



WATER RIGHTS AND WATER STEWARDSHIP: WHAT ABOUT ABORIGINAL PEOPLES?

Article by David K. Laidlaw and Monique Passelac-Ross ♦

Introduction

The province of Alberta is currently reviewing its approach to the allocation, licensing and transfer of water rights. The government has received advice from three groups of experts established under various government initiatives.¹ Concerned citizens have also come forward with their own recommendations, calling for an “overhaul to Alberta’s water rights system, to ensure that water is secured for people and the environment”.² In addition, the government has announced that it will hold public consultations on the proposed review of its water allocation and management system in the summer of 2010.³

One of the striking features of the reports received by government is the quasi-absence of attention paid to the issue of Aboriginal uses of, and rights to, water. First Nations are only mentioned, along with other designated groups, in one recommendation of the report submitted by the Minister’s Advisory Group dealing with governance of water management and allocation.⁴

One of the reasons for this lack of attention paid to Aboriginal rights to water is Alberta’s long-standing position that Aboriginal water rights have been extinguished and that the province has exclusive jurisdiction over water in the province.⁵ This position has been challenged by several First Nations in lawsuits alleging that their water

rights still exist, both on and off reserve, and they should receive the benefit of constitutional protection.

Aboriginal peoples also assert that they must be adequately consulted by the government on proposed reviews of the water allocation system and on ongoing land and water initiatives that impact their rights. In that respect, the government has stated that it will seek input from First Nations on water use and watershed planning initiatives through a separate “yet parallel process”.⁶

In November 2009, the Canadian Institute of Resources Law (CIRL) convened a small workshop, funded by the Alberta Law Foundation and the Canadian Boreal Initiative, to discuss the issue of Aboriginal rights to water in Alberta. The meeting was attended by First Nations elders and councillors, community leaders, lawyers and scholars. This article draws in part from the proceedings of this workshop.⁷

Different Approaches to Water

Settler society and aboriginal conceptions of water rights differ in many respects. At common law water could not be owned but *riparian* doctrines have in the past maintained



RÉSUMÉ

Le gouvernement de l'Alberta a entamé un processus de révision de son régime d'allocation, de délivrance de licences et de transfert des droits à l'eau. Plusieurs groupes d'experts ont soumis leurs recommandations au gouvernement, qui a également annoncé que le public sera consulté sur les propositions de réforme. Le débat sur les droits à l'eau paraît toutefois faire peu de cas des droits à l'eau des Autochtones, qui sont revendiqués par les Premières nations. Cet article examine la question de la possibilité de l'existence de ces droits, explore leur nature et suggère qu'il serait préférable pour la province d'inclure les Autochtones dans le débat actuel sur l'allocation et le transfert des droits à l'eau et de les associer à la gérance des eaux.

a semblance of communal ownership and guarantees of water quality.⁸ Water scarcity and the commoditization of water have led the Crown to claim ownership of almost all waters.⁹ In western Canada, the assertion of federal Crown ownership in and control over waters occurred in the late 19th century with the *North-west Irrigation Act (NWIA)*.¹⁰ The prevailing model is for the Crown to allocate (license) fixed amounts of water to municipal or private interests, on some priority basis, usually first in time.¹¹ The individualism of modern settler society and the market imperative have led to limited self-regulation and limited regulation of water uses¹² with consequent dangers to the environment, fisheries, water quality and quantity.

Aboriginal conceptions of water usually deem waters to be sacred givers of life. Water must be shared respectfully without any use being paramount. The use of water for sacred purposes, hunting and fishing, transportation, recreation and domestic consumption is a shared responsibility, and must address current needs, the needs of the land and future generations. The use of waters is governed by a natural law, by which the taking of waters without due regard to the environment and the needs of current and future generations can only lead to disaster. Aboriginal peoples see themselves as caretakers with responsibilities to preserve water and life.

Aboriginal Rights/Responsibilities to Water: Do They Still Exist?

Aboriginal peoples were here first. Water rights in aboriginal conceptions flow from their use and

occupation of their traditional lands from time immemorial. Waters were not separable from the land and the rights to water have long been asserted by Aboriginal peoples as part of their rights to live on their lands.

The difficulty faced by Aboriginal peoples in seeking recognition of their water rights is that there has never been a court ruling in Alberta (or for that matter, in Canada) that has unequivocally established or denied Aboriginal rights to water. As stated below, First Nations in Alberta assert their rights to water in Canadian law under either claims of Aboriginal title, Aboriginal rights, treaty rights or even riparian rights.

The Supreme Court of Canada has described Aboriginal title as a right in "land" that gives Aboriginal peoples the right to exclusive use, occupation and possession of the land for a broad range of purposes. In the seminal case of *Delgamuukw v. British Columbia*,¹³ Chief Justice Lamer for the majority described common law Aboriginal title as follows:

"(...) the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land."¹⁴



In an earlier case, Justice McLachlin had described the Aboriginal interests recognized by the common law as “interests in the land and waters” and suggested 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.”¹⁵ [emphasis added]

Insofar as water is considered an integral part of land, then Aboriginal title gives Aboriginal peoples the right to 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. Aboriginal title also imparts the right to make decisions with respect to water, and the right to apply Aboriginal law systems to water uses.¹⁶

As to Aboriginal rights, they confer the right to engage in site-specific activities on a tract of land to which Aboriginal people may not have title. Aboriginal rights can exist independently of aboriginal title.¹⁷ 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. Canadian jurisprudence confirms 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. They may 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 addition, the use of water is connected with harvesting activities such as fishing, gathering

country food, hunting, trapping, and lumbering. The Supreme Court has recognized that “all harvesting activities are land and water based.”¹⁸

Given that Aboriginal rights to waters have existed from time immemorial, on what basis could the government claim to have extinguished these inherent rights? According to settler law, Aboriginal rights can only be extinguished through treaty, surrender or express legislation that states a “clear and plain intention” to do so. A number of questions arise in this context: Did Aboriginal peoples in Alberta agree to give up their water rights through statements in treaties? Did the Crown extinguish Aboriginal water rights by legislation? Were Aboriginal rights to water extinguished by the 1930 *Natural Resources Transfer Agreement (NRTA)*? If the answers to these questions are negative, then Aboriginal water rights still exist.

The first question to address is whether Aboriginal water rights were extinguished or modified by treaty. Even though they all contain a so-called “land surrender clause”, the text of the older treaties (including the Alberta Numbered Treaties)¹⁹ does not expressly mention waters, with the exception of a clause in Treaty 7 reserving to the Crown certain rights to the rivers of the reserves set aside for the First Nations. This was understandable in that water was not viewed as separate from the land promised to First Nations, and the promise of the treaties was to build sustainable communities and to ensure both a traditional and an agricultural livelihood from the land. It appears to have been the common intention of the parties to the Alberta treaties that the First Nations would remain economically self-sufficient, by practicing agriculture and stock raising, and/or by continuing to gain a livelihood from traditional activities such as hunting, trapping and fishing.²⁰ This is confirmed by the written provisions of the treaties and by historical evidence of oral promises made at the time of treaty-making. Indeed, it may be suggested that the right to water was affirmed as an incidental right, given the fundamental need for water to exercise the treaty rights granted.

The second question to be debated is whether Aboriginal water rights have been extinguished by legislation. The simple answer is that there has





been no competent legislation that expresses a “clear and plain intention” to eliminate aboriginal rights to water.²¹ The *Indian Act* (1876),²² passed by the federal Parliament in accordance with its constitutional authority under subsection 91(24) of the *Constitution Act*, did not mention Aboriginal water rights (aside from Band Councils’ powers to approve the construction and maintenance of watercourses and the construction and regulation of water supplies), let alone extinguish them. The *NWIA*,²³ which as stated earlier asserted federal ownership of surface waters (1895 amendment) in the Prairie Provinces, was passed to ensure access to irrigation and encourage settlement. The *NWIA* did not mention, let alone expressly revoke, Aboriginal water rights. Indeed, the declaration of an exclusive property interest was made subject to prior rights inconsistent with the Crown’s deemed vesting.²⁴ Further, there is some possibility that sections 5 and 6 of the *NWIA* protected the rights arising from treaties.²⁵ The Act was enacted while treaty negotiations were ongoing in what is now Alberta. The lands to which the Act applied were either subject to Treaty (the lands encompassed within Treaties 6 and 7, signed respectively in 1876 and 1877), or subject to subsisting Aboriginal title (the lands later encompassed within Treaty 8, signed in 1899). As Richard Bartlett has suggested, it would take “a highly disenchanted view of federal policy”²⁶ 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.

The third question that arises is whether Aboriginal water rights were extinguished or modified by the 1930 *Natural Resources Transfer Agreement* (*NRTA*).²⁷ Alberta was established in 1905 by the *Alberta Act*²⁸ but the province did not have authority over lands and resources within its borders. An agreement was reached to transfer certain lands and resources to the province under the *NRTA*. The list of resources transferred did not specifically include waters and it was not until 1938 that the agreement was amended to “clarify”

that surface water was included in the transfer.²⁹ Section 10 of the *NRTA* speaks of Indian reserves then existing as continuing to be vested in the federal Crown and goes on to say that further Indian reserves may also be set aside:

“(…) to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way *in all respects as if they had never passed to the Province under the provisions hereof.*”
[emphasis added]

This suggests that any transfer of resources, including water, were revocable by the federal Crown and hence there was no effective transfer of resources of any kind on reserve lands.³⁰ In any event, all of these transfers were qualified as the resources were transferred “subject to any trusts existing in respect thereof, and to any interest other than that of the [federal] Crown in the same”.³¹ Aboriginal title and Aboriginal rights to water, to the extent that they were unextinguished, are clearly interests “other than that of the Crown”. They were thus protected from extinguishment under paragraph 1 of the *NRTA*.³²

We can conclude from the preceding discussion that it is highly unlikely that Aboriginal and/or treaty rights to water were ever ceded or extinguished. If anything, the treaties actually confirmed existing water rights, although they admittedly modified these rights. And neither the *NWIA* nor the *NRTA* show a clear and plain intention to extinguish the water rights held by Aboriginal peoples.

What is the Nature and Scope of the Water Rights Asserted by Aboriginal Peoples?

Aboriginal peoples in Alberta assert that they have water rights both on reserve lands and on traditional lands. While the existence of some of these rights is accepted by government, many others are not. In the various lawsuits that they have launched against the Alberta and the federal governments (as outlined below), First Nations



are claiming an extensive array of rights to water. Asserted water rights can be categorized as outlined below.

First, there are rights to a traditional livelihood, including rights to hunt, fish, trap and gather, but also domestic uses (drinking, washing, watering animals), navigation, as well as cultural, spiritual, ceremonial uses. As stated earlier, the treaties guaranteed that Aboriginal peoples would retain the right to live off the land, either by relying on their traditional activities or by engaging in stock raising and agriculture. Aboriginal peoples were promised that their way of life would remain substantially the same, and that they would not be confined to reserves. Water was essential to that way of life. Not only is the survival of fish and wildlife populations dependent on water, access to waterways is also indispensable for the exercise of the above-mentioned uses. These rights exist both on and off reserves (on lands not “taken up”). Implicit in the treaty rights to water is the continued ability to exercise the rights. This means that water must be of a sufficient quantity and quality to support these uses. In addition, water rights give rise to governance rights: the right and responsibility to make decisions grounded in Aboriginal laws and customs.

In the second category, are rights to the use of water for agricultural, commercial and industrial purposes, e.g. irrigation, hydroelectric development. These rights exist on reserve lands. The treaties contained no express reference to water or water rights in the surrender or in the reservation of lands (with the above-noted exception in Treaty 7), 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. In particular, Bartlett wrote in 1988 that the object of the provision of reserves was “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”.³³ He noted that the water rights on reservations in the United States 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, involving the construction of dams or reservoirs on the Milk River in the state of Montana.³⁴ In his view:

“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.”³⁵

The modern uses of water on reserves cannot be restricted to those uses (e.g. irrigation) that sustain agriculture or cattle raising. They may include other water uses needed to support commercial or industrial developments that may provide a livelihood for First Nations.

The third category of water rights asserted by Aboriginal peoples are riparian rights. In addition to the above-mentioned water rights, Aboriginal peoples benefit from riparian rights on reserves.³⁶ At the time Treaties 6 and 7 were negotiated, the common law was the law of riparian rights. Because reserve 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. Riparian rights include rights of access to water, rights to drain surface water from adjacent land into the water body, rights to the natural flow of water, rights to the quality of water, rights to use the water for both “domestic” and “extraordinary” purposes (with some limitations), and rights of accretion.³⁷

A fourth category of rights is based on ownership of the waterbeds. 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. In Western Canada, the common law presumption has been held to only





apply to non-navigable waters.³⁸ 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*.”³⁹ The rights arising from ownership of the waterbed and the foreshore are quite extensive. They include the right to erect anything thereon: wharf, bridge, dam or diversion projects. 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. The question of Aboriginal ownership of the beds and shores of rivers and lakes on reserve lands remains unsettled. As stated below, this issue has recently been brought to the courts by the Stoney Nakoda Nations.

Alberta Cases in Relation to Asserted Aboriginal and Treaty Water Rights

The ongoing uncertainty surrounding the legal recognition of their asserted rights to water has compelled First Nations in Alberta to resort to the courts. In 1986, the Piikani launched a lawsuit against the Alberta government 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.⁴⁰ However, the issue of the nature and extent of the Piikani’s water rights, including their ownership of the riverbed, was never resolved by 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 2002.⁴¹

More recently, other First Nations have initiated legal challenges against both the provincial and the federal government in relation to their asserted

water rights. The Stoney Nakoda Nations are advancing an express challenge to Alberta’s assertion of ownership and jurisdiction over lands and waters under the *NRTA*.⁴² The First Nations are claiming ownership of lands and waters, including waterbeds, on reserves. This is a broad and extensive challenge to the validity of Alberta’s position. Another action claims Aboriginal title, Aboriginal rights and treaty rights in surface and subsurface waters in lands off reserve within the traditional territory of the Nations.⁴³

Further, the Tsuu T’ina and Samson Cree have challenged the Water Management Plan for the South Saskatchewan River, on the grounds that the Plan has been developed and adopted without proper and adequate consultation with them, and does not adequately accommodate their existing rights to use and enjoy their reserve lands, their hunting and fishing rights, and their asserted Treaty water rights.⁴⁴ The trial decision, handed down in 2008, rejected the claims of the First Nations.⁴⁵ The trial judge held, in part, that the Water Management Plan was a completed approval not an anticipated one, and further that it had minimal, if any, adverse impact on the water use of the First Nations.⁴⁶ An appeal of the decision was heard in November 2009, with a decision to follow.

For its part, the Beaver Lake Cree Nation has commenced an action against the provincial and federal governments on different grounds.⁴⁷ The significant legal argument is that, while particular resource development approvals may have included some consultation with First Nations (although the bulk have not), the cumulative impacts of multiple project approvals have resulted in a denial of and infringement of treaty rights to hunt, fish, trap for subsistence and for cultural, social and spiritual needs. The boreal forest, which is the homeland of the First Nation, is an intricate ecosystem of bogs, fens, marshes and forest in which water is a key component of the ecosystem. The clear cumulative consequences from multiple development projects on the environment have been the loss of fishing and hunting rights (in that waters in the boreal forest are needed to support wildlife) in violation of treaty rights that affirm existing Aboriginal rights.



Conclusion

Aboriginal conceptions of water stewardship and governance have much to contribute to Canadian law. The concept of water stewardship as a collective responsibility, embraced in the North West Territories' draft *Water Stewardship Strategy*⁴⁸ reflects aboriginal understandings. The Strategy is founded on a collaborative partnership approach that includes Aboriginal governments and states its intention to support existing rights and improve the decision-making processes of all parties involved in water stewardship in the NWT. To date in Alberta, any framework that acknowledges Aboriginal concerns and rights to water has not been forthcoming from either the provincial or federal levels of government.

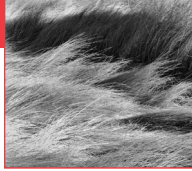
Why this is so is puzzling. The likelihood of the continued existence of Aboriginal water rights, as suggested in this article, highlights the need for negotiation and consultation with Aboriginal peoples leading to true accommodation of their rights and involvement regarding water use and management. Until this happens, Aboriginal peoples will have little recourse but to engage in continuing litigation.

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Notes

1. Minister's Advisory Group, *Recommendations for Improving Alberta's Water Management and Allocation* (August 2009), online: <<http://environment.gov.ab.ca/info/library/8239.pdf>>; Alberta Water Council, *Recommendations for Improving Alberta's Water Allocation Transfer System* (August 2009), online: <<http://www.albertawatercouncil.ca>>; Alberta Water Research Institute, *Towards Sustainability: Phase 1 — Ideas and Opportunities for Improving Water Allocation and Management in Alberta* (November 2009), online: <http://www.waterinstitute.ca/pdf/summary_report_future.pdf>.
2. Water Matters, News Release, November 5, 2009 — Water matters launches campaign promoting water for people and the environment. Water Matters and Ecojustice jointly published a discussion paper outlining a series of recommendations: Danielle Droitsch & Barry Robinson, *Share the Water — Building a Secure Water Future for Alberta* (September 2009), online: <<http://www.water-matters.org>>.
3. Government of Alberta, "Water for Life: Alberta's Water Allocation Management System Review", under Who is involved in the Water Allocation System Review?, online: <<http://www.waterforlife.alberta.ca/564.html>>.
4. Minister's Advisory Group, *supra* note 1, Recommendation #12 at 12: The government should confirm the importance of regional and local expertise and knowledge in water management planning by clearly stating the responsibilities and authorities of the Watershed Stewardship Groups, the designated Water Planning and Advisory Councils, the Alberta Water Council, water trusts, *First Nations* and any other designated groups. [emphasis added]
5. Nigel Bankes, "Water Law Reform in Alberta: Paying Obeisance to the 'Lords of Yesterday', or Creating a Water Charter for the Future?" (1995) 49 *Resources* 1 at 5.
6. Government of Alberta, *supra* note 3.
7. It also draws from an upcoming publication: Monique M. Passelac-Ross & Christina Smith, *Defining Aboriginal Rights to Water in Alberta: Do They Still 'Exist'? How Extensive Are They?*, Occasional Paper (Calgary: Canadian Institute of Resources Law) [forthcoming in 2010].
8. At common law, riparian lands lay along the shores of non-tidal rivers and streams. The owners of riparian rights were entitled, among other things, to divert waters for domestic consumption and any other reasonable purpose. Downstream owners along the watercourse were entitled to obtain waters not significantly diminished in quantity or quality by upstream uses. See Alastair Lucas, *Security of Title in Canadian Water Rights* (Calgary: Canadian Institute of Resources Law, 1990) at 5-7.
9. Thus riparian rights were extinguished under provincial land grants unless confirmed by a Court before 18 June 1931 or by the terms of the grant: *Public Lands Act*, R.S.A 2000, c. P-40, s. 3. This would include regulating the right of riparian property owners to divert water: *Water Act*, R.S.A. 2000, c. W-3, s. 22. Note that these laws do not apply on lands reserved for Indians as provincial law(s) could never extinguish Aboriginal rights. Until





- 1982, when aboriginal rights became constitutionally protected (*Constitution Act, 1982*), only federal legislation was capable of extinguishing Aboriginal rights. See: *infra* note 20.
10. The *North-west Irrigation Act*, S.C. 1894, c. 30, s. 4, am. by S.C. 1895, c. 33, s. 2.
11. David R. Percy, *The Framework of Water Rights Legislation in Canada* (Calgary: Canadian Institute of Resources Law, 1988) at 12-14.
12. Such as the “beneficial use” requirement in Western U.S. Water Law. See: Arlene J. Kwasniak, “Waste Not Want Not: A Comparative Analysis and Critique of Legal Rights to Use and Re-Use Produced Water — Lessons for Alberta” (2006-2007) 10 U. Denv. Water L. Rev. 357.
13. [1997] 3 S.C.R. 1010 at paras. 111 and 117 [hereinafter *Delgamuukw*].
14. *Ibid.* at para. 117.
15. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 269 and 275.
16. In *Delgamuukw*, Chief Justice Lamer’s comments on the test for infringement of aboriginal title as follows: “[...] Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses *the right to choose* to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an *inescapable economic component*”: *supra* note 13 at para. 166 [emphasis in original].
17. *R. v. Van der Peet*, *supra* note 15 at 562, para. 74, and *R. v. Adams*, [1996] 3 S.C.R. 101, paras. 25-30.
18. *R. v. Sappier and Polchies* (2004), 273 N.B.R. (2d) 93, 242 D.L.R. (4th) 433, [2004] 4 C.N.L.R. 252 at para. 50; cited with approval by Justice Bastarache for the majority in *R. v. Sappier*, *R. v. Gray*, [2006] 2 S.C.R. 686 at para. 51.
19. *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. 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. 8*, Made 21 June 1899, and Adhesions, Reports, etc. (Ottawa: Queen’s Printer, 1966). For copies of all the Historic Treaties, see online: <<http://www.ainc-inac.gc.ca/all/hts/tgu/index-eng.asp>>.
20. 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) at 25-28; Graham Statt, “Tapping into Water Rights: An Exploration of Native Entitlement in the Treaty 8 Area of Northern Alberta” (2003) Canadian J. L. & Soc. 103 at 115-116.
21. The test for extinguishment of Aboriginal rights before 1982, as stated in *Calder* and confirmed by Chief Justice Dickson (as he then was) 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”: *Calder v. British Columbia (A.-G.)*, [1973] S.C.R. 313, 34 D.L.R. (3rd) 145; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099.
22. R.S.C. 1985, c. I-5, as am.
23. *Supra*, note 10.
24. Section 2 of *NWIA* (S.C. 1895, c. 33) reads: 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*. [emphasis added]
25. 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.
26. Bartlett, *supra* note 20 at 163-164.
27. *Natural Resources Transfer Agreement*, being a Schedule to the *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 25 [hereinafter *NRTA*]. The Agreement was enacted provincially by *The Alberta Natural Resources Act*, S.A. 1930, c. 21.
28. S.C. 1905, c. 3.
29. *Natural Resources Transfer (Amendment) Act 1938*, S.C. 1938, c. 36. Groundwater was originally not included, but in 1962 Alberta claimed jurisdiction over all surface and subsurface waters. See: *Water Resources Amendment Act*, S.A. 1962, c. 99, s. 2.
30. The case of *Canada (Director of Soldier Settlement) v. Snider Estate*, [1991] 2 S.C.R. 481 has some interesting comment, particularly Justice Cory’s comments in dissent about the *NRTA*: “This Agreement has been incorporated into the Constitution of Canada as Schedule 2 of the *Constitution Act, 1930*. Paragraph 1 of the Agreement transferred the federal government’s interest “... in all Crown lands, mines, minerals



- (precious and base) and royalties derived therefrom ... to Alberta. Certain lands were excluded from the transfer. These included *Indian reserves*, national parks and land held by the federal government as security." [emphasis added] Further on he criticizes Justice Stevenson's narrow interpretation of "land" in the *Soldier Settlement Act* as surface rights only.
31. *NRTA*, *supra* note 27, para. 1. This paragraph is similar to s. 109 of the *Constitution Act, 1897*.
 32. In *Delgamuukw*, 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": *supra* note 13 at para. 175. 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. The Queen* (1888), 14 A.C. 46 at 118 and 123-124.
 33. Bartlett, *supra* note 20 at 20.
 34. *Winters v. United States*, 207 U.S. 564 (1908).
 35. Bartlett, *supra* note 20 at 35.
 36. Bartlett, *ibid.* at 49-51.
 37. Statt, *supra* note 20 at 111; Kate Kempton, *Bridge over Troubled Waters: Canadian Law on Aboriginal and Treaty "Water" Rights, and the Great Lakes Annex* (April 2005) at 45-47.
 38. It is unclear whether the presumption applies to Indian Reserves. See: *R. v. Lewis*, [1996] 1 S.C.R. 921 at paras. 61-62; and *R. v. Nikal*, [1996] 1 S.C.R. 1013.
 39. Bartlett, *supra* note 20 at 93. [emphasis added]
 40. See *Peigan Indian Band v. Alberta*, [1998] A.J. No. 1108 (QB), paras. 14-16.
 41. *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 Piikani settlement agreement, see Merrell-Ann S. Phare, *Denying the Source — The Crisis of First Nations Water Rights* (Surrey: Rocky Mountain Books, 2009) at 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* (LL.M. Thesis, University of Saskatchewan, 2008) at 66-69.
 42. Alberta Court of Queen's Bench, Action No. 0601-14544.
 43. Alberta Court of Queen's Bench, Action No. 0301-19586.
 44. ACQB Action No. 0701-02170 and 0701-02169.
 45. *Tsuu T'ina First Nation v. Alberta*, [2008] ABQB 547, 453 A.R. 114, [2009] 2 W.W.R. 735, 96 Alta. L.R. (4th) 65 at paras. 152-155.
 46. For a comment on the decision, see Nigel Bankes, "Water management planning and the duty to consult and accommodate", A comment on *Tsuu T'ina First Nation v. Alberta* (2008) ABQB 547, University of Calgary Faculty of Law Blog on Developments in Alberta Law (8 October 2008), online: <<http://ablawg.ca/>>.
 47. *Beaver Lake Cree Nation v. Alberta and Canada*, ACQB Action No. 0803-06718.
 48. Online: <http://www.assembly.gov.nt.ca/_live/documents/documentManagerUpload/09-11-04%20Draft%20NWT%20Water%20Stewardship%20Strategy.pdf>.

NEW PUBLICATIONS

Looking Through Cloudy Waters — A Historical Analysis of the Legislative Declarations of Crown Water Rights in Alberta

by Michael M. Wenig, 2010. 16 pp. Occasional Paper #27. \$10.00 (Softcover) (download available)

This paper analyses a keystone of the legislative framework for water rights – the legislative declarations of government or Crown rights to water in Alberta. These declarations originated in the first water rights legislation adopted by Parliament in the late 1800s, but they have been changed numerous times, resulting in a dynamic, complex and arguably confusing evolution. Viewed both individually and collectively through their evolutionary history, these rights declarations arguably raise more questions than they answer. Chief among these questions are: What purpose have they served? What non-legislative public or private rights and public duties have they recognized? Are either the declared rights, or the private rights issued from Crown rights, in the nature of "property"? And finally, is there any current legal effect of the widely varying Crown rights declarations over time? If nothing else, the numerous legislative formulations of this declaration over the years indicate that the concept of Crown rights to water is itself murky and, thus, should be clarified as part of any effort to reform the allocation system.



NEW PUBLICATIONS (CONTINUED)

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by Michael M. Wenig, 2010. 28 pp. Occasional Paper #28. \$15.00 (Softcover) (download available)

Alberta's *Water for Life Strategy* has generally spurred expectations for the development of "watershed management plans" by provincially-sanctioned local community organizations known as "watershed protection and advisory councils" (WPACs). This paper analyses how WPACs' roles have been defined in law and in various provincial policy documents and advisory reports. The analysis focuses particularly on provincial direction as to the extent and scope of WPACs' decision-making authority and on the scope, content, and implementation of the WPACs' watershed management plans. While having broad-based support, WPACs have little provincial direction as to what they must actually accomplish. In some sense, the new land use framework sidesteps these uncertainties by providing a legislative framework for regional planning and for integrating those plans with governmental decision-making across the land and resource management spectra. However, this newer provincial initiative raises even more uncertainty about WPACs' roles.

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