Transformation and Re-Formation: First Nations and Water in Canada

by

Danika Billie Littlechild
LLB, University of Toronto, 2000
BA, Carleton University, 1997

A Thesis Submitted in Partial Fulfillment
of the Requirements for the Degree of

Master of Laws

in the Faculty of Law

Supervisory Committee

Transformation and Re-Formation: First Nations and Water in Canada

by

Danika Billie Littlechild
LLB, University of Toronto, 2000
BA, Carleton University, 1997

Supervisory Committee

John Borrows, Faculty of Law
Co-Supervisor

James Lawson, Faculty of Political Science
Co-Supervisor

Abstract

Supervisory Committee
John Borrows, Faculty of Law
Co-Supervisor
James Lawson, Faculty of Political Science
Co-Supervisor

First Nations in Canada face numerous challenges when it comes to water. First Nations experiences with water range from individual and family challenges, including limited or no access to safe drinking water, to broader collective concerns such as exercising aboriginal or treaty rights to hunt, fish or gather. Many changes are in play, centered on the element of water: the implementation of a new federal act regarding drinking water on First Nations reserves; numerous amendments to various federal and provincial environmental laws and regulations; and a recent set of ground-breaking court decisions on First Nations identity, aboriginal title, historic treaties and water.

A sense of urgency comes from these developments. Over the last number of decades, First Nations have been negotiating complex and unwieldy relationships (or the absence of relationship) with federal, provincial/territorial and municipal governments regarding water — for spiritual/ceremonial use, domestic use, waste disposal, and economic development; and as a function of treaty and aboriginal rights and title. Over this time, the laws and standards used to frame such relationship(s) have been "mainstream" or Canadian.

This thesis proposes that in combination with powerful Indigenous legal traditions, the new constitutional and legislative paradigm signifies a transformative and re-formative shift with regard to First Nations and water.

Table of Contents

Chapter 1

ᐯᑕᐸᐣ *Petapan* Approaching Dawn

ᒫᐦ Mah! We hear the admonition, and listen. We listen with every faculty of our being. We watch, so carefully. Our eyes widen, our ears perk to every hint of sound, our fingers start to unconsciously spread, ready to grasp. Some feel fear. Others feel exhilarated. A few are calm, ready in a kind of knowing-ness. We all think that we know what is to come. We all have our own ideas and theories about what will transpire. Our commonality lies in the intimacy of the collective. We huddle close, wrapped in the protection of our language, our culture, our spirituality, our beliefs, our identity, our being-ness. We share that with one another. We sheltered each other as best we could through this long night. Now the dawn approaches. The blue break of dawn — the time when…

We hear a voice outside: "Stop wasting time!" they shout, "this is purely technical and we have made everything so easy for you! Just fill out this paper and sign it at the bottom, stop your procrastinations and circumnavigations!"

We reply quietly: "It is not technical. It is not easy. This is about who we are. This is about Cree law and responsibilities. This is about the last three hundred years and more. This is about the future. This is about our Treaty relationship with you. It has not been so long for us. You are our Treaty Partner. You must understand this."

We begin our ceremony.

1) INTRODUCTION: OUR LIVES, OUR WATERS

My name is ᓄᑐᑫᐤ ᐃᓵᔮᐃᐧᐣ ᐱᒫᑎᓰᐚᐦᑎᐠ *notokwew isâyâwin pimâtisîwâhtikwak* Grandmother Tree.[1] I am a Cree woman from Ermineskin Cree Nation, which we call

[1] I received my Cree name in 2012, well after the accepted time to receive a Cree identity. Perhaps this is because when I was very young, I received a Blackfoot name, bestowed upon me by a well-respected Blackfoot Elder, late Maggie Blackkettle. She named me Night River Smoker. I have been told that this name has connections to water animal totems, including the beaver. I have also read about the "big smoke" that was held the whole night through at the river near the site of the signing of Treaty 7. I continue to work to understand the meaning in this name as well as the responsibilities. My family has a long history of good relations with the Blackfoot. Maskwacis commemorates our historical Indigenous-to-Indigenous Treaty with the Blackfoot.

ᓀᔭᐢᑫᐧᔭᕽ *Neyaskweyahk*, located in ᒪᐢᑲᐧᒌᐢ *Maskwacis* (“Bear Hills”)[2] territory of Treaty 6 in the province of Alberta.

Water has defined identity in my family, as my mother was known as a diviner in her own First Nation of *Kehewin* (“Eagle’s Nest,” also located in Treaty 6 territory in Alberta). Many of my mother’s relatives have wells or cisterns, as the nearby Long Lake is unfit for human consumption. My late father worked in the administration of *Neyaskweyahk* to promote and support oil and gas development in the region, in spite of his concerns about how it was impacting waters and lands.

I grew up on the reserve, in a household that used and continues to use untreated well water. I remember exploring the bush around my home, and seeing a lot of biodiversity in the plants, insects and animals. We used to have a slough just behind our house. In only a few decades, the slough dried up and desertification set in. Now, when I walk in the bush around the house, it is a rarity to see the old familiar plants, insects and animals. Now, all I see is crabgrass and a lot of dead bush trees, a testament to the broader impacts of oil and gas development in the region, combined with extensive agricultural use of reserve lands. Natural ecosystems and groundwater aquifers have been impacted by directional drilling and unregulated use of pesticides/herbicides. Animals have been dispossessed of their habitats, surface water has been depleted to an extreme, and environmental contamination continues to be an issue.

As a child, I witnessed firsthand the uneven interactions at the community level between the opposing forces of Indigenous knowledge, law and tradition and mainstream laws and society. Alcoholism, violence, suicide and high mortality were and continue to

[2] Maskwacis encompasses four First Nations: Ermineskin Cree Nation, Samson Cree Nation, Montana First Nation and the Louis Bull Tribe. All lands and waters of each reserve lie contiguous to each other.

be significant factors in shaping our lives on the reserve.[3] In spite of these challenges, I grew up firmly rooted within the culture, spirituality, language, and knowledge systems of *Maskwacis* and *Kehewin*.

After becoming a lawyer, I moved home to *Neyaskweyahk* to practice law. I moved back in with my mother and siblings, as it is a cultural practice to support and remain close to family and extended family. In addition, the availability of housing on reserve is extremely limited. It is not uncommon for a three-bedroom house to be stretched to accommodate up to ten people or more. This has ramifications for the provision of safe drinking water and appropriate sanitation, as some water and wastewater systems for residences may not have been designed to support such a large number of people. As of 2011, for approximately 2,700 people living on reserve, there were a total of 573 homes on Ermineskin lands. Of those, 199 homes were serviced by a water treatment plant (WTP), 333 homes had individual groundwater wells, and 41 homes were supplied water via truck delivery from the nearby municipality of Wetaskiwin. The Ermineskin WTP faces low productivity due to well intake fouling, line losses and other infrastructure related issues.[4] Health Canada recently issued their 2013 data and statistics regarding health services in *Maskwacis*. With regard to in-home care service provision, the most

---

[3] Maskwacis has the largest RCMP Detachment in the province of Alberta. There is a special Gang Unit dedicated to addressing organized crime in the four First Nations. In the last few years alone, about 14 violent incidents in Maskwacis made it to national mainstream press, with a multitude more going unreported in the media (See http://www.huffingtonpost.ca/news/hobbema/). Health Canada estimated that in 2010, the 20 to 44 age group represented four per cent of all Canadian deaths but accounted for more than a third of the First Nations deaths in Alberta. The leading cause of death for First Nations in Alberta was injuries and poisonings, which in their statistical formula include suicide (Lachance, Natalie et al. Health Determinants for First Nations in Alberta, 2010, at 18-19 online: <http://publications.gc.ca/collections/collection_2011/sc-hc/H34-217-2010-eng.pdf>).

[4] Crowther, Roy A., Aquatic Resource Management Ltd., Dillon Consulting Limited, Tesera Systems Inc. *Final Report: Water Needs Assessment to Support Anticipated Population Growth on Maskwacis Cree Nations Lands (Ermineskin Cree Nation, Louis Bull Tribe, Montana First Nation and Samson Cree Nation)* (January 31, 2011) (Unpublished, archived at Tech Services, Ermineskin Cree Nation Band Administration) at 44, 54

prevalent need in the four First Nations of *Maskwacis* is for treatment of skin lesions, which has been tentatively attributed, at least in part, to water contamination.[5]

Despite substantial revenues arising out of oil and gas development in the region (1946 — 2006), neither the First Nations of *Maskwacis* nor the Department of Aboriginal and Northern Affairs Canada (AANDC) made significant efforts to construct all necessary infrastructure for safe drinking water and appropriate wastewater systems in buildings, schools, homes and families on the four First Nations reserves. This is mainly due to the fact that much of the revenue from oil and gas development on reserve lands was and continues (in part) to be held in trust for the First Nations by the Crown. In *Ermineskin Indian Band and Nation v Canada*[6] , Rothstein J. held that the Crown was not under any obligation to invest such monies, and could in fact borrow from them for other purposes without any prior agreement with the First Nations and without any obligation to pay interest on such borrowing.[7] The only Crown obligation the Supreme Court of Canada found was to "guarantee the funds would be preserved and would increase," even if that increase was incremental. The argument of the First Nations appellants was that they had lost millions of dollars in revenue from lost investment opportunity. With no obligation on the Crown to invest royalty revenues, and the control of such revenues firmly in the hands of the Crown, there was no chance of either First Nations or Crown initiative to invest in infrastructure on the reserves. In spite of theoretically owning substantial oil and gas royalty revenues, the First Nations of *Maskwacis* were never in a position to engage

---

[5] Lachance, Natalie "Maskwacis Health Status 2013 Presentation" (Paper delivered at the Annual Meeting of Maskwacis Health Services, Camrose Alberta, 15 February 2014) [unpublished].

[6] *Ermineskin Indian Band and Nation v Canada* 2009 SCC 9, [2009] 1 SCR 222

[7] Subject only to ensuring payment of minimal rates of interest on the monies held in trust by the Crown, as determined by the Crown from time to time.

in long-term community, water/wastewater or related environmental planning based on such revenues. As such, *Maskwacis* was caught up in the same federal discourse as many other First Nations in Canada: annual negotiations for Contribution Funding Arrangements[8] with a Federal Government that rarely provides monies or projections for long-term community planning.

2) INDIGENOUS PEOPLES AND WATER: THE BROADER CONTEXT

This is not a unique story. AANDC released a *National Assessment of First Nations Water and Wastewater Systems 2009-2011* with the purpose of "defining current deficiencies and operational needs of water and wastewater systems, to identify long term water and wastewater needs for each community and to review sustainable, long-term infrastructure development strategies for the next ten years."[9] It classified 39% of the systems inspected at high overall risk, 34% at medium overall risk and 27% as low overall risk, assessed against existing regulations and guidelines. As of October 31, 2014 139 Drinking Water Advisories[10] affected a total of 96 First Nations across Canada (excluding British Columbia). Eighteen of those advisories were in the province of

---

[8] Contribution Funding Arrangements are one of the national models of funding agreements maintained by AANDC. The models are used to transfer funding to First Nations who have not entered into their own self-government agreements, and include policy targets and program delivery standards and requirements. See Canada, Department of Aboriginal and Northern Affairs Canada, *National Funding Agreements Models* online: < https://www.aadnc-aandc.gc.ca/eng/1322746231896/1322746482555>

[9] Canada, Department of Indian and Northern Affairs Canada, *National Assessment of First Nations Water and Wastewater Systems,* by Neegan Burnside Ltd., File No: FGY163080.7, at i online: <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/enr_wtr_nawws_rurnat_rurnat_1313761126676_eng.pdf>

[10] Drinking Water Advisories include three types: Boil Water Advisories/Orders, Do Not Consume Advisories/Orders (when there is a contaminant that cannot be removed by boiling), and Do Not Use Advisories/Orders (when there is a contaminant that cannot be removed by boiling and where water should not be used for any reason). See: Canada, Health Canada "Drinking Water and Wastewater", online: <http://www.hc-sc.gc.ca/fniah-spnia/promotion/public-publique/water-eau-eng.php#type1>

Alberta, including my mother's First Nation of *Kehewin* and two reserves in *Maskwacis*.[11]

First Nations experiences with water range from individual and family challenges, including limited or no access to safe drinking water, to broader collective concerns such as exercising aboriginal or treaty rights to hunt, fish or gather. Aboriginal and Treaty rights are of no real import if they cannot be exercised in a healthy environment. First Nations lived experience also includes water use for ceremonial, spiritual and community purposes. Diversions, contamination, degradation, or destruction of water sources has far-reaching implications for First Nations. Identity formation as well as cultural and linguistic diversity can be compromised. When First Nations lose access to a sacred or traditional water source, they also lose access to the beings and spirits that inhabit that water source. This loss ripples out. Stories, songs, dances, and even Indigenous words related to or based in that water source are also lost. The foundational elements of Indigenous legal traditions[12] and knowledge systems are therefore at risk.

---

[11] Canada, Health Canada, "Drinking Water Advisories in First Nations Communities", online: <http://www.hc-sc.gc.ca/fniah-spnia/promotion/public-publique/water-dwa-eau-aqep-eng.php >

[12] A useful description is offered by Sakej Youngblood Henderson in *First Nations Jurisprudence and Aboriginal Rights* (Saskatoon: Native Law Centre University of Saskatchewan, 2006) at 126-127: "Aboriginal societies developed their laws and jurisprudences without any knowledge of European jurisprudence, basing them on the laws, values, principles, stories, traditions, symbols, and ceremonies given to them by the Life Giver that generated relationships, duties and responsibilities. They existed prior to contact between Aboriginal and European societies and prior to the assertion and protection of sovereignty by the Imperial British sovereign. This fact makes First Nations jurisprudence distinct from other jurisprudences, integral to their order, and thus sui generis. The distinct characterization is more than a suppressed jurisprudence that courts have never permitted to be heard or evaluated. It acknowledges the constitutionalized First Nations jurisprudence and law embedded in different systems of knowledge, understanding law from a performance-based culture or internal perspective, rather than a construction by outsiders or dominant discourses. First Nations jurisprudences are best studied in the context of Aboriginal languages, stories, methods of communication, and styles of performance and discourse, all of which encode values and frame understanding. These processes are the legal medium for communicating law to the family and the community." It is not a goal of this paper to define or describe in detail specific Indigenous legal traditions – in fact, my position is that it is the Indigenous nations, tribes and peoples who must provide that definition for themselves – in this, I recognize that there is a multiplicity of legal traditions within the vague grouping of "Indigenous peoples" and as such, any proposal for an "Indigenous

First Nations across Canada have been estranged from their most important relations: those that flow through water. External institutions and actors within the dominant legal and political systems, as well as the private sector, make decisions about water that impact First Nations management, planning, access and use of water. This estrangement has grave consequences for living beings and First Nations life-ways within traditional territories and reserve boundaries. This estrangement has developed slowly, resulting from the impacts of settlement and "development". Industrial and agricultural projects have polluted, contaminated, deforested and degraded traditional Indigenous lands and waters across Canada.

First Nations have not, for the most part, benefitted from or been compensated for damages resulting from industrial development, least of all those damages impacting water. In fact, damages are commonly assessed in terms of environmental impact, and are therefore brought to adjudication as an environmental matter and not as an aboriginal rights or title matter.[13] Due to the character of Canadian law, which will be described in detail in this thesis, First Nations have little space to articulate properly their lived experiences of water depletion or contamination. Yet these voices need to be heard in an appropriate, equitable and substantive manner. Canadian legal and political systems are in the process of transformation, but it has yet to be seen whether that re-formation will be responsive to First Nations.

---

green theory" must at the outset recognize that it would be pluralistic and not another unitary theory that may be added to the mix, with broad characterizations and potentially exclusionary in application.

[13] Conversation with Professor C. Macintosh, University of Victoria Faculty of Law (25 March 2009).

Many changes are in play, centered on the element of water: the implementation of a new federal act regarding drinking water on First Nations reserves;[14] numerous amendments to various federal and provincial environmental laws and regulations;[15] and a recent set of ground-breaking court decisions on First Nations identity, aboriginal title, historic treaties and water.[16]

A sense of urgency comes from these developments. Over the last number of decades, First Nations have been negotiating complex and unwieldy relationships (or the absence of relationship) with federal, provincial/territorial and municipal governments regarding water — for spiritual/ceremonial use, domestic use, waste disposal, and economic development; and as a function of treaty and aboriginal rights and title. Over this time, the laws and standards used to frame such relationship(s) have been "mainstream" or Canadian. This has restricted the relational dialogue to First Nations and the federal crown. Even in the face of recent developments in Canadian law, this may continue into the future.

---

[14] *Safe Drinking Water for First Nations Act*, SC 2013, c.21

[15] The federal omnibus budget bills of 2012, popularly known as Bills C-38 and C-45: the *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c.19 wherein over ten pieces of federal environmental legislation were amended or repealed, including significant changes to federal environmental assessment law, fisheries law and the law protecting Canada's navigable waters. In the province of Alberta, a new law regarding Aboriginal consultation has been proclaimed into force and Alberta's First Nations consultation policy and guidelines have recently been amended: *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management* (June 3, 2013); *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management* (July 28, 2014) and the *Aboriginal Consultation Levy Act*, RSA Chapter A-1.2.

[16] In particular, *Behn v. Moulton Contracting Ltd*. 2013 SCC 26, [2013] 2 R.C.S. 227; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44; *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48; *Tsuu T'ina Nation v. Alberta (Environment)*, 2010 ABCA 137; *Halalt First Nation v. British Columbia (Environment)*, 2012 BCCA 191.

3) THESIS PURPOSE AND ORGANIZATION

The purpose of this research is to engage in a Cree approach to understanding the impacts of mainstream water law and policy on the lives and livelihoods of First Nations in Treaty 6 territory in Alberta. This is not to say that I will be taking an approach through a singular lens of Cree knowledge, law or epistemology. Rather, the research attempts to demonstrate the lived experience of First Nations, in particular the Cree, vis-à-vis water in the current cacophonous moment of Canadian and Indigenous perspectives, experiences, histories, laws, and policies, producing each other in mutually constitutive processes. The deeper theme of the research is to critically examine the opportunities and obstacles to reconciliation between and amongst Indigenous and non-Indigenous Canadians. Change will not happen *to* us, but rather change will happen *among* us, hopefully for the better.

The thesis will articulate how recognition of Indigenous legal traditions has a transformative capacity to secure better water management and governance, within a re-formative constitutional vision of aboriginal and treaty water rights and responsibilities.

The second chapter will further expand upon my methodological and theoretical approach. The third chapter will examine the constitutional parameters of aboriginal and treaty rights and responsibilities related to water. The fourth chapter will examine and analyze changing federal and provincial water law and policy, and attempt to describe the path(s) ahead regarding water governance and the First Nations of Treaty 6 in Alberta.

There is an additional intent and motivation behind this research. Prior to commencing the LLM program at the University of Victoria, I did ceremony in the form of a Sundance to ask for permission and authority to do this work. Over the years since commencing the

LLM program, I have continued in my ceremonial obligations. I have also dedicated my time and efforts towards supporting the Cree, other First Nations and non-governmental organizations in Canada and internationally to secure Indigenous rights and responsibilities with regard to safe water, a healthy environment and full recognition of Indigenous Peoples as self-determining. In this regard, I have worked with First Nations, various water-related committees (both ad hoc and formally established), gatherings, working groups, and institutions. In the course of my work and research, I have had the privilege of learning from many along the way. This learning has taken so many forms: linear and formal; experiential and organic; aural and informal; kinaesthetic and tactile. I have learned from Cree and other Indigenous peoples, numerous water experts, fellow students, water activists and advocates, academic scholars and professors, representatives of federal, provincial and municipal governments, and the private sector. I hope to continue this work into the future.

Chapter 2

ᐃ·ᔦᓯᐁ·ᐊ·ᓐ Wiyasiwewan: There Is Law Involved In It

Preparing for the ceremony, I consider my prayer. In the moments before the prayer starts, I set my mind straight. I banish negative thoughts, I strive to feel balance in my mind and body. I let go of ego. I consider myself as small and humble, insignificant in the tumultuous cacophony of creation. I know that others around me are doing the same, as we have been taught. We begin to pray together, some in words, some in their own minds, some in song. We join in each other's prayers, utterances of confirmation and agreement heard above the voices.

It has become a sacred space, where we offer the best of our pitiful hearts and minds. The prayer songs are laws, passed down and gifted over centuries. Their meanings move like water within us. We cannot stop this recitation of laws until they are finished, we cannot interrupt them. We reach new understandings in our own minds as the prayers are offered, which are like answers from creation. We ask for the consent of the Creator and our relations, the sun, the moon, the stars, the animals, the earth and water, to pray to them and to affirm our connections with them. We ask them to take pity on us. We are humble, and through our prayer recognize the roles and responsibilities we have been gifted.

We are patient in our ceremony, carrying out the protocols without urgency or haste. We have been patient with those outside the ceremony, and we choose not to worry about their patience in waiting for us to finish.

1) PREFACE: THE ORIGINS AND NATURE OF WATER

It may be appropriate to start with where water comes from, what or who water is, and how we ought to relate to water. For the purposes of this thesis, I will present two statements, the comparison of which is intended to provide a baseline or benchmark to draw out in stark relation the "difference" between Cree foundational conceptualizations of water, and modern Western foundational conceptualizations. The first is from an Elder Apprentice named Jerry Saddleback from *Maskwacis* in Treaty 6. He has spent his life in what might be termed prior forms of learning from many Elders within Treaty 6 territory,

and is one of the keepers of our Cree *History of Creation Stories*, which will be discussed later in this thesis. He states:

> Our indigenous peoples' belief states that "Askiy" ("The Earth") is our mother and was "ekih iyinamaht" ("Given to us as indigenous people of the land by The Creator".) Our History of Creation stories tell us that she is a living being and has manifested a part of herself to nurturing all life forms of her children upon her body. These children of hers, have in turn, manifested themselves from their spiritual "Creator's image" form, into plant, animal and other life giving forms as we see them. The Creator gave us these life forms to be in direct relations with as "our older siblings" as we were the last sibling that was Created within this interconnected family link. The greatest teaching from this being that the Creator's Natural Law dictates to us that we take care of our mother Askiy (" The Earth") in the same compassionate manner that she takes care of us. She constantly nurtures us in this compassionate manner as newborn infants nursing from "Otohtosapom" ("Her Breast Milk") which is the water that She provides us with. Since time immemorial we as First Nations people have maintained the purity and the natural flow of Her Breast Milk (as our gesture of compassion) for our succeeding generations. This Law states that there should always be a conscientious effort in continuity of taking care of the interlinked balance of His Creation upon our "Mother Earth" as She provides for our required sustenance and livelihood. The sacred doctrines of our History of Creation Stories tell us that we were Created upon this island to maintain our oneness with our "Mother Earth." We have always followed this Law as "Mother Earth's" caretakers until this balance was subsequently tainted from us from the time of "contact." On being Placed as the caretakers of our Mother Earth, our First Nations people wanted to have as Stewards, the overall, or at the very least, equal voice as to how and where She was going to be utilized. Our Plains Cree Elder Kisikaw Kiseyin states in the etymological reference to our term for water ("Nipiy"), "Ni" derives from the term "Niyah" which means "I Am", and "Piy" derives from the term "Pimatisowin" which means "The Life", which reads as "I Am The Life". Another Plains Cree Elder Mary Alice Whitecalfe (who had a mother that was 123 years old), stated that "Water was the Creator's Own Flesh and Blood."[17]

The second statement is by Pierre Perrault (1611-80), excerpted from his monograph *On the Origin of Springs*, which has been described by Jamie Linton as a "quotation suggest[ing] the main contribution of science to modern water: the disentanglement of the

[17] Saddleback, Jerry *Cree Testimony on Water* published in *International Organization of Indigenous Resource Development (IOIRD) Stakeholder Communication* to the Office of the High Commissioner for Human Rights on Request further to Decision 2/104 on Human Rights and Access to Water, United Nations Human Rights Council. online: <http://www2.ohchr.org/english/issues/water/contributions/civilsociety/IOIRD_Alberta.pdf>

waters of the earth from the chorological and cultural contexts that otherwise give them meaning for people"[18]:

> For me, who have undertaken to speak only about the Origin of Springs, it is sufficient to have done so, and by this means to have given them birth. Their fate is run upon the Earth and throughout the World, I shall let them do so without taking any interest in what may happen to them, good or bad; if the ones become famous through the various good or bad qualities they have contracted in their travels, according to the lucky or unlucky meeting they may have made with favourable or unfortunate soils; if others attract the admiration and amazement of curious people by their flow and by their surprising effects, if others remain by nature mild and peaceful, as they were at birth. All this is no concern of mine, it is enough that they should be simply springs, their quality being only an accident which can happen or not happen to them without changing their essence.[19]

The abstraction of water has led to its manipulation within frameworks that belie our reciprocal dependence with water, as described by Elder Apprentice Jerry Saddleback above. While historically, water was considered a shared public asset,[20] what Linton calls "modern water" has been reduced to a chemical compound to be dealt with by "experts" and certainly devoid of social and ecological relations.[21] This has absolved us, as individuals and collectives, of our responsibilities to water. Linton describes it as follows: "A corollary of the placelessness of modern water (perhaps best symbolized by the tap) is the transfer of water control to placeless discourses of hydrological engineering, infrastructural management, and economics."[22]

While as Canadians we are becoming incrementally more aware of the water challenges and crises that we may face now and in the future, leading experts, scholars

---

[18] Linton, Jamie *What is Water? A History of a Modern Abstraction* (Vancouver: University of British Columbia Press, 2010) at 103

[19] Perrault, Pierre *On the Origin of Springs,* 1674, Reprint (New York: Hafner, 1967) at 144-145

[20] Pentland, Ralph and Chris Wood, *Down the Drain: How We Are Failing to Protect Our Water Resources* (Vancouver: Greystone Books, 2013) at 8

[21] *Supra* note 18, at 14

[22] *Ibid* at 18

and academics continue to write varying perspectives about water as a chemical compound, which can be improved or remediated through science, engineering, regulation, or (challenging) neoliberal market conceptions of water.[23]

The paradigm of modern water as described by Linton is not as strong as it once was. There are minds opening to new ideas and new actors in the dialogue(s) about water. This is where Indigenous peoples might step in, in a collaborative way. This is what I hope to describe in the following chapters of this thesis.

How this happens will depend a great deal on the theoretical and conceptual framework that is used to dynamically constitute new relations between and amongst Canadians, Indigenous peoples and water. The next section will introduce theoretical and conceptual elements that may contribute to reconciliation.

2) RESEARCH METHODS AND APPROACHES: CREE LAW AND GREEN LEGAL THEORY (GLT)

ᓂᐱᐦ *Nipiy* is the Cree word for water. ᓂᓀ "Ni" derives from *niya*, meaning "I" or "I am." ᐱᒪᒋᔑᓯᐏᐣ "piy" derives from the word *pimatisiwin*, meaning "Life." *Nipiy* is thus

[23] A caveat: not all those listed herein subscribe to any particular descriptor. However, each in their own way attempt to address water problems through approaches that ultimately have their source in what Linton describes as "modern water." I must note that some have tried, in an incremental but important fashion, to understand how identity and in particular indigenous identity, might relate to water as well. The fact that recognized experts in their field are opening their minds to indigenous ethics around water is a positive sign for the future. See generally: Sandford, Robert William *Cold Matters: The State and Fate of Canada's Freshwater* (Calgary: Rocky Mountain Books, 2012); Prud'Homme, Alex *The Ripple Effect: The Fate of Freshwater in the Twenty-First Century* (New York, Sribner Books, 2011); de Villiers, Marq *Water* (Toronto: Stoddart Publishing, 2000); Wood, Chris *Dry Spring: The Coming Water Crisis of North America* (Vancouver: Raincoast Books, 2008); Pentland and Wood, *Supra* note 17. There are also those who are intensely critical of the traditional conceptions of modern water, and who seem very interested in how Indigenous conceptions of water might be useful or at least integrated in some way into a re-formed ideal of what modern water could be. See generally Bakker, Karen *Eau Canada: The Future of Canada's Water* (Vancouver: University of British Columbia Press, 2007); Brooks, David, Oliver M. Brandes and Stephen Gurman, *Making the Most of the Water We Have: The Soft Path Approach to Water Management* (London: Earthscan Books, 2009); and in general the publications of Maude Barlow and the work of the Council of Canadians.

properly understood as meaning "I am Life." Water is lifeblood, animating us as human beings, and all that is around us. The Cree language operates on the principle of anima, life-force. Understanding that elements of our environment(s) and ourselves have an inner life force determines how those elements are described, usually in a relational manner. Water is as much a process as it is an entity. Water has so many identities in our language –over 40 words or phrases in Cree describe water in all its forms and manifestations.[24] Water is a living, cultural and spiritual entity that defies reduction to a mere resource.

Water finds a place in the *Cree History of Creation Stories*, ceremonies and laws regarding human interaction with and use of water. There are people in Cree society who hold special responsibilities for water.[25] For instance, women are life-givers and as such hold a sacred status for this ability, which translates into related roles in gender-specific ceremony, song, dance and oral knowledge. Collective responsibilities also arise out of Indigenous legal orders, practices, and protocols respecting water management, collection, and use. Accordingly, water can shape identity much as it shapes land and rock. The spirit of water flows through and amongst peoples, family and individuals to contribute to the dynamic structures of culture, language, legal orders, and landscapes.

My purpose in this chapter is to find a theoretical and methodological moment of *reconciliation*. I understand this word to be fraught with criticism and idolatry. Invoking

---

[24] See generally Waugh, Earle, Nancy LeClaire and George Cardinal, *Alberta Elders' Cree Dictionary* 1st Edition, 4th Printing (Edmonton: University of Alberta Press and Duval House Publishing, 2006) at pp. xxi and 472.

[25] See generally McGregor, Deborah "Anishnaabe-Kwe, Traditional Knowledge, and Water Protection" in *Canadian Woman Studies* (2008) 26, and in particular her account of the Akii Kwe, the women who speak for water. It is outside the scope of this thesis to discuss all the grassroots movements that have come about around the issue of water, but this is a great example of how local Indigenous women are taking control of their power vis-a-vis water and enacting their responsibilities in a publicly accountable manner.

reconciliation gives rise to a variety of emotions and reactions, which have more to do with the meanings attributed to the word in the past and less to do with the potential of reconciliation for the future. As Mark Walters pointed out, "the features of reconciliation that make it a powerful political idea also make it controversial."[26]

Reconciliation has been invoked by Canadian Courts in their analysis of s.35 (1) of the *Constitution Act, 1982,*[27] including in the often cited case of *Mikisew*, wherein the Supreme Court of Canada held that "[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[28] Similarly, The Supreme Court of Canada underlined in *Haida Nation*: "This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples."[29] More recently, the 2008 Statement of Apology to former students of Indian Residential Schools on behalf of the Government of Canada,[30] and the establishment of the Truth and Reconciliation Commission of Canada[31] raised up reconciliation as foundational to future inter-societal

---

[26] Walters, Mark "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in: Kymlicka, Will and Bashir Bashir (Eds.) *The Politics of Reconciliation in Multicultural Societies* (New York: Oxford University Press, 2008) at 165

[27] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[28] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69 at para. 1 See also the excellent overview and critique of how reconciliation has been an "arbitrary creation of the court. It remains disconnected from Aboriginal aspirations and has in fact produced the continued dispossession of Aboriginal peoples through law." Vermette, D'Arcy "Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal Peoples" (2011) online: Social Science Research Network <http://ssrn.com/abstract=1906716>

[29] *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 SCR 511 at para 32

[30] Canada, House of Commons, "Statement of Apology to former students of Indian Residential Schools" in *Hansard*, 39th Parl, 2nd Sess, Volume 142, No. 110 (11 June 2008) at 1515 (Right Hon. Stephen Harper, Prime Minister, CPC).

[31] Truth and Reconciliation Commission of Canada (TRC) describes the process leading to its establishment as follows: "With the support of the Assembly of First Nations and Inuit organizations, former residential school students took the federal government and the churches to court. Their cases led to the Indian Residential Schools Settlement Agreement, the largest class-action settlement in Canadian history. The agreement sought to begin repairing the harm caused by residential schools. Aside from providing

relations. In a sense, it has become a by-word in the dialogue amongst First Nations and other Canadians. Reconciliation can be invoked to truly open a space for us to "sit again with"[32] each other, or invoked to create an attractive façade for a negative intention, or for almost any other purpose. Victoria Freeman has examined the theoretical objections to the concept of reconciliation, and still finds redeeming qualities:

> Rather than jettisoning the concept of reconciliation, what we need in Canada is a vigorous public discussion of who defines what constitutes reconciliation, who sets the agenda and who, if anyone, controls the process. Along with a number of other Indigenous and non-Indigenous activists, such as Sto:lo writer and elder Lee Maracle, I understand reconciliation not as a process of seeking forgiveness or "getting over colonization" or simply "making friends" or "working together" without any substantive changes to the underlying relationship between our peoples. Rather I see reconciliation as a multi-faceted and on-going process of building the relationships, alliances, and social understandings that are necessary to support the systemic changes that are true decolonization. The focus, then, is not on forgiveness of perpetrators but on transformation, at a personal and social level, for both Indigenous and non-Indigenous peoples, and on changes that are practical, symbolic, and substantive. In this view, reconciliation is about restoring interconnectedness and reciprocity at all levels, within Indigenous communities as well as between Indigenous and non-Indigenous peoples.[33]

I believe there is place and space for reconciliation. It is something worth pursuing. I agree that reconciliation can offer transformation. To my mind, the concept of reconciliation is like a trickster.[34]

---

compensation to former students, the agreement called for the establishment of The Truth and Reconciliation Commission of Canada with a budget of $60-million over 5 years." TRC, "About the Truth and Reconciliation Commission of Canada" *Truth and Reconciliation Commission of Canada website* online: <http://www.trc.ca/websites/trcinstitution/index.php?p=4>

[32] Borrows, John *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) note 107 at 412, wherein Borrows defines reconciliation as: "com[ing] from Latin roots *re*, meaning 'again'; *con* meaning 'with'; and *sella*, meaning 'seat.' *Reconciliation*, therefore, literally means 'to sit again with'.

[33] Freeman, Victoria "In Defence of Reconciliation" in: *Canadian Journal of Law and Jurisprudence* Vol. XXVII, No.1 (January 2014) 213 at 216

[34] A trickster has been described by various Indigenous peoples in different ways. My own Cree knowledge, passed down to me through stories, is that of *Wesahkecahk*, our trickster character. In our Cree stories, *Wesahkecahk* is sometimes a hero, sometimes a joker, sometimes a being that really embarrasses us, sometimes what we would consider a transformer.

The Cree have a being, our elder brother, *Wesahkecahk*, who has been called "the trickster." Neal McLeod has criticized this characterization of *Wesahkecahk*, saying that the notion of a trickster being relies on Western literary theory and distorts Indigenous narrative, so that the term "trickster" becomes inaccurate. McLeod describes how "trickster" calls to mind other forms of the word, like trickery or trick, "something less than the truth." He goes on to say:

> [o]ne could argue that this is part of the same dynamic that exists when courts and governments have argued that Indigenous lands have been historically empty of laws and governance structures (the notion of *terra nullius*). The term 'trickster' is part of this same trickery, making Indigenous narratives conceptually empty and potentially devoid of truth."[35]

McLeod urges the narratives of *Wesahkecahk* be understood as part of a genre of sacred stories, so that the understanding shifts to conceive of the trickster as an elder brother and transformer instead, who "creates a state of heteroglossia through the questioning of social space."[36]

This is how I would like to understand the concept of reconciliation. As a trickster at first, until we begin to explore it, unpack it, strip away the false names attributed to it, and finally alight on the true core of the concept – that of transformation. This of course is a powerful tool. It may therefore be a dangerous tool. However, the outcome will depend on us, how we choose to engage in reconciliation, and how our actions, omissions and interpretations dynamically shape the future of reconciliation. Consider this narrative about the trickster Nanabush by John Borrows:

---

[35] McLeod Neal, *Cree Narrative Memory: From Treaties to Contemporary Times* (Saskatoon: Purich Publishing Saskatoon, 2007) at 97

[36] *Ibid*.

> …Nanubush remembered he couldn't escape the law, no matter how hard he tried or what form he took. Law was just like him – a peaceful, vicious being. It was all around him, continually in motion, never stable, always changing. It needed conflict and it needed resolution, so new conflict could arise and devour resolution. There was no way to escape its grasp, though many tried. Transformation is the life of law.[37]

There will never be a perfect singular solution or path *to* reconciliation, as reconciliation *is* the path. It is my hope that by taking a Cree approach and adapting/adopting a legal theory that finds part of its roots in Western legal thought, I might create more solid grounding for the transformative path of reconciliation.

a) METHODOLOGY PART I: NIPIY AND CREE LAW

The presence of spirit in water and its place in our lives is tied to the way Cree Legal Traditions describe rights and duties affiliated with water. The tangible and intangible cannot, and should not, exist without one another:

> The term, 'spirit of place', constitutes not only a dynamic relationship, but also process of involving living human beings. It is an expression that articulates, in and of itself, the two fundamental components of this relationship: 'spirit' which refers to thought, to human beings and to the intangible; and 'place,' which evokes a geographical location, a physical environment and all tangible elements. Both are inextricably joined in close interaction, each component constructing and being constructed in a relationship of complementary synergy: the spirit builds the place and, at the same time, the place gives structure to the spirit. Thus, the relationship between thought and material world is not unilateral but two-way, for it is ever evolving and continually exchanging in dynamic of mutual give and take.[38]

Nipiy is a fluid path upon which we all walk, and we must respect what the Creator, ᑭᓯᒪᓂᑐ *Kisemanito*, has given us. As Indigenous Peoples, our ability to exercise rights and responsibilities in the natural world, including the ability to fish, hunt, gather or

---

[37] *Supra* note 32 at 285

[38] Turgeon, Laurier ed., *Spirit of Place: Between Tangible and Intangible Heritage* Montreal: Les Presses de l'Universite Laval, 2009) at xxxvii.

produce other food or medicines, depends on the existence of clean water. Water has a place in maintaining cultural and spiritual integrity through the Cree knowledge system, the *Cree History of Creation Stories*, ceremonies and sacred gatherings, and Cree Legal Traditions regarding all relationships, ᐊᐧᐦᑯᐦᑐᐏᐣ *wâhkôhtowin*.

I am deploying a Cree methodology in this work. As such, I am engaging in Cree knowledge, as a body of ideas and practices. I understand this knowledge system from a holistic perspective. It is an interconnected, interwoven body of knowledge encompassing culture, spirituality, the environment, community, family and the individual. As such, the heart of Cree knowledge is about relationships. In fact, our verb-oriented language always places relationships at the center of expression. Our relational linguistic practices are reflected in our protocols, decision-making processes and the transmission of knowledge. We consequently focus on relationships.

In this thesis I also hope to show how this knowledge can be passed in an academic format. My own understanding of *Neyaskweyahk* knowledge is limited. This means my thesis will only dimly reflect the vibrancy of community understanding of the world. Instead of taking a definitional approach to relationships, Indigenous knowledge systems may take a more descriptive and non-categorical approach to describing relationships, not just amongst individuals but between individuals, collectives, and ecological orders.

The *Cree History of Creation Stories* constitutes a compendium of inter-related oral knowledge, law, protocol, custom, and tradition, *nêhiyaw-itâpisiniwin*. It is also a source of sacred law, and the process related to it is a sacred or spiritual process fraught with protocols, requirements of commitment and time for recital and learning. The recital of a complete iteration of the *Cree History of Creation Stories* would take approximately one

month (sunrise to sunset), although a short version might be recited in a period of 4 days. In addition, there is no single person who has every piece of the *Cree History of Creation Stories*. Different knowledge holders, Elders, and Elder Apprentices hold different parts of the *Cree History of Creation Stories*. I have only been learning certain parts for the last 8 years, a relatively short period of time. As such, I cannot claim expertise, nor can I reveal the substantive content. While there are specific limitations on how much I can disclose for the purposes of this work, I am confident that the knowledge I have will serve to inform the analysis provided in this thesis. As the author Neal McLeod wrote:

> "[t]he greatest Cree storytellers often said, "*môya mistahi ê-kiskêyihtamân* (I do not know much).' I would have to say, '*nama kîkway ê-kiskêyihtamân* (I know nothing)'; the truths that resonate from the pages of this book are not mine, but the echoes of ancient voices that I have imperfectly articulated.[39]

There are many ways to describe the law captured in the *Cree History of Creation Stories* and other Cree laws – descriptors like "natural laws"[40] and "Indigenous legal orders" have been used. John Borrows has articulated the descriptor of "legal traditions" to facilitate understanding of different legal systems in Canada:

> A legal tradition is an aspect of general culture; it can be distinguished from a state's legal system if a national system does not explicitly recognize its force. Legal traditions are cultural phenomena; they provide categories into which the 'untidy business of life' may be organized and where disputes may be resolved. Sometimes different traditions can operate within a single state or overlap between states. This is known as legal pluralism: 'the simultaneous existence within a single legal order of different rules apply to identical situations.' In applying these insights to our country, it could be said that Canada is a legally pluralistic state: civil law, common law, and indigenous legal traditions organize dispute resolution in our country in different ways. Although there

---

[39] *Supra* note 35 at 5

[40] In Nature's Law, the parameters of 'nature' do not match western conceptions…notions of nature also involved the supernatural, thus forces and powers of the spirit world, including ancestors and unknown energies in the cosmos were part of the natural order, since they were accorded influence in the affairs of animals, humans and the landscape at large. When we use the term Nature's Law, then, we are using it in the enlarged Indigenous sense." See Chief Wayne Roan and Earle Waugh, *Nature's Laws* (Alberta: Heritage Community Foundation, 2004) online: <www.abheritage.ca/natureslaws/knowledge_natural/index9.html>

> are similarities between traditions, each has its own distinctive methods for development and application. The vitality of each legal tradition does not rest solely on its historic acceptance or how it is received by other traditions. 'The strength of a tradition does not depend upon how closely it adheres to its original form but on how well it develops and remains relevant under changing circumstances.' When recognized, provided with resources, and given jurisdictional space, each legal tradition is applicable in a modern context. A mark of authentic and living tradition is that it points us beyond itself. Each of Canada's three major legal traditions is relevant in this respect, and each continues to grow amidst changing circumstances.[41]

The *Cree History of Creation Stories* represents more than a strict basis or framework of law and knowledge. Each time I hear portions of it, I learn something new. I understand more about the deep content of laws contained in our language, which even when translated into English, somehow manage to retain multiple levels of meaning and application. As such, Cree knowledge cannot be conflated entirely with Cree legal traditions. They must be understood as overlapping - along with the natural environment, other Indigenous legal traditions and the legal systems of Canada's pluralist state - they feed into one another, and are simultaneously informed by internal and external dynamics and changes. While the *Cree History of Creation Stories* forms a kind of foundation in my formal and informal education, there are other Indigenous laws which are very much at play in a more contemporary form, and which have evolved over decades.[42]

These laws have developed as a result of observations of the natural environment, and over centuries of interactions between ᐊᐦᔨᔨᐦᐅᐊᐤ *ayisiyinowak* people / human beings and ᐅᑲᐃᐧᒪᐊᐧᐘᐢᑭᐩ *okâwîmâwaskiy* mother earth.[43] Such interactions cannot be reduced to mere

---

[41] *Supra* note 32 at 7-8

[42] When working with First Nations, I am occasionally called upon to facilitate the codification of Indigenous legal traditions – which generally ends up being a kind of amalgam of Indigenous legal traditions and the mainstream or Canadian legal system. Sometimes, individuals will express doubt about how much Indigenous knowledge and law is "left" after years of colonization, oppression, dispossession, racism and discrimination. I like to tell them: "It is like the bank commercial on TV…you are richer than you think!"

[43] *Supra* note 40 at 29: "…these laws may be regarded as literally being written on the earth."

"cultural practice" that might be adapted into "traditional knowledge" for the benefit of a mainstream activity or process such as an environmental assessment. Indigenous Peoples do not, in general, privilege or elevate human beings as the main or only actor/beneficiary in relation to the natural world. Marie Battiste aptly pointed out that "we reject the concept of culture to mean Indigenous knowledge, heritage, and consciousness, and instead connect each Indigenous manifestation as part of a particular ecological order."[44] As such, a kind of equality with regard to rights and responsibilities is embedded in interactions between human beings and the natural world. Human activity becomes as much of an "ecological event" as that which we witness or participate in the natural environment/ecosystem. These interactions and ultimately, communications, become the basis for Cree knowledge and what Neal Mcleod calls "Cree Narrative Memory." Sometimes these interactions take place not only in the physical world, but in dreams that provide guidance and assist in the interpretation of natural law:

> My great-great-great grandfather *Wîhtikôhkân*, who died in 1914, was from the bush country around present-day Cold Lake, Alberta. He preferred to hunt with a bow and arrows. He had dream helpers, *pawakanak*, who told him where game was. In our current reliance on technology, we have forgotten many things that this old man knew. My Uncle Burton Vandall told me that *Wîhtikôhkân* could talk to animals. He would call out to them and they would come.[45]

i) APPLYING CREE LAW IN CONTEXT

Members of my family still talk about *pawakanak*, and I myself have been assisted in this way in the course of my work. This is a demonstration of the connectivity of the natural with the supernatural, the sort of unlimited accountability that stretches from the

---

[44] Battiste, Marie and Sakej Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage* (Saskatoon: Purich Publishing, 2000) at 146

[45] *Supra* note 35 at 26

worlds we can see to those that we cannot. One of the first legal teachings of the *Cree History of Creation Stories* tells us that our "thoughts echo in the heavens." This is a reflection of the concept of "spirit of place" or "being." It also suggests that each individual carries knowledge and law within themselves at all times, and as such remain accountable to the law at all times. We may easily breach a law within our own minds as much as we may breach a law through physical actions or omissions. This creates a different source of transparency and accountability than what is generally experienced under mainstream or Canadian law.

The consequences of such a breach are not tangible in the same way as a violation of law in the mainstream or Canadian legal system:

> …in the Indigenous context, no august being demanded obedience to an absolute law; nor was there a being who was responsible for condemning those who did not obey. Rather the notion was that going against this enlarged sense of nature/supernatural would inevitably lead to negative consequences. It might better be characterized as: you and your society will only get out of nature's system what you put into it, a 'natural' justice system exists in the world. One went against this natural system at his or her peril.[46]

Another example of laws arising from our interactions with mother earth can also be drawn from water. Some hold medicine (sacred law and knowledge) related to the beaver which comes from the role of the beaver in the regulation and management of the natural environment – this is knowledge related to my Blackfoot name, *Night River Smoker*, and how laws around water management for Indigenous Peoples in the plains region related in an intimate way to those animals who live in or around water bodies. We look to the beaver to "tell" us how a water source is faring, what the coming season will hold in terms of the health of the water source and the surrounding ecosystem, and

[46] *Supra* note 40

also for guidance on what we might do or not do into the immediate future. Laws (process and protocols) lay out how we discover this information and how we must approach the beaver and medicine related to the beaver.[47] This has been documented in academic scholarship as well:

> Although all of the inhabitants of the plains enjoyed a reliable food supply, they shared a vulnerability that continues to limit human occupation of the plains to the present: the need for a dependable supply of water. The large size and limited mobility of prehistoric communities in a drought-prone area undoubtedly made access to water a primary concern. To meet the challenge, the indigenous population developed a water management strategy that offered them from the effects of even a long-term drought. Ecological studies have shown that the Avonlea tradition and the Old Woman's tradition that grew from it purposefully abstained from beaver hunting as a means of managing the amount of available water. Archaeologist Grace Morgan wrote that 'bison were the staff of life,' though beaver 'were at the core of a profound ideological framework which prized the rule of the beaver in stabilization of water resources.' The relationship between the species and plains people is so deep that religious practices involving beaver medicine bundles continue to hold deep significance among the *Niitsitapi* people even in the 21st century.[48]

Even today, non-Indigenous peoples reference this law as an aspect of good water management. In a 2013 article in *Alberta Views* magazine, Karl Van Tighem urged that this legal protocol be reinstated to improve water supply from Alberta's foothills and mountain headwaters to capture as much snowmelt and rainwater as possible. He recommended that trapping, a practice regulated by the Alberta government, be amended to disallow for the trapping of beaver. He pointed out that for a government (Alberta) that ostensibly holds watershed health as a top priority, allowing for such trapping to continue

---

[47] Sometimes, the beaver will come to us to try and tell us what we must do with regard to the management of our responsibilities to water (personal conversation, Murray Healy (*Niitsitapi*), Water Operator *Nipisikopahk* Samson Cree Nation, May 2012)

[48] Daschuk, James *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013) at 7

(in addition to logging, off-road motorized recreation and hydropower production) goes firmly against this priority.[49]

It is important to recognize that where Indigenous legal traditions and non-Indigenous knowledge intersect, there is an opportunity for equitable reconciliation. Our path of reconciliation may diverge, twist, turn, become forked and seemingly destined never to meet. A convergence is a moment that we should not allow to pass us by.

b) METHODOLOGY PART 2: ADOPTING/ADAPTING GREEN LEGAL THEORY

A major and ongoing project has been how to better recognize Indigenous legal traditions, culture and knowledge in mainstream or Canadian legal systems. The impetus behind this project has been to tailor Indigenous legal traditions to the space provided in mainstream legal systems. Often, that space is extremely limited and restrictive. However, my project in this thesis is different. I aspire to describe a transformative and re-formative reconciliation between equals. I think that inter-societal standard setting can be achieved in a way that allows for the independent and autonomous flourishing of Indigenous legal traditions and mainstream legal systems.

If Cree knowledge and laws regarding water are to be effectively and appropriately recognized and exercised, there must be a way of articulating that through a kind of bridge, or inter-societal theory. Part of the fundamental challenge is to find a legal theory rooted in mainstream law that can make the space for such recognition. In addition to my use of Cree Law to guide my research, I have also engaged in my own search for a good

[49] Van Tighem, Kevin "Land Planning" in *Alberta Views*, Vol. 16 No. 6, July/August 2013, at 28-35

"brother" to adopt/adapt - a legal theory that would make room for me to be myself in the course of this research. I found Green Legal Theory (GLT).

A multitude of environmental challenges and issues face Canada and the world today: climate change, water scarcity, exponential industrial development, and concomitant land degradation, amongst others. In particular I have focused on the issue of water, and am interested in how Indigenous and mainstream law can assist in addressing the burgeoning issues of water scarcity, water contamination and water security – such terms being understood from both an Indigenous and non-Indigenous lens. Law is an important tool to be used in mitigating and resolving conflicts around the use and management of natural resources. Law can mediate the web of interests surrounding our individual and collective relationship(s) with nature.

The many interests that law mediates include those of the state, industry and the private sector, Indigenous peoples, civil society, and local communities. Yet, as noted earlier, Canadian law has not served Indigenous Peoples well because it has not recognized Indigenous law or accorded it appropriate protection. This is unfortunate because Indigenous peoples and communities keenly feel the impacts of environmental challenges, issues and problems, due to their dynamic relationships with and reliance upon the environment for livelihood or life-ways, cultural and linguistic survival and assertion of identity. Canadian law cannot deal with the full nature of Indigenous environmental relationships without affirming and implementing Indigenous law.

While there are avenues of public participation in the formation, re-formation and implementation of laws related to or impacting upon the environment in Canada, very few of those avenues are open to engaging Indigenous values, perceptions, knowledge

and legal traditions. Indigenous legal traditions have remained on the periphery, locked in a shallow discourse with the state and the institutions created out of state law. A fundamental change in legal (and attendant theoretical) approaches to the environment is necessary in order to properly engage, empower and reflect Indigenous legal traditions. GLT may offer an opportunity to articulate a pluralistic Indigenous green legal theory.

At the core of GLT lies a movement to re-conceptualize the relationship between humans and nature. Over the course of western European history, that relationship has for the most part been framed as one of domination and control of man over nature. This so-called relationship has been formalized throughout the development of modern law.[50] As such, law has taken on an important role in the promulgation of "systemic unsustainability."[51] The goal of GLT is to challenge unsustainable practices. GLT seeks to radically reshape law and its role in facilitating the resolution of major environmental issues. GLT is not merely concerned with conventional environmental law as a subset of the broader legal system. Rather, GLT seeks to question the "content and process of *law itself* – generally understood as formal, state-based regulation – and the institutional structures that it creates and supports".[52] This is important for Indigenous Peoples, because much of modern environmental law, meaning in particular law and policy created by the state that facilitates private sector profit, has been economically, politically and culturally harmful.

Thus, the intent of GLT is not merely to critique current procedures and structures, but to offer a pathway to "systemic re-formation" or a "new naturalism", as has been

---

[50] Holder J., "New Age: Rediscovering Natural Law" (2000) 53 Current Legal Problems 151 at 152

[51] M'Gonigle M. and P. Ramsay, "Greening Environmental Law: From Sectoral Reform to Systemic Re-Formation" (2004) 14 *Journal of Environmental Law and Practice* 333 at 334

[52] *Ibid* at 334

proposed by M'Gonigle.[53] This offers a revisionist form of escape from the well-intentioned existing legal framework of water governance, which is admittedly based on widely accepted models of development. It does not require all the laws to be re-written – it requires their re-interpretation.[54] The existing framework is de-contextualizing and objectifying for Indigenous Peoples.[55] Professor M'Gonigle sees systemic re-formation as a contribution of ecological thinking to legal theory, and as a critical tool in social transformation. He says GLT "provides a universal and trans-rational truth-in-diversity".[56] I submit that Indigenous legal traditions (as the holders of such knowledge express them) may make an important contribution to GLT. Indigenous laws constitute an important source of law for GLT's transformation. The inclusion of Indigenous law within GLT may give rise to (an) entirely differentiated approach(es) to green theory.

This section will demonstrate why Indigenous legal traditions ought to be a significant source of authority for GLT. I will do this by examining the current situation faced by Indigenous peoples with respect to the environment. I will also show how an Indigenized GLT can address the challenges discussed in the introduction. The use of Indigenous law in addressing Indigenous Peoples' relationship(s) to water is an fundamental expression of Indigenous identities, values, culture and knowledge. Indigenous legal traditions can be exercised through GLT to develop everyone's rights and duties towards water under Canadian law and policy.

---

[53] See generally M'Gonigle, *supra* note 51 and M. M'Gonigle, "A New Naturalism: Is there a (Radical) 'Truth" Beyond the (Postmodern) Abyss?" (2000) 8 Ecotheology 8

[54] *Supra*, note 32 at 20 Borrows explains: "We do not have to abandon *law* to overcome past injustices. In placing our country on a firmer footing, we only have to relinquish those *interpretations of law* that are discriminatory."

[55] Boelens, Rutgerd et al *Out of the Mainstream: Water Rights, Politics and Identity* (London: Earthscan, 2010) at 5

[56] *Supra* note 53 at 11

3) CONCEPTIONS OF INDIGENOUS VOICE IN MAINSTREAM FRAMEWORKS

Indigenous voice in Canadian society, law, policy and economy has been shaped by the interplay between Indigenous Peoples and the settler society over the course of Canadian history. Much has been written about the different worldviews of these distinct societies. Obviously, Indigenous peoples used their pre-existing knowledge systems as a basis for their interaction with non-Indigenous peoples (the settler societies), and other Indigenous peoples and the environment around them.[57] They still do so, despite the overall failure of federal and provincial regimes to recognize this. However, the Canadian Courts have, at times, attempted to recognize Indigenous legal traditions, such as in the case of *Campbell v. British Columbia (Attorney General)* (2000), 189 D.L.R. (4th) 333 (BCSC). There, Williamson J. stated at para.86:

> The continued existence of indigenous legal systems in North America after the arrival of Europeans was articulated as early as the 1820s by the Supreme Court of the United States. But the most salient fact, for the purposes of the question of whether a power to make and rely upon aboriginal law survived Canadian Confederation, is that since 1867 courts in Canada have enforced laws made by aboriginal societies. This demonstrates not only that at least a limited right to self-government, or a limited degree of legislative power, remained with the aboriginal peoples after the assertion of sovereignty and after Confederation, but also that such rules, whether they result from custom, tradition, agreement, or some other decision-making process, are 'laws' in the Dicey constitutional sense.

Indigenous legal traditions have not only informed Indigenous participation in mainstream processes, decision-making, and institutions –they continue to exist,

[57] See generally Charles C. Mann, *1491: New Revelations of the Americas Before Columbus* (Second Edition) (New York: Vintage Books, 2006); Charles C. Mann *1493: Uncovering the New World Columbus Created* (New York: Vintage Books, 2011); and William Cronon, *Changes in the Land: Indians, Colonists and the Ecology of New England* (20th Anniversary Edition) (New York: Hill and Wang, 2003)

exercised by Indigenous Peoples. My own experience has been one of living in "two worlds" for many years. With Cree peoples, I have a sense of belonging, being a part of a collective, and engaging in a knowledge system that does not reference mainstream systems for legitimacy or cohesion. In the mainstream, I am able to navigate because I have the formal and informal education of the mainstream knowledge system to do so. However, there have been few moments in my engagement with the mainstream system where I have truly felt the space to be myself. Part of the reason for that are, I believe, systemic limitations of mainstream laws. In other words, it is not that Canadians in general are oppositional to the existence of Indigenous peoples. The law itself has created systemic barriers and obstacles to reconciliation, as the law has been premised on a discriminatory, racist and outright genocidal history. While many Canadians have moved away from the values embodied by this history, the law has been much slower to adapt.

a) THE LIMITATIONS OF CANADIAN LAW: SYSTEMIC FACTORS

It is a loss to all Canadians that the knowledge systems and legal traditions of Indigenous Peoples do not enjoy the same level of legitimacy provided to the dominant constitutional structure and legal systems. For example, Indigenous law does not have the same official stature as common law and civil law in Canadian life:

> …Western perceptions have, to a large degree, failed to recognize that indigenous conceptual systems have their own internal logic and rationality, which are not always translatable into the dominant Western legal and political system. This is particularly evident in the policymaking areas, where Western terminology and concepts are imposed as a way to define, categorize and evaluate concepts in indigenous societies. Such action often serves to legitimate the interests of the existing legal and economic system of the state, denying, misrepresenting or fabricating the concepts or categories

> of indigenous peoples. As a result, colonialism is perpetuated, because indigenous systems are subjugated to a lesser order within the dominant framework.[58]

As such, Indigenous knowledge systems have been internally contained and expressed within Indigenous communities while at the same time being shaped by the interaction of those communities with the non-Indigenous world around them. The complexity of those interactions cannot be understated. The complexity arises in large part because of the challenges presented in expressing Indigenous identities within the dominant system(s). Indigenous Peoples are not without power to change the dominant tide that seems to be arrayed against their legal ideas. Indigenous Peoples continue to possess agency that enables them to influence how Canadian law unfolds, we will realize that Indigenous law has continuing relevance in addressing environmental issues – including water. This is the promise of Indigenous GLT, it could allow for the enhancement of Indigenous choice and action.

In his book *Liberalism, Community and Culture*,[59] Will Kymlicka posits that the onus is on Indigenous peoples to demonstrate their identity and rights in Canada, stating: "For better or worse, it is predominantly non-aboriginal judges and politicians who have the ultimate power to protect and enforce aboriginal rights, and so it is important to find a justification of them that such people can recognize and understand….on the standard interpretation of liberalism, aboriginal rights are viewed as matters of discrimination and/or privilege, not of equality".[60] Anishinabek scholar Dale Turner has commented on

---

[58] Smallacombe, Sonia "On Display For Its Aesthetic Beauty: How Western Institutions Fabricate Knowledge About Aboriginal Cultural Heritage" in: Ivison, Duncan, Paul Patton and Will Sanders (eds) *Political Theory And The Rights Of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 152 at 161

[59] Kymlicka, Will *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989) at 154

[60] This might seem like a very reasonable assertion, as the object of formation or re-formation of the state is embodied in the state legal system, or the dominant legal system. However, Kymlicka is not interested in

this statement by Kymlicka, saying that "Indigenous peoples have been explaining themselves to the European newcomers since the time of first contact"[61] and characterizing it as "Kymlicka's constraint" which is a "brutal reality check"[62] for Indigenous peoples in Canada.

In so writing, Turner is appropriately critical of Kymlicka's burden. However, Turner does not delve deeply enough into how Kymlicka's constraint operates to 'cut off at the knees' any real effort at maintaining integrity while communicating an authentic Indigenous perspective – in effect, silencing the Indigenous voice. Kymlicka's constraint contains an implicit assumption about the inherent legitimacy of the dominant system, and everything that system has been built upon since the time of contact. Each interaction, transaction, or event since that time has contributed to the ongoing process of defining the terms of intercultural relationships and, in turn, shaping or creating institutions based upon the premise of Kymlicka's constraint.

While the creation of institutions out of inter-societal relations may on its face be a positive development – providing both Indigenous and non-Indigenous peoples with a sense of stability or certainty and establishing modes of communication and interaction – the way in which these institutions have been created, and the historical relations leading to their creation, have resulted in institutions that provide far greater benefit to non-

---

deep reform of the existing system – he is only interested in how Indigenous peoples can be "fit" into the legal system without too much trouble or challenge to the liberal project.

[61] Turner, Dale "Perceiving the World Differently" in C. Bell & D. Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) at 57 In fairness to Turner, I should also say that he terms the *White Paper* liberalism a "reality check" for Indigenous peoples as well, and points out that it serv[ed] to "rouse Aboriginal peoples from their colonial slumbers and begin to question the legitimacy of liberal views of justice" see D. Turner, *This is Not a Peace Pipe* (Toronto: University of Toronto Press, 2006) at 36.

[62] *Ibid* at 60

Indigenous peoples. As explained below, the opening the GLT provides could challenge the false assumption of non-Indigenous institutional legitimacy in Kymlicka's models.

The aim of the present system seems plainly to ensure that the territory on which the settler societies are built is effectively and legitimately under exclusive non-Indigenous jurisdiction and open to settlement and capitalist development. Key means to this end are twofold: the ongoing usurpation, dispossession, incorporation and infringement of the rights of Indigenous Peoples coupled with various long-term strategies of extinguishment and accommodation that would eventually capture their rights, dissolve the contradiction and legitimize the settlement.[63] GLT and Indigenous legal traditions would challenge these presumptions.

However, the present situation does not easily accommodate such challenges. In fact, when attempting to advocate for Indigenous rights in non-Indigenous institutions, Indigenous peoples are compelled to employ official or more formal aspects of the dominant system, all in the name of equality. Expert scientific knowledge and 'modern' water systems are commonly presumed to be foundational for progressive and forward-looking policy purposes. Such policies have a homogenizing effect, since Indigenous Peoples must engage in a policy language that is not conducive to proper translation. This misrepresents Indigenous ideology, beliefs or legal traditions.

Indigenous peoples have been compelled, beyond speaking a dominant language (such as English or French) in expressing themselves, also to adopt the institutional frameworks of the dominant society to move towards development and stability within their communities. I once heard an Indigenous advocate describe it in this way: "Either you sit

[63] Tully, James "The Struggles Of Indigenous Peoples For And Of Freedom" in: Duncan Ivison, Paul Patton and Will Sanders (eds) *Political Theory And The Rights Of Indigenous Peoples,* (Cambridge: Cambridge University Press, 2000) 36 at 41

at the table or else you might be the meal."[64] In other words, Indigenous peoples are caught in a paradigm where they may find themselves *on the table* as the problematic or object of policy, law, and discussion ("client," "customer," "user," or "beneficiary"). Alternatively, they can change themselves to fit in the chair designed for them *at the table* ("partner," "equal participant," or "stakeholder"). Consequently, in order to be seen as "equals", Indigenous Peoples have to construct themselves actively in accordance with the dominant model of equality. An example of this comes in Chapter 4, in discussing the overarching system of water governance in the province of Alberta, as well as the recent federal legislation that imposes a provincial statutory and regulatory framework on Indigenous water management and governance. These imposed systems have the potential to continue oppressive and uneven water governance regimes in Indigenous communities.

While the governance systems established by the *Indian Act* RSC 1985 c. I-5 were, in the first place, forced upon many Indigenous nations in Canada (beginning in the late 1800s and early 1900s), over time those prescribed structures of governance have become normalized and entrenched within First Nations communities. Very few communities have been able to establish their own governance systems arising out of Indigenous legal traditions. The communities who have had some success are those few who have negotiated self-government agreements[65] that reflect Indigenous legal traditions. This process spans many years and consumes an abundance of resources.

---

[64] Conversation with Kenneth Deer, Indigenous World Association, Haudenosaunee. (July 2014) I have heard Kenneth say this many times over the years of my acquaintance with him.

[65] Self-government agreements are outside the scope of this thesis and will not be discussed further. For reference, there are approximately 21 self-government agreements that have been entered into across Canada involving some 35 Indigenous communities. Of those, 18 are part of a comprehensive land claim agreement. Some self-government is what is called "sectoral negotiations" where only one or two discreet

Thus, for the most part, Indigenous peoples have effectively set up mirror federal bureaucracies within their communities.[66] These bureaucracies undermine dynamic leadership, traditional teachings, customary understandings, and Indigenous beliefs or practices. Effectively, those bureaucracies prevent sustainable advocacy and maintenance of Indigenous legal traditions on the part of Indigenous communities. Indigenous peoples are forced to adopt bureaucracies and the underlying assumptions regarding rules and forms of government and advocacy.[67] As such, even where Indigenous peoples purportedly have jurisdiction over specific resources or lands, the way that jurisdiction is exercised will probably be predicated upon an institutional framework which itself constrains the complete and effective expression of Indigenous epistemology and legal traditions. Thus it becomes an issue of process and the institutionalization within and around Indigenous communities of the dominant system with the pro forma inclusion of Indigenous knowledge.

Indigenous engagement in environmental governance and law in Canada has been framed in terms of what can be conveniently appropriated from our traditionally held, or traditionally disseminated Indigenous knowledge (popularly known as "TK" or

---

areas of jurisdiction are negotiated, such as for example the sector of education. There are about 90 self-government negotiation tables in Canada currently. Canada: AANDC, *Fact Sheet: Aboriginal Self-Government* online: <http://www.aadnc-aandc.gc.ca/eng/1100100016293/1100100016294>

[66] Nadasdy, Paul *Hunters and Bureaucrats: Power, Knowledge and Aboriginal State Relations in the Southwest Yukon* (Vancouver: UBC Press, 2003) at 6-7. It is not only governance systems on reserves that are mirroring the institutions of the settler society. After 1960 – when "Indians" were given the right to vote – Indigenous activism rose exponentially. And, interestingly, the forms of organization that many Indigenous activists chose to take were structures that existed already in the dominant society. For example, the first manifestation of the Assembly of First Nations was the "National Indian Brotherhood" – a fraternity. Even now, most if not all Indigenous representative organizations (such as the Congress of Aboriginal Peoples, the Native Women's Association of Canada, the Inuit Tapirat Kanatami amongst many others) are incorporated as societies, charities, not-for-profits etc.. Métis organisations in Alberta, for example, operate through the establishment of "locals" in various regions of the province, which effectively govern and determine membership and benefits.

[67] *Ibid* at 8

traditional knowledge). It is a reductionist approach that simplifies Indigenous knowledge to an extreme, firmly grounded in existing hierarchical structures that promulgate essentialist concepts of Indigenous knowledge. This is not consistent with a GLT approach. In fact, it facilitates the ongoing imposition of mainstream law on Indigenous communities, to much the same effect as has been seen over the last few hundred years. It basically allows for mainstream institutions and governance systems to be let "off the hook" with regard to Indigenous rights, as they can say that they consulted us or incorporated TK into the decision making process. It is one of the reasons First Nations have not been able to effectively resist legislative changes that impose a provincial regulatory system on Indigenous water management and governance.

b) THE LIMITATIONS OF CANADIAN LAW AS APPLIED TO THE ENVIRONMENT

A specific example of such essentialization of Indigenous knowledge is found in the federal environmental assessment regime. The former *Canadian Environmental Assessment Act* RSC 1992 c.37 made the following provision under section 16: "Community knowledge and aboriginal traditional knowledge may be considered in conducting an environmental assessment"[68]. In the Canadian Environmental Assessment Agency's policy[69] on the implementation of this section, the stated goals of the section is to provide information that relates to the science of the assessment (like biophysical information or environmental effects) and to contribute to "relationship building"

[68] Note that this is permissive and not prescriptive wording. A further examination of the new Canadian Environmental Assessment Act 2012 will be addressed in Chapter 3.

[69] Canada, Canadian Environmental Assessment Agency, "Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the Canadian Environmental Assessment Act – Interim Principles" online: Canadian Environmental Assessment Agency <http://www.ceaa.gc.ca/012/atk_e.htm>

amongst the parties to the development and "capacity" of Aboriginal communities. The law never refers to the fact that the knowledge sought is a part of Indigenous legal traditions – it expresses those legal traditions, and as such forms a section of the inter-related web of knowledge that comprises Indigenous legal traditions.

As such, Indigenous knowledge has been seen as a tool for science as opposed to being a legitimate and valuable form of knowing and judging science. By framing Indigenous participation in environmental governance and law as something limited to the knowledge that they have to offer to the scientific process, Indigenous peoples' ways of knowing therefore become an object which must be integrated into the existing dominant system. In some instances, this may actually be a useful way of addressing problems, conflicts, or environmental issues. However, for Indigenous peoples, the practice places them firmly on the periphery of environmental governance and law. Their position there depends upon the discretion and tolerance of the dominant systems' decision-makers. Thus, although they hold valuable knowledge (even if the value ascribed to their knowledge is minimal), that knowledge provides them only negligible power.

If the power of Indigenous knowledge can thus only be employed when it was somehow connected to or understood in relation to forms of state power, it is questionable what sort of force or control this knowledge provides. John Borrows has commented that "[s]o-called democratic institutions repress indigenous participation, degrade their environments, and thereby hinder the extension of knowledge about how to successfully live with the environment."[70] And yet, the expression of Indigenous knowledge within state institutions is only one sliver of the whole. An entire world

[70] Borrows, John *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 33

extends beyond that expression, within an Indigenous order that shapes relationships without describing them in categories or silos, that is more about process and experience than about ownership, control and "rights and wrongs".[71]

The peripheralization of Indigenous knowledge and legal traditions from environmental law is not surprising, given the history of science and law developing hand-in-hand in the western legal tradition. It is why a fundamental change is needed, in accordance with the kinds contemplated by Green Legal Theory. Jane Holder has demonstrated how the precepts of classical science – universality, rationality and objectivity – coalesced in development with the modern laws to estrange humans from their world. She has shown how the scientific method creates the separation of man and nature. Its ideological consequences have allowed for the exploitation of the physical environment.[72] Worse, efforts at environmental regulation have created silos or artificial boundaries around sub-sectors of nature, described through the lens of western science:

> …environmental law implicitly adheres to the assumption that the route to sustainability is through laws that target that mysterious sub-sector of "the

[71] See Harvey A.Feit "Hunting and the Quest for Power: The James Bay Cree and Whitemen in the 20th Century", in: R. Bruce Morrison and C. Roderick Wilson (eds) *Native Peoples: The Canadian Experience*, (New York: McCelland & Stewart, 1986) 171 at 177 "The meaning of power in the Cree perspective, therefore, differs in important ways from our own. We typically think of power as the ability to control others and/or the world. For the Cree it is more complex. Human knowledge is always incomplete, and there is often a gap between what humans think and what actually happens. In hunting, for example, a hunter will frequently dream of an animal he will be given before he begins to look for it. He may then go out hunting and find signs of that animal that confirm his expectation. When the things he thinks about actually come to be, when he is given the animal, that is an indicator of power. But humans never find that all they anticipate comes to be. The power is a coincidence between an internal state of being (thought) and the configuration of the world (event), a congruence anticipated by the inner state and that this anticipation helps to actualize. Both the thought and the event are social processes. Power is not an individual possession, it is a gift, and a person cannot in this view bring his thought to actuality by individually manipulating the world to conform to his desires. And, at each phase of happenings in the world, humans, spirit beings, and other beings must sensitively interpret and respond to the communications and actions of the other beings around them. "Power" is a relationship in thought and action among many beings, whereby potentiality becomes actuality. Hunting is an occasion of power in this sense, and the expression of this is that animals are gifts, with many givers. Power in this Cree sense may have analogies to our concept of truth, i.e., thought that comes to be. We might say that power is truth unfolding, rather than that power is control."

[72] *Supra* note 50 at 152

> environment." As Jane Holder notes, "…the term 'environmental law' assumes that the environment can be identified as a discipline, and that problems with the environment, 'out there', can be addressed by applying a law to some fraction of human activity."[73]

Examples of this approach at work in water law and policy can be found in a brief survey of the web of Canadian laws and regulations alone that touch upon, directly or indirectly, water. There are at least 13 federal laws, all dealing with varying aspects and perspectives on water, according to the Government of Canada.[74] None of these laws allows the space for Indigenous legal traditions about water, including the concept of water as a living entity, an aspect of the functionality of aboriginal title, aboriginal rights and treaty rights. The artificial separation of different aspects of the environment therefore limits Indigenous contributions under the current legal-scientific system. Among its many other implications, this is detrimental to First Nations water rights. The limited nature of participation under current models does not permit Indigenous Peoples to place their relationships on stable ground. The current system's separation of the environment from science and people does not facilitate structural or process-based interpretation of the environment through the lens of Indigenous knowledge and legal traditions. Instead it more firmly establishes false dichotomies of Aboriginal and non-Aboriginal relations.

As such, the space for Indigenous knowledge, thought, or legal traditions is logically limited to what might represent "added value" – the information or knowledge that can support the on-going stabilizing work of the state. This does not bode well for GLT or

---

[73] *Supra* note 51 at 350

[74] Such laws include not only the *Canada Water Act,* but also laws about transboundary waters, environmental protection, fisheries, navigation, geographically specific federal laws (including Mackenzie Valley and Nunavut), shipping and power to name a few. See Canada: Environment Canada, *Federal Policy and Legislation – Water* online: <http://www.ec.gc.ca/eau-water/default.asp?lang=En&n=E05A7F81-1>

Indigenous legal traditions. The de facto structural limitation of Indigenous participation in wider environmental processes and water governance in particular does facilitate the ultimate neoliberal capitalist goal of wealth creation. Thus, Indigenous issues are only acknowledged at the periphery of mainstream law.

Indigenous rights and claims have been primarily advanced through the only avenues of appeal available to Indigenous peoples in Canada – the recognition and enforcement of aboriginal title and aboriginal rights as set out in treaties, agreements and other constructive arrangements between them and the federal government, as well as rights defined by the common law (aboriginal title and rights jurisprudence). The enforcement of rights contained in these agreements and other rights are often expressed as the implementation of legal protections offered in the *Constitution Act, 1982* section 35, which reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

4) GLT: MAKING ROOM FOR INDIGENOUS LEGAL TRADITIONS

Generally, rights and correlated duties related to the environment in Canada have multiple sources, and are held individually and collectively. The more commonly identified rights are property rights. However, property rights have a social aspect to them, and are not limited to the dominant civil and common law systems in Canada. They are bundles of rights which apply according to jurisdiction, and may be better characterized as negotiated outcomes as a result of the interaction of multiple sources of law. What is most significant here are those rights held by Indigenous peoples,

entrenched within the *Constitution Act* (1982), and for the most part, collectively held – aboriginal and treaty rights.

Case law and advocacy related to the natural environment (including most prominently, land) has strongly asserted the expression of those rights. This focus has shifted somewhat to water, although the courts are cautious in how to approach this issue (see Chapter 3, below).

Indigenous peoples rely on the larger environment to exercise their aboriginal and treaty rights. A healthy environment is key to basic Aboriginal rights to hunt, fish and gather traditional medicines. If significant environmental degradation besets the traditional territories of any Indigenous peoples, this will have a direct and immediate impact on their ability to sustain life-ways, express themselves culturally, maintain linguistic integrity, and in turn sustain legal traditions.

Because the Federal government has jurisdiction over "Indians and Lands Reserved for Indians" under the *Constitution Act* of 1867, many of the appeals for rights and title have been directed federally, effectively containing Indigenous voice within a federal and constitutional discourse. However, this does not necessarily or entirely impede Indigenous peoples from transforming this discourse in articulating a pluralistic Indigenous green theory. As mentioned before, Indigenous Peoples possess choice and agency. They have their laws and can articulate them in interacting with the state. In fact, M'Gonigle has commented that "In Canada, the most advanced forms of green legal theory today are visible in aboriginal title struggles, where participants problematize the

state system and assert, not request, other forms of authority and legitimacy."[75] John Borrows also agrees with the possibility of transformation in legal discourse:

> Therefore, in partial answer to questions about how we can strengthen our environments, democracies could invite full participation from Indigenous peoples and take some guidance from their laws and their knowledge of their territories. Federalist structures could be revitalized to place those communities at the centre of debates concerning their environments. This would enable the integration of political and ecological activities occurring at the same place.[76]

We also see possibilities for broader acceptance of Indigenous law in theorists' characterizations of the promise of GLT. Holder has explored phases in the development of environmental law. Holder finds current environmental law to be narrow and inadequate because it offers a mainly techno-centric approach to environmental problems. The definition of environmental problems is necessarily science-led; solutions depend upon mobilizing scientific expertise and techniques. She argues that such problems require more inclusive and deliberative laws and administration, particularly to allow for a range of values and 'non-expert' voices to be expressed. This may include Indigenous legal traditions regarding land and resource management for example. She also argues for a legal appreciation of the "laws of nature" or, in modern terms, "natural limits" through the development of ecological laws. She tells us to follow the principles of the ecology movement dealing with fundamental aspects of the human-nature relationship, recognizing that the environment is not simply "out there" but forms part of our lives.[77]

---

[75] *Supra* note 51 at 348

[76] *Supra* note 70 at 45

[77] *Supra* note 50 at 165-167

The latter point, in fact, is oft-repeated by many Indigenous peoples. As noted, it has led, unfortunately, to some mainstream essentializing of the character of Indigenous knowledge or legal traditions, and minimizing how much of that knowledge is held today. In other words, the mainstream objectifies and reduces Indigenous peoples to one-dimensional subjects of progressive water management and governance. This may be a kind of pro forma recognition within water management and governance systems of Indigenous Peoples, but substantively it leaves no space for fully realized Indigenous identities, rights and legal traditions. Indigenous systems are, as discussed above, ecology-based systems.

In the practice of law, I have encountered the often-implicit idea that through the processes of colonization and assimilation much of Indigenous knowledge has been lost, along with language and culture. This idea expresses itself in the often pro forma integration of the concept of indigenous knowledge. For example, a meeting between mainstream government or private sector representatives and Indigenous peoples may begin and end with a prayer or invocation from an Indigenous person, with the rest of the meeting being conducted firmly in the framework of mainstream knowledge and law. This kind of integration, or what some might mistakenly be considered a form of reconciliation, does not attempt to comprehensively or practically recognize Indigenous knowledge or law throughout an encounter. This too often implies a similar dissolution of legal traditions, as expressed through those vehicles of language, culture and knowledge.

Indigenous peoples have managed to preserve their culture, knowledge and legal traditions in the face of continuous onslaught of the dominant knowledge system. Indigenous legal traditions have been preserved through maintenance and revitalization

of language, cultural practices and expressions, and beliefs, values, laws, customs, social relations and practices. Despite losses, including language losses, Indigenous worldviews have been maintained, through propagating Indigenous belief systems and by extension legal traditions in mainstream languages .

The core of these systems, I would argue, are and have been maintained in communities facing loss and oppression on many levels. For example, Indigenous systems are sometimes maintained just through the experience of being on or near their traditional territories. Sakej Youngblood Henderson has pointed out that "most aboriginal worldviews and languages are formulated by experiencing an ecosystem"[78] As such, Indigenous knowledge and legal traditions are cumulative and dynamic, and evolve in accordance with environmental change – as well as social, familial, cultural, political, economic and spiritual.

This is very similar to what is suggested by M'Gonigle in the paradigm shift to a "new naturalism" – he suggests bringing the subject into dynamic relation to social and natural contexts, acknowledging the sacred within nature, and promote "being in relation" and having respect or reverence for all beings instead of exercising power over them. Further to "being in relation" is the concept of mindfulness or engaged experience, or as M'Gonigle characterizes it "non-hierarchical universalism celebrating the unity of being in the diversity of otherness (social and natural).[79] This has significant implications for my thesis that Indigenous water relations can be revitalized through Cree legal traditions and broader Canadian constitutional recognition.

---

[78] Youngblood Henderson, James (Sakej) "Ayukpachi: Empowering Aboriginal Thought" in: Battiste, Marie and James (Sakej) Youngblood Henderson (eds) *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing, 2000) 248 at 259-261

[79] *Supra* note 53 at 15-18.

5) CONCLUSION

In proposing an Indigenous green theory, I find theoretical justifications in legal traditions and expressed through the knowledge of Indigenous practitioners. Knowledge translation for the purposes of systemic environmental law re-formation will provide powerful impetus and real progress for Indigenous Peoples and water governance or management. We know that Cree legal traditions have significant value for water management and governance – substantively and procedurally. Engaging Indigenous legal traditions and mainstream law using the GLT lens has the potential to transform existing water management and governance regimes. This will promote a healthy environment, and be to the benefit of both Indigenous and non-Indigenous Peoples.

Linkages between practical applications of human relations with water, and theoretical justifications for those relations, facilitate a deep understanding of the larger context we face as Canadians together. What I hope to accomplish with this research is to identify the axis upon which Indigenous legal traditions can reconcile and balance with a legal approach that is, at least partially, grounded in Western legal theory. While GLT is itself a theory that challenges other Western legal theories, it is one that does not entirely discard or abandon Western theoretical underpinnings. I think GLT in combination with Cree or Indigenous laws may provide a transformative path towards collective (Indigenous and non-Indigenous) re-formation of laws and policies respecting water in Canada. In this process of re-formation, all Canadians, be they Indigenous or non-Indigenous, have something of value to contribute.

Having long experienced Canadian bureaucratic decision-making, Indigenous peoples may be uniquely placed to understand the limits of bureaucracy while pushing the

envelope towards an ecological approach. In other words, based on our own laws and knowledge systems, in partnership and collaboration with Euro-Canadian/settler systems, re-cast on a GLT footing, we can change the face of water management and governance. We can work with the rest of Canada to take a "quantum leap" collectively beyond the restrictive and limiting confines of existing environmental and water law and policy, towards realizing the aspirations of clean water and a healthy environment.

Indigenous peoples already know what it is to be trapped by bureaucracy and regulation. It has been a part of their daily lives and decision-making processes. They have made many inroads in breaking new ground in the area of "discursive democracy".[80] These lessons will form part of the springboard we can use together to leap into a better future.

[80] *Ibid* at 26, consider how "specific prescriptions must pay careful attention to their theoretical justifications, in contrast to the a-theoretical stance of environmental law".

CHAPTER 3

Omah kaweh kihci pekiskweyan kihci Now that you are under oath

Weyasowewinihk, in the court of law

Tapwêwin ci eweh apacihtayin? Are you going to use the truth?

Kimanitominaw ayisk ki natohtak. Because our God is listening to you.

Ascih kanesohkamak tapwêwin kita apacihtawat. And he will help you tell the truth.[81]

ᐸᐣᐸᐱᐤ Paspâpiw From The Outside In

As we finish the prayer and continue with the ceremony, a thought comes to my mind. Perhaps those outside might have heard some of our words. Even if they did not understand those words, or the songs, perhaps the spirits we prayed to have decided to help us by going to those on the outside. Maybe those on the outside will experience a lull in their frustration, perhaps their minds will open because of our prayers. When we sit with them again, we can look for the shift. Who knows, maybe some of those on the outside would like to learn more about who we are. They might also be looking for the shift. We trust in the strength of our ceremony to provide us with guidance.

1) INTRODUCTION: A NEW CONSTITUTIONAL PARADIGM

This chapter explores the constitutional landscape with respect to the water rights and responsibilities of indigenous peoples in Alberta. As demonstrated in Chapter 2, Cree legal traditions exist and are integral to the identities and life-ways of Indigenous Peoples in Treaty No.6 territory, which are the focus of the analysis in this thesis. Cree legal traditions have established norms and processes which operate in parallel to, and occasionally overlap, the framework of mainstream law. However, recognition of Cree legal traditions has been severely restricted in spite of expressed willingness on the part

[81] *Supra* note 24 at 561

of various institutional and government actors to engage with Indigenous Peoples on a cultural or consultative basis. The parameters for such engagement are often reductionist, disallowing appropriate participation of Indigenous Peoples in relationship building or strengthening with Canadian or provincial actors.

In general, the mainstream legal order and policy framework impose structural obstacles on the recognition of Indigenous legal traditions. Cree legal traditions, green legal theory and a new constitutional paradigm can re-locate the praxis of relations between indigenous and non-indigenous peoples with regard to water management and water governance. As noted in the second chapter, we can take a collective "quantum leap" beyond the structural obstacles into a relationship based the dynamic interactions of a pluralist legal landscape that includes historic treaties. This relationship is re-formative and "in progress." There is a new script for the dialogue between Indigenous Peoples and other Canadians. This chapter explains how this script might be written.

A re-formative relationship between Indigenous peoples and other Canadians is made possible by a groundbreaking constitutional paradigm introduced by the Supreme Court of Canada in 2014, which we will discuss in detail in this chapter. That paradigm is a visionary and forward-looking conception of Aboriginal title and Treaty rights that facilitates recognition of Indigenous legal traditions in water governance and management. The paradigm introduced by the Supreme Court has the potential to overcome the dominant "chokehold" on Indigenous voice in water law and policy that I touched upon in previous chapters. The Supreme Court of Canada has provided some tools necessary to address on-going environmental harms. The Court has also redistributed constitutional obligations in a way that better reflects the struggles,

obstacles and challenges generally present in Indigenous – mainstream relations around the issues of water and wastewater.

In the past, Indigenous Peoples in Treaty No. 6 territory were reluctant to engage with provincial authorities out of concern that they would breach their own Treaty, which is understood as being primarily and initially on a Nation-to-Nation basis with the British Crown. The Canadian Crown is the successor to the British Crown, and from the perspective of Indigenous Peoples, the province has no formally recognized role. This perspective has shaped the mode of conduct on the part of Indigenous peoples in Canada for years, although the federal and provincial governments have repeatedly scorned the nation-to-nation relationship through imposition of laws, regulations and policies that impinge on the self-determination of Indigenous peoples.

However, fundamental and transformative change may be possible due to two Supreme Court decisions: *Tsilhqot'in Nation v. British Columbia* (2014 SCC 44) ("*Tsilhqot'in"*) and *Grassy Narrows First Nation v. Ontario (Natural Resources)* (2014 SCC 48) ("*Grassy Narrows*"). The former decision firmly establishes that the doctrine of *terra nullius*[82] does not apply in Canada, that Aboriginal rights are a limit on both federal and provincial jurisdiction, and affirmed the territorial nature and expansive content of Aboriginal title. The *Grassy Narrows* decision confirmed that a province has all the constitutional obligations of the Crown, is bound by and must respect treaty and fulfill treaty promises in accordance with Indigenous interests in treaty lands. These two decisions read together create a new dynamic in water governance and water management in Treaty No. 6 territory in the province of Alberta. Indigenous Peoples can

[82] Latin for "the land of no one," defined in Black's Law Dictionary 8th Ed. as "A territory not belonging to any particular country."

fully realize the potential of Cree legal traditions in addressing water concerns, while employing Treaty No. 6 as a solution to current challenges and as a framework for *miyo-wahkohtowin*, good relations with other Albertans and Canadians in the context of water and land-use planning, management and governance.

2) ANALYTICAL OUTLINE: ABORIGINAL TITLE, TREATIES AND WATER

This chapter will begin with an examination of the constitutional basis for the assertion of an Aboriginal right to water further to Aboriginal title and, as traditionally described, in relation to "land" and "prior occupation." This will necessarily include Indigenous legal traditions, as outlined by Justice Lamer in *Delgamuukw*[83]:

> …[P]rior occupation… 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 a 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* (emphasis added).

I will then examine the impact of historic treaties on these rights. I will suggest that treaties did not extinguish Indigenous rights to water, which were essential to the common intention of the parties to maintain the life-ways of Indigenous Peoples. Further, I argue that the decision of *Grassy Narrows* (although limited to Ontario in that particular case) has placed a constitutional burden on all provinces to exercise its powers in the context of legal obligations to be a good Treaty partner, conforming to the honour of the Crown and subject to the Crown's fiduciary duties when dealing with Indigenous interests in water.

---

[83] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para 114

In this Chapter, I will attempt to address the structural character of the problem of Indigenous water rights by examining the constitutional framework, but not only in the limited meaning of that word. I will also seek to open up the analysis to be inclusive of Indigenous legal traditions and to the "broader and more powerful 'constitutive' processes of institutional and regula[tory]"[84] aspects - to be drawn out in brighter hues in Chapter 4.

3) ABORIGINAL TITLE AND ABORIGINAL RIGHTS TO WATER

a) *TSILHQOT'IN* AND THE NEW PARADIGM OF ABORIGINAL TITLE: RECONCILIATION

On June 26, 2014, for the first time in Canadian history, the Supreme Court of Canada granted a declaration of aboriginal title. The case of *Tsilhqot'in Nation v. British Columbia* (2014 SCC 44) has historic significance for Canadian and provincial laws relating to land, resource entitlements, and their governance. I submit that the major theme in this ruling is 'reconciliation,' a word mentioned no less than twelve times throughout the judgment. The tenets of law and jurisprudence in the ruling are constructed, linked, described and applied around that theme. The Supreme Court of Canada has offered Canadians a new paradigm of constitutional relations built on reconciliation.

The semi-nomadic Tsilhqot'in Nation inhabited a part of central British Columbia since time immemorial. In 1983, British Columbia granted a commercial logging licence on the traditional territory of the Nation. The Tsilhqot'in sought a declaration prohibiting commercial logging on the land, and subsequently amended an existing land claim to

[84] M'Gonigle, M. and Louise Takeda "The Liberal Limits of Environmental Law: A Green Legal Critique" In: *Pace Environmental Law Review*, Vol. 30 Issue 3 Summer 2013 Article 4 at page 1014

include Aboriginal Title to over 4,380 square kilometers. Further to federal and provincial objections, in 1998 the Chief of the Xeni Gewt'in Indian Band brought an action on behalf of the Tsilhqot'in against British Columbia and Canada.

The trial started in 2002, and the judicial journey of proving Tsilhqot'in Aboriginal Title ended 12 years later, in June of 2014, with a Supreme Court judgment. At trial, the Court held that "occupation" was established for the purpose of proving Aboriginal Title by evidence showing regular and exclusive use of sites or territory. The Trial Court found that the Tsilhqot'in were entitled to a declaration of Aboriginal Title on a portion of the area claimed and another small area. On appeal, the British Columbia Court of Appeal held that Aboriginal Title had not been established, but that the Tsilhqot'in may be able to prove site-specific title where there had been "intensive" use within reasonably defined boundaries at the time of the assertion of Crown sovereignty. On appeal, the Supreme Court of Canada overturned the Court of Appeal's narrow construction of Aboriginal Title and occupation, in favour of the trial judge's finding. The Supreme Court of Canada held that a declaration of Aboriginal Title be awarded to the Tsilhqot'in over the claim area at issue.

In elucidating its decision, the Supreme Court also clarified the application of criteria for establishing Aboriginal Title and justified infringements[85] of Aboriginal Title,

[85] The Court proposes the model of reconciliation described by *Delgamuukw* and where infringement of Aboriginal Title, Aboriginal rights and Treaty rights is justified when: "…the Crown [can] demonstrate that: (1) it complied with its procedural duty to consult with the rights holder and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians." (at para 125)

effectively "displac[ing] the doctrine of inter-jurisdictional immunity."[86] In this case, the Supreme Court of Canada interpreted existing laws (including those of Indigenous legal traditions), sensitive to the constitutional protections afforded to Aboriginal and Treaty rights since 1982. At the same time, the Court explicitly rejected the continued application of a legal principle of *inter-jurisdictional immunity* that prevents "productive cooperation" between and amongst jurisdictions in Canada. This in itself is remarkable, and the Supreme Court provides an extensive analysis as to their reasoning for abandoning the application of the principle of inter-jurisdictional immunity to Aboriginal and Treaty rights. The *Tsilhqot'in* decision takes a "re-formative approach" (as defined by GLT) to the law, fleshing out the role of Indigenous legal traditions as part of a Canadian pluralist system, and bravely rejecting the old paradigm of assimilation. This case marks the beginning of a different era of jurisprudence and hopefully, impacts appropriately the current relations between Indigenous Peoples and the rest of Canada.

b) RE-FORMATIVE LAW: ESTABLISHING ABORIGINAL TITLE

Tsilhqot'in confirmed that Indigenous Peoples existed and held territories (in accordance with varying Indigenous legal traditions) that they occupied at the time of contact, as well as when the British Crown asserted sovereignty over what is now Canada. The *Royal Proclamation of 1763* recognized Aboriginal Title and formed the basis of settlement in Canada. However, it is not the "source" of Aboriginal Title, as described above.[87]

---

[86] *Tsilhqot'in supra* note 16 at para 2 and in particular see analysis set out in paras 138-151.

[87] *Supra* note 86

Calder[88] and *Delgamuukw*[89] established that Aboriginal Title does not depend on formal recognition of the British Crown, but rather finds its legitimacy in the prior occupation of the lands by Indigenous Peoples. This is consistent with the oral histories and knowledge systems of Indigenous Peoples. While Indigenous Peoples may not have held comparable property rights structures as those found in English or Canadian law, certainly Indigenous Peoples had specific legal orders respecting their relations in traditional territories (lands and waters), including historic alliances and treaties with one another.[90] Land and water rights and responsibilities were articulated through such Indigenous-Indigenous alliances and treaties that described territorial parameters, always in conjunction with the implementation of pluralistic legal traditions.

Tsilhqot'in described the case of *Guerin v. The Queen*, [1984] 2 S.C.R. 335 as situating Aboriginal title in relation to ancestral lands.[91] Indigenous Peoples did not divide up such ancestral lands conceptually into categories of natural resources such as forests as distinct from water bodies, etc. The *Cree History of Creation Stories*, as a sacred law and process, describes a more holistic and inter-connected vision of mother earth. As such, the content of Aboriginal Title must be informed by this worldview, as demonstrated in the *Tsilhqot'in* decision:

> …the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into

---

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

[89] *Supra* note 16

[90] For examples of such alliances and treaties, see generally the Treaty 7 Elders and Tribal Council (with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider) *The True Spirit and Intent of Treaty 7* (Montreal: McGill-Queen's University Press, 1996) at 3-11, 83-110

[91] *Supra* note 16 at para 12

> equivalent modern legal rights…*The Aboriginal perspective focuses on laws, practices, customs and traditions of the group*.[92] (emphasis added)

This interpretation encompasses and expands upon the previous analysis provided by Justice Lamer in *Delgamuukw*, where he 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 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 the Aboriginal peoples may not have title (which was a major argument of the Province in the case of *Tsilhqot'in*). At the other end of the spectrum, is Aboriginal title conferring the right to the land itself.[93]

Indigenous legal traditions therefore are integral to the necessary analysis to establish Aboriginal Title and Aboriginal rights. The Supreme Court does not require those legal traditions to fit or "mirror" the common law categories of, for example, property occupancy. Rather, the Court understands that other indicators may be more easily articulated in common law terms but find their source firmly within Indigenous legal traditions, oral history and knowledge systems. Accordingly, instead of attempting to "attribute" occupancy or use indicators, the Court has chosen to look at the qualities of occupancy or use indicators from the perspective of Aboriginal peoples.[94]

Similarly, the Court in *Tsilhqot'in* has also attempted firmly to ground a s.35 infringement and justification framework that is "culturally sensitive." After Aboriginal Title has been declared, the Crown (whether federal or provincial) cannot proceed with

---

[92] *Ibid* at paras 32 and 35

[93] *Ibid* at para138

[94] *Ibid* at para 41

developments on such lands without the consent of the Aboriginal title-holders. Surprisingly, the duties of the Crown in this regard may have *retroactive* attributes:

> Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing.[95]

It is unclear just how far back this retroactivity extends, but the implication of the above statement is that it would relate to development projects approved but not completed – those projects that "could" be cancelled. This will be important in British Columbia with regard to future developments related to water such as run-of-river or hydro developments that are prolific in that province.[96]

c) THE NATURE AND SCOPE OF ABORIGINAL TITLE

The question for the purposes of this thesis is whether rights to land or related to land also include rights to waters, shores, or "submerged" lands.[97] In riparian law, there is a presumption called "*ad medium filum aquae.*" Riparian owners own the bed of non-tidal rivers and streams to the center thread or channel – watercourses were public resources but riparian owners could receive a flow of water for their use.[98] Groundwater was

---

[95] *Ibid* at para 92

[96] As of 2008, a study commissioned by BC Hydro and the BC Transmission Corporation found that there were more than 8,000 sites in the province with the potential to be developed as run of river projects http://www.straight.com/news/province-has-8000-potential-run-river-power-sites-bc-hydro-study

[97] Notably in the *Tsilhqot'in* decision (at para 9), a small portion of the area designated by the trial judge for a declaration of Aboriginal title included underwater or submerged lands. Unfortunately, no declaration of Aboriginal Title over submerged or underwater lands was sought before the Supreme Court in that case, and as such those submerged lands were excluded from the final declaration of Aboriginal Title.

[98] Bartlett, Richard *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary: Canadian Institute of Resources Law, 1988) at 82

governed in common law by different legal principles, where a landowner was entitled drill a well without regard to the impacts on his/her neighbor.

However, the *Northwest Irrigation Act* (NWIA) of 1894 ended the application of such English common law precepts and legislated ownership in, and authority to allocate, water to the Crown. The NWIA did not extinguish Indigenous rights to water, however, and served instead to confirm Treaty rights. It explicitly stated that "[t]he 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, is 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*…"[99] (emphasis added). Indigenous water rights did exist at the time according to Indigenous legal traditions, and as will be discussed herein, Treaty No. 6 did not explicitly cede water rights in the written text.

The Supreme Court has however placed certain limitations on Aboriginal rights vis-à-vis water licences, albeit not in relation to treaty lands in particular. In the case of *R v Nikal*,[100] the Court held that the requirement for a water licence does not necessarily infringe Aboriginal rights to a surface water source. In the case of *R v Lewis*,[101] the Supreme Court of Canada considered the principle of *ad medium filum aquae* and its application to Squamish Nation reserve lands. At common law, as stated above, it is presumed that riparian owners on opposite sides of non-tidal rivers and streams own the bed to the mid-point, each in equal halves, regardless of whether the water body is

---

[99] *The Northwest Irrigation Act* SC 1895 s.2 rev'g s.4 of the previous Act (1894).

[100] *R v Nikal*, 1996 SCC 245, [1996] 1 SCR 1013

[101] *R v Lewis*, [1996] 1 SCR 921

navigable or not. The Court in *Lewis* restricted the application of *ad medium filum aquae* to non-tidal, non-navigable waterways, but specifically left open the question of whether reserve lands could be riparian lands and whether the principle of *ad medium filum aquae* applied to reserve lands:

> At the outset, it should be noted that, since the ad medium filum aquae presumption relates to ownership of riparian land, the question remains as to whether it applies to Indian reserves. For the purposes of this appeal, given that the application of the presumption to Indian reserves was not argued by either of the parties, I will assume without deciding that the ad medium filum aquae presumption applies to reserves.[102]

Indigenous Peoples also had systems of law and practice related to water sources, surface water sources in particular. However, as stated earlier, the Cree peoples of Treaty No. 6 did not distinguish "natural resources" in a categorical manner that easily relates to common law ideations described above (i.e. water, submerged lands, water beds). Water is naturally a part of land, and not something that could be artificially separated through the application of laws. Of course, modern mainstream environmental laws aspire to do just that. Much of how water is described in Cree laws revolves around uses, stewardship practices (as cited earlier in this thesis) and natural/supernatural relations representing legal obligations. Consequently, a completely different ethic affects the perception of water as an aspect of land and as a resource. Merrell-Ann Phare noted that water rights for Indigenous Peoples arise from their connection to traditional territories and responsibilities from the Creator.[103] This is supported by Elder Pete Waskahat of Treaty No. 6:

---

[102] *Ibid* at para 57

[103] Phare, Merrell-Ann *Denying the Source: The Crisis of First Nations Water Rights* (Surrey: Rocky Mountain Books, 2009) at 71-72

> On this land, in the past and even today we were very careful about what we were given - what we were given through the uses of everything on the land, Creation. We were very careful, we had our own teachings, our own education system - teaching children that we have life was taught [by] the grandparents and extended families; they were taught how to view and respect the land and everything in Creation. Through that the young people were taught how to live, what the Creator's laws were, what were the natural laws, what were these First Nation's laws… The teachings revolved around a way of life that was based on their values.[104]

The issue is not to assert "ownership" over water resources, but rather to engage actively in implementing Indigenous legal traditions related to decision-making, management, and governance of water resources.

In *Calder*, the 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.*"[105] Justice McLachlin in a dissenting opinion in the case of *R v Van der Peet*,[106] also touched on the concept of Aboriginal interests in land encompassing water as well:

> ….the interests which aboriginal people 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.

However, the Courts in general have seemed reluctant to adjudicate the particular issue of Aboriginal title and rights to water.

The BC Court of Appeal decided to take on the issue only in the case of *Helalt First Nation v. British Columbia.*[107] It dealt with consultation and addressed, in summary

---

[104] Cardinal, Harold and Walter Hildebrandt *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples will One Day be Clearly Recognized as Nations* (Ottawa: Canada Council for the Arts, 2000) at page 6

[105] *Supra* note 88 at 174 (emphasis added)

[106] *R v Van der Peet*, [1996] 2 S.C.R. 507 at paras 269, 275

[107] *Helalt First Nation v. British Columbia* (2011 BCSC 945)

fashion, reserve rights to groundwater. In that case, the Helalt First Nation (HFN) sought judicial review of an environmental assessment certificate issued under BC's *Environmental Assessment Act* respecting a project known as the Chemainus Wells Project. The HFN argued the Crown failed to discharge its constitutional obligations to consult and accommodate it, and succeeded in its application. Justice Wedge of the British Columbia Supreme Court held that the Crown failed to engage in adequate consultation and failed in its duty to accommodate. HFN claimed Aboriginal rights to groundwater based on its interest in a reserve set aside by executive act rather than pursuant to treaty. The reason this case is important to Treaty in Alberta is that it points to the functionality of reserves and how they are set aside – they cannot be provided without any water at all. However, in the case of *Helalt* the province took the position that the Aboriginal title claim to groundwater was extinguished by provincial legislation, namely the British Columbia *Water Protection Act*. Justice Wedge concluded

> …that Halalt has an arguable case that the groundwater in the aquifer was conveyed to the federal crown in order to fulfill the objects for which the reserve lands were set aside. If that is the case, then the province cannot purport by legislative act to expropriate the groundwater.[108]

The judgment in *Helalt* seems to point in the direction of the kind of "practical coordination" and "functionality" that the Supreme Court sketches out in the case of *Tsilhqot'in*. That is to say, the functional aspects of Aboriginal title and rights must be understood. By extension, treaty rights must also have a functional aspect. In other words, a grant of Aboriginal title, or the exercise of Aboriginal and treaty rights do not properly function and cannot be properly exercised or realized without any water.

---

[108] *Ibid* at para 561

Aboriginal title to land cannot be so easily separated from all water sources contained within a particular claim or declaration, surface or sub-surface. The land must be understood as a whole, and aspects of land subject to Aboriginal Title cannot be severed without satisfying the test for justifying infringement of such title. In the case of *Tsilhqot'in*, the resource in question was forests. Water arguably must receive similar treatment.

Furthermore, we know that Aboriginal title confers the right to choose what uses the title holders can make of their lands;[109] the Supreme Court in *Tsilhqot'in* held that rights of Aboriginal title are "similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land."[110] In general, it might be acknowledged by both mainstream modern Western laws as well as Indigenous legal traditions that water is an integral aspect of land. For the Cree, water has been and in some respects continues to be used, managed and protected further to Indigenous legal traditions prior to and at the time of the assertion of the sovereignty of the Crown, it follows that Aboriginal title must include all those rights described by the Supreme Court to lands submerged by water and the water bodies themselves – and that such uses not be restricted to traditional customs and practices. This would by extension explicitly include the obvious uses like fishing, hunting or gathering (well-established Aboriginal rights) but also use of water for domestic purposes, transportation, spiritual and customary purposes and modern uses

[109] See generally *Delgamuukw*, which held that uses are not restricted to traditional customs and practices (at 1083-1084) but has an "inescapable economic aspect."

[110] *Supra* note 16 at para 73

such as commercial purposes. We know that the Courts in Canada have reinforced the concept of Aboriginal and treaty rights as "sui generis" and therefore capable of flexible extension.[111] Of course, the caveat on such uses is that the land or water cannot "be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes – even permanent changes – to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises."[112] Jurisprudence on the matter of Aboriginal Title to water in particular has not yet been fully considered by the Courts. However, given the exponentially increasing public and Indigenous interest in multiple water concerns such as scarcity, contamination, and security, such a claim of Aboriginal Title to water seems likely to arise sooner or later in the Courts.

d) ABORIGINAL RIGHTS TO WATER

Indigenous Peoples may be able to access water as an Aboriginal right and not only as a matter of Aboriginal Title. Section 35(1) of the *Constitution Act, 1982* states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." What must be emphasized is that section 35(1) is not a "grant" of rights, but rather a recognition and affirmation of rights "derived from other sources."[113]

---

[111] Borrows, John and Len Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it make a Difference?" (1996) 36 *Alberta Law Review* 9

[112] Supra note 16 at para 74

[113] Kempton, Kate "Bridge Over Troubled Waters: Canadian Law on Aboriginal and Treaty 'Water' Rights, and the Great Lakes Annex"(2005) Olthius Kleer Townshend, online: <http://www.chiefs-of-ontario.org/node/96 > at page 24

Through a series of decisions including *Sparrow*, *Van der Peet*, *Delgamuukw* and *Marshall*, the Supreme Court has attempted to provide an understanding of the meaning and significance of the constitutional recognition and affirmation of Aboriginal rights. This body of caselaw has resulted in s.35(1) making federal and provincial laws, acts, or decisions that interfere with and infringe aboriginal rights subject to these rights, unless the Crown can justify the laws, acts, or decisions. *Tsilhqot'in* held that "provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s.35 infringement and justification framework." Thus there are potential limiting factors on an assertion of an Aboriginal right to water.

The Aboriginal right to water includes rights of transportation (navigation), rights to use water for domestic use, and the rights to water for spiritual or ceremonial purposes. The right to water, at its most basic level, is one of survival. As referenced earlier in this Chapter, Aboriginal rights are founded on actual practices, customs or traditions of Indigenous Peoples which are 'integral to the distinctive culture' of those peoples.

Binnie J., for the Court in *R. v. Sappier, R. v. Gray*,[114] held: "I find that the jurisprudence weighs in favour of protecting the traditional means of survival of an aboriginal community". The Court went on to state that: "The nature of the right cannot be frozen in its pre-contact form but rather must be determined in light of present-day circumstances. The right to harvest wood for the construction of temporary shelters must be allowed to evolve into one to harvest wood by modern means to be used in the construction of a modern dwelling." The term "survival" would surely include access to safe drinking water as much as it includes access to shelter.

---

[114] *R. v. Sappier, R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54 [38] at para 52

Certainly, survival from an Indigenous perspective should be understood to be inclusive not only of the rudimentary implements of human life, such as water, shelter, food and clothing. It must also be inclusive of the diversity of *life-ways* as they are reflected in the daily realities of Indigenous peoples. Ardith Walkem notes that "many activities protected as Aboriginal rights (including hunting, fishing, gathering and spiritual practices) are closely tied to waters and rely upon a continuing supply of clean water."[115] In the case of *R v. Sundown*,[116] the Supreme Court identified protected activities incidental to the exercise of Aboriginal rights. This may assist in capturing water rights as incidental rights attached to more basic and accepted protected activities such as hunting and fishing. In the case of *Saanichton Marina Ltd. v. Claxton*[117], protection of water and seabed had the effect of protecting treaty rights to fish. Rights to fish are the most obvious rights related to water, as an incidental aspect. Merrell Ann Phare described it as follows:

> Based on this doctrine, all inherent rights and environment-related aboriginal and treaty rights (including the right to self-government), likely include the right to use and determine the uses of water itself (as separate rights from those related to products of the water, such as fishing and harvesting rights).[118]

While there has to be continuity between the claimed aboriginal right and pre-contact practices, the Supreme Court has rejected since the *Sparrow* case the "frozen rights" approach to defining aboriginal rights. In *Sparrow*, the Supreme Court held that "existing" means the rights that were in existence when the Constitution Act came into effect in 1982. The word "existing" means "un-extinguished" requiring an interpretation

---

[115] Walkem, Ardith "The Land is Dry: Indigenous Peoples, Water, and Environmental Justice" in Karen Bakker, ed. Eau Canada – The Future of Canada's Water (2007) UBC Press, Vancouver at page 307

[116] *R v Sundown* (1999) 1 S.C.R. 393

[117] *Saanichton Marina Ltd. v. Claxton (1989*) 36 B.C.L.R. (2d) 79

[118] *Supra* note 103 at 53

that is flexible so as to permit their evolution over time. The Supreme Court also noted in *Sparrow* that "existing" means that rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour." The danger with this analysis with respect to ensuring a healthy environment and safe water is that "contemporary form" may connote the provision of hard infrastructure for aboriginal and treaty rights, with less emphasis on the protection of existing natural infrastructure (maintaining the integrity of watersheds for example). Having a man-made lake to fish from is not equivalent to being able to access traditional surface water sources. However, due to the rapid degradation of water sources in Alberta, including the impacts of oil sands developments[119] and the comparatively low existence of surface water,[120] a concern is that the opportunity to protect is rapidly narrowing.

Sparrow established the infringement and justification test regarding existing aboriginal and treaty rights. In essence that test asks:

> (1) are the limitations imposed by the regulation/legislation unreasonable?
> (2) does the regulation/legislation impose undue hardship on the aboriginal people affected? This can also include asking whether, in the exercise of ministerial discretionary authority, that authority is adequately described and takes into consideration the potential existence of aboriginal and treaty rights.
> (3) does the regulation deny the holders of the rights their preferred means of exercising their right? And
> (4) does the regulation unnecessarily infringe the interests protected by the right?

---

[119] Ecojustice, *Backgrounder: Alberta Oil Sands Development and Impacts on Water*, online: http://www.ecojustice.ca/media-centre/media-backgrounder/backgrounder-alberta-oil-sands-development-and-impacts-on-water> In this information sheet, Ecojustice points out that 529 million cubic meters of water per year is expected to be withdrawn from the Athabasca River, which is a major tributary of the Mackenzie River Basin. In addition, tailings ponds contain toxic substances including acids, hydrocarbons and heavy metals.

[120] Alberta, *Alberta Water Facts* online: http://albertawater.com/index.php/learn/interesting-facts/alberta> Alberta states that while Canada has 20% of the world's drinking water, only 2.2% of Canada's freshwater is in the province, and only 3% of Alberta is covered by approximately 600 lakes and 245 rivers. As of 2009, industrial and commercial activities (including oil sands and agriculture) held over half of groundwater allocations in the province and close to 40% of surface water allocations. As such, the private sector controls around half or more of the existing water in the province. Issues of allocations will be further discussed in Chapter 4.

The onus of proving the infringements of an aboriginal right or a treaty right rests with the group or person challenging the legislation that issue. If interference of an existing aboriginal right or treaty right is found, the analysis then moves to the justification, and the onus shifts to the crown to demonstrate that such infringement is justified.

The Supreme Court of Canada has stated that the objective of Parliament, provincial governments and their respective agencies must be examined to determine the merits of the government's justification; and that the merits will vary from resource to resource, species to species, community to community and from time to time, which is evidence of the "silo mentality" discussed earlier in this chapter.[121] A valid legislative objective that can justify an infringement of aboriginal and treaty rights includes conserving and managing a natural resource,[122] preventing harm to the general populace and aboriginal people (ensuring safety), and other "compelling and substantial objectives."

In the case of *R. v. Marshall* [1999] ("*Marshall No. 1*")[123] the Supreme Court noted with approval the following statement from *R. v. Adams*[124] at para. 64:

> In light of the crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risk infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers and administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delicate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the crown with sufficient directives to fulfill their fiduciary duties, and the statute

---

[121] *R. v. Marshall* (reconsideration refused), [1999] 3 S.C.R. 533 ("*Marshall No. 2*") at para 22

[122] *R v Sparrow* [1990] 1 S.C.R. 1075 at 1113; *R. v. Adams* [1996] 3 S.C.R. 101 at para 57; *Delgamuukw, supra* note 83 at para 161; and *Marshall No. 2, ibid* at paras 21 and 26

[123] *R. v. Marshall* [1999] 3 S.C.R. 456 ("*Marshall No. 1*")

[124] *Adams*, *supra* note 125

will be found to represent and infringements of aboriginal rights under the *Sparrow* test.

The existing water law and policy environment is harmful to Indigenous Peoples – culturally, legally, politically and economically - however well-intentioned such laws and policies may be.[125]

Much of the harm to and outright violation of Aboriginal rights is being carried out, not in a targeted manner, but as a result of structural obstacles to appropriate recognition. This is a very similar story to that of Treaty Rights, which the next section of this analysis covers.

e) TREATY WATER RIGHTS

Before Cree people entered into Treaty with the British Crown, we had our own legal orders and understandings of what constituted good relations, or *miyo-wahkohtowin*. Our own laws described our connectedness to the earth, water, air, and resources of the lands and territories. We recognized our roles and responsibilities to such resources, and their importance for our health and wellness and that of the natural world, even in the very words we used to describe them, such as *Nipiy* (see above, Chapter 1). Ceremony, spirituality and sacred laws governed how we approached our relations with each other and the world around us; this continues to be the case.

When we entered into Treaty, we did so as sovereign Nations. From the perspective of the Cree and many other Indigenous peoples, Indigenous Nations and the Crown affirmed each other's sovereignty in the treaty process. The treaty parties entered into treaty

[125] *Supra* note 55 at 78

making because of inherent powers as sovereign nations. As a matter of historical record, this is confirmed by Treaty Commissioners who negotiated on behalf of the Crown, and chose to abide by international law at the time which required treaty or conquest for the acquisition of lands and territories. This is evident from the ceremonial / spiritual context (on the Indigenous side and on the side of the Crown, who chose to include wording that referenced "God" as an element of the agreement) leading up to treaty signing and the terms that were used in the treaty negotiations and in concluding the treaty. In the book *Treaty Elders of Saskatchewan*, it is described in the following way:

> The treaties, through the spiritual ceremonies conducted during the negotiations, expanded the First Nations sovereign circle, bringing in and embracing the British Crown within their sovereign circle. The treaties, in this view, were arrangements between nations intended to recognize, respect, and acknowledge in perpetuity the sovereign character of each of the Treaty parties, within the context of rights conferred by the Creator to the Indian nations.[126]

Like any law, the Treaty must be understood as a whole, taking into account the written text and the "spirit and intent" of the Treaty as well, being the understanding of the Indigenous Peoples. This spirit and intent is as valid as the written text and will last "as long as the sun shines, the rivers flow and the grass grows." The world *Witaskiwin* was used in the negotiations when describing the accord relating to lands. *Witaskiwin* means sharing or living together on the land. Ironically, it is the basis for the name of the municipality located nearest to *Maskwacis*, now known as Wetaskiwin, Alberta.

We take the "spirit and intent" of treaty analysis with regard to the written text of the treaty as well. When our ancestors secured the clauses respecting provision of health care (delivery and services) – the infamous "medicine chest" clause - as well as a clause

---

[126] *Supra* note 104 at 41

respecting "pestilence and famine", they did so in the understanding that our health and wellness was also tied to the implementation of the rest of the Treaty, respecting lands, territories, waters, resources and continuing our life ways. The Treaty Commissioner for Treaty 6, Alexander Morris, stated it as follows:

> What I trust and hope we will do is not for today or tomorrow only; what I promise and what I believe and hope you will take, is to last as long as that sun shines and yonder river flows.[127]

Treaty was necessary in order to establish our relationship for living together in these lands and territories. Treaty is a part of the Canadian Constitution because the Canadian Crown is a successor to the British Crown, and the land could only have been settled with Treaty in place. The *Grassy Narrows* decision now divides the Treaty obligations within the Crown between the Federal and Provincial governments.

Constitutionally entrenched Treaty Rights that are recognized and affirmed in the *Constitution Act, 1982*. These rights are in addition to the rights that all Canadians are entitled to through the *Canada Water Act* and the provincial Alberta *Water Act* and related agencies and policies. Case law affirms that Treaty rights, as with Aboriginal rights described above, arise from the pre-existing sovereignty of Indigenous Peoples in these lands before entering into Treaty.

Kate Kempton has noted that in the Great Lakes area, treaty provisions included provisions for the surrender of ground covered by water or water themselves, which would indicate that the British Crown recognized that Indigenous Peoples held title to

---

[127] Morris, Alexander *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They were Based, and other Information Relating Thereto*, (Saskatoon: Fifth House Publishers, Saskatoon, 1991) at 202

waterbeds and even to waters.[128] The question then becomes whether the historic "numbered" treaties, including Treaty No. 6 contained similar provisions.

Treaty No. 6 agreed in 1876 in what is now central Alberta and Saskatchewan. It encompasses the South and North Saskatchewan watersheds. The written terms of the treaties are quite similar throughout Alberta (Treaties Nos. 7 & 8 also cross into provincial borders). They all contain the infamous "land surrender" clause, in return for various promises and undertakings of the Crown with regard to the setting aside of reserve lands, the payment of annuities, education, the provision of implements and cattle for farming, and other provisions. The land surrender clause reads as follows:

> …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 forever, all their rights, titles and privileges whatsoever to the lands included within the following limits…[129]

The concept of cede and surrender has been debated in the courts. In the 2005 Federal Court decision of *Buffalo v. Canada*[130] there was a significant amount of testimony and evidence provided by elders and experts regarding the issue of cede and surrender. While the Court did not accept much of the oral evidence provided by elders, what was submitted and referred to in the judgment is enlightening. For example, a witness named Professor Ray theorized that the message to Indians at the time of Treaty was that they wanted to share land with the Indians and not take anything away from the Indians' livelihood.[131] I particularly noted the testimony of Professor Leroy Littlebear, who "was of the opinion that land could not be sold because it is part of the relational network, with

---

[128] *Supra* note 116 at 53-55

[129] Treaty No. 6, 1876

[130] *Buffalo v Canada*, 2005 FC 1622

[131] *Ibid* at para 274

Mother Earth as the source of all life. Furthermore, the animals have an interest in the land; thus, it could not be sold without first consulting them."[132] This idea could easily be applied to water under the Cree Laws I have described in this thesis, that is, Indigenous Peoples did not enter into treaty with the understanding that they were "giving up" water.

Importantly, the Treaty contains a written promise to the Indigenous Peoples that they would retain all their "usual vocations" or ways of life. Further, Treaty No. 6 protects our rights to "pursue [their] avocations of hunting and fishing throughout the tract surrendered." The fact that the Treaty also included a provision that set aside reserve lands and promises of assistance to farm or raise stock is vital to this analysis.

f) RULES OF TREATY INTERPRETATION

For Indigenous Peoples, we entered into Treaty with the Crown intending to make a permanent relationship. To Indigenous Peoples, promises, accords, covenants, or vows are irrevocable and inviolable when they are made to the Creator in ceremony according to the laws governing them.[133] The lasting nature of treaties is also found in indigenous legal traditions of what the consequences might be if promises are broken. When such promises are made to the Creator through ceremony conducted in accordance with the laws governing them, those promises cannot and must not be broken. If someone breaks these promises it can bring about supernatural punishment to the transgressor (*pastahowin*).[134] These are the rules of treaty interpretation for Indigenous Peoples.

---

[132] *Ibid* at para 281

[133] *Supra* note 104 at 18

[134] *Ibid* at 7, see also Borrows *supra* note 32 at page 85.

In the Canadian legal system, extensive rules of interpretation of treaties have been established over the last few decades. Early judgments seem to have assumed an imbalance of bargaining power in treaty negotiations, and urged courts to resolve ambiguity in favor of the Indian.[135] Jurisprudence has also urged flexibility when determining the legal nature of documents recording transactions with indigenous peoples.[136] In *Simon*, the Supreme Court of Canada held that Indian treaties must be liberally construed and uncertainties resolved in favor of the Indians. *Simon* also stated that Indian treaties are *sui generis* and are not created or terminated based on the rules governing international law.[137]

The Supreme Court of Canada has developed principles of interpretation of treaties that demand a fair, large and liberal construction of the Treaty terms in favor of the Indians, and interpretation that maintains the honor and integrity of the Crown. Some of these principles are as follows:

- The words in a treaty cannot be interpreted in a strict technical sense but rather in the way that the indigenous parties would have understood them;[138]
- any ambiguities or doubtful expressions must be resolved in favor of the Indians;[139]
- the oral promises made at the time of the treaty form part of the treaty.

---

[135] *R. v. Battiste*, (1978) 84 DLR (3d) 377 at 385

[136] *R. v. Sioui* [1990] 1 SCR 1025 at 1036

[137] *R. v. Simon,* [1985] 2 SCR 387 at 402

[138] *Nowegijick v. R*. [1983] 1 SCR at para 36; *Sioui supra* note 136 at paras 1035-1036; *Sparrow supra* note 125 at para1107

[139] *R.v.Badger* [1996] 1 SCR 771 at 794; *Simon*, supra note 137 at para 402

The Court in *Grassy Narrows,* a case concerning Treaty No. 3 in Ontario, has provided a new role for provincial government with regards to treaty obligations. In that case, the primary issue was the "taking up" of lands for non-indigenous settlements and other purposes. This is a clause that also exists in Treaty No.6. At trial, the court accepted the Anishinaabe understanding that Treaty No. 3 was made with Canada and not Ontario. This is a common position of Treaty nations in Canada. The Court of Appeal in Ontario disagreed with the trial judge and pursuant to the case of *St. Catherine's Milling*, held that Ontario's ownership of Crown lands in Treaty no. 3 left no role for the federal government in land-use decisions affecting treaty rights. The Supreme Court of Canada in their ruling in 2014 broke new ground by confirming that Ontario has all the constitutional obligations of the federal Crown pursuant to treaty.[140] This is exceptionally important because it provides a new avenue of advocacy for indigenous peoples with regards to water rights, inclusive of both federal and provincial jurisdictions, held pursuant to aboriginal title, aboriginal rights and treaty.

This decision dovetails with the decision of the Supreme Court in *Tsilhqot'in*, the two cases together providing greater clarity with regard to the legal framework of constitutionally protected aboriginal and treaty rights. In brief, the Supreme Court held in these two decisions that (a) indigenous peoples were indeed sovereign prior to the settlement of Canada, and that the land was not empty when settlers arrived; and (b) that such sovereignty could only be altered by agreement or consent of the Indigenous Peoples, for example, through entering into treaty with them.

---

[140] *Supra* note 16 at para 32

In fact, consent is a treaty principle, found in the written text of the treaty and also an integral aspect of Indigenous Peoples' oral histories regarding treaty. Similarly, in aboriginal title cases, the Crown must first obtain First Nation consent or justify infringements of aboriginal title.

This is also important because before the *Grassy Narrows* decision, the province of Alberta could argue that their obligations were restricted to the duty to consult which they carried out in accordance with poorly constructed consultation guidelines, which came under heavy fire from Alberta First Nations chiefs.[141] The *Grassy Narrows* decision essentially increases that obligation to one of justifying infringements of treaty rights.[142] The court does still direct the province in this case, to engage in appropriate consultation including accommodation: "Not every taking up will constitute an infringement of… rights set out in Treaty 3. This said, if the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, finished, and trapped, a potential action for treaty infringement will arise."[143]

The cases of *Tsilhqot'in* and *Grassy Narrows* have established that in fact there was an extinguishment of aboriginal rights to land further to treaty. However, this does not have the same results for on-reserve and off-reserve lands. What it means is that the Indigenous peoples surrendered the lands within the boundaries of the Treaty area.

---

[141] Narine, Shari "Chiefs Reject Consultation levy legislation in Alberta" in: Windspeaker, Vol. 31 Issue 3, 2013 online: http://www.ammsa.com/publications/windspeaker/chiefs-reject-consultation-levy-legislation-alberta See also Klinkenberg, Marty "First Nations chiefs boycott Alberta government over consultation plan" in: Edmonton Journal, August 28, 2014 online: <http://www.edmontonjournal.com/First+Nations+chiefs+boycott+Alberta+government+over+consultation+plan/10158178/story.html#__federated=1>

[142] *Supra* note 16 at para. 50

[143] *Ibid* at para. 52

However, Indigenous peoples retained their rights to small parcels of land known as reserves, where they were to settle and live. While aboriginal title to land was extinguished according to the "cede and surrender" clause as described in the *Grassy Narrows* decision, reservations of land were set aside for the indigenous peoples who entered into treaty and those lands cannot be understood as having lost similar rights.

The Alberta treaties make no reference to water or water rights. One exception in a clause in Treaty No. 7 reserves 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 implies that all other rights and interests in relation to rivers within reserves are left to the First Nations. Similar to the medicine chest clause described earlier in this chapter, much of the clauses of the historic numbered treaties are the same or similar. Many Indigenous peoples have argued that while the medicine chest clause appears in writing only in Treaty 6, it is a basic right that must (in accordance with principles of treaty interpretation) be applicable to other historic treaty regions as well. In much the same vein, the clause in Treaty 7 regarding navigation ought to apply in Treaty 6.

Treaty Commissioner Alexander Morris famously told the indigenous representatives at treaty signing that "what I have offered does not take away your living, you will have it then as you have it 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 grab you, we have not come here to take away anything that belongs to you."[144]

---

[144] Johnson, Harold *Two Families, Treaties and Government* (Saskatoon: Purich Publishing Ltd., 2007) at 62

Vivienne Beisel takes the position that title to water, waterbeds and watercourses run separately from the land, and that "extinguishment of title to water and water beds must be clear, express and based on full free and informed consent."[145] This approach may provide some hope in the face of the decision by the Supreme Court in *Grassy Narrows*. As some treaties do mention water, it would suggest that those which do not may have reserved those rights and did not cede release such rights under treaty.

The treaties were about sharing the land and not ceding land and waters - and in fact many Indigenous Peoples will continue to take the position that the cede and surrender clause does not equate to extinguishment, in spite of the recent ruling in *Grassy Narrows*.

However, if one accepts the position of the Supreme Court on this matter, this analysis will continue to approach the concept of treaty water rights as they exist on-reserve and not off-reserve, including the right to a livelihood as described in Treaty No. 6, and further to *Helalt*, as a practical aspect of the setting aside of a reserve.

I do submit however, that at the very least there may continue to exist incidental water rights to those treaty rights which are exercised off-reserve, such as those related to hunting, fishing, and gathering that are found cited in the text of Treaty No. 6. This relates back to an earlier argument based on *Tsilhqot'in* and *Grassy Narrows*, which is that there is a "functional" aspect of treaty rights and aboriginal title. This functionality requires that land which is provided or set aside (whether by Treaty or a grant of Aboriginal Title and/ or the creation of a reserve) must be useful to the proposed occupants. Water must be a part of land in order for it to be in a state appropriate for the intended use, whether you are thinking about it from a mainstream modern Western

[145] Beisel, Vivienne *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) at page 119-129.

perspective (there has to be water to drink and use) or a Cree perspective (the environment has to be healthy in order to exercise traditional life ways as well as ensure spiritual/cultural values are maintained).

Keeping these rights in mind, I now turn to the overarching structure of water governance and decision making in particular in the province of Alberta, to demonstrate how these rights are not being accommodated or recognized currently, with the caveat that the recent Supreme Court judgments described above potentially change the dialogue into one based on reconciliation in a way that recognizes the true spirit and intent of the treaties and Aboriginal rights.

CHAPTER 4

ᑲ ᓵᐳᐢᑌᑵᐩᐠ ka sâpostekwîyak The Water Runs Right Through

Having finished our ceremony, we come out from that sacred place. We have peaceful hearts, and walk forward with kindness. We have decided to trust each other, and we have decided to show those outside that we can trust them too.

Our prayers have created a channel between our world and theirs, in common waters. In this channel, we can meet each other. This channel of water, connecting us and them, does not distinguish between a splash we make, or a diversion they make. Water simply accepts all of us in its fluid embrace.

Water has gifted us with a commonality, a place from which to start. The wonderful part of this gift is that it is a new gift in each moment. Every moment that passes is yet another opportunity to start again, refreshed and new.

1) WATER GOVERNANCE: CANADA, ALBERTA AND TREATY 6

As set out in Chapters 1, 2 and 3, Indigenous rights to water stem from a strong constitutional vision of reconciliation between Indigenous peoples' own legal traditions and the settler systems of Canada and the provinces. The recognition of Indigenous legal traditions, along with GLT, is an important part of this development. This Chapter will attempt to set out some of the existing regimes that have been established for water governance that impact First Nations in particular.

First Nations must seek, as a solution to the water crises many of them face, the enforcement of rights as set out in treaties between them and the federal government, as well as rights defined by the common law (aboriginal rights jurisprudence). First Nations are increasingly interested in describing their entitlement to clean drinking water, freshwater, and maintenance or restoration of natural water systems as aboriginal and

treaty rights.[146] First Nations find themselves in a kind of bottleneck situation when it comes to water – in all its various uses and manifestations – and the governments that are supposed to be accountable to them for the realization of these rights are the federal and provincial governments as the Crown under Canadian constitutional law.

This chapter will provide a thumbnail sketch of the lived realities of Indigenous peoples in Alberta, in particular the Cree, and their experience with the existing system of water law, regulation and policy. I will also attempt to provide some analysis about how their current position in the province will be changed by the implementation of the federal *Safe Drinking Water for First Nations Act*.

a) PLACE AND SPACE FOR INDIGENOUS VOICE

> National and international policies do not attempt to adapt to local contexts, but rather seek to transform and control them. It is the *users' universe* that is to be adapted.[147]

Indigenous peoples often have to "pick their battles" when it comes to the environment and their relationship to it. The most telling example is found in water. Water, as I discussed earlier, has a multitude of meanings, uses, values, and faces in Indigenous community. However, for the wider Canadian society, the most identifiable crisis facing First Nations is that of access to safe drinking water. First Nations and Indigenous peoples in general find themselves having to advocate and express their identities and rights "where they can", and to attempt to break down barriers where they are excluded

---

[146] See McClenaghan, Theresa A. "Why Should Aboriginal Peoples Exercise Governance Over Environmental Issues?"(2002) 51 *University of New Brunswick Law Journal* 211at 229: "Environmental governance by aboriginal peoples may be essential for the protection of environmental aboriginal and treaty rights as recognized by section 35 … There are also the Court's requirements for "evidence" that is "cognizable" to the courts and for proof that the rights are continuing." This latter point is relevant to a discussion in the next section of this paper.

[147] *Supra* note 55 at page 18

or silenced. The diversity and richness of Indigenous voice across legal, political and academic landscapes is crucial to challenging oppression in pastel hues.[148] This voice must not simply adopt the dominant discourse. Instead, Indigenous voice must strive to employ Indigenous epistemology in building relationships with Canadian actors and institutions under Canadian law. It is not necessarily that there is no articulated voice of Indigenous peoples. There is a dearth of scholarly and political knowledge about Indigenous knowledge and what the content of Indigenous knowledge is. This valuable insight remains for the most part in the sphere of theory and recommendation, and very little has actually been translated into policy, practice, law and regulation. Part of the struggle has been that the theoretical basis for such knowledge translation has been contested and contestable. In this thesis, I argue that we can do this is through GLT and Indigenous legal traditions. As said by Margaret Kovach,

> Currently within most countries of the world, Indigenous peoples continue to experience oppression and its implications for the felt experience of life. The overrepresentation of Indigenous peoples in poverty, in prison, and in child welfare persists. Those of us who have pursued academic study and dip their toes into the murky pool of research have obligations to use our skills to improve the socio-economic conditions of Indigenous peoples. Vine Deloria, and his article "Commentary: Research, Redskins and Reality," suggests that apart from documenting narratives of traditional culture for future generations, 'there is a great and pressing need for research on contemporary affairs and conditions of Indians'. We need to take back control of research so that it is relevant and useful. By defining the research inquiry based on actual, not presumed, need and by designing a research process that is most effective in responding to our inquiries, we can use research as a practical tool. In the larger struggle for self-determination, we need to engage in what Tuhiwai Smith terms 'researching back'. Like 'talking back,' it implies resistance, recovery, and renewal.[149]

---

[148] As described so aptly by Margaret Kovach.

[149] Kovach, Margaret "Emerging from the Margins: Indigenous Methodologies" in: Brown, Leslie and Susan Strega *Research as Resistance: Critical, Indigenous and Anti-Oppressive Approaches* (Toronto: Canadian Scholars' Press, 2005) 19 at 32-33.

The repression and oppression of Indigenous participation and identity began with the creation of legislation governing Indians in 1850.[150] This legislation attempted to categorize and define who was Indigenous, and how that identity would be demarcated. The departure from relationships and the emphasis on categories was itself contrary to most Indigenous knowledge systems. The *Indian Act* would later include a definition of "Indian" that was restricted to an Indian man and his children, or a woman who was lawfully married to an Indian man.[151] In 1906, the *Indian Act* was amended to define a "person" as an individual *other* than an Indian.[152] This history has had significant impacts on the shaping of Indigenous identity by external actors and institutions – and may have played a role in the proper realization and inter-generational transmission of community roles and responsibilities with respect to water in particular. For example, if a person (likely a woman) who had traditional responsibilities for water was excluded from the community by the definition of Indian in the *Indian Act*, this could have negative consequences for the transmission of this knowledge to future generations.

In the recent court case of *Behn v. Moulton Contracting Ltd*.[153], the Supreme Court of Canada added another aspect of representation and identity to the exercise of Aboriginal and Treaty rights – that of standing in the courts. In effect, the Supreme Court found that the only party who could claim to represent a First Nations' interest in Aboriginal or Treaty rights in the Court was a duly authorised representative of a First Nation, and not

---

[150] *An Act for the Better Protection of the Lands and Property of the Indians of Lower Canada*, S.C. 1850, c.42, 13 and 14 Vic.

[151] *Indian Act*, *1876*, S.C. 1876, c.18

[152] *Indian Act, 1906*, S.C. c.81, s.2(c) An amendment to the Indian Act, redefining the term, was not made until 1951. The restrictions that affected women as legal "non-persons" and denied their entry into legal professions for example, would be applied to both Indian men and women from 1869 until voluntary and involuntary enfranchisement was repealed in the *Indian Act* in 1985.

[153] *Supra* note 16 at 26

the individuals attempting to exercise a collectively held right. Consequently, it will depend on the internal situation of a First Nation as to whether its Council or governing body will choose to support the exercise of Aboriginal or Treaty rights of individual members. This may generate additional internal community divisions and lack of cohesion in asserting rights, as some community members may support development projects impacting their community, and others may not. This could raise the financial and community costs for any individual who may seek a ruling on an Aboriginal and Treaty right. It remains to be seen how this plays out on the ground, but it will certainly influence the processes of consultation and accommodation undertaken by the Crown, whether that is the federal government or the provinces/territories, as now understood further to the *Tsilhqot'in* and *Grassy Narrows* decisions.

2) WATER UNTIL NOW: BACKGROUND AND ANALYSIS OF THE *SAFE DRINKING WATER FOR FIRST NATIONS ACT*

a) CAUGHT IN A FEDERAL DISCOURSE — GOVERNING IN A FIRST NATION

Currently, the *Indian Act* provides extremely limited powers of regulation in the ambit of water on reserves. Band councils are empowered under the *Indian Act* to make regulatory by-laws for the health of residents and drinking water facilities.[154]

Constance Macintosh has stated:

> [t]he only federal legislative gesture has been to grant band councils authority, under the *Indian Act*, to make bylaws respecting "the construction and maintenance of watercourses ..." and "of public wells, cisterns, reservoirs and other water supplies." Breach of the bylaws can result in a fine of up to $100 or imprisonment for a term not exceeding 30 days or both, unless the Minister of Indian Affairs and

[154] *Indian Act*, R.S.C. 1985, c.I-5, s.81(1)(a),(f),(l)

> Northern Development disallows the bylaw. These powers are an inadequate basis for a regulatory framework to ensure the safety of drinking water.[155]

However, these regulatory powers are quite useless in the face of a meager or non-existent budget to cover the costs of implementing such regulations.

While the provinces (through the operation of law) control water allocations to reserve lands,[156] First Nations capacities with respect to water quality, supply, or distribution have remained a "federal matter" – for example, reserve governments have had to negotiate with the federal government for funding for operations and management with respect to drinking water provision.

> …Beginning in the 1980s, and coinciding with efforts to devolve governance activities to First Nations, Canada introduced agreements-- contracts--under which First Nations would be responsible for operating and maintaining capital facilities on their reserves, such as water treatment plants. These contracts began the introduction of non-judiciable protocols and quality guidelines. The protocols are typically based on "best-practices." However, like the contracts, the protocols provide no chain of lawful accountability for reserve residents to call upon, nor do they ensure a remedy if water is unsafe or the infrastructure shows signs of failure…By 1995, INAC had come to describe its role in ensuring safe drinking water "as primarily that of a funding agency."[157]

As such, First Nations communities have been largely "left to their own devices" when it comes to drinking water, with tragic results.

---

[155] Macintosh, Constance "Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves" (2007-2008) 39 *Ottawa Law Review* 63 at 69-70

[156] Walkem, *supra* note 115 at 305: "In some cases, provinces have either refused to honor reserve water allocations and have canceled them outright or issued licenses that reduce the water available to these lands. Provincial failure to honor water allocations included in reserve creation remains a contentious issue. In some prairie provinces, water allocations were included as part of the reserves established under treaties, and these treaty promises have not been fully honored. The Peigan Nation of Alberta recently settled a lawsuit against Canada and Alberta, recognizing that the reserve established for the Peigan under Treaty Six also included a reservation of water."

[157] Macintosh, Constance "Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves" (2007-2008) 39 *Ottawa Law Review* 63 at 69-70

First Nations have fallen between federalism's cracks. They do not receive proper attention from either the federal nor provincial governments. Indigenous communities therefore operate in a kind of limbo – the funding they receive[158] depends upon their ability to estimate their true needs, to negotiate and to express the challenges facing their communities to AANDC without the benefit of any real statutory accountability. At the same time, provinces are under no legal obligation to ensure that their standards of water quality, supply and distribution are implemented on reserves.

Other federal actors which fail to properly address Indigenous water issues include Health Canada and Environment Canada. Health Canada has developed *Guidelines for Canadian Drinking Water Quality*, which are supposed to address issues on water quality on reserves, while Environment Canada is responsible for a range of programs to protect First Nations (on federal and Aboriginal lands) from the effects of pollution and waste.[159] However, despite the possibility of action by federal and provincial governments, First Nations are left without much recognition or protection for their water.

Thus, in spite of — or perhaps as a result of — this mish-mash of policy, law and regulation, many First Nations communities in Canada have lived with and suffered from unsafe drinking water in their daily realities. In 2005, Kashechewan First Nation was evacuated after the water supply, contaminated with *E.coli*, caused impetigo and other skin diseases, and the plight of the community (who had been under a DWA for two

---

[158] *Ibid* at 72 where Macintosh notes that: "INAC will only agree to fund 80% of the estimated operation and maintenance costs for drinking water systems…in 2005, the Commissioner of the Environment found that the cost estimates underlying the 80% funding figure had not been updated for several years, and, shockingly, that in setting the terms of the contract '*INAC ignores whether First Nations have other resources to meet this requirement [to fund 20%] and has no means to enforce it.*'"

[159] See *Canadian Environmental Protection Act* S.C. 1999, c.33 and *Fisheries Act* R.S.C. 1985 c.F-14.

years prior) raised national attention. Canada then faced public criticism for the glaring disparities in the quality of life between First Nations and non-Aboriginal Canadians. [160]

Yet, in spite of similar horror stories about drinking water on reserves across Canada,[161] loss of habitat that provided traditional food sources, and other cataclysmic changes[162] to the environment, many First Nations communities struggle to achieve any forward movement with respect to remedying their common situation around water.

An important aspect of the context facing First Nations is the fact that Band Councils or First-Nations governments are inundated with major and minor issues and concerns on a daily basis, with very little capacity[163] to address them properly. As a result of a general trend of devolution of "basic" governance activities to First Nations, leaders and administrators on reserves are faced with handling matters like health care, education, social assistance, child welfare, other aspects of infrastructure such as roads, housing, and the list could go on (depending on the First Nation). In fact, First Nation governments are often faced with compromising their efforts in one area for the sake of another area that may take precedence due to time pressures, immediacy of impact on members, or

---

[160] See Canada, AANDC "Frequently Asked Questions" online: <http://www.ainc-inac.gc.ca/enr/wtr/h2o/faq/index-eng.asp>. Approximately $330 Million has been allocated in the 2008 budget over two years to address the water crisis faced by First Nations across the country. However, the amount will not be enough to ensure access to safe drinking water in all First Nations communities, many of which require new or up-graded infrastructure as well as training and certification.

[161] See Macintosh, *supra* note 157 at 137: "Of the 76 communities with boil water orders in March 2006, 50 had been in place for over a year, and seven for more than five years."

[162] Another example of such cataclysmic change is the mercury contamination infamously experienced by the Indigenous community Grassy Narrows, ironically also the subject of one the main thematic Court decisions in this thesis. Mercury contamination began in the 1960s from a chemical and pulp mill in nearby Dryden, Ontario, infecting the Wabigoon river system and the fish. The river is a main livelihood source for Indigenous peoples in that region. Over four decades, later, the effects of the mercury are still present. Mercury poisoning and contamination has been so significant that it inspired an international study: Harada, Masazumi, Masanori Harada et al "Mercury Poisoning in First Nations Groups in Ontario, Canada: 35 Years of Minimata Disease in Canada", in: *Journal of Minimata Studies* 3: 3-30. See also Shkilnyk, Anastasia M. *A Poison Stronger than Love: The Destruction of an Ojibwa Community* (Yale: Yale University Press, 1985).

[163] By which I mean, human resources, technical expertise, adequate funding, amongst others.

strategy in on-going negotiations or litigation. They may also be forced to compromise monetary allocations in their budgets — shortfalls are common in under-funded projects, initiatives, infrastructure etc., resulting in operating deficits in areas like operations and maintenance of capital facilities such as water treatment plants.

In 2005, the Office of the Auditor General released chapter five of the Report of the Commissioner of the Environment and Sustainable Development entitled "Drinking Water in First Nations Communities."[164] This report called attention to the severe obstacles to providing safe drinking water that were going largely unaddressed by the government's concurrent strategy. Investigators found serious deficiencies within the governing framework, program management, and parliamentary reporting of results. The report made several key recommendations, including: the implementation of an independent regulator; the introduction of a new management regime, clarification of codes and standards; proper monitoring and follow up; and the establishment of capacity building institutions. The report also emphasized increased parliamentary reporting to provide more accurate descriptions of problems and progress.

b) THE LEAD UP TO THE *SAFE DRINKING WATER FOR FIRST NATIONS ACT*

AANDC has been aware of issues regarding drinking water on First Nations for years. Since the 1990s, the federal government has made various attempts to address these concerns. However, not until the 2006 *Plan of Action* (subsequent to Kashechewan and the Report of the Auditor General) was created did AANDC truly begin to follow through

[164] Canada: Office of the Auditor General, *Report of the Commissioner of the Environment and Sustainable Development*. (2005, Ottawa) online: < http://www.oag-bvg.gc.ca/internet/docs/c20050905ce.pdf>

on its rhetoric regarding the achievement of safe drinking water for First Nations.[165] The plan committed AANDC to having clear protocols for water quality standards, ensuring mandatory training, having certified operators, and creating an expert panel to provide regulatory regime options and regular progress reports on their activities. Late in 2006, the Expert Panel on Safe Drinking Water for First Nations released their Final Report in two volumes regarding the state of First Nations water. It emphasized that further regulation would only be successful if coupled with the provision of adequate human and investment capital. The 2006 Expert Panel proposed three viable options for creating a new system to regulate drinking water in First Nations:

- Parliament could enact a new statute setting out uniform federal standards and requirements;
- Parliament could enact a new statute referencing existing provincial regulatory regimes; or
- First Nations could develop a basis of customary law that would then be enshrined in a new federal statute.[166]

In their *Final Report Volume 2*, the Expert Panel elaborated on the option of creating First Nations jurisdiction over regulation of water on reserves through customary laws. The Expert Panel understood this option as "start[ing] with, and be[ing] driven by, First Nations across the country. The objective would be to incorporate into federal legislation

[165]The 2006 *Plan of Action* required that a *Protocol for Safe Drinking Water in First Nations Communities* be drafted, which was completed. INAC has so far provided three "Progress Reports" on the implementation of this Protocol, based on a short list of First Nations who qualify as what INAC characterizes as "high risk systems". In addition, an *Expert Panel on Safe Drinking Water for First Nations* was struck and travelled across the country soliciting comments and concerns of First Nations on the issues around drinking water.

[166] Canada: AANDC, *Report of the Expert Panel on Safe Drinking Water on Reserve, Vol.1* (Ottawa: Industry Canada, 2006) online: <http://publications.gc.ca/site/eng/298371/publication.html>

the basic tenets of First Nations customary law as they relate to water."[167] The Expert Panel invoked the concept of reconciliation as being the legal basis for this option, citing s.35 (1) of the Constitution Act, 1982 and finding that "[t]he Act provides the constitutional framework to reconcile the fact that aboriginal peoples lived on the land in distinctive societies, with their own practices, traditions and cultures with the sovereignty of the Crown."[168] The Expert Panel went on to analyze the concept of reconciliation as it is expressed through First Nations self-government. In thinking about the implications of the *Pamajewon* decision of the Supreme Court of Canada, the Expert Panel cited that such claims require examination of whether a self-governing activity is a "defining feature of the culture in question" (the test in *Van der Peet*) prior to contact with Europeans. The Expert Panel then cited the 1995 federal policy recognizing First Nations' inherent right to self-government as being "an existing right within s.35 of the Constitution Act, 1982."[169]

> The policy…notes that the inherent right to self-government is based on the view that 'aboriginal peoples of Canada have the right to govern themselves in relation to matters that are integral to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and based on the special relationships that aboriginal peoples have always had with their lands and reserves.' The 'right to govern themselves in relation to matters that are internal to their communities' would, presumably, include the regulation of drinking water, which is a matter that is central to any community.[170]

---

[167] Canada: ANNDC, *Report of the Expert Panel on Safe Drinking Water on Reserve, Vol. 2* (Ottawa: Industry Canada, 2006) online: < http://publications.gc.ca/collections/Collection/R2-445-2006E2.pdf> at 36

[168] *Ibid*

[169] Canada, Department of Indian Affairs and Northern Development. Federal Policy Guide, Aboriginal Self-Government: The Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government. Minister of Indian Affairs and Northern Development, Ottawa, 1995

[170] *Supra* note 167 at 37

Interestingly, the Expert Panel also cited the UN *Draft Declaration on the Rights of Indigenous Peoples* as forming part of the legal basis of this option representing international principles. Since the time of publication of the Final Report of the Expert Panel, Canada has endorsed the *UN Declaration on the Rights of Indigenous Peoples*,[171] which was passed by 144 Member States at the UN General Assembly in 2007.[172] While Canada did express some reservations about the fulsome applicability of the entire Declaration, they did not withhold their support of the minimum standard of self-determination, which is the principle cited by the Expert Panel in their Final Report.

The concept of employing the minimum standards of international law represented by the UN *Declaration on the Rights of Indigenous Peoples* has been investigated by Brad Morse, who outlined how the concept of reconciliation (as described in s. 35(1)) can find appropriate application through the Declaration (given the acronym of "DRIP"):

> An Aboriginal right to water would assist in the reconciliation process between the federal government and First Nations. The DRIP, and other international instruments affirming their human rights, can also be of assistance to Indigenous peoples in reconciling relations with their respective states.[173]

---

[171] Canada, "Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples," (12 November 2010, Ref. #2-3429, Ottawa) online: <http://www.aandc-aandc.gc.ca/eng/1292354321165> In their Statement of Support, Canada stated: "Under this government, there has been a shift in Canada's relationship with First Nations, Inuit and Metis peoples, exemplified by the Prime Minister's historic apology to former students of Indian Residential Schools, the creation of the Truth and Reconciliation Commission, the apology for relocation of Inuit families to the High Arctic and the honouring of Metis veterans at Juno Beach. These events charted a new path for this country as a whole, one marked by hope and reconciliation and focused on cherishing the richness and depth of diverse Aboriginal cultures." Canada: Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, online: <http://www.aandc-aandc.gc.ca/eng/1309374239861/1309374546142>

[172] United Nations, *Declaration on the Rights of Indigenous Peoples* (A/61/295) (2008: United Nations publication, 07-58681)

[173] Morse, Bradford "Indigenous Peoples and Water Rights: Does the United Nations' Adoption of the Declaration on the Rights of Indigenous Peoples Help?" In: The *Journal of Water Law Special Issue: Contemporary Indigenous Peoples' Legal Rights to Water in the Americas and Australasia* (September 2010) Volume 20 Issues 5/6 at 266

The Expert Panel expressed some concern about the existing opportunities for incorporating customary laws in the Canadian legislative framework, citing in particular the then *Canadian Environmental Assessment Act* (CEAA), discussed elsewhere in this thesis, the *Canada National Parks Act* and the *Oceans Act*. The Expert Panel found a more "elevated" role for customary laws in the *Species at Risk Act* (SARA) that contains a statutory obligation to consider community knowledge and aboriginal traditional knowledge.

The Expert Panel found that the option of employing customary laws in water regulation would give those laws "a more central role" in the development of First Nations water legislation, and:

> …give effect to the federal policy recognizing First Nations' inherent right to self-determination; it upholds s.35(1) of our Constitution and its underlying purpose of reconciliation; and lastly it: 'encourages us to broaden our conception of the sources of Canadian law and to recognize the diverse roles that Indian, Inuit, and Metis peoples have played in the formation of this country and its Constitution.[174]

The Expert Panel found some disadvantages to this option of employing Indigenous legal traditions, including the obvious issue of the variations and diversity of First Nations customary laws across the country. The Expert Panel also cited the need to create "governance and administrative infrastructure coherent with such First Nation law to administer a complex regulatory regime where significant technical standards are in play…"[175]

Regardless of these challenges, the Expert Panel concluded that while the use of customary law in water regulation on reserves would have a much longer timeline in

---

[174] *Supra* note 167 at 38-39

[175] *Ibid* at 39

development, it was also likely to provide "greater long-term capacity building potential. The process of articulating traditional law and weaving it in to contemporary regimes will have great positive impact in other areas of law where First Nations wish to assert governance jurisdiction."[176]

The Expert Panel foresaw a possible hybrid option in their discussion of the use of customary law – the combination of Indigenous legal traditions with a new federal legislation. They saw the possibility of incorporating traditional law into the process of a new federal legislation. I submit that this is still a possibility in the implementation of the *Safe Drinking Water for First Nations Act*. I will discuss these opportunities later in this thesis.

The movement within the bureaucracy mirrored activity on Parliament Hill. In 2007, federal government budgets committed funding to develop a regulatory regime based on the Expert Panel recommendations. 2007 also saw the release of the Final Report of the Standing Senate Committee on Aboriginal Peoples entitled "*Safe Drinking Water for First Nations*" in 2007.[177] This report found that while a regulatory regime regulating the delivery of safe drinking water was important, it could not be enacted without appropriate funding: "regulatory standards without the physical and human capacity to meeting them is unlikely to improve the quality and delivery of drinking water on-reserve, and may in fact worsen the situation."[178] AANDC quickly indicated a preference for the "incorporation by reference" option presented by the Expert Panel, such that existing

---

[176] *Ibid* at 40

[177] The Senate Report contained recommendations on how to proceed with legal reform in the area of drinking water and First Nations.

[178] Senate of Canada, Standing Committee on Aboriginal Peoples *Safe Drinking Water for First Nations,* (May 2007) at 3 (Chair: Hon. Gerry St. Germain, PC)

provincial regulations would be made legally enforceable on First Nations reserves across Canada. So began a years-long process of "engagement" between the government of Canada and First Nations on this controversial issue, culminating in the enactment of legislation in 2012: the *Safe Drinking Water for First Nations Act*.

AANDC's approach to the proposed legislative framework did not acknowledge, recognize or affirm Aboriginal and treaty rights. AANDC proposed to "incorporate by reference" provincial/territorial regulations and standards, so as to simply extend their application on reserves in Canada. This was and continues to be unacceptable to many First Nations because it does not accord with broader constitutional principles, or Indigenous peoples' own laws.

I have been active in trying to address this issue. Starting in 2007, I became a member of the Assembly of First Nations *National Water Technical Advisory Committee*, which actively participated in the dialogue between First Nations and AANDC throughout the process leading up to the proposed legislative framework. AADNC's stated position to the Committee at joint meetings heavily promoted incorporation by reference, to the exclusion of Indigenous legal frameworks.[179] However, many First Nations understandably had a problem with that approach.

The application of provincial standards solves the problem of "optics" for the Government of Canada. It makes it clear to Canadians that their government has taken

[179] Even in its own official parliamentary record, it was understood that Indigenous legal traditions were not to be given any space in the formulation of a new framework for First Nations and Water: See : Canada, Library of Parliament *Background Paper: Safe Drinking Water in First Nations Communities* (Ottawa: Library of Parliament, 2010) Publication No. 08-43-E online: < http://www.parl.gc.ca/Content/LOP/researchpublications/prb0843-e.pdf > at 9: "In April, 2007, DIAND held a joint workshop on water legislation with the Assembly of First Nations Technical Water Expert Group. The purpose of the workshop was to engage AFN technical experts on DIAND's preference for proceeding with a federal statute incorporating provincial regulations and to identify issues and challenges that would need to be addressed with respect to this option…"

concrete and legal action to address the crisis of drinking water in First Nations across the country. It does not acknowledge the Canadian constitutional framework nor Indigenous legal traditions, as urged by the Expert Panel in one of the three options they presented in their Final Report. The incorporation by reference approach may, in fact, create more conflict and crisis than it solves.

Mirroring provincial regulations and standards without any attached funding, capacity building, monitoring or assessment guarantees that First Nations will be set up to fail – falling short of provincial standards. Some First Nations are worried, and rightly so, that they will be opened up to new liabilities and additional costs for which they are unprepared. In addition, it is already difficult to obtain and compare information on water quality and quantity in First Nations as well as at the higher level of provinces and territories. All the provinces have their own regimes relating to water governance and management, not to mention assessment and monitoring. For example, in Alberta the water legislation was amended, with watershed councils mandated to work with land-use planners for the purpose of watershed planning. British Columbia only recently engaged in a law re-formation process on water, culminating in a new provincial law and framework.[180] This is all to say that each jurisdiction has taken its own approach and as such, First Nations across Canada will experience the uneven application of varying types of laws on reserves. There will not be a homogeneous application of water laws for First Nations in Treaty 6 because part of the Treaty falls in Alberta, and the rest in Saskatchewan. These types of issues have, of course, been presented many times in

[180] On May 29, 2014, Bill 18 of the BC Legislature, the *Water Sustainability Act* received Royal Assent, and is expected to come into force in 2015, once supporting regulations are developed and finalized. Online: < http://engage.gov.bc.ca/watersustainabilityact/>

various venues over the years since AANDC began the journey of creating federal legislation on First Nations drinking water.

AANDC began their consultation process on the proposed legislative framework in earnest in 2008, with an announcement that the federal government would consult with not only First Nations, but also provincial and territorial governments. The following year, they announced the launch of a formal consultative process.[181] Of course, many First Nations across Canada balked at the use of the phrase "consultation" for the formal process, so AANDC changed the name to "engagement" in order to increase the comfort level of First Nations to participate.

In the AANDC Discussion Paper prepared for the 13 "engagement sessions" they held across Canada indicated a preference to hearing input only on the government's preferred option of incorporation by reference.[182] As a result, the elements of the proposed framework to be discussed at the "engagement sessions" did not include a discussion of Indigenous customary or traditional management or governance frameworks. Instead, the elements to be addressed under the "engagement sessions" were issues like appeals mechanisms for regulatory decisions, compliance, and design approvals, amongst others. The framing of the consultation process firmly excluded consideration of Indigenous forms of water management and valuation.

Any "water rights" under the regime of the new *Safe Drinking Water for First Nations Act* will be predicated and dependent upon purposes derived from statutes and regulations, and from common law. The subjugation and potential abrogation of

---

[181] *Supra* note 179 at 9

[182] Canada *Drinking Water and Wastewater in First Nations Communities: Engagement Sessions on the Development of a Proposed Legislative Framework for Drinking Water and Wastewater in First Nations Communities* (Ottawa, 2009) online: < http://www.safewater.org/PDFS/Policy/DrinkingWaterandWastewaterinFNCommunities.pdf>

Indigenous legal traditions respecting water is unacceptable and possibly unconstitutional in the new paradigm of reconciliation.

First Nations are uniquely situated to take a quantum leap into an era of water management and governance which is not predicated on out-dated models of environmental governance, but which is rather founded on transformative and re-formative approaches to water, wastewater and related environmental laws and regulations. This could be guided by GLT, Indigenous legal traditions and the new constitutional paradigm I have described in earlier chapters. The functionality of Aboriginal title, Aboriginal rights and treaty rights is heavily dependent upon water, as pointed out by the Supreme Court of British Columbia in the *Helalt* case.

What will be interesting to see is how the application of provincial regulations on reserve plays out in the context of the aftermath of the *Grassy Narrows* Supreme Court of Canada decision. It may be that, since the Courts have described the provincial crown as having the same obligations under Treaty as the federal crown, that First Nations have a legal basis upon which to challenge the very regulations that are proposed to be applied in their reserve lands.

The terms of provincial instruments and laws have more often than not been set by non-Indigenous actors and institutions, where Indigenous peoples have had little bargaining power. Too often, provincial law is focused on a single usage, such as drinking water, as opposed to multiple uses and values found in culture and Indigenous legal orders. *Grassy Narrows* changes this dynamic in important ways.

Primarily, water is central to every aspect of reserve life, including health of people and the environment, housing, economic development, agriculture, traditional and ceremonial

activities, and everyday use. Any reductions in the quality, quantity and flow of water sources could require consultation and accommodation.

Prior to *Grassy Narrows*, the Alberta government did not include any assessment of the potential strength of water rights or consider such rights as having implications for watershed basin plans. However, they may now be under such an obligation as the province of Alberta now holds the responsibilities of the Crown further to Treaty as was previously only the domain of the federal government. The province of Alberta will have to meaningfully respond to First Nations treaty rights and water rights in future. In addition, such matters cannot continue to be relegated to parallel processes, whereby treaty and aboriginal rights are "parked" somewhere, in a place that has little to do with the "technical" discussions of water provision on reserve.

Additionally, the SCC decision may also have implications for the broader provincial Aboriginal consultation guidelines and framework. This will be discussed elsewhere in this thesis. In summary however, there will have to be more time dedicated to address First Nations rights, including groundwork to understand impacts on treaty rights and traditional uses of provincial developments and regulations.

Finally, water allocation limits and access to water licences will become a significant issue, mainly due to the fact that Aboriginal and Treaty rights will be elevated in the provincial system as opposed to quashed, due to the decision of the Supreme Court to burden the provinces with the same obligations as the federal crown, including conducting themselves with the "honour of the Crown" with regard to relations with First Nations. While this is not going to change the Alberta system of "first in time, first in right" with regard to allocations, it might at least open up a conversation or potential legal

action about the treaty right to water in particular, which has never been directly dealt with by any court in Canada to date.

A further dimension of the problem is unrecognized by AANDC's approach to dealing with Indigenous water issues through incorporation by reference. AANDC failed to acknowledge and overcome colonial legacies that dispossessed and continue to estrange First Nations from water. Cultural trauma and damage to the integrity of Indigenous knowledge, identity and community was caused by the *Indian Act*, other federal and provincial legislation, the common law, residential schools and other assimilation projects. You cannot rewrite laws for First Nations people without acknowledging and dealing with these facts. Sakej Youngblood Henderson describes a source of colonialism as Eurocentrism, being a "dominant intellectual and educational movement that postulates the superiority of Europeans over non-Europeans".[183] As such, the laws and policies that have been developed to apply to Indigenous peoples in Canada has, as a backdrop, implicit assumptions about the value of Indigenous knowledge, legal orders, and identity. This seems to be what is occurring under AANDC's current approach. This approach may have been foiled by the SCC decisions in *Tsilqoht'in* and *Grassy Narrows*.

So much of the politics of "being Indigenous" and expressing those multi-faceted identities in Canada is closely tied to the Federal government of Canada – through the operation of institutions of law, politics and economy. In other words, Indigenous political actors have been contained within a federal discourse. This has completely changed with those SCC decisions. Partnerships or dialogue with other actors such as provincial, territorial, municipal governments, NGOs and even the private sector appear

[183] Sakej Youngblood Henderson, "Post-Colonial Ghost Dancing: Diagnosing European Colonialism", in Marie Battiste, ed. *Reclaiming Indigenous Voice and Vision* (Vancouver: University of British Columbia Press, 2000) at 57-58.

possible to build, strengthen and /or maintain. The space for Indigenous activism and voice is therefore historically informed, socially constructed and increasingly formalized.

While there are some instances where Indigenous peoples have successfully partnered or worked with other levels of government, NGOs or the private sector, those examples are generally project- or issue-specific and temporally defined. The opportunity is now to understand how Indigenous actors in Canada might meet other Canadians in the old boundary lands that used to divide them; and how that old federal discourse can be shrugged off to enable true engagement, in a meaningful and effective way with other actors, institutions and issues regarding water.

c) ANALYSIS OF THE *SAFE DRINKING WATER FOR FIRST NATIONS ACT (the ACT)*

The lack of consultation with First Nations prior to the introduction of the legislation foreshadowed what is possible in regards to implementation of the legislation. In this section of the Chapter, I will examine the content of the Act, and attempt to address some of the more well-known issues raised by the substantive content of the legislation as well as address the concept of "incorporation by reference."

The primary question that many First Nations asked themselves when the Act was introduced in Parliament, is what the constitutional authority of Canada was to impose a legislative framework on Treaty First Nations. Many representatives asked themselves why Canada felt it could unilaterally change the relationship(s) between water and first Nations. In enacting the legislation, Canada made a number of assumptions concerning their role and the ability to allow for the implementation of provincial regulations and exclude the application of First Nations legal traditions.

Since the Act is enabling legislation, it is very short and broadly written, only nine pages in length. It allows for provincial regulations to be incorporated by reference on First Nation lands respecting water and wastewater. As such, water and wastewater systems in First Nations across Canada will continue to be uneven. First Nations within one treaty region may experience the application of two different provincial regimes respecting water and wastewater.

In his article regarding incorporation by reference in legislation, John Mark Keyes pointed out that:

> It is generally recognized that democracy requires laws to be adopted according to a transparent process that allows them to be meaningfully discussed before they are adopted. In turn, the rule of law recognizes that laws, once adopted, must be capable of being known by those to whom they apply so that they can plan their affairs in accordance with the law and rely on it. Incorporation by reference requires those who want to discover the contents of a proposed or enacted legislative text to go beyond it to find the referenced text (or texts) and to read them together.[184]

Consequently, it is difficult for First Nations within particular treaty regions, for example in Treaty No.6, to address in a collective manner the impacts of the Act upon them. First Nations across Canada will experience different systems and different values for safe drinking water as referenced earlier in this chapter.

As I have attempted to establish in this thesis, Indigenous Peoples have their own authority to deal with water. It is an inherent right, which was not given up at any point in time, but rather continues to exist in parallel with mainstream systems. Water is an integral aspect of indigenous relations and was made an element of the sacred aspect of the treaty — that treaty must last "as long as the waters flow".

---

[184] Keyes, John Mark "Incorporation by Reference in Legislation" in *Statute Law Review* 25(3), 180 at 188

It is obvious from reading the Act that Canada is taking the approach that the provision of drinking water to First Nations is a purely technical, one-dimensional issue. In fact, this is the same mantra that we hear from the province in terms of water and wastewater. There is such a reluctance amongst provincial and federal governments to understand the need to move towards a new ethic with respect to water and wastewater governance. However, First Nations are uniquely situated to make such a leap and become leaders in the field of a new water ethic.[185]

Unfortunately, the imposition of the provincial system on First Nations may also mean a process of "municipalization" of First Nations with regard to water and wastewater. The danger for indigenous peoples is that their constitutionally protected status may be effectively infringed by the application of this legislation upon them.

Perhaps the most troubling of all is that the Act as a whole does not reflect at all the particular legal, treaty, historic and contemporary relationships between First Nations and the Crown. The legislation seeks to characterize First Nations as an extension of the province. This must change, especially in light of the fact that the Courts have now determined that First Nations and the provinces can engage on a Treaty basis. It seems like this is a piece of legislation which, in light of the new constitutional paradigm of reconciliation entrenched by the Supreme Court of Canada in 2014, is ripe for constitutional challenge.

---

[185] See generally Phare, Merrell-Ann and Robert William Sandford, *Ethical Water: Learning to Value what Matters Most* (Calgary: Rocky Mountain Books, 2011)

i) THE CLAUSES OF THE ACT

The Act begins by making clear in section 2 that it privileges human beings with regards to the provision of safe drinking water: the fact that the definition of the First Nation includes a band under the *Indian Act*, as well as the *First Nations Land Management Act* has fueled fears amongst first Nations that it might facilitate a future requirement to bring their communities under the *First Nations Land Management Act*, which many have criticized and opposed in the past. Furthermore and notably, there is no reference to "reserved lands." This raises the question as to whether the legislation has attempted to circumvent the right to a livelihood which I have argued exists further to Treaty. A corollary to this concern is whether the absence of a reference to reserved lands opens the door to convert such lands into "lands of disposition" as set out in the Act.

In section 2(2), the government may make regulations regarding the identity of bands as First Nations and First Nation lands. There are approximately 8 areas within this legislation that allow for the government to make regulations for First Nations and there is only a preambular paragraph stating the Minister of AANDS and the Minister of Health are committed to working with First Nations to develop proposals for regulations to be made under the Act. This is problematic because preambular paragraphs are not legally binding under the statute. They are only meant to be a sort of a guiding principle, or set the context for the legislation.

The most objectionable section is found in section 3:

> For greater certainty, nothing in this Act or the regulations is to be construed so as to abrogate or derogate from any existing Aboriginal or treaty rights of the aboriginal

> peoples of Canada under section 35 of the Constitution Act, 1982, except to the extent necessary to ensure the safety of drinking water on First Nation lands.

This section effectively provides for the abrogation and derogation of aboriginal and treaty rights in the name of a technical and one-dimensional approach to water and wastewater for Indigenous Peoples. Read together with the rest of the Act, this section open the door theoretically for any person or party enjoying an official role pursuant to the Act to be delegated the power to determine where and to what extent to abrogate or derogate from Aboriginal end Treaty rights, without any restriction on that abrogation. It is difficult to elaborate on what abrogation might be based on, as it depends on the application of the tests described above in chapter 3 respecting infringements of aboriginal and treaty rights. In fact, there is no definitive list that we can point to that enumerates grounds for infringement. This makes it both a positive and a potentially negative scenario with regard to water – if industry and agriculture continues its stranglehold on water licences and allocations, it will take a lot to demonstrate the appropriate scope of aboriginal and treaty rights in that context.

In addition, this Act paves the way for public-private partnerships around water and wastewater to establish in First Nations. First Nations may perceive this as a "tendering out" of treaty rights. What this will most likely create is a series of monopolies held by a few private corporations which are likely be closely held and not collectively owned by First Nations. In the case of public-private partnerships, the private proponent is usually the entity which gets all the expertise (knowledge and resources) without any obligation to transfer skills to the First Nation itself. As such it would become difficult for First Nations to evaluate the quality of service being provided or to carry out any monitoring.

In addition if there is a private proponents on the reserve, it will be harder to integrate water and wastewater services with other infrastructure in the community. Finally and most importantly, ownership of water and wastewater facilities would most likely rest with a private proponent and not the First Nation.

3) THE ALBERTA WATER LANDSCAPE: WHAT WILL INCORPORATION BY REFERENCE MEAN ON RESERVES IN TREATY 6?

The example of the Alberta portion of the South Saskatchewan River Basin (SSRB) highlights this interaction and has significance to Aboriginal and Treaty rights under the Constitution of Canada, along with real consequences for access to sufficient quality and quantity of water by First Nations in the region of the SSRB.

I will now analyze the forms of activism which have arisen, and which reveal how effective the federal discourse has been at containment, and the bias inherent in the institutions and venues in which such developments took place.

Alberta adopted the *Approved Water Management Plan for the South Saskatchewan River Basin* in 2006 as a result of the provincial *Water for Life Strateg*y, a government-led form of civil society engagement and policy development on water in Alberta. The original *Water for Life Strategy* was finalized in November of 2003.[186] In 2004, the province established a body called the Alberta Water Council to implement the Strategy.

---

[186]See Alberta, Alberta Environment "Water for Life: Alberta's Strategy for Sustainability" (2003) online: <www.**waterforlife**.**alberta**.ca/> at 5: "Alberta is facing significant pressures on its water resources. Population growth, droughts and agricultural and industrial development are increasing demand and pressure on the province's water supplies, and the risk to the health and well-being of Albertans, our economy and our aquatic ecosystems. In the past, Alberta has been able to manage our water supply while maintaining a healthy aquatic environment because there has been a relatively abundant, clean supply to meet the needs of communities and the economy. However, fluctuating and unpredictable water supply in recent years has stressed the need to make some major shifts in our approach to managing this renewable, but finite, resource. *Water for Life: Alberta's Strategy for Sustainability* is the Government of Alberta's response to develop a new water management approach and outline specific strategies and actions to address these issues."

That body is currently made up of 25 members, comprised of industry, NGOs, governments (large urban, small urban, rural and Métis Settlements), and government departments (such as Alberta Agriculture and Rural Development, Alberta Energy and so on). First Nations are ostensibly given a "seat" in these and similar processes, but rarely are those seats occupied. They remain there in name only.[187] Because of increasing population, economic growth and changing water needs, the Minister of the Environment for Alberta asked the Alberta Water Council to provide the provincial government with recommendations on how to renew the Strategy, which was finalized in November of 2008. The Strategy works in conjunction with the Plans put in place by Alberta Environment with respect to water and watershed management activities.

The SSRB Plan is a water management planning process for the South Saskatchewan River Basin undertaken pursuant to the *Water Act*. Alberta updated its water legislation in an effort to address an antiquated water licensing scheme, and poor protections for water systems. The SSRB Plan came out of a specific provincial effort at water conservation under the Act:

> The water management plan for the South Saskatchewan River recommends a balance that is broadly acceptable to the public between water consumption and environmental protection, in light of economic and social objectives and ecological requirements. The plan envisions future management in the basin combining innovative, efficient and productive water use and improved management of aquatic ecosystems. The plan also provides a foundation for future watershed management planning in the South Saskatchewan river basin.[188]

Prior to commencing the SSRB process, the province of Alberta was aware of some of the Aboriginal interests that may arise as a result of the new water management process.

---

[187] See Alberta: Alberta Water Council, online: <www.albertawatercouncil.ca>

[188] See Alberta: Water For Life Strategy *Rivers and Basins,* online: <www.waterforlife.ca/riverbasins>

Treaties cover the entirety of the province. Water use and access through water licenses and water allocations under a plan like the SSRB are processes that can have significant impact on the Indigenous communities, traditional territories, sacred sites, and other uses of land such as hunting, fishing, gathering (to use the language of the Treaties) and agriculture. While treaty rights provide benefits to Indigenous peoples who are the beneficiaries under the treaty while they are on reserve, treaty rights also comprise rights to livelihood, and life-ways connected to the traditional territories of those nations who signed the treaties.

Consequently, treaty rights (and other aboriginal rights) may be exercised off-reserve, and when it comes to activities like hunting and fishing, often are exercised off-reserve. The use, allocation and management of lands and waters off-reserve therefore have very real and immediate impacts on the ability of First Nations to exercise treaty and aboriginal rights. As we see above, the main question at issue with respect to the SSRB was striking a balance between protection of the environment and habitat (fundamental to the exercise of Treaty fishing and hunting rights) and allocation of water (clearly relevant to the Treaty right to use reserve land and water rights, use and access by First Nations) to meet the needs of a province whose population and industrial base was expanding explosively.

Indigenous rights to use their reserve lands and to hunt and fish will be adversely affected by a water management process that did nothing to include their voice in its development, nor did the process itself include a clear role for First Nations. Alberta Environment has acknowledged indirectly and directly in their documentation (available on-line) that First Nations were not really active in the phases of the SSRB. This was

mainly due to the fact that at that time of the phases of the SSRB, Alberta had no First Nation "consultation policy", and secondarily that they took the position that it was not their role as a province to consult with First Nations (that it was instead the role of the Federal Government).

The Strategy is really the opportunity that has been provided to First Nations to participate in management decisions with respect to water and watershed management activities. It is the same opportunity that has been provided to other "stakeholders" in the province, but it is a limited opportunity. While the Strategy states that it invites and recognizes the role of First Nations in the implementation process, documentation and information available on the websites related to the Strategy and the SSRB Plan show that there are a lot of empty seats where Indigenous peoples should be.

The Strategy describes three different partnerships for the purposes of implementation: the Alberta Water Council, Watershed Planning and Advisory Councils and Water Stewardship Groups. When the Alberta Water Council was first established, it did have three seats for First Nations representatives – one from each treaty area of Alberta. A total of forty-seven (47) First Nations in the province make up the membership of the three treaty areas in the province. The diversity of interests, concerns, priorities, and aspirations is stunning. As such, to allocate one seat for each treaty area poses significant political barriers to each treaty area in terms of deciding who sits at the table. In some cases, First Nations may have opposing interests within a single treaty area. For this reason, and due to other factors of participation and advocacy that I have described in this paper so far, two of the three seats were left empty and continue to be empty. The seat allocated for Treaty 8 was filled by political agreement within the Treaty 8 region.

Treaty 8 covers the northern part of the province, including the contentious tar sands, Athabasca River and other oil and gas activities near the ubiquitous oil sands development areas. As such, water became a high priority for Treaty 8, and they came to an agreement to appoint a representative to the Alberta Water Council. However, that seat-holder's appointment was rescinded[189] in June of 2007, with the following caveat:

> …Minister Renner [of the Ministry of Environment] has indicated a willingness to continue working at a government-to-government level to facilitate the participation of First Nations in the Council's work and in other multi-stakeholder processes. Options and possibilities are being explored to achieve this goal. Each of Treaty 6, 7 and 8 was invited to send an *observer* to this meeting, and the executive will continue efforts to fill the three First Nations seats…where the Council has made commitments to Aboriginal consultations, these will continue to be honoured.[190] (emphasis added)

The Alberta Water Council incorporated as a society in September of 2007 and in their by-laws[191], the category of "aboriginal government" was included, with an allowance for one (1) representative from that category to sit on the Board (in addition to the other seats for Metis). The maximum number of directors is thirty-two (32) and includes all the other categories of membership I noted above. As such, it might be extrapolated that the three seats remain open, but are not yet filled.

The Watershed Planning and Advisory Councils are the other "partnerships" with civil society established by the Strategy. These bodies are supposed to be "multi-stakeholder" who do basin planning and evaluation in coordination with the province. They produce "state of the basin" reports and provide recommendations in watershed management

---

[189] It was rescinded by way of political decision made by Treaty 8 nations, and was confirmed by the Grand Chief of Treaty 8, Arthur Noskey. It is difficult to speculate as to why that recession took place, but evidently it was at any rate a political decision and thus, more than likely, a strategic decision.

[190] See Alberta, Alberta Water Council Minutes of Meeting #16, June 14, 2007 at www.albertawatercouncil.ca/AboutUs/Meeting/Summaries/tabid/64/Default.aspx

[191] See www.albertawatercouncil.ca/AboutUs/Bylaws

plans. They also present issues to the Albert Water Council.[192] Out of the nine (9) bodies listed[193] as falling under this category, only one (1) has an existing First Nation representative.

The final partnership listed under the Strategy is the watershed stewardship groups. The Alberta Stewardship Council takes the lead in this partnership, and lists seven (7) Indigenous members: TSAG (see footnote above); the Centre for Indigenous Environmental Rights (CIER); Treaty 6 (although it is unclear from their website who actually represents Treaty 6); Treaty 8 (again not clarified as to the representative); the Métis Nation of Alberta; the Assembly of First Nations Environmental Stewardship Unit (whose offices are in Ottawa, Ontario) and Treaty 7 (as represented by Piikani First Nation, and the Kainai [Blood Tribe] First Nation).

These figures show how little active participation happens on the part of Indigenous peoples in the implementation of the Alberta Strategy. In fact, although a lot of lip service is paid to the idea of First Nations representation, very little actually occurs. Empty seats and spotty membership in watershed councils or stewardship groups is indicative of a serious problem in the recruitment, communication, and engagement of these entities with First Nations governments and representative organizations. In spite of

---

[192] See Water for Life Strategy, ibid., at 15-16

[193] Battle River Watershed Alliance (no seat for First Nations), Beaver River Watershed Alliance (no seat for First Nations), Bow River Basin Council (no First Nations member although they declare that "membership is open"), Lesser Slave Watershed Council (this is the one with the First Nations representative), Milk River Watershed Council (there is one vacant seat for a First Nations representative, as well as one vacant seat for an academic representative), North Saskatchewan River Watershed Alliance (no seat for First Nations, although out of two hundred fifty three 253 members, they list seven (7) Indigenous members, including: Akosan Project; Buffalo Lake Seniors Society; Enoch First Nation; the Aboriginal Technical Services Advisory Group (TSAG, not a representative organization – only an administrative body for Aboriginal resource related projects and programs); Métis Nation of Alberta; Paul First Nation; and Saddle Lake Tribal Administration.), Oldman Watershed Council (one vacant seat for First Nation but must be elected), Red Deer Watershed Alliance (two vacant seats for First Nations), South East Alberta Watershed Alliance (recently established, listing a membership category of Aboriginal, however without designating a seat for a First Nations representative on their board.). All websites of these organizations are accessible through www.albertawatercouncil.ca website.

formal rights or rules which may require Indigenous participation in the Strategy or the implementation partnerships, these "cannot 'act' by themselves, and it is only the forces and relationships of society that can turn legal [or policy] instruments into societal practice. Social and technical water engineers, lawyers and other legal advocates, in particular, have often overestimated the actual functionality or instrumentality of formal law and policies in local contexts."[194] In fact, the most accessible avenue of engagement on water issues for First Nations remains the federal government[195], either through the operation of the *Indian Act* or through claims processes, negotiation of funding arrangements, or appeals to expand other funding areas to include water issues (for example, health care provision).

Meanwhile, running parallel to the implementation of the Strategy as a mode of civil society engagement, the SSRB Plan was created, shaped and rolled out. Preparation for Phase One of the SSRB Plan began in 2000 and culminated in 2002 with the Phase One Water Allocation Transfers in June of 2002. Alberta Environment consulted with Basin Advisory Committees, whose membership consisted of industry, municipalities, irrigation districts and environmental and recreational groups. Alberta Environment also had some open houses for the public, but none were held at First Nation communities. Then, in phase two of the SSRB Plan, Alberta Environment conducted a series of studies to examine the water management issues. First Nations were not invited to contribute or

[194] Boelens, Rutgerd "Local Rights and Legal Recognition: the Struggle for Indigenous Water Rights and the Cultural Politics of Participation" In: Boelens, Rutgerd, M. Chiba and D. Nakashima (eds.) *Water and Indigenous Peoples*. 46-60 *Knowledges of Nature 2*, Paris: UNESCO, 2006) at 52

[195] Or the courts, as noted below.

participate, nor were any of the impacts of water management on aboriginal and treaty rights examined.[196]

While the phases of the SSRB Plan were ongoing, many First Nations were unaware of the process, or if they were aware, may have lacked capacity[197] to engage in the processes. Furthermore, many First Nations had concerns that if they participated in the provincial process, it would undermine their Treaty rights and prevent them from asserting full Treaty rights in the future.[198] Finally, and most revealingly, since the SSRB came into force, two First Nations – Tsuu T'ina Nation (Treaty 7) and Samson Cree Nation (Treaty 6) have entered into litigation as a result of the SSRB and the impacts it may have on their Constitutional rights. The claim is in its infancy, and is currently at trial.

Thus First Nations can be seen to have turned in two familiar directions in their activism: the federal government, and the federal courts. The problems identified in the thesis thus far with respect to advocacy, activism, voice and participation of Indigenous peoples are numerous and systemic. In the few avenues of participation and opportunity for advocacy, the voice of Indigenous peoples is controlled and contained by years of jurisprudence, oppressive law and policy, and even at times self-censorship. The matrix of these issues is well identified by Paul Nadasdy:

> The point of this book is not that power is simply a matter of the ability to constrain and influence the production and legitimation of knowledge. There are, indeed, other

---

[196] Saunders, Owen J. and Michael M. Wenig, "Whose Water? Canadian Water Management and the Challenges of Jurisdictional Fragmentation" In: *Eau Canada: The Future of Canada's Water*, Edited by Karen Bakker 119-141 Vancouver: UBC Press, 2007 at 127-128

[197] *Supra* note 157

[198] Boelens *supra* note 194, has described this as the "tyranny of participation…if equality is strived for, the question is: equal to what, equal to whom, equal to which model?...if inclusion and participation are the objectives, the obvious question is: inclusion in what? Participation in whose objectives, visions and terms?"

> manifestations of power, such as the ability to use (and legitimize the use of) force. What I do wish to argue, however, is that power \ knowledge is intimately tied to these other more overtly coercive forms of power. It is easy to overstate the degree to which the dominant language (to return to the discussion of Bourdieu in the introduction) can, by itself, silence other ways of speaking. Just as non-official dialects and languages continue to exist in supposedly linguistically homogenous nation-states, so other ways of talking (and thinking) about land and animals continue to exist in the Canadian North. Despite their lack of connections to state power, there are times when these other ways of talking can be heard loud and clear. But being heard (and even understood) is not enough because, without the necessary links to state power, these alternate forms of talking \ knowing cannot form the basis of legitimate action….Solutions to such problems require a radical rethinking and restructuring of aboriginal-state relations.[199]

As such, First Nations need equitable and participatory mechanisms for sustainable partnerships in water resource management. Alberta needs to re-define "community" and "civil society" to be inclusive of the true nature of the Indigenous peoples in the province, in all their diversity. Alberta now has obligations to also engage as a Treaty partner in strengthening treaty relations in accordance with the common law framework. A heavy load indeed.

In assessing the level of involvement of Indigenous peoples in water management, it is clear that so far they have been passive players, remaining at the level of gathering information or observation of provincial activities. Consultation is a relatively "new" development at the provincial levels with respect to First Nations and resource development, and has yet to be meaningfully applied. In addition, First Nations have no recourse to implement their rights to be consulted on provincial activities through the federal consultation mechanisms, as it would be *ultra vires* the jurisdiction of the federal government. In any event, consultation will not be a magic pill either – often it is simply a procedural aspect of development which occurs after a decision has been made to move

---

[199] *Supra* note 66 at 268

forward. In addition, consultation as currently defined and practiced normally does not give communities a veto over final decisions, and is not evenly applied in terms of engaging all the citizens of a community. Laws like the recent consultation guidelines developed by Alberta and the federal government provide shallow participatory rights which [placate?] First Nations and lead to their passive acceptance of possibly unwanted developments.[200]

In addition, we need to redefine what is of value when we talk about research and preparations for development. For example, under the Water Research Strategy developed by the Alberta Science and Research Authority (ASRA, in collaboration with the Alberta Water Council), there is one (1) reference to traditional knowledge in the context of licence applications, and one (1) reference to "Aboriginal Requirements" as a trigger to more rigorous regulatory scrutiny for a new licence application when there is higher potential for impact to a river, sub-basin and/or surrounding ecosystem. There are eighteen other triggers listed in the document.[201]

The strongest document in the Alberta arsenal is the *Wetland Policy Document* (currently under review by the Minister of Environment) – it has numerous and positive statements about aboriginal participation and engagement, and use of traditional ecological knowledge. However, the Alberta Chamber of Resources (mining) and the Canadian Association of Petroleum Producers (CAPP) want to reduce the Policy Document to discretionary guidelines. In September of 2008, the Alberta Water Council

---

[200] Watters, Lawrence *Indigenous Peoples, the Environment and Law* Durham: Carolina Academic Press, 2004 at 81.

[201] See Water Research Strategy, Edmonton: Alberta Science and Research Authority 2006, www.asra.ab.ca at 4. These two paltry references represent a budgetary expenditure of $20,000 for a consultant to arrange and facilitate meetings of ASRA and First Nations (out of a total budget of only $122,000)

recommendations and Policy Document were presented to the Minister of Environment as "non-consensus documents" and are under review at that office.[202]

Strong water governance in Alberta will require community collaboration, coordination and reconciliation. Instead of seeing First Nations as "de-railing the process" by bringing in language of identity, knowledge, and worldview:

> …local custom and norms should be treated more as opportunities than as limitations. They reveal underlying values and habits of thought - and time-honored survival strategies - that can shape and strengthen innovation. The too common story of failed water development schemes is more often attributable to a misunderstanding of local life than to the shortage of water or absent technology. If proposed solutions do not build on locally traditional approaches, even if only to improve on those approaches, they stand a high risk of rejection. That is not to say local people always know best; it is just as wrong to romanticize tradition as it is to exalt science. But local practices always spring from some rationality, and it is this rationality that needs to be understood. Moreover, local knowledge and traditional practice are not static; they may not change fast, but neither do they change randomly. They change when, and only when, people see the value of change.[203]

Indigenous Peoples have been estranged from water and have to reclaim Indigenous norms and normative processes related to water. However, it is difficult to find scholarship which does not essentialize Indigenous legal orders, examining such law systems in a dualist analytic versus attempting the more difficult task of understanding the inter-societal nature of Indigenous advocacy around natural resource management and planning.

---

[202] See Wetland Policy Document, Edmonton: Alberta Water Council, 2008 at www.AWChome.ca or www.albertawatercouncil.ca On this website you will also find copies of the letters written by the Alberta Water Council Chamber of Resources and CAPP in a document entitled: WPPTNonConsensusLetters.pdf

[203] Brooks, David B. *Water: Local-Level Management* Ottawa: International Development Research Centre, 2002 at 56-57

For Indigenous Peoples, the issue of access to water and sanitation necessarily merges with legal and political recognition. Avoidance of such recognition is tantamount to explicit constitutionally protected rights.

Now that *Grassy Narrows* decision has come down, Indigenous peoples might be less concerned with how the Supreme Court of Canada chooses to organize the "Crown" vis-à-vis treaties, than with the implementation of aboriginal and treaty rights. Currently, it happens with either the federal government or the province. Either way, Indigenous Peoples will continue to enjoy the same level of constitutional protection.

What is more troubling is how much the Supreme Court of Canada points to consultation as the avenue of the future. The reason this is troubling is that the current framework of consultation on the ground in Alberta is not beneficial for First Nations. The real hurdle will be to extrapolate the concept of consent as articulated by Supreme Court of Canada in *Tsilhqot'in,* combine it with the common law on consultation and accommodation, and try to critique the existing consultation guidelines in Alberta in a transformative way, as I touched upon earlier in this chapter.

First Nations and the Province of Alberta will face structural problems in understanding or actively engaging in the new kind of relationship that has been described by the Supreme Court of Canada. It will be interesting to see how this new paradigm can be properly integrated by the parties in their conceptual approach to one another, in a way that overcomes existing (and deeply embedded) political and socio-economic stumbling blocks.

Bibliography

LEGISLATION

An Act for the Better Protection of the Lands and Property of the Indians of Lower Canada, S.C. 1850, c.42, 13 and 14 Vic.

Canadian Environmental Protection Act S.C. 1999, c.33

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

Fisheries Act R.S.C. 1985 c.F-14

Indian Act, *1876*, S.C. 1876, c.18

Indian Act, 1906, S.C. c.81

Indian Act, R.S.C. 1985

Jobs, Growth and Long-Term Prosperity Act, SC 2012, c.19

Northwest Irrigation Act (NWIA) of 1894

Royal Proclamation of 1763 R.S.C., 1985, App. II, No. 1.

Safe Drinking Water for First Nations Act, SC 2013, c.21

Aboriginal Consultation Levy Act, RSA Chapter A-1.2.

JURISPRUDENCE

Behn v Moulton Contracting Ltd. 2013 SCC 26, [2013] 2 R.C.S. 227

Buffalo v Canada, 2005 FC 1622

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

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

Ermineskin Indian Band and Nation v Canada 2009 SCC 9, [2009] 1 SCR 222

Grassy Narrows First Nation v Ontario (Natural Resources), 2014 SCC 48

Haida Nation v British Columbia (Minister of Forests) [2004] 3 S.C.R. 511

Helalt First Nation v British Columbia (2011 BCSC 945)

Nowegijick v R. [1983] 1 SCR at 36

R. v. Adams [1996] 3 S.C.R. 101

R v Badger [1996] 1 SCR 771 at 794

R v Battiste, (1978) 84 DLR (3d) 377

R v Lewis, [1996] 1 SCR 921

R v Marshall [1999] 3 S.C.R. 456 ("*Marshall No. 1*")

R v Marshall (reconsideration refused), [1999] 3 S.C.R. 533 ("*Marshall No. 2*")

R v Nikal, 1996 SCC 245, [1996] 1 SCR 1013

R v Van der Peet, [1996] 2 S.C.R. 507

R v Sappier, R. v. Gray, [2006] 2 S.C.R. 686, 2006 SCC 54 [38]

R v Simon, [1985] 2 SCR 387 at 402

R v Sioui [1990] 1 SCR 1025 at 1036

R v Sundown (1999) 1 S.C.R. 393

Saanichton Marina Ltd. v Claxton (1989) 36 B.C.L.R. (2d) 79

Tsilhqot'in Nation v British Columbia, 2014 SCC 44

Tsuu T'ina Nation v Alberta (Environment), 2010 ABCA 137

SECONDARY MATERIAL: MONOGRAPHS

Bakker, Karen *Eau Canada: The Future of Canada's Water* (Vancouver: University of British Columbia Press, 2007)

Bartlett, Richard *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary: Canadian Institute of Resources Law, 1988)

Battiste, Marie and Sakej Youngblood Henderson *Protecting Indigenous Knowledge and Heritage* (Saskatoon: Purich Publishing, 2000)

Battiste, Marie (ed.) *Reclaiming Indigenous Voice and Vision* (Vancouver: University of British Columbia Press, 2000)

Bell, Catherine & D. Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004)

Boelens, Rutgerd et al *Out of the Mainstream: Water Rights, Politics and Identity* (London: Earthscan, 2010)

Borrows, John *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002)

Borrows, John *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010)

Brooks, David B. *Water: Local-Level Management* (Ottawa: International Development Research Centre, 2002)

Brooks, David, Oliver M. Brandes and Stephen Gurman, *Making the Most of the Water We Have: The Soft Path Approach to Water Management* (London: Earthscan Books, 2009)

Brown, Leslie and Susan Strega *Research as Resistance: Critical, Indigenous and Anti-Oppressive Approaches* (Toronto: Canadian Scholars' Press, 2005) 19 at 32-33.

Cardinal, Harold and Walter Hildebrandt *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples will One Day be Clearly Recognized as Nations* (2000)

Cronon, William *Changes in the Land: Indians, Colonists and the Ecology of New England* (20th Anniversary Edition) (New York: Hill and Wang, 2003)

Daschuk, James *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013)

de Villiers, Marq *Water* (Toronto: Stoddart Publishing, 2000)

Freeman, Victoria "In Defence of Reconciliation" in: *Canadian Journal of Law and Jurisprudence* Vol. XXVII, No.1 (January 2014) 213

Ivison, Duncan, Paul Patton and Will Sanders (eds) *Political Theory And The Rights Of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000)

Johnson, Harold *Two Families, Treaties and Government* (Saskatoon: Purich Publishing Ltd., 2007)

Kymlicka, Will *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989)

Kymlicka, Will and Bashir Bashir (Eds.) *The Politics of Reconciliation in Multicultural Societies* (New York: Oxford University Press, 2008)

Linton, Jamie *What is Water? A History of a Modern Abstraction* (Vancouver: University of British Columbia Press, 2010)

Mann, Charles C. *1491: New Revelations of the Americas Before Columbus* (Second Edition) (New York: Vintage Books, 2006)

Mann, Charles C. *1493: Uncovering the New World Columbus Created* (New York: Vintage Books, 2011)

McLeod Neal, *Cree Narrative Memory: From Treaties to Contemporary Times* (Saskatoon: Purich Publishing Saskatoon, 2007)

Morris, Alexander *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They were Based, and other Information Relating Thereto*, (Saskatoon: Fifth House Publishers, Saskatoon, 1991)

Morrison, Bruce R. and C. Roderick Wilson (eds) *Native Peoples: The Canadian Experience*, (New York: McCelland & Stewart, 1986)

Nadasdy, Paul *Hunters and Bureaucrats: Power, Knowledge and Aboriginal State Relations in the Southwest Yukon* (Vancouver: UBC Press, 2003)

Pentland, Ralph and Chris Wood, *Down the Drain: How We Are Failing to Protect Our Water Resources* (Vancouver: Greystone Books, 2013)

Perrault, Pierre *On the Origin of Springs,* 1674, Reprint (New York: Hafner, 1967)

Phare, Merrell-Ann *Denying the Source: The Crisis of First Nations Water Rights* (Surrey: Rocky Mountain Books, 2009)

Phare, Merrell-Ann and Robert William Sandford, *Ethical Water: Learning to Value what Matters Most* (Calgary: Rocky Mountain Books, 2011)

Prud'Homme, Alex *The Ripple Effect: The Fate of Freshwater in the Twenty-First Century* (New York, Sribner Books, 2011)

Sakej Youngblood Henderson *First Nations Jurisprudence and Aboriginal Rights* (Saskatoon: Native Law Centre University of Saskatchewan, 2006)

Sandford, Robert William *Cold Matters: The State and Fate of Canada's Freshwater* (Calgary: Rocky Mountain Books, 2012)

Shkilnyk, Anastasia M. *A Poison Stronger than Love: The Destruction of an Ojibwa Community* (Yale: Yale University Press, 1985)

Simmons, Ellen (ed.) *Indigenous Earth: Praxis and Transformation* (Penticton, Theytus Books, 2010)

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

Turgeon, Laurier ed., *Spirit of Place: Between Tangible and Intangible Heritage* Montreal: Les Presses de l'Universite Laval, 2009)

Turner, Dale *This is Not a Peace Pipe* (Toronto: University of Toronto Press, 2006)

Waugh, Earle, Nancy LeClaire and George Cardinal, *Alberta Elders' Cree Dictionary* 1st Edition, 4th Printing (Edmonton: University of Alberta Press and Duval House Publishing, 2006)

Watters, Lawrence *Indigenous Peoples, the Environment and Law* Durham: Carolina Academic Press, 2004

Wood, Chris *Dry Spring: The Coming Water Crisis of North America* (Vancouver: Raincoast Books, 2008)

SECONDARY MATERIAL: ARTICLES

Boelens, Rutgerd "Local Rights and Legal Recognition: the Struggle for Indigenous Water Rights and the Cultural Politics of Participation" In: Boelens, Rutgerd, M. Chiba and D. Nakashima (eds.) *Water and Indigenous Peoples*. 46-60 *Knowledges of Nature 2*, Paris: UNESCO, 2006) at 52

Borrows, John and Len Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it make a Difference?" (1996) 36 *Alberta Law Review* 9

Holder, Janet "New Age: Rediscovering Natural Law" (2000) 53 *Current Legal Problems* 151

Keyes, John Mark "Incorporation by Reference in Legislation" in *Statute Law Review* 25(3), 180-195

Macintosh, Constance "Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves" (2007-2008) 39 *Ottawa Law Review* 63 at 69-70

Masazumi, Masanori Harada et al "Mercury Poisoning in First Nations Groups in Ontario, Canada: 35 Years of Minimata Disease in Canada", in: *Journal of Minimata Studies* 3: 3-30

McClenaghan, Theresa A. "Why Should Aboriginal Peoples Exercise Governance Over Environmental Issues?"(2002) 51 *University of New Brunswick Law Journal* 211

McGregor, Deborah "Anishnaabe-Kwe, Traditional Knowledge, and Water Protection" in *Canadian Woman Studies* (2008) 26

M'Gonigle Michael and P. Ramsay, "Greening Environmental Law: From Sectoral Reform to Systemic Re-Formation" (2004) 14 *Journal of Environmental Law and Practice* 333

M'Gonigle, Michael "A New Naturalism: Is there a (Radical) 'Truth" Beyond the (Postmodern) Abyss?" (2000) 8 *Ecotheology* 8

M'Gonigle, Micheal and Louise Takeda "The Liberal Limits of Environmental Law: A Green Legal Critique" In: *Pace Environmental Law Review*, Vol. 30 Issue 3 Summer 2013 Article 4

Morse, Bradford "Indigenous Peoples and Water Rights: Does the United Nations' Adoption of the Declaration on the Rights of Indigenous Peoples Help?" In: The *Journal of Water Law Special Issue: Contemporary Indigenous Peoples' Legal Rights to Water in the Americas and Australasia* (September 2010) Volume 20 Issues 5/6 at 266

Van Tighem, Kevin "Land Planning" in *Alberta Views*, Vol. 16 No. 6, July/August 2013, at 28-35

OTHER MATERIALS

Alberta, *Alberta Water Facts* online: <http://albertawater.com/index.php/learn/interesting-facts/alberta>

Alberta, Alberta Environment "Water for Life: Alberta's Strategy for Sustainability" (2003) online: <www.**waterforlife**.**alberta**.ca/>

Alberta: Alberta Water Council, online: < www.albertawatercouncil.ca>

Alberta: Alberta Water Council, *Minutes of Meeting #16, June 14, 2007* online: <www.albertawatercouncil.ca/AboutUs/Meeting/Summaries/tabid/64/Default.aspx>

Alberta: Alberta Water Council, *Wetland Policy Document*, (2008) online: <www.AWChome.ca> or <www.albertawatercouncil.ca>

Alberta: Water for Life, <www.waterforlife.ca/riverbasins>

Alberta, Minister of Aboriginal Relations, *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management* (June 3, 2013) online: < http://www.aboriginal.alberta.ca/documents/GoAPolicy-FNConsultation-2013.pdf?0.7529252641834319>

Alberta, The Minister of Aboriginal Relations, *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management* (July 28, 2014) online: <http://www.aboriginal.alberta.ca/documents/First_Nations_Consultation_Guidelines_LNRD.pdf.pdf?0.7733262749388814>

Beisel, Vivienne *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)

Canada, "Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples," (12 November 2010, Ref. #2-3429, Ottawa) online: <http://www.aandc-aandc.gc.ca/eng/1292354321165>

Canada: "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", online: <http://www.aandc-aandc.gc.ca/eng/1309374239861/1309374546142>

Canada, Canadian Environmental Assessment Agency, *Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the Canadian Environmental Assessment Act – Interim Principles* online: Canadian Environmental Assessment Agency <http://www.ceaa.gc.ca/012/atk_e.htm>

Canada, Department of Aboriginal and Northern Affairs Canada, "Frequently Asked Questions" online: <http://www.ainc-inac.gc.ca/enr/wtr/h2o/faq/index-eng.asp>

Canada: Department of Aboriginal and Northern Affairs Canada, *Fact Sheet: Aboriginal Self-Government* online: <http://www.aadnc-aandc.gc.ca/eng/1100100016293/1100100016294>

Canada, Department of Aboriginal and Northern Affairs Canada, *National Funding Agreements Models* online: < https://www.aadnc-aandc.gc.ca/eng/1322746231896/1322746482555>

Canada: Department of Aboriginal and Northern Affairs Canada, *Report of the Expert Panel on Safe Drinking Water on Reserve, Vol.1* (Ottawa: Industry Canada, 2006) online: <http://publications.gc.ca/site/eng/298371/publication.html>

Canada: Department of Aboriginal and Northern Affairs Canada, *Report of the Expert Panel on Safe Drinking Water on Reserve, Vol. 2* (Ottawa: Industry Canada, 2006) online: < http://publications.gc.ca/collections/Collection/R2-445-2006E2.pdf>

Canada, Department of Aboriginal and Northern Affairs Canada, *Drinking Water and Wastewater in First Nations Communities: Engagement Sessions on the Development of a Proposed Legislative Framework for Drinking Water and Wastewater in First Nations Communities* (Ottawa, 2009) online: < http://www.safewater.org/PDFS/Policy/DrinkingWaterandWastewaterinFNCommunities.pdf>

Canada, Department of Indian Affairs and Northern Development. Federal Policy Guide, *Aboriginal Self-Government: The Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*. (Ottawa: Minister of Indian Affairs and Northern Development, 1995)

Canada, Department of Aboriginal and Northern Affairs Canada, *National Assessment of First Nations Water and Wastewater Systems,* by Neegan Burnside Ltd., File No: FGY163080.7, online: <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/enr_wtr_nawws_rurnat_rurnat_1313761126676_eng.pdf>

Canada: Environment Canada, *Federal Policy and Legislation – Water* online: <http://www.ec.gc.ca/eau-water/default.asp?lang=En&n=E05A7F81-1>

Canada, Health Canada "Drinking Water and Wastewater", online: <http://www.hc-sc.gc.ca/fniah-spnia/promotion/public-publique/water-eau-eng.php#type1>

Canada, Health Canada, "Drinking Water Advisories in First Nations Communities", online: <http://www.hc-sc.gc.ca/fniah-spnia/promotion/public-publique/water-dwa-eau-aqep-eng.php >

Canada, House of Commons, "Statement of Apology to former students of Indian Residential Schools" in *Hansard*, 39th Parl, 2nd Sess, Volume 142, No. 110 (11 June 2008) at 1515 (Right Hon. Stephen Harper, Prime Minister, CPC)

Canada, Library of Parliament *Background Paper: Safe Drinking Water in First Nations Communities* (Ottawa: Library of Parliament, 2010) Publication No. 08-43-E online: < http://www.parl.gc.ca/Content/LOP/researchpublications/prb0843-e.pdf >

Canada: Office of the Auditor General, *Report of the Commissioner of the Environment and Sustainable Development*. (2005, Ottawa) online: < http://www.oag-bvg.gc.ca/internet/docs/c20050905ce.pdf>

Crowther, Roy A., Aquatic Resource Management Ltd., Dillon Consulting Limited, Tesera Systems Inc. *Final Report: Water Needs Assessment to Support Anticipated Population Growth on Maskwacis Cree Nations Lands (Ermineskin Cree Nation, Louis Bull Tribe, Montana First Nation and Samson Cree Nation)* (January 31, 2011) (Unpublished, archived at Tech Services, Ermineskin Cree Nation Band Administration)

Ecojustice, *Backgrounder: Alberta Oil Sands Development and Impacts on Water*, online: <http://www.ecojustice.ca/media-centre/media-backgrounder/backgrounder-alberta-oil-sands-development-and-impacts-on-water>

Klinkenberg, Marty "First Nations chiefs boycott Alberta government over consultation plan" in: Edmonton Journal, August 28, 2014 online: <http://www.edmontonjournal.com/First+Nations+chiefs+boycott+Alberta+government+over+consultation+plan/10158178/story.html#__federated=1>

Kempton, Kate "Bridge Over Troubled Waters: Canadian Law on Aboriginal and Treaty 'Water' Rights, and the Great Lakes Annex"(2005) Olthius Kleer Townshend, online: <http://www.chiefs-of-ontario.org/node/96 >

Lachance, Natalie et al. Health Determinants for First Nations in Alberta, 2010, at 18-19 online: <http://publications.gc.ca/collections/collection_2011/sc-hc/H34-217-2010-eng.pdf>

Lachance, Natalie "Maskwacis Health Status 2013 Presentation" (Paper delivered at the Annual Meeting of Maskwacis Health Services, Camrose Alberta, 15 February 2014) [unpublished]

Narine, Shari "Chiefs reject consultation levy legislation in Alberta" in: Windspeaker, Vol. 31 Issue 3, 2013 online: <http://www.ammsa.com/publications/windspeaker/chiefs-reject-consultation-levy-legislation-alberta>

Roan, Wayne and Earle Waugh, *Nature's Laws* (Alberta: Heritage Community Foundation, 2004) online: <www.abheritage.ca/natureslaws/knowledge_natural/index9.html>

Saddleback, Jerry *Cree Testimony on Water* published in *International Organization of Indigenous Resource Development (IOIRD) Stakeholder Communication* to the Office of the High Commissioner for Human Rights on Request further to Decision 2/104 on Human Rights and Access to Water, United Nations Human Rights Council. online: <http://www2.ohchr.org/english/issues/water/contributions/civilsociety/IOIRD_Alberta.pdf>

Senate of Canada, Standing Committee on Aboriginal Peoples *Safe Drinking Water for First Nations,* (May 2007) at 3 (Chair: Hon. Gerry St. Germain, PC)

United Nations, *Declaration on the Rights of Indigenous Peoples* (A/61/295) (07-58681: United Nations publication, 2008)