith Walkem, “The Land is Dry: Indigenous Peoples, Water, and Environmental Justice” in Karen Bakker, ed., *Eau Canada — The Future of Canada’s Water* (Vancouver: UBC Press, 2007) 303.

² Water rights are defined as rights to use the water. “Water rights are usually attached (“appurtenant”) to land and are passed along with title to the land”: see Randy Christensen & Anastasia M. Lintner, “Trading Our Common Heritage? The Debate Over Water Rights Transfers in Canada” in Bakker, *ibid.* at 220.

³ E.g. David Percy, “Seventy-Five Years of Alberta Water Law: Maturity, Demise and Rebirth” (1996-1997) 35 *Alta L. Rev.* 221; Randall W. Block & Joel Forrest, “A Gathering Storm: Water Conflict in Alberta” (2005-2006) 43 *Alta. L. Rev.* 31.

⁴ The Government of Alberta’s much touted *Water for Life: Alberta’s Strategy for Sustainability* (November 2003) makes no mention of Aboriginal rights to water, nor does *Water for Life: A Renewal* (2008), online: <<http://www.waterforlife.alberta.ca/>>. Similarly, the current debate around a revision of the

world at large is becoming increasingly aware of possible future water shortages, and Alberta, faced with growing concerns about water scarcity and water allocation, is reviewing its water allocation and management regime, it is essential for all concerned to be fully aware of all existing and asserted legal rights to water resources.

The purpose of this report is to summarize the state of knowledge with respect to the water rights of Aboriginal peoples in Alberta and to identify outstanding issues. The report addresses only some of the questions that arise in connection with this subject, namely the origin, nature and scope of the rights. A full analysis of Aboriginal water rights would necessitate an examination of the constitutional jurisdiction with respect to Aboriginal water rights, and of their constitutional status, including their potential infringement and the need for accommodation of these rights. These questions are left aside for now. The main question this report seeks to answer is whether Aboriginal peoples in Alberta can claim rights to water, and if so, what is the status of these rights by comparison with other provincially recognized water rights.

Part 1 identifies the origin of the Aboriginal rights to water. Do Aboriginal title and Aboriginal rights include rights to water? What is the nature and scope of these rights? *Part 2* examines the impact of the 19th century Alberta treaties on these rights. Have Aboriginal rights to water been ceded or surrendered? Have they been reserved? Have they been modified? What is the nature and what is the scope of these rights? *Part 3* addresses the impact of federal water legislation, namely *The North-west Irrigation Act (NWIA)* of 1894, on Aboriginal and treaty rights. Were existing Aboriginal or treaty water rights extinguished by federal legislation? *Part 4* examines the implication of the 1930 *Natural Resources Transfer Agreement (NRTA)* on the water rights of Aboriginal peoples. *Part 5* concludes with some thoughts on the critical need to involve Aboriginal peoples in the search for solutions to our water challenges.

1.0. Tracing the Origin of the Rights to Water: Aboriginal Title and Aboriginal Rights

It is now well established that Aboriginal peoples had title to the territories they occupied when the British Crown asserted sovereignty over what is now Canada. As first stated in the *Calder*⁵ case and confirmed in *Delgamuukw*,⁶ Aboriginal title does not depend on treaty, executive order or legislative enactment. It finds its source in the prior occupation of the lands by Aboriginal peoples. Aboriginal title was recognized by the *Royal*

provincial water management and allocation regime avoids any reference to their potential existence or to the need to address Aboriginal claims to water.

⁵ *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 [*Calder*].

⁶ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*].

Proclamation of 1763, and acknowledged by the Dominion of Canada's policy of extinguishing the Indian title prior to granting lands to third parties. In *Delgamuukw*, Justice Lamer summed up the developments on the doctrine on Aboriginal title as follows:

It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation, 1763*: see *St. Catherine's Milling*. However, it is now clear that although recognized by the *Proclamation*, it arises from prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation which derives from the common law principle that occupation is proof of possession in law ... a second source for aboriginal title — the relationship between common law and pre-existing systems of aboriginal law.⁷

Aboriginal title is one manifestation of the broader category of Aboriginal rights. In *Van der Peet*, the Supreme Court defined it as a “sub-category of Aboriginal rights which deals solely with claims of rights to land” and went on to state that “Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of Aboriginal peoples on that land.”⁸ In *Adams*, the Supreme Court confirmed that Aboriginal rights exist independently of a claim to Aboriginal title and explained that this is so “because some aboriginal peoples were nomadic, varying the location of their settlements with the season and changing circumstances”, but nevertheless relying on the land.⁹ In *Delgamuukw*, Justice Lamer expanded on his previous analysis of Aboriginal rights and Aboriginal title in *Adams* and stated that Aboriginal rights fall along a spectrum with respect to their degree of connection with the land. At one end of the spectrum, are Aboriginal rights which are practices, customs, and traditions that are integral to the distinctive culture of the Aboriginal people claiming the rights. In the middle, are site-specific rights to engage in activities on a particular tract of land to which Aboriginal peoples may not have title. At the other end, is Aboriginal title which confers the right to the land itself.¹⁰

The discussion of Aboriginal title and Aboriginal rights is typically in relation to ‘land’. Do the rights to ‘land’ also include rights to waters and to the shores and beds of water bodies? Are they limited to traditional uses of water? This is the subject of the following sections.

⁷ *Ibid.* at para. 114.

⁸ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 74 [*Van der Peet*].

⁹ *R. v. Adams*, [1996] 3 S.C.R. 101 at paras. 26-27 [*Adams*].

¹⁰ *Delgamuukw*, *supra* note 6 at para. 138.

1.1. Aboriginal Title: The Nature and Scope of the Right to Water

In English common law, water bodies are held to be a form of land and land has been defined as “every species of ground, soil or earth, whatsoever, as meadows, pastures, woods, moors, waters, marshes, furze and heath”.¹¹ In *Reference re Ontario Fisheries* (1895), Ontario argued that ‘lands’ transferred to the province pursuant to section 109 of the Constitution “means as much land covered by water as land not covered by water.”¹² It is worth recalling that it is through the heading ‘lands’ in section 109 of the *Constitution Act, 1867* that the original provinces of confederation claim ownership over water, and that provincial jurisdiction over water arises from the provinces’ legislative powers over the management and sale of public ‘lands’ in subsection 92(5) of the Constitution.

In English riparian doctrine, there is a presumption that riparian owners own the bed of non-tidal rivers and streams to the centre thread or channel: *ad medium filum aquae*.¹³ For tidal waters, ownership extends only to the high-water mark. However at common law, water itself could not be the subject of ownership. Water courses were public resources. Even though they did not own the “corpus” of water, riparian owners were entitled to receive the flow of water to their property substantially undiminished in quantity and unimpaired in quality.¹⁴ Riparianism was grounded firmly in the principle of shared use of water as a common resource.

It is noteworthy that ground water was governed by different principles. A landowner was “entitled to appropriate ground water that percolated beneath the land in undefined channels without any regard for the effect of this action on a neighbour”.¹⁵ Thus, landowners whose water supply was reduced or eliminated as a result of water withdrawals by an adjoining neighbour (e.g. draining a well) had no legal remedy.

In western Canada, in the late 19th century, water rights legislation replaced the common law of riparian rights with a legislated priority system. *The North-west*

¹¹ Earl Jowitt, *The Dictionary of English Law* (London: Street & Maxwell, 1959) at 1053.

¹² *Reference re Ontario Fisheries* (1895), 26 S.C.R. 444 at 492. Section 109 of *The Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, states: “All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.”

¹³ Bartlett, *supra* note 1 at 82.

¹⁴ Alastair Lucas, *Security of Title in Canadian Water Rights* (Calgary: Canadian Institute of Resources Law, 1990) at 6.

¹⁵ Lucas, *ibid.* at 8-11; David R. Percy, *The Regulation of Ground Water in Alberta* (Calgary: Alberta Environmental Research Trust, 1987) at 1-2 [Percy, *Regulation of Ground Water*].

Irrigation Act (NWIA) vested the ownership in, and authority to allocate, water to the Crown.¹⁶ With the Crown's assertion of ownership in and control over surface waters, the question of whether the Dominion's (and later provincial) assertion of property in and rights to the use of waters can be reconciled with a potential Aboriginal prior interest in water arises. Does Aboriginal title encompass both land and water? what is the nature and scope of that right? what is the Aboriginal perspective on the issue? what have Canadian courts said in that respect?

Aboriginal peoples view water resources as being an intrinsic part of their 'land'. As underlined by the RCAP, for Aboriginal peoples, land has a broad meaning: "Land means not just the surface of the land, but the subsurface, as well as the rivers, lakes (and in winter, ice), shorelines, the marine environment and the air."¹⁷ In Richard Bartlett's opinion: "A right to water is accordingly an integral part of aboriginal title. It includes and does not distinguish between land and water. Both were central to traditional aboriginal life".¹⁸ Ardith Walkem is of the same view: "A right to, and in, water itself is included as part of Aboriginal title. Oceans, lakes, rivers, streams, wetlands, ice, and permafrost are all included as part of Aboriginal title territories".¹⁹

It is worth emphasizing however that even though the issue of *ownership* of lands and waters is preeminent from a western law perspective, western concepts of property differ markedly from Aboriginal worldviews and traditions. The RCAP notes that "in no case were lands or resources considered a commodity that could be alienated to exclusive private possession. ... In general the bundle of rights included use by the group itself, the right to include or exclude others (by determining membership), and the right to permit others to use land and resources."²⁰

You must recognize that although we exercised dominion over these lands prior to the coming of the foreigners, our values and beliefs emphasized stewardship, sharing and conservation of resources, as opposed to foreign values of ownership, exclusion and domination over nature.²¹

This implies jurisdiction, in addition to rights of use, over lands and waters. From an Aboriginal standpoint, the concept of "property" or "title" implies the right to control

¹⁶ See Part 3 of this report for an analysis of *The North-west Irrigation Act* of 1894 and its impact on existing Aboriginal rights to water, including title.

¹⁷ Royal Commission on Aboriginal Peoples, "Volume 2(1): Restructuring the Relationship" in *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) at 448 [RCAP Report].

¹⁸ Bartlett, *supra* note 1 at 7.

¹⁹ Walkem, *supra* note 1 at 306.

²⁰ RCAP Report, *supra* note 17 at 458.

²¹ Quotation from Chief George Desjarlais, West Moberly First Nation, 20 November 1992, RCAP Report, *supra* note 17 at 457.

access to, and the use of, lands and resources, including waters. But it also and most importantly conveys a sense of stewardship of the earth and a set of responsibilities and obligations with respect to lands and resources. What is key to Aboriginal tenure systems is the acceptance of obligations that go with the rights.

In the Aboriginal worldview, water is the giver of life, it is a “sacred trust”.²² Merrell-Ann Phare states that indigenous water rights flow from connection to traditional territories and responsibilities from Creator:

These gifts from the Creator come with significant responsibilities. ... The animus and interconnectedness of all things on earth are fundamental principles that require humans to engage in respectful relationships with all beings. Indigenous People indicate that this stewardship responsibility is the primary characteristic of their relationship to the earth.²³

Aboriginal water rights include inherent responsibilities to protect and use water, and to make decisions regarding waters, based upon indigenous laws. What matters to Aboriginal peoples is not to be considered exclusive owners of waters, but to exercise governance powers and stewardship of water resources.²⁴

However, in the face of governments’ assertion of property in and exclusive rights to water, and their insistence that First Nations’ pre-existing rights have been extinguished or surrendered, First Nations have sought to assert title to the waters and to the beds and shores of water bodies. In *Adams*, the Mohawks claimed that their right to fish was based on either their aboriginal title to the lands in the fishing area, or on a free-standing aboriginal right to fish.²⁵ In the recent *Ahousaht* case in British Columbia, the Nuu-chah-nulth claimed Aboriginal title to their fishing territories, including “the rivers, foreshore areas (not the upland), and bodies of water below the low water mark and extending 100 nautical miles seaward.”²⁶ Several of the modern comprehensive land claim settlements negotiated in northern Canada protect title to waterbeds and marine areas, which form

²² Keepers of the Water Declaration, 7 September 2006: “As a sacred trust we have been given responsibility from the Creator to ensure the integrity of all waters in our lands in all its many forms — from the aquifers deep underground, to the rich marshlands, rivers and lakes that connect and sustain our communities, to the glaciers on the high mountains, to the rains and snow that restore and replenish our Mother Earth in an unending cycle of renewal.” Online: <<http://www.keepersofthewater.ca>>.

²³ Phare, *supra* note 1 at 71-72.

²⁴ See also Christensen & Lintner, *supra* note 2 at 221: “Aboriginal custom did not create private rights to water [...]; rather it sought to ensure that all forms of water usage recognizes and respected one’s spiritual connection with water.”

²⁵ *Adams*, *supra* note 9.

²⁶ *Ahousaht Indian Band and Nation v. Canada (A.G.)*, 2009 BCSC 1494 at para. 495 [*Ahousaht*].

part of the settlement lands.²⁷ The Haida, which have been negotiating their comprehensive land claim in British Columbia since 1993, are claiming title to all of Haida Gwaii (the Queen Charlotte Islands), including the deep sea and ocean bed surrounding the islands.²⁸

Canadian courts have not dealt squarely with the issue of Aboriginal title to water. In the two cases cited above (*Adams* and *Ahousaht*), the courts declined to deal with the Aboriginal title issue, preferring to find that the First Nations had established an aboriginal fishing right which, in the *Ahousaht* case, included both the right to fish and to sell fish. However, we can draw some implications from the courts' characterization of Aboriginal title.

In *Calder*, Justice Hall of the Supreme Court described Aboriginal title as “a right to occupy the lands and enjoy the fruits of the soil, the forests, and of the rivers and streams”.²⁹ In *Delgamuukw*, Justice Lamer described Aboriginal title as a *right in land*, not only a usufructuary right to use the land for a variety of activities, which encompasses “the right to exclusive use, occupation and possession of the land held pursuant to that title for a variety of purposes”.³⁰ In an earlier case, Justice McLachlin dissenting on another point had described the Aboriginal interests recognized by the common law as “interests in the land and waters” and went on to state that:

... the interests which aboriginal peoples had in using the *land and adjacent waters* for their sustenance were to be removed only by solemn treaty with due compensation to the people and its descendants. This right to use *the land and adjacent waters* as the people had traditionally done for its sustenance may be seen as a fundamental Aboriginal right. It is supported by the common law and by the history of this country. It may safely be said to be enshrined in s. 35(1) of the *Constitution Act, 1982*.³¹ (emphasis added)

Aboriginal title confers the right to choose what uses Aboriginal title holders can make of their title lands. While it was unclear until 1997 whether or not those uses were limited to historic and traditional uses,³² *Delgamuukw* established that Aboriginal title is

²⁷ *RCAP Report*, *supra* note 17 at 723-732. These include for instance the Inuvialuit Final Agreement, the Nunavut Final Agreement, the Yukon Umbrella Final Agreement, the Sahtu Dene and Métis Comprehensive Land Claim Agreement and the Gwich'in Comprehensive Land Claim Agreement.

²⁸ Walkem, *supra* note 1 at 307.

²⁹ *Calder*, *supra* note 5 at 174.

³⁰ *Delgamuukw*, *supra* note 6 at paras. 111 and 117.

³¹ *Van der Peet*, *supra* note 8 at paras. 269 and 275.

³² In 1988, Bartlett suggested that “water rights derived from aboriginal title may be limited to historic and traditional uses”: *supra* note 1 at 8. His analysis was based on the 1985 *Bear Island* case (*Attorney General for Ontario v. Bear Island Foundation*, [1985] 1 C.N.L.R. 1 (Ont. S.C.)), and the comments of La Forest in his 1973 treatise, *Water Law in Canada — The Atlantic Provinces* (Ottawa: Information Canada, 1973), as well as on his examination of US jurisprudence. Nevertheless, Bartlett was careful to emphasize

not restricted to traditional customs and practices.³³ The land uses, however, are subject to an inherent limit: these uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples. Justice Lamer observed that “the land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value.”³⁴ Brian Slattery sums up Chief Justice Lamer’s description of Aboriginal title in the *Delgamuukw* decision as follows:

... aboriginal title is a *sui generis* right that gives Indigenous peoples the right to use the land for a broad range of purposes. These purposes need not be aspects of traditional customs and practices, so long as they are not irreconcilable with the nature of the group’s basic attachment to the land.³⁵

Insofar as water is considered an integral part of land, then Aboriginal title gives Aboriginal peoples the right to exclusive use, occupation and possession of the lands submerged by water and entitles them to make use of the waters for a wide variety of purposes not restricted to traditional occupations. They can use the waters for traditional purposes (including fishing, hunting, gathering, domestic or household uses, transportation, spiritual, cultural and ceremonial practices) as well as for modern uses, such as hydro-electric development, large-scale irrigation or other commercial purposes. Chief Justice Lamer clearly stated that Aboriginal title, “unlike the aboriginal right to fish for food, has an inescapable economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put.”³⁶

Most importantly, since Aboriginal title conveys the right to make decisions with respect to the use and management of the ‘land’, Aboriginal peoples should be entitled to make water and land use decisions on their Aboriginal title lands, according to their own laws and traditions.

1.2. Aboriginal Rights: The Nature and Scope of the Rights to Water

As stated earlier, Aboriginal rights exist independently of the existence of Aboriginal title. Aboriginal rights confer the right to engage in site-specific activities on a tract of land to which Aboriginal people may not have title. Consequently, Aboriginal peoples may have Aboriginal rights to water, even if they cannot prove Aboriginal title to water.

the tentative nature of that conclusion, in light of the findings of Chief Justice Dickson in *Guerin* that a description of Aboriginal title was “potentially misleading”: *Guerin v. R.*, [1984] 2 S.C.R. 335 [*Guerin*].

³³ *Delgamuukw*, *supra* note 6 at 1083-1084.

³⁴ *Ibid.* at 1089-1090.

³⁵ Brian Slattery, “The Metamorphosis of Aboriginal Title” (2007) 85 Can. Bar Rev. 286.

³⁶ *Delgamuukw*, *supra* note 6 at 1113.

The nature and scope of Aboriginal rights to water are more limited than is the case with Aboriginal title, since Aboriginal rights are characterized as being founded on actual practices, customs or traditions of the group claiming the rights, practices that were ‘integral to the distinctive culture’ of the group. In addition, land or water-based Aboriginal rights are site-specific. Nevertheless, as outlined in the following paragraphs, they include a wide array of activities or practices. In addition to harvesting activities, all of which, as noted by the Supreme Court, “are land and water based”,³⁷ Aboriginal rights to water include rights to travel and navigation, rights to use water for domestic uses such as drinking, washing, tanning hides and watering stock, as well as rights to use water for spiritual, ceremonial, cultural or recreational purposes.

In *Sappier and Gray*, a case dealing with a right to harvest wood, the Supreme Court clarified that ‘integral to a distinctive culture’ included those practices undertaken for survival purposes. Justice Bastarache found “that the jurisprudence weighs in favour of protecting the traditional means of survival of an [A]boriginal community.”³⁸ The Court defined the way of life of the Maliseet and of the Mi’kmaq during the pre-contact period as “that of a migratory people who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation”, and acknowledged that the harvesting of wood for uses such as shelter, transportation, tools and fuel was directly associated with that particular way of life. The Court characterized the claimed right as “a right to harvest wood for domestic uses as a member of an [A]boriginal community.”³⁹

It follows that the uses of water directly associated with the particular way of life of an Aboriginal community and necessary for its survival are protected as Aboriginal rights. The uses of water that are vital to the life of an Aboriginal community are quite extensive. Walkem notes that “many activities protected as Aboriginal rights (including fishing, hunting, gathering, and spiritual practices) are closely tied to waters and rely upon a continuing supply of clean water”.⁴⁰ Statt states that “the procurement of water and water resources was more than simply useful to the subsistence of Native culture in the treaty 8 area of northern Alberta. It was vital to the spiritual, cultural and physical sustainability of these groups.”⁴¹

The harvesting activity most obviously associated with water is the Aboriginal right to fish. The Supreme Court has acknowledged the significance of the right to fish of Aboriginal peoples in several key cases. For instance, Justice Lamer stated in *Adams*:

³⁷ *R. v. Sappier and Polchies*, [2004] 4 C.N.L.R. 252 at para. 50 [*Sappier*]; cited with approval by Justice Bastarache for the majority in *Sappier*; *R. v. Gray*, [2006] 2 S.C.R. 686 at para. 51 [*Gray*].

³⁸ *Ibid.* at para. 37.

³⁹ *Ibid.* at para. 24.

⁴⁰ Walkem, *supra* note 1 at 307.

⁴¹ Statt, *supra* note 1 at 104.

... fishing for food in the St. Lawrence River and, in particular, in Lake St. Francis, was a significant part of the life of the Mohawks from a time dating from at least 1603 and the arrival of Samuel de Champlain into the area. The fish ... were an important and significant source of subsistence for the Mohawks.⁴²

However, the scope of the Aboriginal right to fish extends beyond fishing strictly for food. In *Sparrow*, the SCC established the existence of the Aboriginal right to fish of the Musqueam Indian Band and determined the scope of that right. Based on the central significance of the salmon fishery for the Musqueam's culture, the court characterized their right as a right to fish for food, social and ceremonial purposes.⁴³ In certain circumstances, the right to fish may also include a right to sell or trade the resource on a commercial basis. In *Gladstone*, Justice Lamer recognized that the Heiltsuk Nation had an Aboriginal right to trade herring spawn-on-kelp on a commercial basis.⁴⁴ In the *Ahousaht* case, the court found that "the plaintiffs had established aboriginal rights to fish for any species of fish within the environs of their territories and to sell that fish", adding that "the right is not an unlimited right to fish on an industrial scale, but it does encompass a right to sell fish in the commercial marketplace".⁴⁵

Fishing is intrinsically linked to the right to access and use waterways in a particular location, and to the continued existence of fish in water bodies. The construction of structures over or in the water that would negatively impact domestic uses of water by Aboriginal peoples in a particular location may be opposed on these grounds. In *Saanichton Marina*, the British Columbia Court of Appeal found that the construction of a marina could not be allowed as it would disturb the eel grass necessary to sustain the crab fishery of the Tsawout people.⁴⁶ The court stated:

[w]hile the right does not amount to a proprietary interest in the sea bed It does protect the Indians against infringement of their right to carry on the fishery, as they have done for centuries.⁴⁷

If the traditional means of survival by way of fishing are to be protected against any infringement, the water necessary to sustain the exercise of the aboriginal right must remain suitable for that use. Implicit in the right to fish, trap and hunt is a right to water quantity and quality similar to the common law riparian owners' right to receive water sensibly undiminished in quantity and quality.

⁴² *Adams*, *supra* note 9 at para. 45.

⁴³ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099 [*Sparrow*].

⁴⁴ *R. v. Gladstone*, [1996] 2 S.C.R. 723 [*Gladstone*].

⁴⁵ *Ahousaht*, *supra* note 26 at para. 489.

⁴⁶ *Claxton v. Saanichton Marina Ltd.*, [1988] 1 W.W.R. 540 (B.C.S.C.) *aff'd* [1989] 3 C.N.L.R. 46 (C.A.) [*Saanichton Marina*].

⁴⁷ *Ibid.* at 56. Note that the right at issue in that case was a treaty right, not an Aboriginal right.

There must be continuity between the claimed right and pre-contact practices. However, starting with *Sparrow*, the Supreme Court has rejected the “frozen rights” approach to the definition of Aboriginal rights, explaining that “the phrase ‘existing aboriginal rights’ must be interpreted flexibly so as to permit their evolution over time”.⁴⁸ In *Van der Peet*, the Court stated that “the definition of Aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times”.⁴⁹ In *Marshall/Bernard*, the Court found that a traditional activity (in this case a right to trade) can evolve into a modern activity within limits, and defined logical evolution as “the same sort of activity, carried out in the modern economy by modern means”.⁵⁰ In *Sappier and Gray*, the Court observed that “the cultures of the aboriginal peoples who occupied the lands now forming Canada prior to the arrival of the Europeans, and who did so while living in organized societies with their own distinctive ways of life, cannot be reduced to wigwams, baskets and canoes”.⁵¹

In the *Tsilhqot’in* case, Justice Vickers summed up the Supreme Court doctrine on the evolution of Aboriginal rights as follows:

As such, pre-contact practices can evolve and establish modern Aboriginal rights, provided continuity between the modern right and pre-contact practices is demonstrated. Evolution, in the context of Aboriginal rights, refers to the same sort of activity, carried on in the modern economy by modern means. The practice is allowed to evolve, but the “activity must be essentially the same” ...⁵²

If a First Nation can no longer utilize a certain species of tree or fish on which it traditionally relied as a result of its unavailability or disappearance, it will have to find a substitute species. Applied to fishing, this means that the Aboriginal right to fish is not restricted to fishing a particular species of fish, but extends to available species of fish for livelihood uses. Further, Aboriginal peoples may fish using modern vessels and equipment, and modern means.

2.0. The Impact of the Alberta Treaties on Aboriginal Water Rights

What impact did the treaties signed between the British Crown and Aboriginal peoples have on Aboriginal title and Aboriginal rights to water? In her analysis of the treaties

⁴⁸ *Sparrow*, *supra* note 43 at 1093.

⁴⁹ *Van der Peet*, *supra* note 8 at para. 64.

⁵⁰ *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 at para. 25.

⁵¹ *Sappier and Gray*, *supra* note 37 at para. 49.

⁵² *Tsilhqot’in Nation v. British Columbia*, [2008] 1 C.N.L.R. 112 (B.C.S.C.) at para. 1179.

signed at or near the turn of the 19th century in the Great Lakes area, Kate Kempton notes that the treaties include provisions for the surrender (or reservation) of ground covered by water or of waters themselves, which would indicate that the British Crown recognized that Aboriginal people held title to waterbeds and even to waters.⁵³ Are there similar provisions in the western “numbered” treaties, such as those existing in Alberta?

2.1. The Alberta Numbered Treaties

After the Government of Canada assumed sovereignty over the “Northwest” in 1870, it entered into treaties with the western Indians to maintain peace as it was contemplating settlement and development of the territory. The Alberta treaties include Treaties 6, 7 and 8, as well as small portions of Treaties 4 and 10 (see map of Treaties No. 1-11).⁵⁴ Treaties 6 and 7 were signed in 1876 and 1877 respectively.⁵⁵ They include the central and southern parts of what is now Alberta. The lands encompassed by Treaties 6 and 7 are mostly prairie in the south, and parkland and forest to the north. The two branches of the Saskatchewan River as well as the Milk River flow through these lands. Treaty 8, which encompasses the northern half of Alberta, was signed in 1899 and 1900.⁵⁶ Treaty 8 lies within the boreal forest. It coincides with the southern half of the Mackenzie River basin and is drained by the Athabasca, Peace and Hay Rivers.

2.2. The Spirit and Intent of the Treaties

2.2.1. The Written Terms of the Alberta Treaties

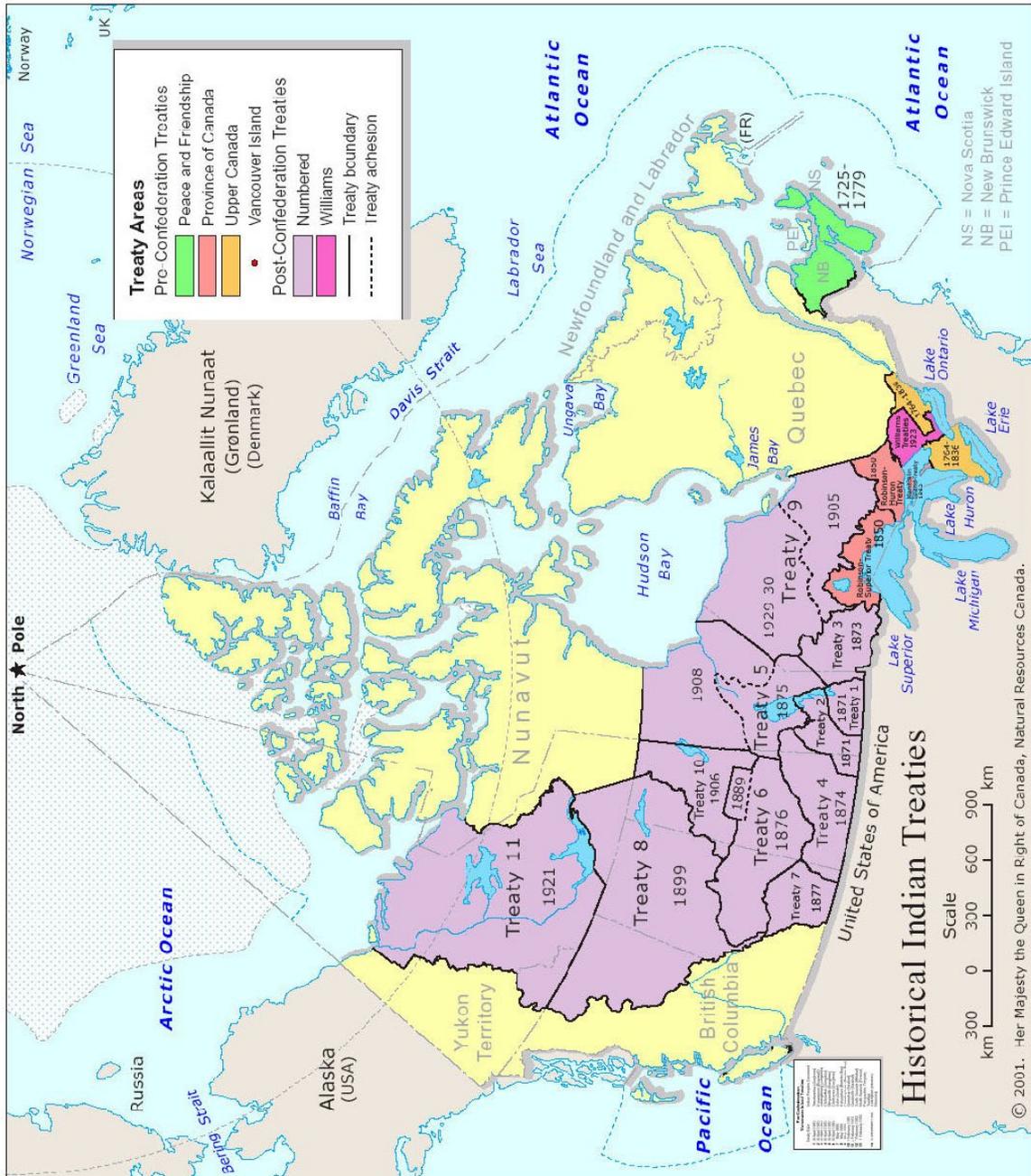
Alberta’s numbered treaties have similar written terms. They all contain a so-called ‘land surrender clause’, in return for various promises made by the Crown with respect to the setting aside of reserve lands, the payment of annuities, education, the provision of cattle, tools and implements “for the encouragement of the practice of agriculture”, etc. The ‘land surrender clause’ reads as follows:

⁵³ Kempton, *supra* note 1 at 53-55.

⁵⁴ The map of Treaties 1-11 shows that Treaties 4 (1874) and 10 (1906-1907) also extend into Alberta.

⁵⁵ *Treaty No. 6, made 9th September 1876 between Her Majesty the Queen and the Plains and Wood Cree Indians and other tribes of Indians at Fort Carlton, Fort Pitt and Battle River* (Ottawa: Queen’s Printer, 1996) [Treaty No. 6]; *Treaty No. 7, made 22nd September 1877 between her Majesty the Queen and the Blackfeet and other Indian Tribes, at the Blackfoot Crossing of the Bow River, Fort Macleod* (Ottawa: Queen’s Printer, 1966) [Treaty No. 7].

⁵⁶ *Treaty No. 8, made 21st June 1899, and Adhesions, Reports, etc.* (Ottawa: Queen’s Printer, 1966) [Treaty No. 8].



Aboriginal Treaties Nos. 1-11

From: http://atlas.nrcan.gc.ca/site/english/maps/reference/national/hist_treaties/referencemap_image_view

... the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and her successors for ever, all their rights, titles and privileges whatsoever to the lands included within the following limits ...⁵⁷

A critical clause in all three treaties is the written promise made to the Indian signatories that they would retain their ‘usual vocations’ or way of life. The treaties vary somewhat in the wording of that clause, reflecting the different ways of life amongst the Aboriginal peoples of the three treaty areas. The Prairie Indians depended on buffalo hunting, while the Woodland Indians depended on forest-dwelling game, including fur-bearing animals and fish.⁵⁸ In the boreal forest of the north, the economy of the Indians consisted of hunting, fishing and gathering with variations to suit local resources.

The ‘usual vocations’ clause in Treaty 6 protects the Indians’ right “to pursue their avocations of hunting and fishing throughout the tract surrendered”, while the clause in Treaty 7 only refers to their “vocations of hunting” and does not mention a right to fish. However, as pointed out by Kent McNeil, “it appears to have been the understanding of the Stoney Indians, at least, that fishing rights were included.”⁵⁹ In Treaty 8, the clause broadly protects the Indians’ “vocations of hunting, trapping and fishing”, recognizing the fact that the Aboriginal peoples living in the north wished to maintain their traditional economic activities and were much less likely to settle on reserves than those living in the prairies.⁶⁰ It reads as follows:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.⁶¹

In addition, all three treaties include provisions for the setting aside of reserve lands and promises that the Crown will supply agricultural tools and cattle to those Bands that are willing to cultivate the soil or raise stock, “for the encouragement of the practice of agriculture among the Indians”.⁶² In the case of Treaty 7, reserves were originally

⁵⁷ *Ibid.*

⁵⁸ John Leonard Taylor, “Canada’s Northwest Indian Policy in the 1870s: Traditional Premises and necessary Innovations” in Richard T. Price, ed., *The Spirit of the Alberta Indian Treaties*, 3d ed. (Edmonton: The University of Alberta Press, 1999) at 3-45.

⁵⁹ Kent McNeil, *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1983) at 9.

⁶⁰ Richard Daniel, “The Spirit and Terms of Treaty 8” in Price, *supra* note 58 at 80.

⁶¹ *Treaty No. 8, supra* note 56.

⁶² *Treaty No. 6* and *Treaty No. 7, supra* note 55. The provision in *Treaty No. 8* reads: “for the encouragement of agriculture and stock raising.”

selected as part of the treaty negotiations and their boundaries are identified in the treaty. Treaty 8 contains a promise to provide ammunition and twine for making nets “for such Bands as prefer to continue hunting and fishing”.

2.2.2. The Rules of Interpretation of Treaties

It is now widely acknowledged that the written text of the treaties does not fully reflect the understanding and commitments of the parties. In *Badger*, the Supreme Court stated that the written documents “recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement”.⁶³ Richard Daniel has observed that “even though the document was apparently read and translated to the Indian people, this was only a small part of the exchange between the parties ...”.⁶⁴ For his part, Brian Slattery has stated that treaties “typically took the form of a spoken exchange of proposals and responses” and that “in most cases, the treaty was the oral agreement, and the written document just a memorial of that agreement, similar in status to the belts used by some Indian parties”.⁶⁵

The Supreme Court has developed principles of interpretation of treaties that demand a fair, large and liberal construction of the treaty terms in favour of the Indians, an interpretation that maintains the honour and integrity of the Crown.⁶⁶ Some of these principles are as follows:

- the words in a treaty must not be interpreted in their strict technical sense, but rather in the sense that Aboriginal peoples would have understood them;⁶⁷
- any ambiguities or doubtful expressions must be resolved in favour of the Indians: a corollary to this principle is that limitations that restrict the rights of the Indians must be narrowly construed;⁶⁸
- the oral promises made at the time of the treaty form part of the treaty;⁶⁹

⁶³ *R. v. Badger*, [1996] 1 S.C.R. 771 at 798 [*Badger*].

⁶⁴ Daniel, *supra* note 60 at 47.

⁶⁵ Brian Slattery, “Making Sense of Aboriginal and Treaty Rights” (July 2000) 79:2 Can. Bar Rev. 208.

⁶⁶ *Simon v. R.*, [1985] 2 S.C.R. 387 [*Simon*]; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Badger*, *supra* note 63 at 794 [*Sioui*].

⁶⁷ *Nowegijick v. R.*, [1983] 1 S.C.R. at 36; *Sioui*, *ibid.* at 1035-1036; *Sparrow*, *supra* note 43 at 1107; *Badger*, *supra* note 63 at 799.

⁶⁸ *Badger*, *ibid.* at 794; *Simon*, *supra* note 66 at 402.

⁶⁹ *Badger*, *ibid.* at 799-800; *R. v. Marshall*, [1999] 3 S.C.R. 456 at 472 [*Marshall*].

- the Aboriginal understanding of the treaties is derived from oral histories and collective memories of the treaties;⁷⁰ and
- the court will choose among possible interpretations of a treaty the one that best reflects the common intention of both parties.⁷¹

2.2.3. The True Spirit and Intent of the Alberta Treaties

What then were the intentions of the parties negotiating the Alberta treaties, and what was the Aboriginal understanding of these treaties, taking into account the oral promises made by the Treaty Commissioners representing the British Queen?

A comprehensive research project on the Aboriginal and government understanding of the spirit and intent of the Alberta treaties was undertaken in the early and mid-1970s by the Indian Association of Alberta. The study involved historical research and extensive interviews with elders. Its results were published in 1979 in the first edition of *The Spirit of the Alberta Indian Treaties*.⁷² The Treaty 7 Tribal Council also undertook a comprehensive review of Treaty 7 in 1991 to determine its original spirit and true intent, based on the understanding of the elders.⁷³ In Saskatchewan, the Office of the Treaty Commissioner has facilitated exploratory treaty discussions between the federal government and the Federation of Saskatchewan Indians (FSIN) to find a common understanding on a number of treaty issues and the implementation of treaty rights.⁷⁴ This initiative is helpful for a proper understanding of the Alberta treaties, because Saskatchewan includes portions of Treaties 4, 5, 6, 8 and 10.⁷⁵

What emerges from these studies is that from an Aboriginal point of view, the treaties were about entering into a familial relationship with the newcomers based on good relations. Treaties were first and foremost Peace Treaties, agreements offering benefits to

⁷⁰ *Badger, ibid.* at 803

⁷¹ *Sioui, supra* note 66 at 1069; *Marshall, supra* note 69 at 514-515. Ascertaining the common intention of the parties has become a key principle of treaty interpretation, as noted by Catherine Bell & Karin Buss, "The Promise of Marshall on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises" (2000) 63 Sask. L. Rev. 667-700.

⁷² Price, *supra* note 58.

⁷³ Treaty 7 Elders and Tribal Council with Walter Hildebrandt, Dorothy First Rider and Sarah Carter, *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen's University Press, 1996).

⁷⁴ In 2007, the Saskatchewan Office of the Treaty Commissioner released a report entitled *Treaty Implementation: Fulfilling the Covenant* (Regina: Office of the Treaty Commissioner, 2007) [*Treaty Implementation*] which provides advice on ways to further the treaty implementation process.

⁷⁵ See also Harold Johnson, *Two Families, Treaties and Government* (Saskatoon: Purich Publishing Ltd., 2007), which speaks to the Aboriginal understanding of Treaty 6.

both sides. On the Aboriginal side, it was an offer to share the fruits of the land, in exchange for specific promises by the British Crown. The elders from all three main treaty regions speak of sharing the land with the newcomers, as opposed to ceding the territory, and of the guarantee of the continuation of a way of life and economic self-sufficiency. As Jean Friesen observes, regardless of the variations in the wording of the ‘usual vocations’ clause of the treaties:

... at treaty time, the Indians heard nothing that would cause them to question their assumption of Indian open access to resources. The European desire for a cheap Indian policy and gradual assimilation meant that the Indians in *all* the treaties heard promises of continued use of resource rights in their old lands.⁷⁶

The government’s intentions and understanding of the treaties vary from those of the Aboriginal signatories. Ray et al. have described the primary objective of Canada in negotiating the numbered treaties as follows:

The Dominion’s main interest in formally making treaty with Indians — to clear what it understood to be ‘Indian title’ to facilitate an agricultural and commercial frontier — is well known.⁷⁷

But in addition to a surrender of Aboriginal title, the Crown’s objectives also included “establishing peaceful relationships with Treaty First Nations, obtaining First Nations’ consent to the settling of their territories by European populations, and ensuring the First Nations would make a transition to the new economy.”⁷⁸ Clearly, the Crown’s intentions were to protect the livelihood rights of the First Nations with whom it was entering into treaty. In every treaty area, the Indians expressed concerns about the loss of their traditional livelihood. The Treaty Commissioners consistently reassured the Indians of the Queen’s intention to protect hunting, fishing and trapping in the ceded territories and to assist them in gaining a livelihood through farming. The written treaty provisions for the setting aside of reserve lands and the provision of agricultural tools and cattle for the pursuit of agriculture, as well as ammunitions and twine for those who preferred hunting and fishing, were understood as reinforcing the Commissioners’ oral promises of a variety of livelihood opportunities.⁷⁹ In the context of Treaty 8, the Supreme Court stated

⁷⁶ Jean Friesen, “Magnificent Gifts: The Treaties of Canada with the Indians of the Northwest 1896-1876” in Price, *supra* note 58 at 211.

⁷⁷ Arthur Ray, Jim Miller & Frank Tough, *Bounty and Benevolence* (Montreal & Kingston: McGill-Queen’s University Press, 2000) at 64.

⁷⁸ *Treaty Implementation, supra* note 74 at 5.

⁷⁹ And indeed, as revealed by Sarah Carter in *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy*, Native and Northern Series #3 (Montreal: McGill-Queen’s University Press, 1993), Plains Indians reserve residents were anxious to farm and expended considerable effort on cultivation: their lack of success was largely due to government policies that undermined their efforts. In the context of Treaty 8, a report by Bennett McCardle and Richard Daniel documented that a few First Nations had diversified their economy by taking up farming and stock raising: see *Development of Farming in Treaty 8*,

in *Badger*: “the promise that their livelihood would not be affected was repeated to all the bands who signed the Treaty” and these promises, which “contemplated a limited interference with Indians’ hunting and fishing practices”, “were to be similar to those made with other Indians who had agreed to a treaty”.⁸⁰

The following statement by Prof. Ray, quoted by Justice Cory in the *Horseman* case, captures the concerns of the government with respect to maintaining the economies of the First Nations entering into treaty:

The commissioners responded by stressing that the government did not want Indians to abandon their traditional economic activities and become wards of the state. ... The government feared that the collapse of these economies would throw a great burden onto the state such as had occurred when the bison economy of the prairies failed.⁸¹

It is on the basis of such promises and stated government’s intentions that the Treaty Commissioners obtained adhesions to the treaties they were negotiating. We must conclude that the common intention of the parties to the Alberta treaties was that the First Nations would remain economically self-sufficient, by entering into a new agricultural way of life (farming and stock raising), and/or by continuing to gain a livelihood from traditional activities such as hunting, trapping and fishing. In either case, attendant water rights were essential to the way of life.

2.3. Were the Aboriginal Rights to Water Ceded or Extinguished by Treaty?

The written text of the treaties in the ‘land surrender clause’ expresses the Crown’s intention to extinguish Aboriginal peoples’ “rights, titles and privileges to the *lands*” included within the treaties. As stated earlier, it is doubtful that the Aboriginal signatories understood this clause in the same way as it is now asserted by the Crown, or agreed to this land cession. With respect to water, the question that arises is whether the land cession clause implies an extinguishment of *Aboriginal title* and *rights* to waters and to the waterbeds? A different situation may exist for off-reserve and on reserve lands.

The test for extinguishment of *Aboriginal rights* before 1982, as stated in *Calder* and confirmed by Chief Justice Dickson and Justice La Forest in *Sparrow*, is “that the Sovereign’s intention must be clear and plain if it is to extinguish an aboriginal right”.⁸²

1899-1940, Research Paper on the Implementation of Treaty 8 (1976) [unpublished, prepared for the Treaty and Aboriginal Rights Research Group of the Indian Association of Alberta].

⁸⁰ *Badger*, *supra* note 63 at 801-802. See also *R. v. Sundown*, [1999] 1 S.C.R. 393 at 398 [*Sundown*].

⁸¹ *R. v. Horseman*, [1990] 1 S.C.R. 901 at 928 [*Horseman*].

⁸² See *Calder*, *supra* note 5. Note that the Court split evenly on the issue of extinguishment. Hall, Spence & Laskin JJ. adopted the reasoning of a US Court in *Lipan Apache Tribe v. United States*, 180 Ct.

Further, the onus lies on the Crown to prove the intent to extinguish the right.⁸³ The “land surrender clause” in the treaties does not manifest a clear and plain intention to extinguish existing Aboriginal rights to *water*. Even though rivers and lakes often served to identify the tracts of lands subject to treaty agreements, the Alberta treaties make virtually no reference to water or water rights. One exception is a clause in Treaty 7 reserving to the Crown “the right to navigate the above mentioned rivers, to land and receive full cargoes on the shores and banks thereof, to build bridges and establish ferries thereon” on rivers within lands set aside as Indian reserves. This clause seems to imply that all other rights and interests in relation to rivers within reserves are left to the First Nations.

The Aboriginal understanding that emerges from interviews with the elders in the above-mentioned studies is that the animals, birds and fish were not surrendered, that the lakes and rivers were not given up. Harold Johnson cites the words of Alexander Morris, who negotiated Treaties 3 to 6: “What I have offered does not take away your living, you will have it then as you have now, and what I offer now is put on top of it. ... We have not come here to deceive you, we have not come here to rob you, we have not come here to take away anything that belongs to you.”⁸⁴ One can surmise that either the transfer of waters and waterbeds was not discussed during the treaties negotiations, or that it was discussed and purposely excluded from the treaty.

The question of whether *Aboriginal title* to water was extinguished by the “land surrender clause” remains unsettled. There has been no judicial consideration of this issue in Canada. There is an argument to be made that Aboriginal title remained unextinguished on reserves set aside pursuant to treaties, notably when reserves were originally selected as part of the treaty negotiations, as is the case with Treaty 7. Further, scholars point to the fact that it was not always assumed in Canada that “lands” include “waters”. At the time when Treaties 6 and 7 were signed, the common law held that “flowing water could not be owned by anyone”.⁸⁵ The concept of water as a public resource corresponds to the Aboriginal understanding of the treaties: the treaties were about sharing the land and its bounties, not ceding the land and the waters. When the federal government transferred lands and resources to the Prairie Provinces under the 1930 *Natural Resources Transfer Agreements (NRTAs)*, it was unclear whether the interest in water had also been transferred to the provinces. It took an amendment to the *NRTAs* in 1938 to clarify that the Crown interest in waters had indeed been transferred along with the interest in lands, although the scope of the water rights transferred is

C1 487 (1967); *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* (1980), 107 D.L.R. (3rd) 513 (F.C.T.D.); *Sparrow*, *supra* note 43 at 1099.

⁸³ *Badger*, *supra* note 63 at para. 41.

⁸⁴ Johnson, *supra* note 75 at 62.

⁸⁵ David Percy, *The Framework of Water Rights Legislation in Canada* (Calgary: Canadian Institute of Resources Law, 1988) at 13 [Percy, *Framework*].

certainly still a matter of debate given outstanding Aboriginal and treaty rights claims.⁸⁶ Vivienne Beisel suggests that title to water, waterbeds and watercourses runs separately from the land, and that “extinguishment of title to water and waterbeds must be clear, express and based on full, free and informed consent”.⁸⁷

As to *Aboriginal rights* to water, the written provisions of the Alberta numbered treaties explicitly affirmed and protected some of the existing water-based Aboriginal rights, such as the rights to fish, hunt and trap. Even though a treaty may not specifically protect fishing rights, the Supreme Court has found that the Aboriginal right to fish was not affected by a surrender of lands. In *Adams*, the Court considered the effect of an 1888 surrender agreement between the Mohawks and the Crown and concluded:

While these events may be adequate to demonstrate a clear and plain intention in the Crown to extinguish any aboriginal title to the lands of the fishing area, neither is sufficient to demonstrate that the Crown had the clear and plain intention of extinguishing the appellant’s aboriginal right to fish for food in the fishing area. ... The surrender of lands, because of the fact that title to land is distinct from the right to fish in the waters adjacent to those lands, equally does not demonstrate a clear and plain intention to extinguish a right. ... There is no evidence to suggest what the parties to the surrender agreement, including the Crown, intended with regards to the right of the Mohawks to fish in the area; absent such evidence the Sparrow test for extinguishment cannot be said to have been met.⁸⁸

We concluded earlier that the common intention of the parties to the treaties was to ensure that the livelihood and way of life of Aboriginal peoples would be protected. Given the fundamental need for water inherent in their way of life, the presumption is that the First Nations reserved their rights to water. Even though they were not expressly written in the treaties, existing *Aboriginal rights* to water, such as the right to travel and navigate, the right to use water for domestic uses and for a livelihood, as well as for spiritual, ceremonial and cultural purposes, were not extinguished. Further, treaties made explicit provisions for the creation of reserves where Aboriginal peoples could settle and earn a livelihood through farming. The treaty provisions promising the supply of agricultural tools and cattle were designed to encourage the transition to a new economy. Given that farming and cattle raising both necessitate access to and the use of water, the presumption is that water rights were appropriated along with reserve lands.

⁸⁶ See Part 4 of this report for a discussion of the Alberta *NRTA* and its impact on Aboriginal and treaty rights.

⁸⁷ Beisel, *supra* note 1 at 119-129.

⁸⁸ *Adams*, *supra* note 9 at para. 49.

2.4. What is the Nature and Scope of the Rights to Water Reserved by Treaties?

We have suggested that the intention of both parties to the Alberta treaties was to protect the livelihood of First Nations. Aboriginal peoples received assurances that they would be able to both pursue their traditional activities of hunting, fishing and trapping, and to engage in stock raising and agriculture, if they so desired. Treaty rights could be exercised on traditional territories as well as on reserves set aside for the needs of Aboriginal peoples. Different water rights attach to the exercise of treaty rights on traditional lands and on Indian reserves.

2.4.1. *On Traditional Territories and on Indian Reserves: Right to a Livelihood*

The Prairie treaties confirmed the Aboriginal right to hunt and fish on the lands transferred by treaty, except on lands that may be “required” or “taken up” by government for purposes such as settlement, mining, lumbering or trading.⁸⁹ As stated in *Simon*, the treaty “constitutes a positive source of protection against infringements on hunting rights.”⁹⁰ Jack Woodward states that “treaties typically guarantee or codify certain rights of an aboriginal people, such as hunting and fishing rights, in exchange for the surrender of other rights, such as title”.⁹¹

But beyond the explicit recognition of the rights to hunt and fish, the common intention of the parties to the treaties was that First Nations would remain economically self-sufficient. The rights to live off the land, to a livelihood, to a culture, expressed in the treaties as rights to hunt, fish and gather, are fundamentally linked to the use of water resources. Water was essential to that way of life. Access to waterways was indispensable for transportation, for domestic and for ceremonial purposes. It was understood that all traditional activities that necessitate access to and use of water resources, be it for food, shelter, transportation, or spiritual purposes, would continue unhindered. In effect, the treaties confirmed existing Aboriginal right to water. In Brian Slattery’s view: “treaty rights throw a protective mantle over Aboriginal rights, providing an additional layer of security. The latter become “treaty-protected” aboriginal rights”⁹²

⁸⁹ For an analysis of the “lands taken up” provisions, see e.g. Shin Imai, “Treaty Lands and Crown Obligations: The ‘Tracts Taken Up’ Provision” (2001) 27 *Queen’s L.J.*; Nigel Bankes, “The Lands Taken Up Provision of the Prairie Treaties” in Henry Epp, ed., *Access Management: Policy to Practice*, Proceedings of the Conference Presented by the Alberta Society of Professional Biologists, Calgary, 18-19 March 2003.

⁹⁰ *Simon*, *supra* note 66 at 401.

⁹¹ Jack Woodward, *Native Law*, Looseleaf (Toronto: Thomson Carswell, 1989) c. 5 at 5§790.

⁹² Slattery, *supra* note 65 at 210.

Thus, regardless of whether or not title to waters and waterbeds was surrendered on traditional territories, the water rights reserved by treaties include the right to use and access water for a wide variety of uses, and the right to rely on the water to sustain fish and wildlife populations and their habitat. These rights include the activities that are “necessarily incidental” to the exercise of the livelihood rights guaranteed by treaty.⁹³ The concept of ‘reasonably incidental’ was developed by the Supreme Court of Canada in *Simon* and defined in *Sundown* as “something which allows the claimant to exercise the right in the manner that his or her ancestors did, taking into account acceptable modern developments or unforeseen alterations in the rights”, including not only activities which are essential or integral, but more broadly “activities which are meaningfully related or linked.”⁹⁴ As noted with respect to Aboriginal rights to water, implicit in the treaty rights to water is the continued ability to exercise the rights. This means that a sufficient quantity and quality of water is available to maintain the exercise of the treaty rights. The scope of the water rights is discussed further in Part 2.5 of this report.

2.4.2. On Reserve Lands

Almost all reserve lands in the Prairie provinces were set apart pursuant to treaty or agreement. On reserve lands, Aboriginal title is owned by the Crown on behalf of the Aboriginal beneficiaries for their use and benefit.⁹⁵ The nature of that interest is very broad. In *Guerin*, the Supreme Court held that the Aboriginal interest in reserve lands and lands held pursuant to Aboriginal title is the same.⁹⁶ In *Delgamuukw*, the Court added that title to reserve lands, rather than being limited to historical Aboriginal practices, is broad and includes the right to use the interest for the “general welfare of the Band”.⁹⁷

Most Indian reserves in Alberta were established along, or encompass, rivers, streams and lakes. Their boundaries were often described as running along rivers and lakes.⁹⁸ Further, many reserve surveys clearly incorporate rivers and lakes. For instance, the Siksika and Tsuu T’ina reserve boundaries pass through and include the Bow and Elbow Rivers respectively, and the Montana First Nation and Samson Cree Nation are surveyed to meet in the centre of the Battle River.⁹⁹ On reserve lands in areas covered by treaty, the

⁹³ Beisel, *supra* note 1 at 131.

⁹⁴ *Sundown*, *supra* note 80 at 409-410.

⁹⁵ *Indian Act*, R.S.C. 1985, c. I-5, ss. 2(1) and 18(1).

⁹⁶ *Guerin*, *supra* note 32.

⁹⁷ *Delgamuukw*, *supra* note 6 at para. 121.

⁹⁸ See generally the text of Treaty 6, 7 and 8: *supra* notes 55 and 56.

⁹⁹ See e.g. Dominion of Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882* (Ottawa: MacLean, Roger & Co., 1883) at 219-224; Dominion of Canada, *Annual*

water rights held by Aboriginal peoples include, but are more extensive than, those existing on traditional lands. Bartlett states that “water rights on reserves may ... be principally derived from two sources: from the intent found in the treaty, agreement or executive appropriation and from the possession of the riparian land itself.”¹⁰⁰

For the purpose of this report, water rights on Indian reserves have been categorized as follows: rights to a modern livelihood, riparian and groundwater rights, and rights of ownership of the waterbeds.

Rights to a modern livelihood

The treaties contained no express reference to water or water rights in the surrender or in the reservation of lands, but declared that the object of the reserves was to encourage agriculture and cattle raising. Scholars have argued that there is a presumption that water rights were appropriated along with reserve lands.

Bartlett develops the analysis of the intent with which reserves were set apart. He describes the object of the provision of reserves as being “to enable the aboriginal people to become a settled and “civilized” people in the European manner, and to encourage the adoption of non-traditional as well as traditional uses of the land and water”.¹⁰¹ The government’s intention was not to deprive Aboriginal peoples from their traditional means of sustenance. As stated earlier, even though the Alberta treaties made no express reference to water rights appurtenant to the reserves, they protected traditional livelihoods while also encouraging farming.

Bartlett notes that the water rights on reservations in the US are founded upon interpretive principles that are similar to the ones adopted by the Supreme Court in Canada. The leading US case in this respect is the *Winters* case.¹⁰² The federal government brought an action on behalf of the Gros Ventre, Piegan, Blood, Blackfoot and River Crow Indians to restrain the maintenance or construction of dams or reservoirs on the Milk River in Montana. The government argued that the upstream use and development of water would prevent the Fort Belknap Reservation from having sufficient water to meet its needs for consumption, irrigation and stock raising. The Supreme Court found that the 1888 agreement between the First Nation and the US government creating the Fort Belknap Reservation in Montana reserved the water rights on the Milk River to

Report of the Department of Indian Affairs for the Year Ended 31st December 1885 (Ottawa: MacLean, Roger & Co., 1886) at 147-150. Bartlett cites a document from the Department of Indian Affairs dated from 1889 describing over eighty reserves in the Prairie Provinces. The banks and shores of rivers and lakes are often used as a boundary in the description: see Bartlett, *supra* note 1 at 87, footnote 32.

¹⁰⁰ Bartlett, *supra* note 1 at 50.

¹⁰¹ *Ibid.* at 20.

¹⁰² *Winters v. United States*, 207 U.S. 564 (1908) at 575-576 [*Winters*].

the First Nation, even though the agreement did not explicitly mention water or water rights. The case stands for the proposition that when lands were set aside as reserves for Indians, it is to be implied that sufficient water for use on the reserve land was also set aside, or reserved. The case was subsequently affirmed in a number of decisions.¹⁰³ Bartlett concludes his analysis of US and Canadian jurisprudence as follows:

The treaties and agreements with Indians in Canada promised lands for farming and other developments, and the maintenance of hunting, trapping and fishing. Ordinary principles of interpretation require that water rights be implied in the undertakings given by the Crown. Without water rights, the promises made by the Crown cannot be fulfilled. Reference to principles requiring a “fair, large and liberal construction” and regard for the Indian understanding of the treaties and agreements affirm that conclusion.¹⁰⁴

With respect to Treaty 7, Beisel reviews the historical evidence of treaty promises to help First Nations transition to farming and ranching. She notes that the First Nations chose localities for their reserves along rivers, since “water rights were crucial to the establishment of agriculture and ranching.”¹⁰⁵ Likewise in the context of Treaty 8, Statt states that it would be senseless for the government to promote agriculture and stock raising in this area without the capacity to appropriate water.¹⁰⁶ In his view:

... it is clear that the Crown intended to establish successful agriculture and stock raising on reserves in the treaty 8 area of northern Alberta. It is also apparent that by 1899 the critical importance of irrigation in any attempt to establish successful agricultural and cattle-ranching communities was recognized by the Crown. Therefore, the Crown must have intended that the reserves be able to appropriate the water necessary to successfully utilize their lands in these pursuits.¹⁰⁷

Riparian rights and groundwater rights

In addition to the above-mentioned treaty rights to a modern livelihood, the setting aside of reserves pursuant to treaty resulted in the creation of riparian rights and groundwater rights. As stated earlier, at the time Treaties 6 and 7 were negotiated, the common law was the law of riparian rights. Riparian rights are derived from possession of land adjacent to water, they are a “natural incident to the right to the soil itself”.¹⁰⁸

¹⁰³ *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468 (1963); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), 104 S. Ct. 3536 [*Adair*].

¹⁰⁴ Bartlett, *supra* note 1 at 35.

¹⁰⁵ Beisel, *supra* note 1 at 137.

¹⁰⁶ Statt, *supra* note 1 at 112-113. Statt cites the opinion expressed by Charles Mair, who accompanied the Treaty commission in 1899, that the land in Treaty 8 was suitable for farming and stock raising, with some irrigation.

¹⁰⁷ *Ibid.* at 115.

¹⁰⁸ Bartlett, *supra* note 1 at 49.

Riparian owners can use water for domestic as well as secondary or “extraordinary” purposes, including large-scale irrigation and even manufacturing.¹⁰⁹ Domestic uses of water, such as using water for drinking, washing or watering stock, are not restricted. However, when making extraordinary uses of water, for instance irrigation or running a mill, riparian owners are under an obligation to return the water to the watercourse substantially undiminished in quantity and quality. Riparian rights have been defined as including rights of access to water, rights to drain surface water from adjacent land into the water body, rights to natural flow of water, rights to quality of water, rights to use the water for “domestic” and “extraordinary” purposes, and rights of accretion.¹¹⁰ By comparison with Aboriginal rights which are paramount, riparian rights are shared rights reduced by the rights of other riparian owners.

Because reserves lands are held for the use and benefit of the respective First Nations, First Nations are the lawful riparian land owners and holders of riparian rights. As noted by Bartlett, the possible possession of riparian rights by a First Nation was acknowledged in *Pasco v. Canadian National Railway Co.*¹¹¹ Mention was made earlier that the 1894 *The North-west Irrigation Act (NWIA)* abolished the common law doctrine of riparian rights in the North-west Territories (including present-day Alberta). The Act vested the property in and the right to use water in the Crown. However, there are compelling arguments that the *NWIA* did not extinguish Aboriginal or treaty rights and that it did not apply to Indian reserves created by treaty in Alberta.¹¹²

In addition to riparian rights to surface water, First Nations also hold rights to ground water. Whereas the *NWIA* vested the property in and the right to use surface water to the Crown in the late 19th century, the common law riparian rights doctrine continued to apply to ground water. It was not until 1962 that Alberta specifically brought ground water under statutory control. It did so by “the simple expedient of including ground water in the definition of the types of water regulated by the provincial *Water Resources Act*.”¹¹³ Insofar as First Nations had rights to ground water on reserve lands, these rights could not have been extinguished by provincial legislation.¹¹⁴

¹⁰⁹ Lucas, *supra* note 14 at 5-6.

¹¹⁰ Statt, *supra* note 1 at 111; Kempton, *supra* note 1 at 45-47.

¹¹¹ Bartlett, *supra* note 1 at 51.

¹¹² See Part 3 of this report for a full discussion of the impact of *NWIA* on Aboriginal and treaty rights. See also Statt, *supra* note 1 at 111-113.

¹¹³ Percy, *Regulation of Ground Water*, *supra* note 15 at 3. See *Water Resources Amendment Act*, S.A. 1962, c. 99, s. 2.

¹¹⁴ *Delgamuukw*, *supra* note 6 at para. 173: “After 1871, the exclusive power to legislate in relation to “Indians, and Lands reserved for the Indians” has been vested with the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*. That head of jurisdiction, in my opinion, encompasses within it the exclusive power to extinguish aboriginal rights, including aboriginal title.”

Ownership of the waterbeds on reserve lands

The question of the Aboriginal ownership of the beds and shores of rivers and lakes on reserve lands remains contentious. There is a common law rule of presumption of riparian ownership of the beds of non-tidal rivers and streams. Riparian owners own the bed of the river in equal half *ad medium filum aquae* — to the centre thread or channel of the stream.¹¹⁵ The presumption has been applied to navigable waters in Atlantic Canada and Ontario, but in western Canada, the courts have held that the presumption only applies to non-navigable waters.¹¹⁶ Does this presumption apply to Indian reserves which, as mentioned earlier, were often established along and encompass rivers or lakes? Does it apply only to non-navigable waters?

In 1988, Bartlett suggested that the granting of reserves to Indian bands “was made upon the understanding that traditional hunting, fishing and trapping would entail substantial use and dependence upon the water-bed or foreshore and, accordingly, it may be considered to pass with the setting apart of riparian lands, *irrespective of a presumption to the same effect.*”¹¹⁷ In his view the question is one of intention in the grant of land. Bartlett examined the substantial jurisprudence in the United States in that respect. The cases suggest that a strong case may be made that Aboriginal peoples retain the beds and shores, irrespective of common law presumptions, where indicia of intention such as the “essential” use of fishing grounds above the water-bed, or boundaries which are drawn to encompass the river, can be found in the treaties.¹¹⁸ In Alberta, as noted earlier, reserve lands were set aside pursuant to the treaties and were often established along and encompass rivers and lakes.

There has been limited judicial consideration of this issue in Canada. In *Lewis and Nikal*,¹¹⁹ two cases dealing with title to the riverbeds of navigable rivers adjacent to Indian reserves in British Columbia, the Supreme Court found that the common law presumption did not apply to navigable waters. Beisel suggests that the application of the finding in *Nikal* to reserves created under Treaty 7 is problematic, since the reserve in question was not created as a result of a treaty, and the case was decided before *Delgamuukw*, which set the analysis for Aboriginal title claims. In her assessment, the written provision in Treaty 7 reserving to the Crown the right to navigate, land and

¹¹⁵ Bartlett, *supra* note 1 at 82.

¹¹⁶ *R. v. Nikal*, [1996] 1 S.C.R. 1013 at paras. 64-72 [*Nikal*], Cory J. provides an overview of the relevant case law in western Canada.

¹¹⁷ Bartlett, *supra* note 1 at 93 [emphasis added].

¹¹⁸ *Ibid.* at 100.

¹¹⁹ *R. v. Lewis*, [1996] 1 S.C.R. 921 [*Lewis*]; *Nikal*, *supra* note 116. For a strongly argued criticism of the Supreme Court’s analysis in both cases, see also Peggy J. Blair, “Settling the Fisheries: Pre-Confederation Crown Policy in Upper Canada and the Supreme Court’s decisions in *R. v. Nikal* and *Lewis*”, (2001) 31 R.D.G. 87-172.

receive cargoes on the shores and banks of rivers on reserves suggests that “if the Crown had intended to exclude the bed of the Bow River from the reserve, it would have stated its intention in clear and express terms in the treaty”.¹²⁰ Even though the Crown reserved rights of navigation on reserves in the Treaty 7 area, First Nations retained title to the beds of navigable rivers.¹²¹ Statt states that “the analogies that may be reliably drawn from these two cases for the purpose of the treaty 8 area of northern Alberta are limited”.¹²² Statt suggests that “ownership of the bed of on-reserve watercourses in the Treaty 8 area may have passed in Treaty 8 through implication”, and that the exclusive right to fish on reserves also passed with the bed of waters at the time of treaty.¹²³

The rights arising from ownership of the waterbed and the foreshore are quite extensive.¹²⁴ They include the *right to erect anything thereon*: wharf, bridge, dam or diversion projects. A Band could authorize major water control and diversion projects causing diminution of flow or damage to downstream landowners. Its power to do so depends on the scope and priority of the band’s rights to water use.¹²⁵

If a water-control project is built upon an Indian-owned water bed as a fixture, it becomes the property of the owner of the bed. An acknowledgement of this ownership interest is found in the agreement signed in 1981 between Alberta and the Peigan (now Piikani) Indian Band (a signatory of Treaty 7), which recognized the Band’s ownership of water control structures and diversion works on the Oldman River on their reserve.¹²⁶ In 1986, the Piikani launched a lawsuit against Alberta as a result of Alberta’s proposed construction of a dam and reservoir (the Oldman River Dam) upstream from its reserve. The Band claimed that it had rights to appropriate water for its reasonable needs, that the riverbed of the Oldman River formed part of the reserve, and that the construction of the dam and reservoir would change the flow and quality of the Oldman River through the reserve and interfere with the Band’s water or riparian rights.¹²⁷ The issue of the extent of the Piikani’s water rights, including the ownership of the riverbed, was never resolved by

¹²⁰ Beisel, *supra* note 1 at 139-142.

¹²¹ *Ibid.* at 142-145.

¹²² Statt, *supra* note 1 at 122.

¹²³ *Ibid.* at 123-124.

¹²⁴ As stated by Gerard LaForest, the owner of the waterbed “owns everything above or below the land”: *Water Law in Canada — The Atlantic Provinces* (Ottawa: Information Canada, 1973) at 234.

¹²⁵ Bartlett, *supra* note 1 at 110-111.

¹²⁶ *Ibid.* at 111.

¹²⁷ See *Peigan Indian Band v. Alberta*, [1998] A.J. No. 1108 (CQB) at paras. 14-16.

the courts. All legal challenges against Alberta and Canada were discontinued when the Piikani entered into a settlement agreement with both levels of government in 2002.¹²⁸

In addition, the owner of the bed has *the exclusive right to hunt, trap and fish over the waters*, subject to applicable game and fishing laws regulating the exercise of the right. It should be noted that the *Indian Act* specifically empowers band councils to exercise the above-mentioned rights arising from ownership of the waterbeds. Subsection 81(f) of the *Indian Act* authorizes bands to make by-laws respecting the “construction and maintenance of water courses”. Subsection 81(l) of the Act empowers band councils to make by-laws respecting the “construction and regulation of the use of public wells, cisterns, reservoirs, and other water supplies”. Subsection 81(o) of the Act enables band councils to make by-laws “for the preservation, protection and management of fur-bearing animals, fish and other game on the reserve”. The province cannot abrogate these rights on reserve.

2.5. Scope and Priority of the Rights

Bartlett observed in 1988 that the possible scope of water rights, which entails considering issues of both quantity and quality of water, may lead to disputes between Aboriginal and non-Aboriginal users, which may be resolved according to the priority assigned to these rights.

Scope of the right

We have seen that treaty rights entitle Aboriginal people to water for hunting, trapping and fishing, traditional cultivation and irrigation, transportation, and domestic uses on traditional lands. The Aboriginal interest in water on Indian reserves, while it is more extensive, includes and affirms that right. It is not limited to traditional uses, but also includes modern uses.

The right of use (consumptive use) assumes that the water is suitable for the proposed use (non-consumptive use). A right to water implies an incidental *right to quantity and quality of water*. This is true both on reserve and off reserve, to the extent that a right to fish and to a livelihood can be established throughout traditional lands. Damage done to fisheries and fish habitat by way of dams and other developments may be considered a breach of treaty promises and entitles a First Nation to bring an action to restrain pollution, founded upon the same causes of action that give rise to the right of use.

¹²⁸ *Settlement Agreement dated the 16th of July 2002 among: Her Majesty the Queen in Right of Canada and the Piikani Nation and Her Majesty the Queen in Right of Alberta*, Section J: The Action (24.1 and 24.2). For a discussion of the settlement agreement, see Phare, *supra* note 1 at 1-8; Beisel, *supra* note 1 at 66-69.

The US cases recognize the non-consumptive nature of an Aboriginal water right to support hunting and fishing. In *Adair*, the Court found that “the entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive rights applies.”¹²⁹

As Bartlett observes, even a water right limited to traditional uses is sufficient to restrain the development of any major water resource project on Aboriginal title lands. In *Kanatewat v. James Bay Development Corp.* the Quebec Superior Court issued an interim injunction to restrain the construction of Hydro-Quebec’s James Bay hydroelectric project on the basis of unsettled Cree and Inuit land claims.¹³⁰ Justice Malouf noted that the project would completely transform major rivers in the territory and their flows, with significant adverse effects on the animals, fish and vegetation on which the Cree and the Inuit depend, and concluded that the construction of the project was inconsistent with the existence of Aboriginal title of the Aboriginal population.¹³¹ Even though the interim injunction was dissolved by the Court of Appeal a week later,¹³² its issuance, along with ongoing Cree and Inuit opposition to the project, was influential in triggering the negotiation of the 1975 *James Bay and Northeastern Quebec Agreement*.¹³³

Other Canadian cases confirm that the courts acknowledge the importance of habitat protection for the maintenance of rights guaranteed under treaty. In *Saanichton Marina*, the BC Supreme Court and the Court of Appeal did not hesitate to restrain the construction of a marina which would have interfered with the treaty right to fish guaranteed to the First Nation.¹³⁴ The Court of Appeal found that the treaty right included incidental rights of access to the area and a right related the protection of the fishery. In *Halfway River*, Justice Dorgan of the BC Supreme Court held that “logging even a limited area of the Tusdzuh would irrevocably change its character” and thus might

¹²⁹ *Adair*, *supra* note 103.

¹³⁰ *Kanatewat v. James Bay Development Corp., Kanatewat v. Quebec Hydro-Electric Co.*, [1974] R.P. 38 (Que. S.C.).

¹³¹ *Ibid.* at 161-162.

¹³² *James Bay Development Corporation v. Kanatewat*, [1975] C.A. 166.

¹³³ Québec, *The James Bay and Northern Québec Agreement* (Québec: Éditeur officiel du Québec, 1976).

¹³⁴ *Saanichton Marina*, *supra* note 46. Note that the treaty right to fish at issue in that case was a right granted pursuant to the Saanich Treaty, one of the Douglas Treaties concluded on Vancouver Island between 1850 and 1851. In exchange for the cession of lands surrounding the Saanichton Bay, the treaty reserved certain lands on the bay and provided that the Saanich Tribe was at liberty to “carry on its fisheries as formerly”.

infringe the treaty rights to hunt and trap of the Halfway River First Nation: as in *Saanichton*, the court acknowledged the importance of habitat protection.¹³⁵

Statt remarks that both cases deal with developments proposed close to a reserve and asks whether development activity hundreds of miles away that may affect the quantity and quality of water rights may also be restrained. He analyzes the impact of large scale hydroelectric development on water ecosystems, and concludes that “activities upstream to a riparian owner that result in the inability of those downstream to consume the water, eat the fish or consume other game that has become contaminated from the very same water resources may be considered pollution and a diminished quality of water” and entitle a riparian owner to an action for pollution.¹³⁶ The protection of water quantity and quality should not be limited to riparian owners, however. Statt suggests that water rights which are critical to the survival (economic, cultural and spiritual) of Aboriginal peoples in the Treaty 8 area “need to be protected from upstream development”, both on traditional territories and on reserves.¹³⁷ The implications for industrial developments, such as oil and gas, oil sands, and forestry developments, are quite significant.

A right to water unaltered in quantity and quality therefore exists, but as Bartlett notes, its enforcement is complicated by issues of proof and attribution. The problem is establishing the sources, causation and proof of loss or injury associated with water pollution. Even in instances of established mercury pollution in Canada (e.g. Grassy Narrows), the companies responsible for the discharge of pollutants did not admit liability nor the damage caused by pollutants, and the parties reached an agreement to resolve their dispute out of court.¹³⁸

¹³⁵ *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.) at para. 106.

¹³⁶ *Ibid.* at 125-126.

¹³⁷ Statt, *supra* note 1 at 118-119.

¹³⁸ Bartlett, *supra* note 1 at 75-76. Mercury pollution of the English-Wabigoon River system originating with a paper mill in Dryden, Ontario was found to have had severe impacts on the Grassy Narrows and Islington Indian Bands. It led to the closure of commercial fishing and restrictions on fish consumption. Actions were filed against the company in the 1970s, and the dispute was finally resolved by the conclusion of a mediation agreement involving the Government of Ontario, the Government of Canada, and the Grassy Narrows and Islington Bands in 1978, with a further agreement signed in 1985: *English and Wabigoon River Systems Mercury Contamination Settlement Agreement Act*, S.O. 1986, c. 23. As noted by Bartlett, the paper-mill companies did not admit liability nor did they acknowledge that the pollutants released caused damage. The Bands received financial indemnities (\$16,667,000), with some of the funds to be used for a Mercury Disability Fund to help disabled Band members. Forty years later, Band members continue to suffer from mercury-related health concerns, and are asking the provincial and federal governments to address “the mercury pollution that has poisoned their peoples, the waters, and their lands for the past forty years”: Chiefs of Ontario, Press Release, “Ontario Regional Chief Supports Grassy Narrows First Nation in their Call for Governments to Deal with Mercury Pollution” (6 April 2010), online: <<http://media.knet.ca/node/7851>>.

Priority

Bartlett observes that:

The priority of Indian water rights determines their precedence and controls their scope. An early priority date will require other water rights holders, whether riparian or otherwise, to take water subject to the Indian water rights.¹³⁹

On reserves, the priority is determined by the date the reserves were set apart. However, in the US *Adair* case, the court found that pre-existing Aboriginal rights to water to support hunting and fishing rights carry a priority date of “time immemorial”, since a Treaty “is a recognition of the Tribe’s aboriginal rights to water and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle”.¹⁴⁰

Bartlett comments that the distinction between a priority date of “time immemorial” and a priority date of the eighteenth or nineteenth century is often not of significant practical importance, because either date usually pre-dates the appropriation of water by non-Aboriginal users. But in Alberta and, given that the *NWIA* was enacted prior to the entering into of Treaty 8 in 1899, it may have significance. On traditional lands where rights to hunt, fish and trap and to a livelihood were confirmed and guaranteed by treaty, these rights will enjoy priority, to the extent that they can be proven.

In *Sparrow*, the Supreme Court has outlined a doctrine of priority of Aboriginal rights as part of the second branch of a justification test for Crown infringement of Aboriginal rights. The Court stated that “the nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery.”¹⁴¹ As stated by Woodward, the doctrine “compels government to give first priority to conservation needs and second priority to aboriginal rights (ahead of the interests of all other users)”.¹⁴² If treaty rights to fish, hunt and trap are proven to be prior rights, to the extent that they entitle the right holders to the protection of water for both consumptive and non-consumptive uses, they should take precedence over other legislated water rights acquired after *NWIA* was enacted. The implications for water allocation and water management in Alberta, and for the security of existing water licences, are potentially far-reaching.

Several First Nations in Alberta have launched lawsuits against the federal and provincial governments, asserting their rights to water both on and off reserve. In

¹³⁹ *Ibid.* at 78.

¹⁴⁰ *Adair*, *supra* note 103 at 1414.

¹⁴¹ *Sparrow*, *supra* note 43 at para. 76.

¹⁴² Woodward, *supra* note 91 at 13 and 670.

addition to the Piikani (Peigan) legal challenges mentioned earlier, the Tsuu T'ina Nation and the Samson Cree Nation, as well as the Stoney Nakoda Nations have also initiated legal challenges against the provincial as well as the federal government, claiming extensive Aboriginal and treaty rights to water.¹⁴³ These cases may help establish the nature, scope and priority of Aboriginal rights to water.

3.0. The Impact of Federal Water Legislation: *The North-west Irrigation Act of 1894*

As stated earlier, prior to their constitutional protection in 1982, Aboriginal rights could only be extinguished by the federal parliament only by legislation or by treaty, provided the intention to extinguish was “clear and plain”. Brian Slattery suggest that “the requisite degree of legislative clarity is significantly higher in relation to treaty rights than it is to aboriginal rights, otherwise the treaty undertakings would not have the effect of *reinforcing* aboriginal rights, which are already protected by a rule of interpretation requiring “clear and plain” legislation.”¹⁴⁴

The federal enactment that poses potential questions related to possible extinguishment of Aboriginal rights to and in water resources is *The North-west Irrigation Act (NWIA)* which was enacted by the Canadian Dominion parliament in 1894.¹⁴⁵ The Act was applicable to areas which are now within the Provinces of Alberta and Saskatchewan, Northern areas of Manitoba, Ontario and Quebec as well as what are now the Yukon Territory, Nunavut and the Northwest Territories (see map circa 1895). Much of this area is coincidental/overlaps with areas subject to the numbered Treaties 1-11 which were signed between 1871 to 1921 (see Treaty map on page 13).¹⁴⁶ The *NWIA* shows a clear intention on the part of the Dominion Crown to assert rights of ownership and user over water resources in these areas, however it does not show a clear and plain intention to extinguish Aboriginal rights of use or title to these resources.

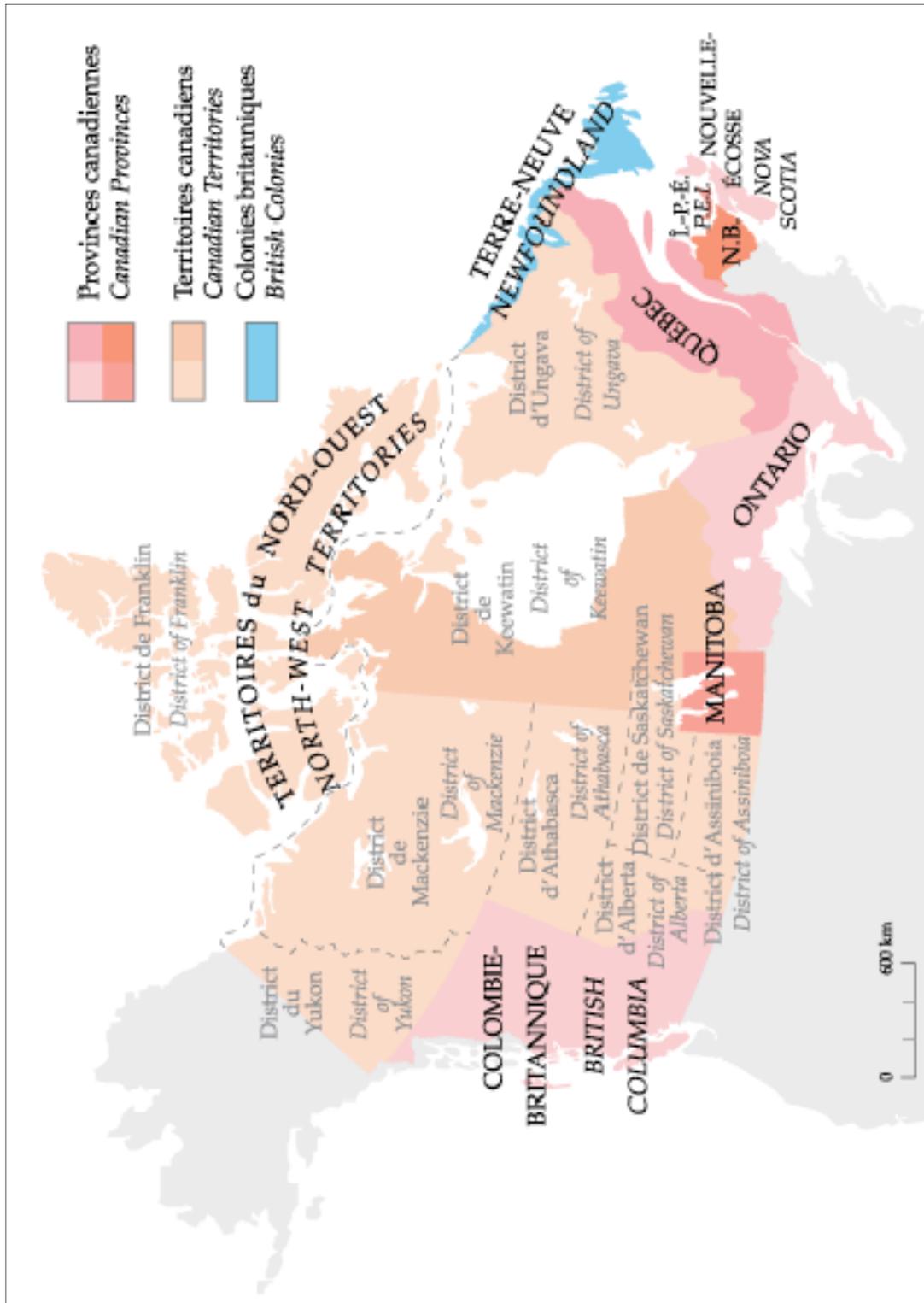
The *NWIA* was enacted in the late 19th century in order to support and promote settlement in the semi-arid regions of the prairies where successful agricultural

¹⁴³ As stated earlier, the Piikani settled its legal challenges against both levels of government in 2002; the Tsuu T'ina Nation and the Samson Cree Nation, as well as the Stoney Nakoda Nations have also launched lawsuits in which they assert their treaty rights to water on their reserves.

¹⁴⁴ Slattery, *supra* note 63 at 211.

¹⁴⁵ *The North-west Irrigation Act*, S.C. 1894, c. 30, am. by S.C. 1895, c. 33 [*NWIA*].

¹⁴⁶ Note: Treaties 1-7 (1871 to 1877) pre-date the *NWIA*, while Treaties 9-11 were signed later.



Provinces of Canada, 1895

From: <http://www.rootsweb.ancestry.com>

development appeared to require sizeable irrigation undertakings for feasibility.¹⁴⁷ Advocates for irrigation development felt strongly that existing common law riparian water rights were inadequate to address water access and distribution issues.¹⁴⁸ The goal was to replace or at least restrict riparian rights with a legislated allocation system similar to the prior appropriation system that was in use in the Western United States.¹⁴⁹ Under that system rights of user were granted by priority based on the first in time to put the water to beneficial use. Under the western Canadian system, rights to take and use would be authorised by way of a licensing scheme. Prior to granting such licences the Dominion first vested in the Crown the property in water, and thereby the right to grant licenses to it.

Although the original enactment of 1894 claimed only the exclusive right of use for the Crown, by amendment in 1895 the Crown declared that ownership of all waters in the territories vested in the Crown:

The property in and the right to the use of all the water at any time in any stream ... be deemed to be vested in the Crown unless and *until and except so far as some right therein, or to the use thereof, inconsistent with the right of the Crown* and which is not a public right or a right common to the public is established; and, *save in the exercise of any legal right existing at the time ...*¹⁵⁰
(emphasis added)

Thus, the declaration of an exclusive property interest was made subject to prior rights inconsistent with the Crown's deemed vesting. As discussed in previous parts of this report, Aboriginal rights to use and/or ownership in water resources did exist in 1895 and, to the extent that they were in conflict with the assertion of Crown ownership and uses, were not subject to this provision and not extinguished by it.

¹⁴⁷ Percy, *Framework*, *supra* note 85; Steven J. Ferner, *Instream Flow Protection and Alberta's Water Resources Act: Legal Constraints and Considerations for Reform* (Calgary: Canadian Institute of Resources Law, 1992).

¹⁴⁸ David. R. Percy, "Water Rights in Alberta" (1977) 15 Alta. L. Rev. 142.

¹⁴⁹ As noted by Percy, the licensing system "interferes substantially with the common law rights of riparian owners, but deals only obliquely with the general issue of riparian rights": *ibid.* at 18. Alastair Lucas states that the common law riparian doctrine "remains relevant to the extent that it has not been clearly modified or abolished by statute. A major reason why security of water title is problematic in modern Canadian water law is that the prior allocation and riparian systems either co-exist in a single jurisdiction, or one system has been modified by incorporating concepts of the other": *supra* note 14, at 17. Riparian owners retain riparian-like rights to use water for domestic purposes without a license, as confirmed by the *Water Resources Amendment Act, 1981*, S.A. 1981, c. 40, s. 2(2).

¹⁵⁰ 1895 NWIA, *supra* note 145, s. 2, rev'g s. 4 of the previous Act.

The intention of the *NWIA* was fairly explicit — it was to control the diversion and use of surface water by settlers in *irrigation* undertakings.¹⁵¹ The Act makes no mention of Aboriginal water rights, and historical documentation suggests no implicit intention to extinguish them. While the Act shows no intention to protect these rights, it shows no implicit, nor explicit, intention to abrogate or derogate them in any way either. In *Gladstone*, a case dealing with an Aboriginal right to trade or sell a fish product for commercial purposes, Justice Lamer stated that, “failure to recognize an aboriginal right, and the failure to grant special protection to it, do not constitute the clear and plain intention necessary to extinguish the right.”¹⁵² While the Act aimed to abolish or at least restrict riparian law and to assert Crown ownership of water resources, it explicitly made the vesting subject to existing legal rights inconsistent with the rights asserted by the Crown. Aboriginal rights in and to water, either under existing treaties, or pursuant to Aboriginal title and rights, were such existing legal rights. In addition, sections 5 and 6 of the *NWIA* may offer additional protection to these water rights arising from “agreement or undertaking” existing prior to the Act.¹⁵³

As part of the settlement and development of prairie lands the Dominion government had a clear policy of extinguishing Aboriginal title to lands prior to conveyance to third parties. Sir John A. MacDonald stated during debates in the House of Commons in 1881 related to railway development that: “we [the Crown] cannot give lands that belong to the Indians ... unless we have the title to it.”¹⁵⁴ The Dominion’s policy was to negotiate and acquire land by way of treaty. As such it is fair to suggest that, at the time of the enactment of the *NWIA*, lands to which the Act applied were either subject to subsisting Aboriginal title (the lands later encompassed within Treaty 8, signed in 1899) or subject to Treaty (the lands encompassed within Treaties 6 and 7, signed respectively in 1876 and 1877). In the former case, Aboriginal rights or interests in water would be subsisting rights that would likely be inconsistent with the assertion of Crown ownership by way of

¹⁵¹ Note: the Act also would be used to regulate irrigation systems on reserve land under the auspices of the Department of Indian Affairs: *Report of the Department of Indian Affairs in Sessional Papers*, No. 14 (1897) on Irrigation on the Blackfoot and Blood reserves.

¹⁵² *Gladstone*, *supra* note 44 at para. 36. Justice Lamer found that a regulation under the *Fisheries Act* dealing with a conservation concern (in this case salmon) and placing aboriginal rights to fish commercially under the general regulatory scheme applicable to commercial fishing did not extinguish the aboriginal right to fish commercially. Justice McLachlin added that “a measure aimed at conservation of a resource is not inconsistent with a recognition of an aboriginal right to make use of that resource”: at para.168. See also *Adams*, *supra* note 9 at paras. 32-33.

¹⁵³ Sections 5 and 6 of the *NWIA* provide that absent a previous or further “agreement”, no “grant” conveys riparian water rights or ownership of the waterbeds. The argument is that Indian Reserves were not constituted by a grant and that the existing and subsequent treaties were “agreements” within the broad and liberal interpretation afforded Aboriginal groups. This has not been tested in court.

¹⁵⁴ *House of Commons Debates*, 3rd Sess., 4th Parl. (31 January 1881) at 785. Note also that the *Dominion Lands Act*, which dealt with the administration and management of Crown lands, did not apply to areas where Indian title had not been extinguished: 1883, 46 Vict., c. 17, s. 3.

the *NWIA*, and therefore outside of the Act. In the latter case any rights or interests would be subject to the provisions of the Treaty by which they may have been affirmed or extinguished. In either case, the *NWIA* holds no role as an abrogating document.

It is not a coincidence that irrigation legislation was implemented during the time of ongoing treaty negotiations; both endeavours were directly related to the desire to promote and facilitate settlement of the western territories. As Bartlett suggested, it would take “a highly disenchanting view of federal policy”¹⁵⁵ to suggest that the *NWIA* aimed to extinguish Aboriginal water rights while treaty negotiations were ongoing and while government representatives were promising Aboriginal peoples continued use of and access to waterways for transportation, fishing, and everyday use as well as promoting reserve lands for agricultural uses which would require adequate water in order to be successful. He points out that the United States Supreme Court has refused to take this view.

4.0. The Impact of the *Natural Resources Transfer Agreement (NRTA)*¹⁵⁶

The *Natural Resources Transfer Agreements (NRTAs)* came into effect in 1930 as a result of extended negotiations and lobbying by the provinces of Manitoba, Alberta and Saskatchewan for control and ownership of the natural resources within their boundaries.¹⁵⁷ When Alberta was created in 1905, all Crown lands and resources, including “the interest of the Crown in the waters within the province under the *North-west Irrigation Act 1898*” remained vested in the Crown and administered by Canada.¹⁵⁸ The purpose of the transfer of public lands was to put the Prairie provinces in the same position with respect to resources as the original provinces of the Confederation were under section 109 of the *Constitution Act, 1867*.¹⁵⁹ Following the transfer, the interest of the federal Crown in all lands within these territories would belong to the respective province. The *NRTAs* are of import in any review of Aboriginal water rights in the Prairie provinces because they deal with lands and resources, including water¹⁶⁰ and fisheries,¹⁶¹

¹⁵⁵ Bartlett, *supra* note 1 at 163-164.

¹⁵⁶ *Constitution Act, 1930* (U.K.), 20-21 Geo. V, c. 26, Schedule (2), reprinted in R.S.C. 1985, App. II, No. 26; *Alberta Natural Resources Act*, S.A. 1930, c. 21.

¹⁵⁷ Manitoba joined the confederation in 1870: *The Manitoba Act, 1870*, S.C. 1870, c. 3, reprinted in R.S.C. 1985, App. II, No. 8; Alberta and Saskatchewan in 1905: *The Alberta Act, 1905* (U.K.), 4 & 5 Edw. VII, c. 3; *The Saskatchewan Act, 1905* (U.K.), 4 & 5 Edw. VII, c. 42.

¹⁵⁸ *The Alberta Act, 1905*, *ibid.*, s. 21.

¹⁵⁹ *The Constitution Act, 1867*, *supra* note 12.

¹⁶⁰ Paragraph 8 under the heading “Water” only deals with water power undertakings. Water resources were confirmed to be part of the transfer in 1938.

have specific provisions related to Indian Reserves,¹⁶² and because the Courts have declared that the *NRTAs* are constitutional documents.¹⁶³

Although the *NRTAs* had a paragraph headed “Water,” the original transfers did not specifically state that water was part of the transfer. Rather, paragraph 8 dealt only with the issue of existing works and undertakings for water power generation. While Alberta enacted water legislation the year following the transfer agreement,¹⁶⁴ doubts remained as to whether the interest of the Crown in waters and water powers had been vested in the province.¹⁶⁵ It was not until 1938 that the transfer of control and ownership of water resources was confirmed by an amendment to the *NRTA*.¹⁶⁶ The 1938 amendment stated that the transfer of water was subject to the provisions of the 1930 *NRTA* and specifically “to the exception of all such interests in or rights to the use of waters ... as continue in virtue of such provisions”. While Alberta claims control of and a proprietary interest in water resources,¹⁶⁷ any provincial ownership or interest is only as extensive, or as restrictive, as the federal interests that were transferred and are subject to any agreements that the federal government had in place prior to the transfer. As discussed in Part 3 of this report, Aboriginal rights to water existing either under treaties or pursuant to Aboriginal title were not abrogated by the *NWIA*, and therefore were not included in the federal interest and could not have been transferred to the province.

Similar to section 109 of *The Constitution Act, 1867*, the first paragraph of the *NRTAs* makes the transfer of lands, mines and minerals, “subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same”. Aboriginal title, if

¹⁶¹ See *NRTA supra* note 156 at para. 9.

¹⁶² Specifically, *NRTA, ibid.*, para.10.

¹⁶³ *R. v. Blais*, [2003] 2 S.C.R. 236 at para.17 [*Blais*]. See also *Horseman, supra* note 81 at 933; *Badger, supra* note 63 at para. 47.

¹⁶⁴ *The Water Resources Act*, S.A. 1931, c. 71 [*WRA*].

¹⁶⁵ Note however that in *Burrard Power Co. v. The King*, the Privy Council found that the “grant by the Province of British Columbia of ‘public lands’ to the Dominion Government undoubtedly passed the water rights incidental to those lands”: [1911] A.C. 87 (P.C.) at 94.

¹⁶⁶ *The Natural Resources Transfer (Amendment) Act, 1938*, 2 Geo. VI, c. 36 (or *Natural Resources Transfer (Amendment) Act 1938*, S.C. 1938, c. 36); *An Act to Ratify a certain Agreement between the Government of the Dominion of Canada and the Government of the Province of Alberta*, S.A. 1938, c. 14. The 1938 amendment transferred: “the interest of the Crown in waters and water-powers within the Province under the *Irrigation Act*, being chapter sixty-one of the Revised Statutes of Canada, 1906” Note that the 1938 amendment was not ratified by the Imperial Parliament. There is some doubt as to whether an amending agreement is capable of transferring jurisdiction over the administration of water resources from the Dominion to the provinces: see Stoney Nakoda Nations, “Water Rights of the Stoney Nakoda Nations” (Presentation to the Canadian Institute of Resources Law, 6 November 2009) [unpublished].

¹⁶⁷ *WRA, supra* note 164, s. 5(1)

unextinguished, is clearly an interest other than that of the federal Crown which would be outside the scope of the transfer.¹⁶⁸ Although on its face the question of Aboriginal title appears to be answered by the existence of the numbered treaties which cover all the lands in the province, questions remain as to whether Aboriginal title to land and title to water are coextensive or severable and whether or not the latter was ever extinguished. Although Aboriginal, or Indian, title has long been recognised both by the federal government and by the Canadian courts, its fundamental nature remains shrouded.¹⁶⁹ The fact that it took a separate enactment some years later to confirm that the transfer of lands and resources by way of the *NRTAs* included water resources shows that it is not possible merely to assume that the two interests are inextricably linked. In addition to Aboriginal title, Aboriginal rights to water are also clearly “interests other than that of the Crown”, and to the extent that they were unextinguished, were protected from extinguishment under paragraph 1 of the *NRTAs*.

In addition, paragraph two of the *NRTA* requires that the province would, “carry out in accordance with the terms thereof every contract to purchase or lease ... and every other arrangement whereby any person has become entitled to any interest therein against the Crown,” There can be little doubt that the treaties were arrangements which limited the control and interests of the province. Interpretation of these agreements remains crucial to understanding the scope of the *NRTA*. However the Supreme Court has consistently held that the *NRTAs* were constitutional documents that did alter the rights of Aboriginal peoples. Specifically, it has been held that any rights Aboriginal peoples had to hunt or fish commercially were by virtue of the transfer confirmed as restricted to rights to take game and fish for support and subsistence only.¹⁷⁰ Thus the Alberta *NRTA*

¹⁶⁸ *Delgamuukw*, *supra* note 6 at para. 175: Chief Justice Lamer confirmed that s. 109 of the *Constitution Act, 1867* qualifies provincial ownership by making it subject to the “any Interest other than that of the Province in the same”. C.J. Lamer refers to the *St. Catherine’s Milling* case, where the Privy Council held that Aboriginal title was such an interest and found that Provinces can only acquire beneficial title upon the surrender of Aboriginal lands by treaty “duly ratified in a meeting of their chiefs or headmen convened for the purpose” and characterized Aboriginal title as a prior burden on Crown title: *St. Catherine’s Milling and Lumber Co. v. R.* (1888), 14 A.C. 46 at 118 and 123-124.

¹⁶⁹ Slattery, *supra* note 35, at 256.

¹⁷⁰ *Horseman*, *supra* note 81 at 931-932; *Badger*, *supra* note 63 at para. 45. Note that historical research undertaken on the circumstances surrounding the negotiation and drafting of the *NRTAs* brings into question the view of the Supreme Court that the Canadian government intended to curtail the commercial rights to hunt and fish and restrict them to hunting and trapping “for food”: see Arthur Ray, “Commentary on the Economic History of the Treaty 8 Area” (1995) 10:2 *Native Studies Review* 160; Frank J. Tough, “Introduction to Documents: Indian Hunting Rights, Natural Resources Transfer Agreements and Legal Opinions from the Department of Justice” (1995) 10:2 *Native Studies Review* 121; “The Forgotten Constitution: *The Natural Resources Transfer Agreements* and Indian Livelihood Rights, ca. 1925-1933” (April 2004) 41:4 *Alta. L. Rev.* 999; Robert Irwin, “‘A Clear Intention to Effect Such a Modification’: The *NRTA* and Treaty Hunting and Fishing Rights” (2000) 13:2 *Native Studies Review* 62.

was made subject to the respective treaties, however, the *NRTA* may also have significantly altered the rights and relationships of the earlier treaty agreements.

Nevertheless, Canadian courts have held that protection of Aboriginal rights, consistent with Crown obligations under treaties, was *the* fundamental concern of federal authorities when they were negotiating the *NRTAs*.¹⁷¹ The specific provisions of the *NRTAs* related to Aboriginal peoples (paras. 10-12 in the Alberta *NRTA*)¹⁷² were reviewed and explained by the Supreme Court of Canada in *R. v. Blais*:

The broad purpose of the *NRTA* was to transfer control over land and natural resources to the three western provinces. The first two of the three provisions on “Indian Reserves” were included to specify that the administration of these reserves would remain with the federal government notwithstanding the general transfer. However, the provincial government would have the right and the responsibility to legislate with respect to certain natural resource matters affecting Indians, including hunting.¹⁷³

With respect to reserve lands, Alberta courts have confirmed that the *NRTA* did “not abrogate the Indian interest in reserve lands nor the federal government’s right to administer such lands”.¹⁷⁴ In respect of water-power, federal legislation from 1929 had provided that the transfer of administration under the *NRTA* was not to apply to “any water-power upon or within Indian reserves that are or may be set apart, or Indian lands ...”.¹⁷⁵ Paragraphs 10 and 11 of the 1930 *NRTA* removed existing and future Indian reserves from the ambit of the transfer. And the 1938 *NRTA* amendment did not expand the rights granted pursuant to the original 1930 transfer. Consequently, the province did not acquire any rights in water and waterbeds appurtenant to the reserves nor did it gain jurisdiction over water rights.¹⁷⁶ The *NRTA* was further amended in 1945, and the amendment confirms that any rights in water granted to the province only pertained to the lands transferred, and did not include those waters or waterbeds appurtenant to Indian Reserves.

With respect to paragraph 12 (the third of the three provisions), the Supreme Court in *Blais* found that the purpose of that paragraph was to fulfill pre-existing treaty obligations by protecting and preserving the hunting and fishing rights of beneficiaries/Aboriginals

¹⁷¹ *Blais*, *supra* note 163 at para. 20 citing the findings of the courts below.

¹⁷² *NRTA*, *supra* note 156 at paras. 10-12.

¹⁷³ *Blais*, *supra* note 163 at para. 12.

¹⁷⁴ *Re Stony Plain Indian Reserve No. 135*, [1982] 1 W.W.R. 302 at 314-315.

¹⁷⁵ *An Act respecting Water Power in the Provinces of Alberta, Saskatchewan and Manitoba, 1929* (U.K.), 19 & 20 Geo. V, c. 61, s. 1.

¹⁷⁶ Note that non-navigable waters on existing Indian reserves were already outside the federal interest, and that the beds, banks, waters and water-powers of those portions of navigable waters running through Indian reserves remained vested in the Dominion.

under the treaties, while at the same time granting the province the ability to regulate hunting and fishing rights for conservation purposes.¹⁷⁷

While the transfer agreements specifically dealt with issues of Indian Reserves and hunting and fishing rights, they did not specifically deal with Aboriginal title to land or water or with Aboriginal water rights more broadly. This is not surprising given that the agreements were ambiguous with regard to ownership and use of water in general. Further, “[t]he *NRTA* was not a grant of title, but an administrative transfer of the responsibilities that the Crown acknowledged at the time towards “the Indians within the boundaries” of the Province.”¹⁷⁸ Primarily, it was a transfer of governmental administration and control of resources and should be interpreted in that context.

While it seems clear that the federal government was seeking to preserve and protect both existing rights and interests and ensure ongoing compliance with its obligations to Aboriginal peoples under treaties, the province of Alberta holds the view that the *NWIA* and the *NRTA* extinguished all Indian titles to land and resources, including water, in the province:

... The position of the Crown in right of Alberta is that such alleged water rights and alleged rights to river beds, if they ever existed, were extinguished by competent legislation of, and executive action by, the Crown in right of Canada.

The Crown in right of Alberta further takes the position that by the provisions of the [*NRTA*], the water rights and rights to river beds passed to Alberta along with the constitutional jurisdiction over such rights. Such rights are now subject to the provisions of the *Alberta Water Resources Act* [*Water Act*] ...¹⁷⁹

This view might in the future turn out to be somewhat erroneous. Similar to the notion suggested above that it would be disparaging to suppose that the federal government was in the process of extinguishing rights to water through legislation *NWIA* at the same time that it was promising ongoing rights to fish and to a way of life and livelihood in treaty negotiations, it would seem paradoxical that the federal government would strive to protect rights and promises under these same treaties while simultaneously and unilaterally derogating these rights and interests by virtue of administrative arrangements made with the provinces. With regard to water resources it is unlikely that the *NRTA* had any impact on existing Aboriginal rights and interests which must be determined by interpretation of the specifics of the treaties.

¹⁷⁷ *Blais supra* note 163 at paras. 13 and 32.

¹⁷⁸ *Ibid.* at para. 19.

¹⁷⁹ Alberta Water Resources Commission, *Water Management in Alberta: Challenges for the Future*, Background Paper, vol. 3 (Edmonton: Alberta Environment, 1991); see also Bankes, *supra* note 1 at 5: “it is the Province’s position that aboriginal water rights have been extinguished and that the province has the exclusive jurisdiction over water in the province”.

5.0. Conclusion

This report has examined some of the issues surrounding the existence and the extent of Aboriginal and treaty rights to water in Alberta. The discussion has focused on the impact of the 19th century Alberta treaties, the 1894 *NWIA* and the 1930 *NRTA* and its amendments on Aboriginal water rights as they existed “from time immemorial”. Even though many legal issues remain outstanding, the above discussion shows that there is a strong likelihood that Aboriginal water rights have not been extinguished. If this is the case, then the provincial legislative scheme of water allocation and management, and the government’s denial of the existence of these rights, may well be questioned.

Since 1982, Aboriginal and treaty rights can only be extinguished by constitutional amendment or by agreement with Aboriginal people.¹⁸⁰ The constitutional protection and affirmation of Aboriginal and treaty rights signals that these rights are *paramount*. They cannot be abrogated or extinguished. Even though they may still be infringed (they are not absolute), they now enjoy a “constitutional priority” over non-aboriginal property rights. In *Sparrow*, the Supreme Court of Canada stated:

By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification.¹⁸¹

The water crisis facing the world at large, and Alberta in particular, suggests that the time is ripe for a concerted effort to address the issues we are all facing. This report suggests that the search for lasting solutions needs to involve Aboriginal peoples. The *Water Stewardship Strategy* recently put forward by the Northwest Territories embraces the concept of water stewardship and acknowledges the importance of promoting collaboration between a wide group of water users, notably Aboriginal people.¹⁸² Unless and until the water rights of Aboriginal peoples in Alberta are acknowledged and respected, and Aboriginal people become true partners in water conservation and management efforts, Alberta’s *Water for Life* strategy will not achieve its objectives to “manage and safeguard Alberta’s water resources, now and in the future”.¹⁸³

¹⁸⁰ Subsection 35(1) of the *Constitution Act, 1982* provides: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

¹⁸¹ *Sparrow*, *supra* note 43 at para. 64.

¹⁸² Government of the Northwest Territories, *Northern Voices, Northern Waters — Draft NWT Water Stewardship Strategy* (November 2009), online: <<http://www.assembly.gov.nt.ca/live/documents/document/ManagerUpload/09-11-04%20NWT%20Water%20Stewardship%20Strategy.pdf>>.

¹⁸³ *Water for Life*, *supra* note 4.

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April 2010